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NO. 36030-0-III

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

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

Respondents,

v.

WASHINGTON STATE COMMUNITY COLLEGE DISTRICT 17, an  
agency of the State of Washington,

Respondents,

v.

COWLES PUBLISHING COMPANY,

Appellant.

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**BRIEF OF RESPONDENT WASHINGTON STATE COMMUNITY  
COLLEGE DISTRICT 17**

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## I. INTRODUCTION

This appeal arises under the Public Records Act (“PRA”) Chapter 42.56 RCW. Respondent, the Community Colleges of Spokane, (“CCS”) is committed to providing public access to its records under the PRA, consistent with the Act’s purpose to ensure transparency in government.

In March 2018, the Spokesman Review, Spokane Television, Inc. (KXLY), and Inland Publications (The Inlander) submitted a public records request to CCS for documents relating to the investigation and resignation of then Spokane Falls Community College Acting President, Dr. Darren Pitcher. Thereafter, Respondent Jane Does, successfully moved the court for a permanent injunction preventing CCS from fully disclosing the documents requested.

Throughout the underlying action, as well as on appeal, CCS maintains the position of being willing and able to comply with the PRA and court orders regarding the disclosure of records. CCS therefore submits this brief to the court without argument, and instead uses this opportunity to provide the court with background on the history of the PRA as well as a synopsis of the pertinent case law regarding RCW 42.56.230(3) and RCW 42.56.540.

## II. STATEMENT OF THE CASE

Dr. Darren Pitcher resigned from his position as Spokane Falls Community College's Acting President in early 2018. CP 8. His resignation came 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 to CCS, pursuant to the PRA. CP 73. The request stated:

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 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 the 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 we described.

CP 73.

CCS timely responded to the request and stated that it was prepared to release the documents on March 20, 2018. CP 18. Prior to the release, CCS's Human Resources Department notified the Does of the pending release of documents. CP 31, 34, 37, 40, 43, 46, 49, 52, 55.

On March 16, 2018, counsel for Jane Does filed in Spokane County Superior Court, a complaint and motion for temporary restraining order and preliminary injunction. CP 1-10. The Does requested CCS redact their names and personal identifiers before releasing the documents pursuant to the public records request by the Spokesman Review. CP 9-10.

CCS did not take a position at the temporary injunction hearing. See RP 7-14. Rather, CCS stated it was ready to comply with the request once the court provided further instruction regarding the redactions of the Does' identities. RP 7. CCS brought the records in question and offered them to the court. RP 7. The court accepted those documents for an *in camera* review. RP 20.

After hearing argument from the parties, the court granted the Does motion and an order reflecting the same was entered on March 20, 2018. CP 56-63; RP 19-20. The court ordered that CCS was enjoined from disclosing the names and identifiers of Plaintiffs in any response to the request. CP 56-63; RP 19-20. CCS was additionally ordered to produce the responsive documents with Jane Does' names and identifiers redacted by

March 26, 2018. CP 61; RP 20. The order was to remain in effect until further order by the court at the Does' motion for permanent injunction on March 30, 2018. CP 61.

On March 30, 2018, the parties appeared for the permanent injunction hearing. RP 25. Again, CCS's position was that it was "ready to comply with whatever ruling the Court hands down ...." RP 43. After arguments, the court entered a permanent injunction, permanently enjoining CCS from disclosing the names and identifiers of the Does. CP 101-107; RP 47. The court found the Does had a legitimate privacy interest in their personal information and there was no public interest in knowing the identities of the both of the victims and witnesses involved. CP 101-107; RP 47. On April 25, 2018, the Spokesman Review filed its appeal to the permanent injunction.

### **III. ARGUMENT**

#### **A. Standard of Review**

In cases such as here, "where the record both at trial and on appeal consists entirely of written material ... the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo."

*Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719-20, 328 P.3d 905 (2014). The court also applies de novo review to injunctions issued under the PRA. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 791, 418 P.3d 102 (2018).

## **B. Background on Public Records Act**

The PRA was originally enacted by the people of Washington through a popular initiative on November 7, 1972. Laws of 1973, ch. 1, §§ 1-50. The purpose of the Act is to preserve the central tenet of a representative government, the sovereignty of the people and the accountability to the people of our public officials and institutions. *Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); RCW 42.56.030. The legislation reflects the intent of Washington citizens to maintain control of their government by ensuring broad access to records relating to its conduct and performance of its functions. RCW 42.56.010(2); 030.

The PRA mandates the broad disclosure of public records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013); *PAWS II*, 125 Wn.2d at 251. Under RCW 42.56.070(1), a governmental agency must disclose public records upon request unless a specific exemption in the PRA applies or some other statute applies that exempts or prohibits disclosure. *Ameriquest Mortg. Co. v. Office of Att’y*

*Gen. (Ameriquest II)*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013); *PAWS II*, 125 Wn.2d at 250. The primary purpose behind the broad disclosure policy is to keep public officials and institutions accountable to the people. *PAWS II*, 125 Wn.2d at 251. The Act includes exemptions that excuse a number of specific categories of records from public disclosure.<sup>1</sup> *See generally*, RCW 42.56.210–480 (listing specific exemptions). The exemptions to disclosure represent choices by the Legislature to protect certain classes of documents for countervailing policy reasons. *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371-72, 374 P.3d 63 (2016). The party opposing disclosure bears the burden of establishing that an exemption applies. *Ameriquest II*, 177 Wn.2d at 486; *see* RCW 42.56.550(1).

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.” As a result, the court must liberally construe the PRA in favor of disclosure. *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014). Courts are to take into account the Act’s policy “that free and open examination of public records is in the public interest, even though such an examination may cause inconvenience or

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<sup>1</sup> RCW 42.56.070(1) addresses exemptions contained elsewhere.

embarrassment to public officials or others.” *PAWS II*, 125 Wn.2d at 251. Agencies must withhold only those portions of the document which come under a specific exemption. *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 216, 951 P.2d 357 (1998). Partial disclosure of the document is permissible when possible. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015); *see also*, RCW 42.56.070(1).

**1. RCW 42.56.230(3)**

The Does rely on RCW 42.56.230(3) as a basis for the redaction of their names and personal identifiers. RCW 42.56.230(3) exempts from disclosure “personal information in files maintained for employees ... of any public agency to the extent that disclosure would violate their right to privacy.” “Application of this exemption involves three separate questions 1) whether the records contain personal information, 2) whether the employees have a privacy interest, and 3) whether disclosure of that personal information would violate their right to privacy.” *Predisik*, 182 Wn.2d at 903-04 (citing *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 210, 189 P.3d 139 (2008)).

**a. Personal Information in Files Maintained for Employee.**

The first issue to be determined is whether the records in question contain personal information. The PRA does not define “personal

information.” *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn. 2d 196, 201, 172 P.3d 329 (2007). Courts have adopted the definition of “personal information” found within Webster’s Third New International Dictionary which is, “of or relating to a particular person, affecting one individual or each of many individuals, peculiar or proper to private concerns and not public or general.” *Lindeman*, 162 Wn.2d at 202 (citing Webster’s Third New International Dictionary 1686 (2002)).

The second part of the first issue, “in files maintained for employees,” was discussed in *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998). There, the court addressed the exemption of personal information in files maintained for employees through former RCW 42.17.310(1)(b), which is identical to current RCW 42.56.230(3). *Woessner*, 90 Wn. App. 205. In *Woessner*, the Appellant argued that former RCW 42.17.310(1)(b) was inapplicable because the records sought “were not prepared for employees, nor do[es] the report get placed in an employee’s personnel file.” *Woessner*, 90 Wn. App. at 216. The court held that the Appellant’s reading of the exemption, requiring personnel records to be placed in an employee’s personnel file, was too narrow. *Woessner*, 90 Wn. App. at 216. The court instead found that whether the file is specifically labeled as an employee’s individual personnel file is not the focus of the exemption. *Woessner*, 90

Wn. App. at 217. Instead, the focus is on “whether the requested file contains personal information that is normally maintained for the benefit of employees, disclosure of which would violate their right to privacy.” *Id.*

Likewise, in *Cowles Publ’g Co v. State Patrol*, Division III also focused on the content of the requested record, not the record’s format or where it was stored. *Cowles Publ’g Co v. State Patrol*, 44 Wn. App. 882, 724 P.2d 379 (1986), *rev’d on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988). The court discussed the exemption and the meaning of “maintained for employees,” noting that the provision was intended to shield only that highly personal information often contained in “employment *and other personnel files.*” *Woessner*, 90 Wn. App. 217 (emphasis in original) (citing *Cowles Publ’g Co.*, 44 Wn. App. 882). The court, however, did not find that “maintained for employees” included any file relating to a particular individual and instead concluded the exemption was meant only to protect highly personal information. *Cowles Publ’g Co.*, 44 Wn. App. at 891.

#### **b. Privacy Interest**

The existence of “personal information” in a public record is necessary in order to successfully raise the exemption, but its existence alone is not sufficient to withhold the record. *Predisik*, 182 Wn.2d at 904. Employees must also demonstrate that they have a right to privacy in the

personal information contained in a record and if such a right exists, that disclosure would violate it. *Predisik*, 182 Wn.2d at 904.

The term “right to privacy” is defined in RCW 42.56.050 to mean information about a person that is “highly offensive to a reasonable person” and “is not of legitimate concern to the public.” Under the PRA, a person’s right to privacy is violated if disclosure of the information would be “highly offensive to a reasonable person” and “is not of legitimate concern to the public.” RCW 42.56.050. But, the statute does not otherwise explicitly define when the right to privacy exists. *Predisik*, 182 Wn.2d at 904.

When this statute was amended in 1987, the Legislature stated that the term “privacy” as used in the statute, “is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst v. Hoppe*.” Laws of 1987, ch. 403, §1; *Bainbridge Island Police Guild, v. City of Puyallup*, 172 Wn.2d 398, 426, 259 P.3d 190 (2011). The *Hearst*<sup>2</sup> case adopted the *Restatement (Second) of Torts* standard:

Each 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 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. When these intimate

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<sup>2</sup> *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

*Bainbridge Island Police Guild*, 172 Wn.2d at 427 (citing *Restatement (Second) of Torts* §652(D) (1977)).

The right to privacy does not protect everything that an individual may prefer to keep private. *Predisik*, 182 Wn.2d at 905. But the right to privacy, under the above definition, protects personal information that an employee would not normally share with a stranger. *Cowles Pub'g Co.* 44 Wn. App. at 890-91. Whether disclosure of particular information would be highly offensive to a reasonable person is determined on a case by case basis.” *West v. Port of Olympia*, 183 Wn. App. 306, 315, 333 P.3d 488 (2014). However, the disclosure of information containing intimate details of a person’s personal and private life would be highly offensive to a reasonable person. See *Tiberino v. Spokane County*, 103 Wn. App. 680, 689-90, 13 P.3d 1104 (2000).

Employment records would reasonably contain, among less sensitive information, references to family problems, health problems, past and present employers’ criticism and observations, military records, scores from IQ tests and performance tests... and other matters, many of which most individuals would not willingly disclose publicly.”

*Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993) (quoting *Missouliau v. Board of Regents*, 207 Mon. 513, 524, 675 P.2d 962 (1984)).

The question of what is private, however, turns on a factual inquiry and is not amenable to a bright line rule. *Predisik*, 182 Wn.2d at 906.

In *Predisik*, two school district employees filed separate actions to enjoin the district from disclosing documents related to their administrative leave. *Id.* at 902. After consolidating the cases, the Superior Court ordered the records disclosed with the employees names redacted. *Id.* In analyzing the privacy prong within the personal information exemption, the court explained that “agencies and courts must review each responsive record and discern from its four corners whether the record discloses factual allegations that are truly of a private nature, using the *Restatement* as a guide.” *Predisik*, 182 Wn.2d at 906. The court held that although there is an inherent degree of fact-finding in this analysis, a record-specific inquiry is the only way to adhere to the PRA’s mandate that exemptions be construed narrowly. *Id.*

The court went on to hold that the *Bellevue John Does* case did not create a sweeping rule that exempted an employee’s identity from disclosure any time it was mentioned in a record with some tangential relation to misconduct. *Id.* at 907 (citing *Bellevue John Does*, 164 Wn.2d at 210). Instead, only documents related to the investigation that would be deemed not highly offensive to a reasonable person should be disclosed unredacted. *Id.* In *Predisik*, the court concluded that because the records disclosed only revealed that an investigation was opened and did not

disclose the factual allegations underlying the investigation, the public would learn nothing about the personal lives involved and accordingly, the information did not trigger a privacy interest under the PRA. *Predisik*, 182 Wn.2d at 906.

Recently, Division II of the Court of Appeals issued an unpublished decision, *Jane Doe v. Washington State Dep't of Fish and Wildlife*, No. 49186-9-II, 2018 WL 5013860 (Wash. Ct. App. October 16, 2018) (unpublished), with similar facts to those presented here.<sup>3</sup> The case arose out of an investigation into cross-allegations of sexual harassment. *Jane Doe*, 49186-9-II, 2018 WL 5013860, at \*1. The Department received a public records request and located responsive records including interviews, notes, reports, letters and other documents. *Jane Doe* at \*1. The documents contained, in addition to other information, allegations regarding Doe's sexual conduct. *Id.* at \*1. Doe objected to the release of the records without redacting all information that identified her by name, relationship or association. *Id.* After conducting an *in camera* review, the court entered a permanent injunction, accepting some of the redactions proposed by Doe and rejecting others. *Id.* The court found that the un-redacted references did

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<sup>3</sup> As an unpublished case, this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value, as the court deems appropriate. *Crosswhite v. Dep't of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017); GR 14.1.

not connect her to alleged sexual conduct and therefore did not implicate her right to privacy. *Jane Doe* at \*1.

On appeal, Division II held that in making determinations regarding what information should be redacted, the emphasis should be on the content of the records and whether the exemption applies to that specific information. *Jane Doe* at \*3. Affirming the trial court, the Court of Appeals held that even though “a person may be able to figure out Doe’s identity from references to her in the records that does not implicate her privacy interest, that does not mean that such references must be redacted as the contents of those records do not implicate Doe’s privacy interest.” *Id.* at \*3 (citing *Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006) (“The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public’s interest in information regarding the operation of the criminal justice system illegitimate or unreasonable”); *see also, SEIU Healthcare 775NW v. State, Dept. Of Social and Health Services*, 193 Wn. App. 377, 410-11, 377 P.3d 214 (2016) (holding that information is not exempt because its disclosure could lead to the discovery of exempt information.”))

**c. Legitimate Public Concern**

The final prong in determining the applicability of this exemption turns on whether disclosure of the information “is not of legitimate concern to the public.” RCW 42.56.050. The term “legitimate” in the context of the PRA means “reasonable.” *Dawson*, 120 Wn.2d at 798. The purpose of the PRA is to keep the public informed so it can control and monitor the government’s functioning. *See generally Predisik*, 182 Wn.2d at 908; *Dawson*, 102 Wn.2d at 798.

Public employees are paid with public tax dollars and by definition are servants of and accountable to the public. *Predisik*, 182 Wn.2d at 908. The people have a right to know who their public employees are and when those employees are not performing their duties. *Id.* A public employer’s investigation is a governmental act and a consequence of employment with the government. *Id.* at 907. “The public has a legitimate concern regarding the identities of public employees who are the subject of investigation.” *Id.* The public, however, has no legitimate concern in private information that is unrelated to governmental operation. *See Tiberino*, 103 Wn. App. 689-90.

In cases involving the investigation of sexual misconduct, the issue arises of protecting the identity of the victim and/or witnesses from public disclosure so as not to discourage individuals from reporting misconduct

within the workplace. In its ruling, Spokane Superior Court specifically cited the concern of “chilling” witnesses coming forward as a basis for its decision. RP 47. Although courts have not addressed the issue within the context of RCW 42.56.230(3), courts have previously addressed the potential “chilling effect” of witnesses coming forward in relation to RCW 42.56.240(1)<sup>4</sup> and have found the argument that disclosure would deter witnesses from coming forward or participating in an investigation unpersuasive. Specifically, in both *Sargent v. Seattle Police Department* as well as *City of Fife v. Hicks*, the courts found that a generalized fear that disclosure of witness names will chill cooperation with investigations was insufficient to trigger an exemption. *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 314 P.3d 1093 (2013); *City of Fife v. Hicks*, 186 Wn. App. 122, 138-39, 345 P.3d 1 (2015).

**2. RCW 42.56.540: Substantial and irreparable harm required for injunction**

A party other than a government agency attempting to prevent the disclosure of public records under the PRA may seek an injunction under RCW 42.56.540. *Ameriquest II*, 177 Wn.2d at 487, 300 P.3d 799.

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<sup>4</sup> PRA exemption for “specific intelligence information and specific investigate records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.”

RCW 42.56.540 allows “an agency or its representative or a person who is named in the record or to whom the record specifically pertains” to file a motion or affidavit asking the superior court to enjoin disclosure of a public record. *Soter v. Cowles Publ’g. Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007). Under this statute, a nongovernmental party must prove (1) the record in question specifically pertains to that party; (2) an exemption applies; and (3) the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. *SEIU Healthcare 775NW*, 193 Wn. App. at 392 (citing *Ameriquest II*, 177 Wn.2d at 487).

Here, the records in question, specifically the names and identifiers, pertain to the Jane Does. Accordingly, the remaining questions this Court must answer are first, whether RCW 42.56.230(3) applies to the identified documents and if so, whether the release of information will result in actual and substantial injury to the Jane Does.

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#### IV. CONCLUSION

The Community Colleges of Spokane remains committed to providing the public access to its records. CCS maintains its position that it is willing and able to comply with any order from this Court.

RESPECTFULLY SUBMITTED this 9th day of November, 2018.

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**CERTIFICATE OF SERVICE**

I certify that I served all parties, or their counsel of record, a true and correct copy of the Respondent's Notice of Substitution of Counsel to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of November, 2018, at Spokane, Washington.

s/Nanette Dornquist  
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WASHINGTON STATE ATTORNEY GENERALS OFFICE MLS

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**Transmittal Information**

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