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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6 & 9,
Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2, AND SEATTLE JOHN DOES 1-5, 7-8, & 10-17,
AND SEATTLE JANE DOE 1 AND JOHN DOE,
Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL
DISTRICT #210, AND SEATTLE SCHOOL DISTRICT #1,
Respondents, AND
THE SEATTLE TIMES COMPANY,
Respondent/Cross-Appellant.

CORRECTED

RESPONDENT/CROSS-APPELLANT BRIEF OF SEATTLE TIMES
CO.

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in issuing a permanent injunction under the Public Disclosure Act barring release of the names of 15 public school employees accused of sexual misconduct with their students, the names of the employing schools, and the names of all school level personnel involved in the investigations. CP 113.
2. The trial court erred in holding that the public's concern regarding the names of the 15 employees, their teaching certificate numbers, the names of their employing schools, and the names of all school level personnel was not "legitimate" under RCW 42.17.255. CP 113.
3. The trial court erred in issuing the Protective Order prohibiting The Seattle Times from making use of or revealing disclosed names. CP 114-15, 117.
4. The trial court erred in denying an award of attorneys' fees to the Times from the plaintiffs, their lawyer, or their union backers. CP 114, 117.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the public have a legitimate concern in records regarding misconduct allegations against public employees, including the employees' names, regardless of whether the allegations have been proven or the misconduct is deemed "significant"? (Errors 1-2).
2. Should the public have access to identities of teachers withheld based on a determination that allegations against them were unsubstantiated or proven false after adequate investigation or that an adequate investigation had uncovered no "significant" misconduct and the agency issued a letter of direction? (Errors 1-2).
3. May journalists whose employer is a litigant in a public records case be barred from making use of or revealing information voluntarily revealed by a witness in a witness interview or by plaintiffs through failure to redact information prior to providing copies of public records when the protective order barring such use was not sought until several weeks after the disclosures occurred? (Error 3).
4. Are attorneys' fees allowed under CR 65 to a party who successfully dissolves an improperly issued injunction in a PDA case obtained by a non-agency plaintiff? (Error 4).

III. STATEMENT OF THE CASE

This case addresses whether the public has a “legitimate” concern in the identities of schoolteachers accused of sexual misconduct with students and the details of districts’ responses. It also addresses whether journalists may be forbidden from “using” or revealing information learned from agencies’ records or witness interviews and whether a public record requester who overturns wrongfully issued injunctions is eligible for an attorney fee award under CR 65.

A. Procedural History of Case.

The Seattle Times (“the Times”) made Public Disclosure Act (“PDA”) requests to the Respondent school districts (“the districts”) for records regarding teachers accused of, investigated or disciplined for sexual misconduct within the last 10 years.¹ The districts identified and notified such employees and produced charts (without identifying information) to the Times.²

The districts then informed teachers that the identifying information and underlying records would be released unless the districts were enjoined.³ Two attorneys filed four separate lawsuits against the districts on behalf of 37 current or former teachers and obtained temporary restraining orders barring release of the teachers’ names and the name of the school and school level personnel involved in or named in the investigation. CP 98. Attorney Tyler Firkins (“Firkins”) filed suit for 17

¹ CP 98, 266, 271, 326, 340, 361, 370, 372, 378-79.

² CP 349-59, 362-64, 374, 380-81.

³ CP 329, 348, 376, 378.

men and one woman against the Seattle School District (“SSD”), CP 1-9, for 11 men against the Bellevue School District (“BSD”), CP 14-21, and for five men and two women against the Federal Way School District (“FWSD”). CP 252-58. Firkins was retained and is being paid by the Washington Education Association (“WEA”) and not the individual teacher plaintiffs.⁴ Firkins alleged that much of the alleged misconduct “was innocuous, and after investigation determined to be unsubstantiated or false.”⁵

Firkins obtained a temporary restraining order against FWSD, BSD and SSD for the 36 plaintiffs that he alleged were his clients.⁶ The complaints did not seek an injunction against the Times.⁷ All three cases were consolidated on February 11, 2003, and the TROs for all 36 plaintiffs were extended until February 24, 2003. CP 59-61. Another lawyer, Felix Landau, filed suit against SSD for one former teacher named only as John Doe. CP 2476-80. This fourth case was also consolidated, and a TRO was granted for John Doe. CP 2481-85. The districts did not oppose the TROs. CP 582.

The Times was granted the right to intervene. CP 97-98. The trial judge ordered Firkins to give the Times and the court copies of charts providing details about his clients such as the date and nature of allegations, type of accuser (such as parent, student, staff member), level

⁴ CP 577-78, 582, 621, 762, 765.

⁵ CP 8, 20, 257.

⁶ CP 55-57, 222-25, 259-61.

⁷ CP 8-9, 20-21, 257-58.

of school, subject taught, and the disposition. CP 60-61. No individuals' names were disclosed on these charts.⁸ The trial judge also asked Firkins to give the Times copies of the responsive records regarding his clients after redacting the names of schools and individuals. CP 98.

On February 28, 2003 and March 4, 2003, Firkins provided the Times with certain redacted records. CP 1666, 1668. The records were not produced in response to a request for production or interrogatory from the Times, and no signed statement or certification was submitted with the records. *Id.* Although plaintiffs' counsel redacted the records, certain names or identifying details were disclosed. Plaintiffs did not seek a return of these records, object or otherwise immediately seek a protective order. The trial court then reviewed *in camera* what it believed to be a complete set of the responsive records. CP 99. The court actually was given only "pertinent investigation documents" as selected by the districts and plaintiffs. CP 905.

Several plaintiffs were subsequently dropped from the case. The TRO covering six of the plaintiffs was allowed to expire on February 24, 2003.⁹ The TRO covering three additional plaintiffs expired on March 3, 2003 when Firkins was unable to show that he had authority to represent them.¹⁰ As the Times later learned, at least one, and perhaps two, of Firkins' purported clients was dead at the time the lawsuits were filed. CP

⁸ CP 374, 401-03, 405-08, 2185-89.

⁹ CP 98, 2198-201 (Seattle Jane Doe 1, Seattle John Doe 4, and Seattle John Does 14-17).

¹⁰ CP 98, 2204-07 (Bellevue John Doe 5, Federal Way Jane Doe 1 and Seattle John Doe 11).

758-71. A number of others confirmed they were unaware they had ever been part of a lawsuit and had not authorized anyone to file a lawsuit or seek a TRO on their behalf.¹¹

Between March 17 and 24, 2003, counsel for the Times interviewed several of plaintiffs' witnesses.¹² The interviews were conducted via speakerphone, and counsel for plaintiffs and the relevant school district participated. *Id.* In addition, reporters from the Times participated in the interviews with the knowledge of all involved.¹³ These interviews were not conducted under oath, nor were they conducted in response to a subpoena or notice of deposition.

During these interviews, some witnesses disclosed the names or other identifying details of certain plaintiffs. Despite the disclosures, which occurred in the presence of plaintiffs' lawyer, plaintiffs' lawyer did not object or otherwise immediately seek to prohibit the dissemination of this information. CP 86-91. A number of declarations of the witnesses, reporters and others regarding these interviews were publicly filed.¹⁴

On March 25, 2003, two former SSD administrators testified in open court via speakerphone. *See, e.g.*, RP 7, 101. During the testimony, one of the witnesses revealed the name of a plaintiff. RP 33. SSD attorney John Cerqui orally asked the court to enter a protective order barring the Times from using or revealing the name disclosed. RP 40.¹⁵

¹¹ CP 618-19, 621-22, 759.

¹² CP 435-38, 518-23, 524-29.

¹³ *See, e.g.*, CP 426, 519, 525.

¹⁴ CP 195-198, 208-212, 213-216, 217-222, 435-517, 518-23, 524-29, 530-34.

¹⁵ The transcript erroneously attributes his request to BSD lawyer Mike Hoge.

On April 3, 2003 the Superior Court issued a draft order and invited comment from counsel. CP 2231-47. Firkins wrote a letter to the court on April 16, 2003, seeking a protective order prohibiting the Times from “disclosing the names of any plaintiff inadvertently revealed throughout the course of the litigation,” complaining that a failure to do so would be “grossly unfair” to the plaintiffs. CP 2291-92. The Times’ counsel objected by letter on the same date. CP 2295. On April 18, 2003, Firkins moved for a protective order. CP 86-91.

On April 25, 2003, the trial court issued its Order and accompanying Findings and Conclusions. The court held the PDA exempts employee records “where no *significant* incident of misconduct is involved” and ruled exempt “‘letters of direction’ to employees whose purpose is to guide and correct employee performance on the job, where there is no finding of significant misconduct.” CP 112. The court also ruled that the identity of a teacher accused of sexual misconduct, the teacher’s school, and the identity of all school level personnel involved in the investigation were not of legitimate public concern if (1) the allegations are unsubstantiated or proven false after adequate investigation or (2) an adequate investigation uncovers no “significant” misconduct and the agency issues a letter of direction. CP 113-15.

The court dissolved the TRO and ordered the districts to release to the Times the records relating to 22 teachers, including identifying information. CP 99, 117-19. The court ordered disclosure where the

allegations were deemed substantiated, the district issued a letter of reprimand, the record contained no evidence that the district adequately investigated the allegations, or plaintiffs' counsel could not provide proof of representation. CP 100-09. Only the names of students and their parents were to be redacted. CP 117. The court held that identifying information was exempt in the case of 15 teachers. CP 117-18. In those 15 cases, the court ruled the allegations either appeared to be false or unfounded after adequate investigation, the allegations resulted in only "letters of direction," or the actions did not involve "significant" misconduct. CP 101-08.

Finally, the court ordered the Times not to "make use of, or reveal, names inadvertently disclosed" during what the court deemed to be the discovery process.¹⁶

The court denied the Times' request for attorneys' fees and costs under CR 65, reasoning that such awards were not allowed in PDA injunction cases. CP 114, 117.

B. Investigations of the Doe Plaintiffs.

Seattle John Doe 1 ("S1") is or was a high school teacher and coach. CP 1684. In 1994, a former student alleged S1 raped her. CP 1684. The Seattle Police Department investigated and spoke with the school nurse. The criminal investigation was then closed. CP 1680-81. The district's investigation included a review of the teacher's file and communication

¹⁶ CP 101-08, 114-15, 117.

with the student. Ultimately no adverse actions were taken, CP 1681, and the district did not find any evidence to substantiate the accusations. CP 1684. There is no evidence in the file indicating the district engaged an independent investigator or interviewed student witnesses or the student's parents. *See also* CP 1310-24.

Seattle John Doe 3 ("S3") was a long-term substitute teacher at Sharples School. CP 1693, 1698. In 1997 he was accused of making "inappropriate sexual comments" to a student. CP 1693. A seventh-grade girl told a teacher that S3 asked her if she had ever had sex with a man. CP 1697. The girl had informed her mother the day of the alleged event. *Id.* The teacher informed the administration, and in April 1998 the district began an investigation. CP 1696-97. As part of the district investigation, S3 was interviewed, as were other teachers. CP 1698, 1700. During the course of the investigation the principal of the school where S3 previously coached told an SSD paralegal "there were rumors about [S3 involving drug or alcohol use with students] but there was no investigation." CP 1701. SSD was informed that the previous school did not renew S3's coaching contract. CP 1701. No follow-up was performed to learn more about the previous allegations. Although the investigation report states at least two students were to be contacted for statements, CP 1701, there is no evidence in the record these statements were in fact obtained. CP 1692; *see also* CP 527. The district's investigation did not "find sufficient certainty of the charge." CP 1702. The investigation was conducted by

Margo Holland, who admits she never received training in assessing witness credibility. CP 527.¹⁷

Seattle John Doe 5 (“S5”) is or was high school teacher accused in 1995 of putting his hands down the pants of a female student and rubbing the shoulders, back and buttocks of another female student. CP 1705-06. S5 is also accused of asking different female students out to dinner. CP 1705. Accusations were made to the Seattle Police Department, CP 1706, and an investigator conducted an inquiry. CP 1705. S5 previously received a letter of reprimand in 1992, although there are no details about this investigation in the record. He also may have been sued for sexual harassment, although the 1995 investigation led by the district’s then acting director of human resources, Ava Davenport, did not attempt to confirm this. RP 55-56, CP 1706. The investigator interviewed a few witnesses, CP 1706-07, and spoke to the school’s principal. CP 1707. S5 contacted parents of the accusing students during the course of the investigation, “compromis[ing]” the district’s “ability to obtain untainted information.” CP 1711. Eventually the investigation was discontinued. CP 1710. The file contains a “warning” letter, CP 1711, although the district previously said there was “insufficient evidence”, CP 359, and during the course of this lawsuit revised the disposition to be “allegations unfounded.” CP 415. While testifying about the district’s investigation of S5, Davenport said she had given verbal reprimands, as opposed to written

¹⁷ The more than four-month delay in beginning the investigation was due to a “backlog” of cases. CP 527-28; *see also* CP 1330-42.

ones, because “if something is in writing, it’s more damaging or more serious.” RP 58. *See also* CP 1351-59.

Seattle John Doe 6 (“S6”) is or was a substitute high school teacher who, in 1993, was accused of touching a female student’s upper right breast three times. CP 1714, 1718. He admits he “touched the back or shoulders of girls who seemed to be trying to ignore” him during class. CP 1764. S6 states he may have accidentally touched the “top front of [a female student’s] shoulder,” CP 1764, but denies touching her breast. The female student told a different teacher about the incident, prompting a district investigation. CP 1716-18. SSD requested S6 submit a written statement, took written statements from three students and may have interviewed the female student. CP 1716-18. Because the incident occurred at the Juvenile Detention Facility, the King County Department of Youth Services was also involved in the investigation. CP 1718. As the investigation was winding down, the district’s then executive director of human resources, Ricardo Cruz, wrote to a subordinate, “How credible are the alleged victim and her witness? I would not be comfortable firing [S6] as a sub based on the witness statements I have.” CP 1722. Cruz asked the district administrator, “Do you believe that we should have further investigation of these events by our outside investigator?” CP 1722. The administrator said no further investigation was necessary. CP 1870. After the close of the investigation, the teacher was not disciplined because there was “insufficient evidence.” CP 1726. S6 agreed to take classes on

cultural management. CP 1724. When he wished to return to the school as a substitute, Cruz referred him to the school's administrator to make that decision. CP 1726. There is no evidence in the record that the district continued to employ S6. *See also* CP 1360-75.

Seattle John Doe 7 ("S7") is or was a middle school teacher accused of raping a student in 1976 or 1977. CP 1729, 1734. The student also claimed she had an abortion because of the rape. CP 1730. At the time, S7 was the student's stepfather. CP 1733. The allegations were made in 1994 following the student's mental health examinations. CP 1732. The district's investigation included interviewing the student, the mother, an attorney, mental health care worker, and psychiatrist. CP 1732. The investigation also reviewed the case files, police reports, and doctor's files. CP 1732. Though the investigation did uncover evidence that the teacher routinely asked the girl when she was on her period and threw a vacuum at her brother; CP 1737, SSD stated it did not have evidence of the rape and so did not discipline S7. CP 406, 1732. *See also* CP 1376-88.

Seattle John Doe 9 ("S9") is or was a middle school teacher with a "history of sexual misconduct," although this misconduct was not specifically detailed in the record. CP 1768. S9 admitted he gave car rides to students since at least 1990, something which because of his past actions he was forbidden to do. CP 1763. In January 1995, the district began an investigation and interviewed students given rides by S9 providing information consistent with S9's admissions. CP 1767. The

district conditioned S9's employment on "extensive additional evaluations" with a doctor or therapist and an agreement to turn over all treatment records and reports to the district. CP 1761. The district outlined specific criteria for future employment, including prohibitions on: one-on-one counseling or proximity with students or young children; physical contact with students or young children; off-campus one-on-one activities with students or young children; and giving rides to female students unless other adults were present *and* there was no practical alternative. CP 1760, 1768. In addition, any misconduct of a sexual nature toward students would be grounds for discharge. CP 1768. It is unclear if S9 abided by these obligations. He retired and surrendered his teaching certificate number in the summer of 1995. CP 1769-70. *See also* CP 1407-20.

Seattle John Doe 10 ("S10") is or was an elementary school teacher accused of kissing a female student "on the lips," discussing sexual matters with her, giving gifts, taking pictures of students, and writing inappropriate notes. CP 1774. S10 is also accused of going to the student's home unannounced. CP 1774. The student made these accusations in 1996, while in seventh grade, although the actions giving rise to the investigation occurred two or three years prior. CP 1775. In addition, the student complained S10 made her "sit on his lap" and "tried to French kiss" her. CP 1777. Apparently S10 was the student's reading tutor. CP 1776.

S10 admits he wrote notes to students saying “I ♥ [student’s name]” but did it to be “positive” because students are “troubled” and he had no idea the notes were “misinterpreted.” CP 1781. S10 denied kissing the student and all other improper behavior. CP 1782, 1784. The teacher alleged the student was a problem student; SSD administrator Davenport stated it was odd the teacher had not mentioned this before. Davenport stated, based on the S10’s claims, that the student was “known to fabricate and seek attention.” CP 1784. Nonetheless, Davenport recommended S10 be disciplined “for really poor judgment and admonish[ed] . . . to refrain from his highly questionable activities—the notes, songs, poems, gifts to students—in the future.” CP 1784-85. She testified some male teachers “fresh out of college” with “wonderful careers ahead of them” sometimes “do stupid stuff.” RP 80. She added, “Does this mean they don’t deserve to be a teacher, they deserve to have their career ruined . . . ?” RP 80.

SSD submitted inconsistent charts concerning S10, first indicating he resigned, CP 358, but later revising the chart to indicate there was no disciplinary action. CP 414. There is no evidence on the record explaining how or if S10 was disciplined. *See also* CP 1421-34.

Federal Way John Doe 1 (“FW1”) is or was an elementary school teacher. CP 1934. A male student alleged a female student was sitting in the teacher’s lap. CP 1950. FW1 immediately reported the allegation. The district interviewed FW1, took a written statement from the accusing student, spoke with the student’s parents, and took statements from seven

other students. CP 1948. The accusing student did recant, saying it only looked like the female student was sitting in FW1's lap but instead was sitting on an arm of a couch on which the teacher was sitting. CP 1951. *See also* CP 1034-57.

Federal Way John Doe 2 ("FW2") is or was a special education teacher accused in 1998 and 1999 by a teacher's assistant and a parent of having a child sit on his lap, watching children change their clothes and using inappropriate physical force with students. CP 1956-69.

A complaint was first raised in October 1998, alleging hugging of students and allowing them to sit on his lap. CP 1954. FW2 assured the principal this conduct would cease. CP 1954. In March 1999, a second complaint was raised for assault and inappropriate contact. CP 1956-69. In addition, the teacher was reported to Child Protective Services by a counselor. CP 2018. FW2's teaching assistant kept a log recording numerous incidents of sexual and physical abuse against students. CP 1956-69. For example, FW2 allegedly used sitting on his lap as a reward, put his arms around students, cuddled them, cradled them in his lap, pulled up a student's shirt and stroked bare skin, made students go to the bathroom while he watched, and watched them change their clothes. CP 1956-69. Further, the log alleges FW2 threw students into the "time out" room, held them down with his hand over their mouth, and shoved students into the wall. CP 1969. A student also alleged FW2 hit him.

CP 2014. FW2 admits students have sat in his lap but denied the other accusations. CP 1974. *See also* CP 1098-1123.

The teaching assistant claims she was threatened with a lawsuit if she discussed the allegations and insists the principal “would not allow anyone to go after one of her teachers” and “[t]he reaction by the FWSD is in direct conflict with the instruction I have received from the district itself....” CP 1994. In June 1999, a parent followed up on a complaint about FW2 pulling students’ hair, shoving students and acting inappropriately. Neither parent nor son was interviewed. CP 1995. There is no evidence in the record of any follow-up. In April 2001, police began an investigation regarding sexual misconduct with a student, but there is no evidence in the record as to the outcome. CP 1998.

Federal Way John Doe 3 (“FW3”) is or was a junior high school science teacher. CP 2033-34. FW3 was accused of making inappropriate sexual comments, such as telling a student wearing a Martian costume on Halloween, “You know, people from Mars are naked” and touching a female student’s buttocks. CP 2027-29. In November 1998 school administrators spoke with the accusing student and her parents regarding the touching incident and considered the matter resolved. CP 2028-29. In fact, the parents filed a formal complaint in March 1999, triggering an investigation. The district assistant superintendent states he “believe[s] we need to get Curman Sebree [outside counsel] in to do an investigation.” CP 2024. There is no evidence that the lawyer was retained. The

investigation included interviews with parents, the principal, teachers, and two students. CP 2033. FW3 did not deny he made the comments and touched the student but he claimed his words were “misconstrued.” CP 2040. The investigation report states, “[Student’s parents] indicated that they didn’t feel [FW3] was honest in their meeting and [parent] feels that this would indicate that he’s gotten away with it (similar behavior) in the past.” CP 2040. The report concludes, “There are still several points which could be followed up.” CP 2041. There is no evidence in the record of any further investigation. FWSD determined the claims were unsubstantiated and no action was taken, but the reasoning or conclusion is not reflected in the materials in the record. CP 374; *see also* CP 1124-44.

Bellevue John Doe 1 (“B1”) is or was a high school teacher who was accused of “inappropriately and unnecessarily touch[ing] a female student” in November 2001. CP 1842. He was placed on administrative leave pending the investigation for less than two weeks. CP 1842, 1844. B1 admits he touched the student’s knee, gave her a neck rub, and hugged her, but “expressed surprise that the student interpreted [his] intentions as being inappropriate.” CP 1844. There is no evidence of an investigation in the record the district interviewed witnesses or the student. **B1** was not disciplined. CP 394; *see also* CP 952-56.

Bellevue John Doe 2 (“B2”) is or was a high school teacher accused of making female students uncomfortable by the way he looked at them, sent written correspondence, and touched them, hugged them or put his

arm around their shoulders. CP 1847. The district's investigation included the interview of the student's parents, the two female student accusers and one friend. CP 1847. The teacher was instructed to cease the "flirtatious" behavior and received a written letter of direction. CP 394, 1848; *see also* CP 957-60.

Bellevue John Doe 3 ("B3") is or was a gym teacher at Interlake High School. CP 1851. In October 2002 a guardian complained her niece was being treated unfairly. CP 1851. The complaint focused on the student being forced to participate in gym class, even though she had a medical condition and doctor's excuse. CP 1851. In addition, the student claimed other female students got out of participating by "wearing a t-shirt and no bra" or by bringing the teacher donuts. CP 1851. Finally, the teacher was accused of staring at girls with large breasts. CP 1851. The student said she was so uncomfortable she wore sweat shirts or sweaters so as to not attract B3's stares. CP 1851. The district's investigation consisted solely of the principal calling one of the girls the teacher was alleged to stare at into her office and asking her "is there anything in [gym class] making you uncomfortable?" When the student answered "no," the inquiry ended. CP 1852.

The written report notes the complaining student's older sister was friends with girls involved in making complaints against the same teacher in the previous year. CP 1852. The 2002 incident was investigated by Interlake High School Principal Laura Keylin, who did not speak to other

witnesses. CP 153, 437. Keylin states she had no training in assessing the credibility of witnesses or dealing with witness interviews. CP 438. B3 received other complaints about “sexual harassment” in May 2001, but the investigation appeared limited to an interview with a few students and written statements. CP 167-180. Per Keylin, The investigations concluded the allegations were not substantiated, and B3 was not disciplined. CP 395. Keylin acknowledged that she became aware of the 2001 allegations during the 2002 investigation by happenstance. Her assistant principal had been involved in the investigation when he was an administrative intern and had kept a copy of his notes and other records. CP 153. The records were not part of B3’s other files because the earlier misconduct allegation had not led to discipline. CP 153-54. No evidence was presented regarding the earlier investigation or why B3 was not disciplined. *See also* CP 961-65.

Bellevue John Doe 4 (“B4”) is or was a high school teacher.

CP 1858. Former students raised concerns in April 1998, accusing B4 of “hitting on” female students. CP 1858. B4 said he winked at students, and touched students on their shoulders. CP 1858-59. B4 denied he “patted a female student on her rear end” or “solicited dates,” but he admitted at least one student gave him the phone number of the student’s sister and another student brought her sister to class to meet B4. CP 1859. B4 admitted he was “partially at fault” and was told to “set stricter boundaries” and avoid situations “where your actions might be

questioned.” CP 1859. He received a letter of direction. CP 395. There is no evidence the district conducted any investigation or interviewed any of the witnesses or accusers. *See also* CP 966-69.

Bellevue John Doe 6 (“B6”) is or was a high school teacher. CP 396. In February 2002, a parent complained her daughter was touched on the shoulder and had to perform a cheer for extra credit in front of her class. CP 1866. In March 2002, B6 was accused of making inappropriate comments in class, such as “you need a brain transplant” and “you are basically screwed.” CP 1865. B6 did not deny the statements but said he did not intend to “hurt anyone’s feelings.” CP 1865. There is no evidence of any investigation or follow up with the students or witnesses involved. The investigation found the comments were not sexual, and B6 received a “written memorandum.” CP 396, 1867; *see also* CP 974-77.

Bellevue John Doe 7 (“B7”) is or was a middle school teacher who was the subject of at least two investigations, in 1994 and 1997-98. In 1994, B7 was accused of touching a student’s buttocks. CP 396, 1874. The Bellevue Police Department investigated and instructed B7 to act appropriately. CP 1871. There is no evidence in the record the district investigated this incident. In November 1998 a parent accused B7 of sexually harassing the parent’s daughter by sticking out his tongue in a sexual manner. CP 189, 1870. In addition, B7 allegedly walked behind an unknown female student and made kissing sounds. CP 1870. The district’s investigation of the tongue incident included speaking with students in the

class and reviewing student statements. CP 1871. During the investigation, the principal of B7's school noted he did not understand why the accusing student would be making this up. CP 191. There was no investigation of the kissing sound incident since the student in question was unknown. CP 437. Principal Jerry Schaefer, who conducted the 1997-98 investigation, has no training in investigating sexual misconduct cases, interviewing witnesses, or assessing witness credibility. CP 437. Karen Clark, formerly the District's Executive Director of Student Services and Title IX/Affirmative Action officer, admits taking no action to identify the student involved in the "kissing sounds" incident. CP 187, 521. In a November 1998 "letter of direction," CP 396, Clark notes B7 has a "variety of student and parent concerns about specific comments, behaviors and incidents that continually seem to border on or cross-over into the type of behavior . . . [constituting] 'conduct or communication that has the purpose or effect of creating an intimidating, hostile or offensive educational environment.'" CP 1870. B7 was involved in a variety of other incidents, and was previously reprimanded in the 1980s. CP 1871. Although at least one incident on file was deemed a "total fabrication," there were "many other instances" of alleged improper behavior. CP 1871. No evidence was provided regarding the earlier reprimand. *See also* CP 978-85.

Bellevue John Doe 9 ("B9") is or was a physical education teacher. Parents accused him of sexual harassment by making inappropriate

comments and by walking through the girls' locker room. CP 1882-83. The comments included "I can't wait to see you all in your tights bouncing around" and "I just love to watch girls going up and down." CP 1882. B9 admits he walked through the girls' locker room, but claimed he announced he was coming into the room. CP 1883. There is no evidence of any investigation, and the chart fails to indicate any findings or resulting discipline. CP 397. *See also* CP 992-97.

Bellevue John Doe 11 ("B11") is or was a middle school teacher. CP 1895. In 1993, he was accused of touching a student's buttocks and snapping bra straps. CP 1895-96. The Bellevue police were contacted, and officers spoke to the student and the student's mother. CP 1895. The police report states there was no "criminal issue" but "most certainly an issue of inappropriate actions and touching on the part of this teacher." CP 1898. In 1995, three students raised sexual harassment complaints involving B11. CP 1899. These complaints involved inappropriate touching in art class. CP 1899. B11 admitted he touched the students but claimed it was not inappropriate, as it was either accidental or caused by a cramped work space. CP 1902. In 1996, a second police report was filed, this time involving inappropriate touching of students' buttocks and breasts. CP 1903. The police report states officers met with school administrators and counselors and interviewed students. CP 1908. There were multiple examples of B11's inappropriate touching in the art class, including standing behind female students and brushing against their

breasts while demonstrating art techniques or use of equipment. CP 1910-12. Although the activity was not deemed criminal, CP 1914, B11 did admit some of the touching occurred. CP 1915. There is no evidence in the record that the district conducted any investigation, or the final disposition of the investigation. The district's chart notes a "written memorandum" was placed in B11's employment file. CP 397; *see also* CP 1002-33.

C. Relevant Facts Regarding Districts' Behavior

The districts filed several declarations in support of motions made by the plaintiffs to deny material to the Times and in support of plaintiffs' positions.¹⁸ The districts did not advocate for public disclosure, defend against the injunction or appeal, or support the Times.

District personnel acknowledged the importance of considering the existence of earlier allegations when conducting a current investigation. RP 14, 21; *see also* CP 1871. Yet the records indicate that in many of the cases here investigators and administrators were unaware of earlier allegations and lacked access to any documentation of them or the investigations performed. *See, e.g.*, CP 437, 525; RP 63-64.

All those interviewed testified to having performed just a handful of sexual misconduct investigations against employees. *See, e.g.*, CP 520-21, 526. District personnel acknowledged they typically had no specialized training in how to perform a sexual misconduct case against children and

¹⁸ *See, e.g.*, CP 67-76, 80-82, 152-222, 858-60, 884-89, 904-08, 926-28, and 2251-52.

had no training in interviewing witnesses or assessing credibility. *See, e.g.*, CP 437, 438, 526.

Districts and union officials acknowledged the pressures they face in investigating an employee and the concern about a grievance action by an employee who was disciplined. CP 64, 69, 528, 860. Districts and union officials presented the “letter of direction” as a device to allow districts to avoid the trouble and expense of a grievance or termination proceeding. CP 64, 859-60. FWSD Br. at 6-7.

IV. ARGUMENT

More than one year ago, The Times asked the districts for the names and public records of teachers accused of sexual misconduct against students. Both teachers and the districts resisted the release of this information to the Time and by extension parents, taxpayers, the public, and other school districts. From the records that were produced, the Times learned some investigators lacked training, played favorites, and even agreed to hide admissions of sexual misconduct. Without full access to school misconduct files, the public cannot learn how districts treat such complaints without access to the teachers’ names, the public cannot learn which teachers have multiple complaints, or whether they continue to teach. Without public disclosure, no one will know if children are in harm’s way.

A. The Public Disclosure Act Is a Broad Mandate for Disclosure.

The PDA is a “strongly worded mandate for broad public disclosure.” *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989).

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.

Progressive Animal Welfare Soc’y v. University of Wash. (PAWS II), 125 Wn.2d 243, 251, 884 P.2d 592 (1995).

Agencies must disclose all public records unless a specific exemption allows withholding. RCW 42.17.310(4). Courts must construe the right of disclosure broadly and the exemptions narrowly. RCW 42.17.251; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). The party attempting to block disclosure bears the burden of proof. RCW 42.17.340(1).

B. The Records and the Teacher’ Identities Are Not Exempt Under RCW 42.17.310(1)(b)

The trial court ruled that RCW 42.17.310(1)(b) exempts from disclosure the names of 15 public school employees accused of sexual misconduct with their students, their teacher certification numbers, the names of their employing schools, and the names of all school level personnel involved in or named in the investigations. CP 101-08, 113, 117-18. Appellants argue the trial court erred by not including them in

this ruling.¹⁹ Exemption (1)(b) exempts “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.” “Privacy” is invaded under the PDA “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.” RCW 42.17.255. A court may not balance the interests of individuals against those of the public; to enjoin release a litigant must satisfy both prongs of the test. *Brouillet v. Cowles Publ’g*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990).

1. Washington Supreme Court Precedent Requires Disclosure.

The Washington Supreme Court **held allegations** of sexual misconduct by teachers to be a matter of legitimate public concern. In *Brouillet*, the Court ordered disclosure of names of all teachers who were decertified over a 10-year period, including teachers accused of sexual misconduct with students. 114 Wn.2d at 790-91, 798. The Court held, “Because the information sought is of legitimate public interest, we conclude that no privacy right has been violated.” *Id.* at 798. The Court stated emphatically:

Sexual abuse of students is a proper matter of public concern because the public must decide what can be done about it. The

¹⁹ Appellants belatedly argue their records should also be exempt based on RCW 42.17.310(1)(d). This argument was not raised below and has been waived. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The plain language of exemption (1)(d) establishes that it cannot apply to the school district records here and that the districts were not engaged in “law enforcement.” See *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 797, 791 P.2d 526 (1990).

public requires information about the extent of known sexual misconduct in the schools, its nature, and the way the school system responds in order to address the problem.

Id. at 798. The Court recognized the many positive benefits arising from public access to monitoring of misconduct investigative records. Release of information about allegations of sexual misconduct can encourage other victims to come forward. *Id.* at 791. It can make victims feel less isolated. *Id.* Disclosure can enable the public to pressure school systems to investigate complaints and reduce false rumors or speculation. *Id.*

The Court specifically forbade the balancing of individual privacy interests against the interest of the public. *Id.* at 798. The Court ordered disclosure despite the fact that nearly all of the teachers had voluntarily given up their licenses and stopped teaching, the state had assured teachers of confidentiality, and the state never conducted a hearing for those teachers – open or closed – to determine whether the allegations warranted revocation. *Id.* at 792.

In this case, 18 teachers accused of sexual misconduct with students, and at least one of their school districts, argue that the rule set forth in *Brouillet* was not meant to require release of their names. They also seek to avoid release of the names of their schools and all school level personnel involved in or named in their investigations. The reasons they cite all center on concerns for their own privacy including claims that the public's interest, and the teaching profession, will actually be harmed if their names are released. But the same values recognized by disclosure in *Brouillet* are just as present here, perhaps to an even greater extent.

Disclosure of allegations can encourage other victims to come forward. It can make victims feel less isolated. It can enable an informed public to pressure school systems to investigate complaints. It will encourage districts to promptly and adequately investigate allegations. And full disclosure of all materials will reduce false rumors or speculation. The veil of secrecy urged by these teachers and districts does a disservice to the teaching profession and a disservice to our districts. Public access to the records will increase public confidence in the actions taken by districts and with it increase confidence in the quality of professionals to whom we daily entrust our children.

The *Brouillet* decision did not turn on whether the allegation could ultimately be determined to be true or false. Rather, *Brouillet* turned on the gravity of the subject matter – sexual abuse of students and the way the school system responds -- and the important policy of openness embodied in the PDA. Nothing learned in the past decade merits a change in this reasoning. *See* Section IV.B.3 below.

2. Consideration of Governmental Interests Does Not Support Withholding Records of Misconduct Investigations From the Public.

The trial court here balanced the public’s perceived interest in “efficient government” against the public’s interest in disclosure and declared the public’s concern in 15 cases not “legitimate.” The ruling was based on language in *Dawson v. Daly*, which defined “legitimate” in RCW 42.17.255 as “reasonable” and said “[r]equiring disclosure where the

public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable.” 120 Wn.2d 782, 798, 845 P.2d 995 (1993). The Court then concluded the public’s concern in disclosure of performance evaluations that “do not discuss specific instances of misconduct or public job performance” was not legitimate. *Id.* at 800.

The *Dawson* public policy argument has no place in a case like this in which the records are not routine performance evaluations but are limited to those discussing misconduct. Further, the two sources of harms identified in *Dawson* do not exist here. First, the Court found disclosure of performance evaluations would weaken employee morale and spur unhealthy comparisons among employees, which, in turn, would harm the quality of employee performance. *Id.* at 799. Second, the Court found disclosure would reduce supervisors’ candor in the evaluation process, depriving employees of guidance and constructive criticism, which, in turn, would also harm the quality of employee performance. *Id.* at 799-800.

Here, disclosure of misconduct investigations is unlikely to spur employee competition. Further, disclosure of the records would not – and could not legally – chill candor as state law requires reporting potential child abuse or neglect. RCW 26.44.020; *see also* CP 184, CP 205 (Bellevue principals declaring the failure to adequately investigate misconduct allegations can lead to legal liability). Reporting sexual

misconduct may actually cause an increase in candor and adequate investigations. As the Supreme Court recognized in *Brouillet*, release of misconduct information may encourage victims to come forward and enable public pressure on school districts to investigate complaints thoroughly. 114 Wn.2d at 791.

Outside of the context of routine performance evaluations, courts have found that the public's interest in efficient government does not outweigh its interest in disclosure of public records. In *Tacoma Public Library v. Woessner*, the court rejected the library's claim that disclosure of employee names in conjunction with information on salary, benefits, pension and hours worked would cause a drop in employee morale. 90 Wn. App. 205, 223-24, 951 P.2d 357 (1998) (allowing only redaction of identification numbers, *not* names of public employees). In *Yakima Newspapers, Inc. v. Yakima*, the court rejected the city's argument that releasing a settlement agreement would harm efficient government by creating a chilling effect on future settlements. 77 Wn. App. 319, 328, 890 P.2d 544 (1995). Recognizing the public's legitimate concern "that government conduct itself fairly and use public funds responsibly," the court concluded that if the agency's "agreement cannot withstand public scrutiny, it may be flawed in the first place." *Id.*

The other parties ask the Court to shield misconduct records of public employees based on a grab-bag of arguments. B11 argues that allowing public scrutiny of misconduct investigations will cause public

school teachers to flee from – or never enter – the classroom. B11 Br. at 39. The record shows no Plaintiff has made such a claim here. CP 29-31, 785-86. In fact, plaintiffs whose names and records have been released in this case continue to teach in Washington schools.²⁰ Plaintiffs who have left the profession did so before the Times made a request for their records, and their reasons for leaving were unrelated to record requests. CP 29-31.

The parties further argue that if records were subject to disclosure, teachers would reject a “letter of direction” from the district and would require every case to be handled as a grievance. Again, there is no admissible evidence of this.²¹ Further, the parties have not shown why schoolteachers, unlike every other accused individual, would insist on being tried when the investigator was willing to let the matter drop.

²⁰ Stephen Elms received a written reprimand because of “highly inappropriate” and “unacceptable” sexual comments to a student intern, CP1888-89, but is still employed by the Bellevue School District. Michael Tenore is still employed by the Seattle School District following allegations he made “indecent sexual comments” to a female student. *See* Chief Sealth High School web site, at <http://www.seattleschools.org/schools/chiefsealth/Depts.htm>, CP 1756-57. Jerome Collins and Paul Jensen are still employed by the Federal Way School District even though Collins had been reprimanded in 1994 and faced criminal charges, later dismissed, in 1999 and Jensen was reprimanded in 1994 and again in 1996 and was barred from coaching. *See* Federal Way High School web site, at <http://www.fwsd.wednet.edu/fwhs/> CP 2044, 2073, 2099, 2105. Walter Carter is employed by the Shoreline School District following allegations that he has a “fascination” with certain female students and fantasizes about female students while employed by SSD. *See* Kellogg Middle School staff web page, at <http://schools.shorelineschools.org/Kellogg/Staff/Staffnames.html>, CP 1688-89. As the fact of these teachers’ employment is capable of accurate and ready determination, the Times requests that the Court take judicial notice under Evidence Rule 201 of the fact that these plaintiffs are currently employed in Washington school districts.

²¹ S6’s speculation about what he “might” have done is irrelevant as S6 had no letter of direction to reject. CP 107. Statements of union and district personnel are inadmissible as they are based on speculation and hearsay and lack foundation. CP 65, 69, 860.

B11 recites a litany of additional horrors – classrooms “deteriorat[ing] into chaos” because teachers are afraid to discipline students, students with “unfettered power” to destroy teachers’ careers, destruction of records to prevent disclosure of complaints, reputations destroyed – again with no factual support of any sort or binding legal support. B11 Br. at 37-38, 40-41.

Even had they provided evidence to support their claimed harms – which they did not – the parties provide no explanation for how the alleged harms have any bearing under a *Dawson* analysis. The *Dawson* court was concerned with improving performance and efficiency. It was not concerned with investigating or correcting wrongdoing. It was not concerned with whether employees accused of misconduct might choose to leave the profession or might demand more formal grievance processes regardless of the results of the district’s investigation; that an agency might more completely investigate serious misconduct allegations. None of the alleged harms trumps the legitimacy of the public’s concern in assessing the misconduct allegations and investigations.

The other parties here argue for an analysis based on the “efficiency” of government in determining what the public can and cannot be allowed to know. The parties suggest that it is “efficient government” to allow districts and unions to resolve sexual misconduct complaints at the bargaining table rather than through the investigative process. They desire to keep for themselves the option to issue a “letter of direction” or oral

warning and avoid the time and expense involved to adequately investigate a matter. The Times believes “efficient” government requires public confidence and accountability. Efficient government requires public trust. Efficient government does not mean speedy but ineffective governance. It certainly cannot mean that the promise of *Brouillet* is taken away and a decade worth of access is to be overruled.

The public’s concern in monitoring these misconduct investigations, including learning the identities of the accused, is legitimate (i.e. reasonable) in part because the districts’ handling of these matters has illustrated the need for concern

3. The Public’s Concern Is Legitimate.

The record in this case illustrates the conflicting pressures school administrators face when asked to investigate one of their own. District personnel say they are afraid if they discipline a teacher, the district will face a grievance proceeding or lawsuit by the teacher’s union. CP 184, 205. Employees often have difficulty believing a respected colleague could do the acts alleged. *See*, RP 45. And though a teacher may have done “stupid stuff” there is a concern at the district level with “ruining a person’s career.” RP 80.

Districts no doubt worry that a finding of misconduct will open the district up to damage suits by victims and negative publicity by the press. Educators have been studying and documenting these challenges since the Supreme Court spoke in *Brouillet*. CP 272-304. The findings suggest that

the need for public oversight and governmental accountability are as great if not greater than at the time of that decision.

The investigation of sexual abuse of children is a difficult and complex task. Manuals have been written and trainings developed to help those regularly charged with such investigations elicit true and complete information. CP 440-488. Yet district personnel charged with investigating sexual misconduct of teachers against students have generally had no training and little experience. CP 437-438, 526. Untrained administrators fail to interview the victim, *see, e.g.*, CP 1995, or interview **him or** her only in the presence of **his or** her alleged abuser. CP 209. Accused teachers are not always removed from the classrooms during investigations forcing the witnesses and alleged victims to have daily contact with him or her while an investigation is underway. RP 54-55. All district personnel interviewed acknowledged that if they received a report about a student being harmed by someone outside the school, they would immediately report it to the police or Child Protective Services. CP 211, 220. These same administrators, however, stated that if they received a report about a student being harmed by a school employee, they would first do their own investigation before deciding whether to forward the complaint to the police or CPS. CP 211, 220. Few, if any, allegations ever leave the schools. CP 211, 220.

More disturbingly, even when a district believes it has grounds to impose discipline, it will often give just an oral warning or a letter of

direction to avoid “papering” the teacher’s file RP 58, or it will reach agreements with teachers to let them resign in lieu of termination with agreements to purge district files preventing future employers learning of misconduct. *See also* CP 74 (acknowledging that records are destroyed), CP 153; *Cf. Pierce v. St. Vrain Valley Sch. Dist.*, 944 P.2d 646, 650 (Colo. Ct. App. 1997) (ordering disclosure of settlement between district and superintendent accused of sexual harassment who resigned after obtaining agreement that prohibited disclosure of circumstances surrounding resignation). In the case of John P. Vaughn (aka John Doe), SSD found probable cause to suspend the high school teacher without pay for “sexual harassment and other inappropriate behavior” toward students and staff, including asking female students about their sexual practices. *See* CP 1504-1648.²² Yet the district committed to “purging” all references of that misconduct from Vaughn’s personnel file upon his retirement from the district. *Id.* Similarly, SSD entered into a settlement agreement under which it would remove a letter of reprimand from Alan Soble’s file (aka Seattle John Doe 13). CP 528. The district agreed to remove the record of the reprimand even though it had found that Soble had “acted inappropriately” toward three female middle-school students, including taking a female student to the beach while on a trip to Astoria, Oregon, touching his body to female students while coaching them in drills,

²² This range covers all records regarding Mr. Vaughn that were provided to the trial court for its *in camera* review.

repeatedly blocking a female student's exit from a classroom and asking personal questions of a female student. CP 1821-22.

Even as district personnel recognize that investigators should consider prior allegations, CP 525, district agreements such as the ones with Vaughn and Soble ensure that those allegations are no longer available in the individual's personnel files. In addition, even when the district finds conduct warrants a reprimand, district personnel testified that they would issue an oral reprimand so as not to "paper their file." RP 58; CP 537. They do this even while acknowledging that relying on oral reprimands means they – or their counterparts at other school districts that may consider hiring the reprimanded individual – have no way of knowing whether an individual under investigation has received one or countless reprimands for similar misconduct. RP 63-64; CP 537. *See also* CP 297 (50 state survey of child sex abuse by school employees notes problem of teachers who commit misconduct moving from district to district).

Administrators in a number of the cases here acknowledged they were unaware of earlier investigations of the teacher and had no access to those records. CP 437, 525. Many of the teachers whose records have been denied here were the subject of numerous complaints, some which were sustained and led to discipline. But the records and details of these earlier allegations are not contained within their files or available to administrators or the public. CP 437, 525, 187-88, 152-181.

The districts' flawed investigative practices, document destruction, and secrecy agreements increase the risk another district will unknowingly place a predator teacher back in the classroom. The flaws in the process illustrate why the public's concern in monitoring school district handling of misconduct complaints remains legitimate and reasonable.

4. The Public Has a Legitimate Concern in the Identities of Accused Teachers in Order to Adequately Monitor Government.

The other parties argue the public can adequately monitor government without any public employees identifying information and thus has no legitimate concern in the identifying information ordered redacted below. The Doe Appellants all agree that the Times is entitled to the districts' records under the PDA – so long as the Doe Appellants are not identified. S6 Br. at 25-26; S9 Br. at 6; B11 Br. at 28-29. They argue that scrutiny of public agencies does not depend on identifying individual public employees. There are several flaws in this theory.

First, it assumes that requesters will seek records of unknown people. Where, as here, they know the name of an individual, as the Times did with John P. Vaughn, CP 2195, the requester would be given nothing because any redacted set would still serve to reveal information about a person though his name may be removed.

Second, redacted records even for unknown teachers would prevent the public from monitoring the district's handling of complaints. If a school's name was always redacted, the public could never tell how a

particular school responded to complaints. If school personnel names were always redacted, the public could never assess whether districts repeatedly relied on untrained personnel who inadequately investigate allegations against teachers or who disregard statements from the teacher or from the accusers. And if teacher names are redacted, the public can never monitor whether districts are fulfilling their statutory duties and forwarding complaints to OSPI, CPS, or police. It would be impossible to learn whether particular teachers move from district to district, leaving a trail of complaints and resignations or whether a teacher found to have preyed upon children in one school setting has found his or her way into another.

Third, their argument contradicts the rulings of courts across Washington, which have recognized that the PDA does not authorize agencies to withhold the names of public employees from the public. In *Tacoma Public Library v. Woessner*, the court held “disclosure of employee names would ‘allow public scrutiny of government.’” *Woessner*, 90 Wn. App. at 222. While S6 suggests the court found an invasion of privacy based on disclosure of the employees’ names, *see* S6 Br. at 26, the court clearly held that that providing the employees’ names was not highly offensive. *Woessner*, 90 Wn. App. at 222. Only by providing employee names could the public properly monitor government by ensuring, for example, that it is not overpaying an employee, paying non-existent employees or engaging in nepotism. *Id.* It was only release of the

employees' identification numbers, which "could lead to public scrutiny of individuals concerning information *unrelated* to any governmental operation," that the court blocked. *Id.* at 221-22 (emphasis added).

The Times' request focuses solely on governmental operation. The actions of a teacher in his classroom and with his or her students is governmental. The actions of his district and administrators in receiving and responding to an allegation of misconduct is governmental. Public scrutiny of how public school employees perform their jobs is undoubtedly related to governmental operations and is a matter of legitimate public interest. The records here involve teachers whose actions relate directly to their performance as school employees. Only by knowing the identities of the teachers and district personnel involved can the public monitor government action. The identities are a matter of legitimate public concern.

5. *Tacoma News Is Contrary to Other Washington Law and Should Be Rejected.*

The **other** parties urge this Court to rule the identities of the teachers are not a matter of legitimate public concern because the allegations are alleged to be unsubstantiated. The trial court, as urged by the **other** parties, denied the Times access to names of 15 teachers based on the Division Two Court of Appeals case of *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094 (1992), a case which they contend declares all false and unsubstantiated allegations to be beyond the public's legitimate concern.

The *Tacoma News* decision is an anomaly and conflicts with all other Washington case law on the point. *Tacoma News* turns on a definition of privacy other than that contained in the PDA and one specifically excluded by the Legislature's definition of privacy in the PDA. RCW 42.17.255. The PDA's definition of privacy is drawn from RESTATEMENT (SECOND) OF TORTS § 652D, the tort of publication of private facts. The *Tacoma News* case, instead, took its definition of privacy from the tort of false light invasion of privacy, a tort not recognized in the state of Washington. *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 463-74, 722 P.2d 1295 (1986). The premise of *Tacoma News* has been rejected or ignored by every appellate court to consider it, including other panels within Division Two. Its continued existence creates confusion for trial courts and agencies that feel themselves constrained by its holding. It must be overruled or rejected.

Tacoma News held that “the legislature intended to allow public agencies and courts to consider whether information in public records is true or false, as one factor bearing on whether the records are of legitimate public concern.” 65 Wn. App. at 149. The court went on to hold, “If information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative though not always dispositive of falsity.” *Id.*

The *Tacoma News* framework requires a court, or an agency, faced with a record request to look into the public record and determine if information it contains is true or false. If information is unsubstantiated,

the court or agency must assess whether the allegations have remained unsubstantiated after “reasonable” efforts to investigate it. Such a framework places a significant burden on the reviewer and much uncertainty on the subjects and requesters of the records as to what will be and will not be public information. It is a framework that must be rejected here. Like numerous others cases both before and since, this Court must rule that the public’s interest in allegations of misconduct is legitimate regardless of the stage of the investigation or label attached to the allegation. *See, e.g., Amren v. City of Kalama*, 131 Wn.2d 25, 29, 34, 929 P.2d 389 (1997) (ordering release of report of complaints against police chief that mayor concluded were unfounded and false; report had no conclusions or recommendations); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep’t*, 55 Wn. App. 515, 517, 521 & n.3, 778 P.2d 1066 (1989) (rejecting privacy exemption and ordering production of investigative records of complaints against ambulance company though no citation ever issued); *Hudgens v. City of Renton*, 49 Wn. App. 842, 843, 846, 746 P.2d 320 (1987) (holding no privacy exemption to examination of records regarding arrest and strip search of DWI defendant found not guilty at trial); *Columbian Publ’g Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 29-30 671 P.2d 280 (1983) (ordering release of complaints by police officers against chief when no conclusions had been reached and the investigation may not even have begun); *see also Ames v. City of Fircrest*, 71 Wn. App. 284, 286-87 (1993) (holding records of

investigation of police department and officers not exempt though investigation uncovered no criminal intent and no charges were ever filed).

Respondent Districts acknowledge that unsubstantiated allegations are not necessarily false allegations. BSD administrator Karen Clark stated unequivocally: “I do not equate ‘false’ and ‘unsubstantiated.’ It is not uncommon for allegations of misconduct by teachers or students, whether sexual or not, to be unsubstantiated despite reasonable efforts to investigate. That does not mean the allegations are true, and it does not mean the allegations are false.” CP 219.

It is often precisely because an agency is unable to substantiate a claim that the matter is a subject of intense public interest. When an agency is charged with investigating complaints against one of its own, as it was here, the conclusion – or lack of one – is particularly of concern. State employees cannot hide complaints of misconduct from public scrutiny simply by labeling them “unresolved.” This case has illustrated the frequency and tendency of school districts to cut short investigations without making formal findings. Letters of direction, oral warnings, or settlement agreements are routinely issued, preventing a final disposition from being made in nearly every case. Even in cases where the records themselves used words indicating a finding of truthfulness, the districts here sought to change the words used years later during this litigation to suggest the matters **have** been left unresolved. If the *Tacoma News* rule

were allowed to stand and apply here, parents, press and future employers would be routinely denied records of sexual misconduct investigations on the theory that the allegations were left **unsustained**. The *Tacoma News* rule asks the public to simply trust its agencies to adequately investigate and accurately assess the truth or falsity of information. It leaves the requester little recourse except to ask a trial judge to re-try or re-investigate a case and see if he or she agrees it was appropriately deemed false. The *Tacoma News* rule will impose a significant burden on future trial judges asked to do such an analysis, and it does a disservice to agencies asked to second guess the quality of their own investigation in deciding whether material should or should not be released.

Tacoma News easily could be limited to its unique facts. In that case, four separate and independent agencies sought to investigate an anonymous allegation against a mayoral candidate. The court stated that there was “no hint” of an inadequate investigation. 65 Wn. App. at 152. None of the four investigating agencies found any evidence to support the allegation. *Id.* Few, if any cases, will ever involve the level of investigation involved in *Tacoma News*.

In the cases here, there were many “hints” of inadequate investigations. These cases involve serious and troubling allegations of sexual misconduct by elementary, junior high and high school teachers toward their minor students. The complaints had identifiable complainants and in some cases multiple witnesses and complainants. In all but a few

instances, the districts were the sole agency to investigate the claims. In nearly every case, the districts failed to file police reports or seek police or investigative assistance, even in cases alleging physical sexual contact, where such reports were mandatory as a matter of law. Witnesses and victims were not interviewed, leads were not followed, investigators were inexperienced, biased and untrained. The overriding vision one takes away from these cases is that of beleaguered school districts -- with inadequate resources, inadequate investigative skills and training and burdened by considerable political pressures -- investigating one of their own. The record created by the districts does not demonstrate that the complaints were false. Likewise, this Court and the public should not be expected to accept the plaintiffs' self-serving and inadmissible claims that the allegations were false. The label assigned to an allegation by an agency or a party cannot determine whether a record is or is not exempt. The *Tacoma News* rule allows agencies and subjects to decide when they will and will not be monitored. It must be overruled or rejected.

6. The Information Is Not “Highly Offensive” to a Reasonable Person.

The **other parties contend** the names of **teachers here and** numerous other teachers who allege the allegations against them have not been proven **true are** exempt because they allege it is “highly offensive” to identify someone as the subject of an unproven or false sexual misconduct allegation. S6 Br. at 20; B11 Br. at 25.

But as this Court has acknowledged, the lives and actions of public employees are entitled to greater scrutiny than that afforded to private citizens. In *Cowles Publ'g v. State Patrol*, this Court ruled that the identities of police officers investigated for internal affairs complaints were not entitled to withhold their names based on privacy stating:

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. . . .

109 Wn.2d 712, 726-27, 784 P.2d 597 (1988). RCW 42.17. 340(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.***

The Supreme Court has consistently ruled that the disclosure of the names of public employees accused of misconduct bearing on their fitness for their employment is not highly offensive to reasonable people. Complaints against a public employee, even if they have not been fully investigated, must be disclosed. *See Columbian Publ'g Co.*, 36 Wn. App. at 29-30 (disclosure of statements made by police officers concerning specific complaints against police chief did not violate privacy rights of chief or officers who made the statements).

Here, the other parties contend the allegedly unsubstantiated nature of allegations removes them from public view, seeking to limit holdings from cases like *State Patrol* and *Brouillet* that the parties contend were isolated to "true" allegations. Like their argument based on *Tacoma*

News, this asks a court to assess truth, falsity, and completeness before any disclosures could be made. This has not been the rule in this state, and it cannot be. Allegations that plaintiffs acted improperly – while employed by a public entity involving significant public trust – are not “highly offensive” private matters. Rather than requesting data about plaintiffs’ private sexual lives, the Times seeks data about allegations of sexual misconduct that involved (a) status as a teacher or public employee, (b) inappropriate actions and (c) a complaint to a District. While disclosure might embarrass plaintiffs, their desire to keep the details secret does not render the allegations “private.”

7. Decisions From Other Jurisdictions Do Not Support Withholding the Identity of Teachers Accused of Misconduct.

S6 and S9 rely on cases from other jurisdictions – interpreting distinguishable public records laws – to support their argument against identification. S6 Br. at 26-29; S9 Br. at 8. The Michigan case cited by both appellants, *Booth Newspapers, Inc. v. Kalamazoo School District*, and the cases interpreting the federal Freedom of Information Act all balance the public’s interest against individuals’ privacy interests. *See Booth Newspapers, Inc. v. Kalamazoo School District*, 450 N.W.2d 286, 289 (Mich. Ct. App. 1989); *see also Rosenfeld v. United States Dep’t of Justice*, 57 F.3d 803, 811 (9th Cir. 1995); *Tarnopol v. Federal Bureau of Investigation*, 442 F. Supp. 5, 7 (D. D.C. 1977). Washington law prohibits such a balancing test. *See Dawson*, 120 Wn.2d at 795.

S9's reliance on non-Washington decisions is also flawed. In addition to *Booth* and its impermissible balancing test, he relies on a Massachusetts case where, unlike here, the original public records requester expressly "disavowed any interest in the name of the teacher." *Wakefield Teachers Ass'n v. School Committee of Wakefield*, 716 N.E.2d 121, 126 (1999), *rev'd on other grounds*, 731 N.E.2d 63 (2000).

Elsewhere, courts have rejected privacy arguments and required disclosure of the identities of public employees regardless of whether the agencies had found misconduct. *Department of Children & Families v. Freedom of Info. Comm'n*, 710 A.2d 1378 (Conn. App. Ct. 1998) (emphasizing public interest in the safety of children and ordering disclosure of names of disciplined employees); *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. Ct. App. 2001) (ordering disclosure of fully unredacted records relating to allegations of sexual misconduct by police officer and noting that if records are withheld, public employees can move to different jobs and repeat the same misconduct without public knowledge).

Courts have also ordered, more generally, that investigatory records can be disclosed even in the absence of a conclusion or finding of misconduct. *Antell v. Attorney General*, 752 N.E.2d 823 (Mass. App. Ct. 2001) (ordering disclosure of records, with only names of voluntary witnesses redacted, even where police misconduct investigation found no wrongdoing); *Santillo v. Reedel*, 634 A.2d 264, 266 (Pa. Super. Ct. 1993) (finding no invasion of privacy in confirmation of complaint of sexual

abuse of a minor regardless of “[w]hether or not the substance of the complaint was true”).

C. The Other Parties’ Plea for General PDA Exemptions Must Fail.

Exemptions to the PDA are limited to specific statutory exemptions. *See PAWS II*, 125 Wn.2d at 258. These specific statutory exemptions have been “carefully drawn” to apply to “those particular categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government if they are disclosed.” *Id.* Beyond these limited exemptions, there is no general exemption.

Despite this clear mandate, the parties argue for a number of general amorphous exemptions. In copycat fashion, S6 and B11 argue that RCW 42.17.310(2) creates a general exemption for vital government interests. S6 Br. at 35; B11 Br. at 41-42. S9 suggests that RCW 42.17.260(1) creates an exemption for records whose disclosure would create an “unreasonable invasion of privacy.” S9 Br. at 8-9. FWSD argues that RCW 42.17.330 creates a separate exemption. FWSD Br. at 9. All four parties ignore clear statements in the PDA and from the Supreme Court rejecting such general exemptions. *See PAWS II*, 125 Wn.2d at 258 (“the Legislature has never adopted an all-purpose or open-ended exemption. To the contrary, the Act’s exemptions are highly specific, limited and carefully crafted.”).

First, “RCW 42.17.300 is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of

specific public records if they fall within *specific* exemptions found elsewhere in the Act.” *PAWS II*, 125 Wn.2d at 258.

Second, RCW 42.17.310 (2) *limits* what may be *withheld* when an exemption applies. It does not expand what may be withheld regardless of whether an exemption applies. *See Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997) (“if the requested material contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed. RCW 42.17.310(2).”). It does not create a general exemption for information regarding vital governmental interests. *See PAWS II*, 125 Wn.2d at 258. Just as there is no general “vital governmental interests” exemption under RCW 42.17.330, there can be no general “vital governmental interests” exemption under RCW 42.17.310(2).

Third, RCW 42.17.260(1) does not create a separate exemption for privacy. There is no general “privacy” exemption under the PDA. RCW 42.17.255. The Legislature expressly tied RCW 42.17.260(1) to the specific statutory exemptions in RCW 42.17.310. *Sheehan v. King County*, 114 Wn. App. 325, 5.3d 307 (2002). It amended RCW 42.17.260 and at the same time also added RCW 42.17.255, which provides a specific definition for invasion of privacy – without regard to reasonableness or unreasonableness.²³

²³ The very case that S9 cites to support his statutory construction argument requires that, in the event of a conflict, Section 255’s specific definition prevails over Section 260(1)’s reference to invasion of privacy. *State v. J.P.* noted that “the provision coming later in the chapter must prevail so long as it is more specific than the provision occurring earlier in the sequence.” 149 Wn.2d 444, 453-54, 69 P.3d 318 (2003). Section 255, which

The legislative amendment refutes S9's claim that "the legislature directed public agencies to delete information upon the showing of an 'unreasonable' invasion of personal privacy interested [sic]." S9 Br. at 9. The amendment makes clear that an agency may only withhold records under an express statutory exemption. If an exemption applies, the agency may then "delete identifying details in a manner consistent with" the applicable exemption.

D. Disclosure Does Not Violate Constitutional Rights.

1. Disclosure Does Not Violate the Constitutional Right to Due Process.

For the first time, on appeal, B11 claims that disclosing his identity would violate his right to due process. B11 Br. at 44. Despite extensive discussion of a case involving loss of a professional license, he appears to rest his argument entirely on the claim that disclosure would deprive him of his reputation. *Id.* at 44-46. First, disclosure of names does not automatically trigger revocation of a teaching certificate. B11's reliance on *Nguyen v. Washington*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001), involving the standard of professional disciplinary proceedings, is irrelevant. This case does not involve revocation of a teaching certificate of a retired teacher, CP 50; it involves disclosure of public records.

defines invasion of privacy, is more specific than Section 260. In addition, Section 255 would also prevail over Section 260's language regarding "unreasonable invasion of personal privacy" because the former is the more recent provision. *Id.* at 454 ("the more recent provision prevails if it is more specific than its predecessor").

B11's argument that disclosure would deprive him of his interest in his reputation is likewise flawed. The U.S. Supreme Court has refused to recognize injury to reputation, standing alone, as a constitutionally protected liberty interest. *Paul v. Davis*, 424 U.S. 693, 709, 712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Injury to reputation is addressed by state tort law; it "does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law." *Id.* at 712. The court expressly rejected the contrary implication in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971), upon which B11 relies. B11 Br. at 47. In *Paul*, the court noted that *Constantineau* could be interpreted as holding that defamation, without more, implicates due process rights. *Paul*, 424 U.S. at 708. But, the court held, "[i]f read that way, it would represent a significant broadening" of the court's previous holdings. *Id.* The court noted that the posting of information in *Constantineau* raised due process concerns not from harm to reputation, on its own, but from the combination of that harm plus the deprivation of a right previously held under state law. *Id.* at 708-09 (describing notices barring sale of alcohol to identified individuals as depriving them of the right to buy liquor).

Here, even if disclosure could harm B11's reputation – and there is no evidence to support that²⁴ – disclosure would not also deprive him of

²⁴ As this Court has previously held in the context of disclosure of police reports, "Rarely would criminal allegations so devastate the reputation of the suspect that nondisclosure would be necessary to protect against the effect of false accusation." *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999), as amended on denial of reconsideration (2000) (rejecting claim that privacy rights require withholding of police incident report before resolution of case against suspect). The Court further

any previously held right. This Court must reject both B11's attempt to defy U.S. Supreme Court precedent on the scope of due process and his claim of a violation of his right to due process.

2. Disclosure Does Not Violate Any Constitutional Right to Privacy.

B11 argues that disclosing his identity would violate his constitutional right to privacy. B11 Br. at 49-50. His argument fails on several grounds. First, he misconstrues the right to privacy under the Washington and federal constitutions. As explained in *O'Hartigan v. Department of Personnel*, which B11 cites, the right to "confidentiality" typically addresses whether the government has a right to forcibly *collect* information from a person. 118 Wn.2d 111, 117, 821 P.2d 44 (1991).

Second, disclosure under the PDA meets any constitutional requirements that might exist. As the Washington Supreme Court has explained, "[b]ecause the interest in confidentiality or nondisclosure of personal information is not 'a fundamental right requiring utmost protection' we conclude that a rational basis test applies." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997), *amended on other grounds*, 943 P.2d 1358 (internal citations omitted). Disclosure does not violate privacy if it meets "a legitimate governmental goal." *Id.* The test applies to both the state and federal constitutions. *Matter of Meyer*, 142 Wn.2d 608, 620, 16 P.3d 563 (2001).

noted that "the fact that allegations have not yet been proven is not persuasive of the need to provide blanket protection for purposes of a defendant's privacy." *Id.*

The Washington Supreme Court addressed analogous sexual misconduct information in *Meyer*, where it upheld the state’s sex offender notification law. As the Court explained, “The information disclosed to the public is largely, if not entirely, available from public sources The information disclosed is not subject to any specific confidentiality protection” *Id.* at 621. A person’s concern about “avoiding stigma or protecting reputation” does not justify nondisclosure under either the state or federal constitutions. *Id.*

Like the information sought in *Meyer*, the information B11 seeks to withhold exists entirely in public records. No special confidentiality provision protects the information. The PDA requires disclosure unless a specific exemption applies. The exemption at issue here, for employee records that would violate privacy, fits well within the bounds of the constitutional test. The PDA’s privacy definition in RCW 42.17.255 requires B11 to show disclosure would implicate intimate information and show that no legitimate public interest exists to prevent disclosure. This is exactly what the state and federal constitutions require. *See O’Hartigan*, 118 Wn.2d at 117; *see also Paul*, 424 U.S. at 713 (finding no violation of constitutional privacy rights where plaintiff relied on a “claim that the State may not publicize a record of an official act such as an arrest”). As the trial court found, CP 105, 113, and as the Times has indicated above, Section IV. B, the public has a legitimate interest in disclosure. Just as

B11 cannot claim a violation of the PDA, he cannot claim a violation of constitutional privacy rights.

E. A Court Must Review the Entirety of Records Before It Can Rule Them Exempt.

The trial court's *in camera* review in this case included only those records plaintiffs or the agency selected. CP 905. The judge did not have access to all of the responsive records, though he appears to have thought he did. *See* CP 99. Washington case law recognizes the better practice is to conduct *in camera* review of a record before declaring it exempt so to not blindly accept an agency's characterization. *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 577, 983 P.2d 676 (1999) Before any record can be ruled exempt, the Court should perform a thorough *in camera* review of all responsive records, not simply those selected by plaintiffs.

F. The Protective Order Should Be Stricken.

The trial court erred in granting the protective order because it is vague and ambiguous, plaintiffs' motion was untimely, and the material it restrains was not gained through formal discovery.

1. The Protective Order Is Vague and Ambiguous.

The language of the order prohibiting the "use" of teacher's names "inadvertently disclosed" fails to give the Times – or a court – adequate notice of what activities are prohibited or how the inadvertent disclosures may or may not be utilized. Courts should not enter vague and overbroad protective orders. *See, e.g., Pierson v. Indianapolis Power & Light Co.*,

205 F.R.D. 646, 647-48 (S.D. Ind. 2002) (rejecting proposed Fed. R. Civ. P. 26(c) protective order as “entirely too vague and overbroad”, preventing the court from determining “what information the parties will be sealing, whether and under what circumstances it may be sealed”).

In addition, a protective order should not prohibit a party from performing its business when the prohibition does not further the interest underlying the order. *See Chan v. Intuit, Inc.*, 218 F.R.D. 659, 661 (N.D. Cal. 2003) (protective order narrowed when clause effectively “stripped” lawyers of “their ability, indeed obligation, to advise their clients”). Prohibiting the newspaper’s “use” of truthful information impairs its daily business function of newsgathering and publishing. Absent a clear directive as to what constitutes “use,” the protective order forces the newspaper to err on the side of avoiding newsgathering and investigation and withholding publication of truthful material and reporting news. Prohibiting the revelation of the names, in addition to prohibiting the “use” – which could include any “use” for any reason, *e.g.*, mentioning the name in an unrelated story or context – is overbroad and unnecessary to protect the teacher’s purported privacy interest, CP 96, and unduly impedes the Times’ business and daily operations.

In the analogous injunction context, CR 65 requires an injunction be “specific in its terms.” It must be “reasonably clear so that ordinary persons will know precisely what action is proscribed.” *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985) (interpreting the similarly-

worded Fed. R. Civ. P. 65). Courts decline to enter, or subsequently modify, injunctions that fail to provide proper notice of what is enjoined. For example, in *Premier Communications Network, Inc. v. Fuentes*, 880 F.2d 1096 (9th Cir. 1989), the Ninth Circuit remanded an injunction prohibiting the removal of a microwave antennae “designed to intercept or receive” television transmissions. *Id.* at 1100. The court found the order had had multiple potential meanings, and “[b]ecause of this ambiguity, it is not clear what the [party] must do to comply with the injunction.” *Id.* Likewise, the present protective order is ambiguous and it is unclear what the Times can and cannot do to comply with the order. Thus, the trial court erred in entering the protective order.

2. The Plaintiffs’ Motion for Protective Order Was Untimely.

Plaintiffs did not move for a protective order against the Times until *seven weeks* after the plaintiffs disclosed the names. The records at issue were records redacted by plaintiffs and provided to the Times by plaintiffs. Plaintiffs’ lawyer was present during all of the witness interviews where names were revealed voluntarily by the witnesses. Plaintiffs knew – or should have known – the disclosures were made at the time the disclosures occurred. They have offered no legitimate reason for waiting seven weeks after the first disclosures before moving for a protective order.

Delay alone was sufficient grounds to deny the motion for protective order. *See United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 350-51 (D. Del. 1988). Moreover, the court erred in finding the protective

order was timely because the plaintiff teachers “originally sought a protective order in their first filings with the court.” CP 115. The plaintiffs’ complaints lack any claim or prayer for a protective order against the newspaper in any way; at best, the complaints seek an “injunction prohibiting the defendant school district from releasing private and confidential information to the Seattle Times or any other entity,” CP 9, 20, 258. Although the plaintiffs’ motions for a temporary restraining order sought permission to “seal an[y] references [to names], deliberate or accidental *in any hearing*”(CP 34, 788 emphasis added), this specific language was not in the temporary restraining orders prepared by the plaintiffs and entered in January and February 2003 (CP 23, 56, 60, 260), and the disclosures covered by the current protective order did not occur in a “hearing.” The TROs entered in January and February 2003 did not restrain the Times’ use or dissemination of information obtained from plaintiffs or others. *See, e.g.*, CP 23, 56, 60, 260. The TROs enjoined the school districts from giving public records to the Times. *Id.*

Plaintiffs did not seek a protective order against the Times for names revealed outside of a “hearing” until seven weeks after the first such disclosure. *See, e.g.*, CP 23, 56, 260. Because of this unexcused delay, the trial court erred in granting the protective order.

3. The Interviews and Documents at Issue Were Not Produced in Discovery.

The protective order purports to enjoin the use of information gathered from informal witness interviews and documents received from

plaintiffs. These interviews and documents were not produced in “discovery” and are not subject to a CR 26 protective order. CR 26(a) recognizes parties may obtain “discovery” by the following methods: “depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical and mental examinations; and requests for admission.” CR 26(g) requires all responses to discovery requests “be signed by at least one attorney of record in his individual name”; in the absence of a signature, the response “shall be stricken” unless promptly signed.

The documents in question were not produced in response to written interrogatories or requests for production. They were not produced to Seattle Times with a signed statement pursuant to CR 26(g). In fact, the documents were transmitted to the Times with only a cover letter signed by the plaintiffs’ paralegal, not an attorney. *See e.g.*, CP 1666, 1668. Plaintiffs did not – and cannot – contend that formal discovery requests compelled production of the documents.

Likewise, the interviews were informal discussions, conducted in the presence of counsel and news reporters, but not under oath or in satisfaction of notices of deposition or subpoenas. The presence of news reporters does not convert these telephonic interviews to depositions or other circumstances constituting discovery subject to CR 26. In interpreting the similarly-worded Federal Rule of Civil Procedure 26,

courts have found informal interviews between potential witnesses and counsel are not Rule 26 discovery, and thus a Rule 26 protective order is inapplicable. “Informal witness interviews are not encompassed by Rule 26, and therefore this court has no authority under that rule to issue the requested protective order.” *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 38 (D. Mass. 1987); *Cf. Kirshner v. Uniden Corp.*, 842 F.2d 1074 (9th Cir. 1988) (Rule 26 protective order does not apply to material obtained outside of discovery process). Thus even if the protective order is otherwise proper, the trial court erred in determining it covered materials obtained outside of discovery.

S6 claims the trial court erred in conclusion of law 19 because the protective order does not enjoin the “names of the school officials disclosed during testimony.” S6 Br. at 36. The trial court’s finding was correct, because a court cannot lawfully enjoin the disclosure of information presented in open court.

As the trial court properly found in its Findings of Fact and Conclusions of Law on Order for Injunction, the *Oklahoma Publishing Co. v. Superior Court*, 430 U.S. 308 (1977) case prohibits the protective order from applying to names filed with the court or **revealed** in testimony presented in open court. CP 114-15. S6 claims *Oklahoma Publishing* does not apply because the disclosures were not in “a public hearing” (S6 Br. at 37), but there are no facts in the record to support this contention. The trial court judge stated the March 25, 2003 hearing was “open.” RP at 43.

S6 also claims *Oklahoma Publishing* does not apply because the Times was a party to the lawsuit, and its reporters were present in their capacity as a party, not news reporters. CP 37. Even assuming the Times reporters were present as parties, and not in their journalistic capacity, the absence of public spectators does not transform an open hearing to a closed hearing. The evidence in the record confirms the Times reporters were in court as journalists, since they subsequently wrote news stories about the court proceeding. *See* Decl. of Lucy Mohl, filed Jan. 20, 2004 Ex. G.²⁵ The hearing transcript, with the inadvertent disclosures, is also a public record. *See, e.g.*, RP at 33.

Finally, even if the *Oklahoma Publishing* case is factually distinguishable, countless other cases hold prior restraints on truthful information, lawfully obtained, are presumptively unconstitutional. *See, e.g., Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976) (order prohibiting reporting of evidence presented in public preliminary hearing unconstitutional); *See also In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (court order could not enjoin newspapers from publishing name of attorney subject to investigation inadvertently revealed by judge in open court; “[o]nce announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction to two reporters.”) Thus, the trial court was correct in excluding evidence presented in open court from the protective order.

²⁵ The Supreme Court Commissioner found the court could take judicial notice of the publication of the newspaper articles. *See* Mar. 12, 2004 Ruling at 5.

G. The Times Is Entitled to Attorneys' Fees, Costs and Statutory Penalties From the Respondent School Districts.

The PDA entitles requesters to an award of reasonable attorneys' fees, costs and statutory penalties from an agency when the requester prevails "against" the agency in any court action seeking the right to inspect or copy a public record. RCW 42.17.340(4). The PDA also entitles such requesters to a mandatory award of between \$5 to \$100 per record per day for each day the requester was denied the right to inspect or copy said public record. *Id.*

"Against" is not defined in the PDA and should be given "its plain and ordinary meaning ascertained from a standard dictionary." *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). "Against" is defined as "adverse to," "contrary," "opposed to, and "in conflict with." *Black's Law Dictionary*, 61 (1990); *see also Random House Unabridged Dictionary*, 36 (1993) ("in opposition to," "in resistance to" or "hostile to").

An agency's actions before and during a litigation, not merely the label assigned to the agency on a case caption,²⁶ is instructive in determining "against." In *Doe 1 v. State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996), the Division Three Court of Appeals awarded fees pursuant to RCW 42.17.340(4) to a requester against an agency that at the time of the litigation was a co-defendant with the requester in an

²⁶ *See Richmond v. Williamson*, 16 Wn.2d 194, 198, 132 P.2d 1031 (1943) (holding adverse parties to include "all parties whose interests will be affected by a reversal or modification of the judgment or order from which the appeal is taken.").

injunction suit. *Id.* at 300-02, 305. The **court explained** that the requester wanted the records released five days after her request and the agency, by contrast, wanted the court to make the decision. “The parties were not representing the same interests.” *Id.* at 302. The court held that the agency took actions that subtly opposed the party requesting records (“Jane Doe”) and therefore “failed to comply with the strict requirements of RCW 42.17.320.” *Id.* at 303. These actions included communicating in a more prompt fashion with the party whose records were being requested (“John Doe”) than with Jane Doe; assisting John Doe by disclosing a summary of the report to him; and delaying turning over the report to Jane Doe until John Doe’s attorney could request an injunction. The court concluded that the agency, in performing these maneuvers, “preferred the rights” of John Doe over Jane Doe, and “did not give Jane Doe the ‘fullest assistance’ required by the statute.” *Id.* at 303-04.

In this case, the school districts were opposed to and in conflict with the Times. The districts clearly preferred the interests of the plaintiffs, their current and former employees, over the interests of the requesting newspaper. The districts notified affected teachers and gave them significant time to obtain injunctions barring release. CP 271, 344. They provided plaintiffs with copies of records they refused to provide to the requester. *See, e.g.*, CP 905. During the litigation, they stepped forward with plaintiffs seeking to enjoin release of records, including submitting sworn declarations of district personnel “in support of” plaintiffs’ motions

to reconsider release of records to the Times. CP 80-82 (re: **Seattle John Doe 13**), 732-36 (re: **Federal Way John Doe 2**), 926-28 (same), *see also* 904-08 (re: **Seattle John Doe 8**). Though “sued” by the plaintiffs, at no time did they defend the action. Sharon Howard, the General Counsel of BSD and Assistant Superintendent in fact emailed school district lawyers across the state after the TRO was obtained against her district stating: “We, of course, did not resist.” CP 582. The districts never once argued in support of release and against exemption. Two of the three “Respondents” did not even file a brief in this appeal. FWSD’s brief expressly declined to advocate the Times’ position. FWSD Br. at 1, 3 & 9.

The record upon which plaintiffs proceed in this appeal consists almost entirely of declarations provided by the districts to plaintiffs in support of plaintiffs’ position.²⁷ The protective order was initially sought by the lawyer for the SSD after one of plaintiffs’ witnesses mentioned the name of a plaintiff during testimony during a public court hearing. RP 40.²⁸ The Times was “against” the districts in this appeal.

A prevailing party is “one who has an affirmative judgment rendered in his favor at the conclusion of the entire case.” *Progressive Animal*

²⁷ CP 67-69 (W. Bleakney Decl.), 80-82 (M. Holland Decl.), 149-151 (S. Howard Decl.), 152-181 (L. Keylin Decl.); 182-185 (J. Schaefer Decl.), 186-194 (K. Clark Decl.), 195-198 (L. Keylin Supp. Decl.), 199-203 (S. Howard Decl.), 204-207 (K. Taylor Decl.), 208-212 (J. Schaefer Supp. Decl.), 213-216 (K. Taylor Decl.), 217-222 (K. Clark Supp. Decl.), 800-803 (C. Christensen Decl.), 858-860 (C. Christensen Decl.), 884-886 (G. Morris Decl.), 887-889 (M. Holland Decl.), 926-928 (C. Christensen Decl.); *see also* CP 70-76 (BSD Memorandum Regarding Decisionmaking Standards advocating presumption of adequacy of investigation).

²⁸ The court reporter erroneously attributes the statement made by SSD attorney John Cerqui to BSD attorney Mike Hoge in the transcript.

Welfare Society v. University of Washington (PAWS I), 114 Wn.2d 677, 684, 790 P.2d 604 (1990). A party prevails even though portions of the requested documents are found to be exempt. *Id.* at 525. The prevailing party also is entitled to fees incurred in bringing a fee motion. *Fisher Properties v. Arden-Mayfair*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990). Should the Times prevail in this appeal -- either in preserving its right to the names and records of the four appellants, gaining access to the names and records of additional original plaintiffs in this case, narrowing or striking the protective/gag order entered against its reporters, or achieving fees against the plaintiffs or their lawyer or union -- the Times will have “prevailed” in this appeal “against” the districts. Should the Times prevail in any of these respects, and the Times maintains it should prevail on all such counts, then under RCW 42.17.340(4), the Times will be entitled to a mandatory award of its reasonable fees and expenses incurred on review. *See PAWS II*, 125 Wn.2d at 271. Such a fee award is mandatory. *PAWS I*, 114 Wn.2d at 688; *Amren v. City of Kalama*, 131 Wn.2d 25, 36-37 (1997).

The statutory penalty must be imposed for each day the Times **was** denied access to the public records. RCW 42.17.340(4); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 617, 963 P.2d 869 (1999); *Amren*, 131 Wn.2d at 36-37. The Times should be awarded its fees, costs and statutory penalties attributable to this appeal. RCW 42.17.340(4) and RAP 18.1(a), (b).

H. The Times Is Entitled to Fees and Costs in Overturning a Wrongfully Issued TRO.

The Times is entitled to an award of fees and costs for expenses incurred in overturning a wrongfully issued TRO in a PDA action. On equitable grounds, a party may recover attorneys' fees reasonably incurred in dissolving a wrongfully issued TRO. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn. 2d 230, 247, 635 P.2d 108 (1981). A TRO is "wrongful" if it is dissolved at the conclusion of a full hearing. *Cecil v. Dominy*, 69 Wn. 2d 289, 293-94, 418 P.2d 233 (1966).

The trial court erred in granting the TROs because Firkins did not represent at least seven of the parties. At least one of the purported individuals could not consent, having died years earlier. CP 758-71. Nonetheless, Firkins obtained TROs preventing the disclosure of public records relating to these unrepresented individuals. CP 98. It is well established that a party can not enforce the alleged privacy rights of third parties. *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The trial court ultimately denied injunctions to 22 individuals and granted injunctions for the teachers' names but not the details of their investigations or the underlying documents for 15 individuals. CP 116-19.

The trial court erred in its reliance on *Confederated Tribes v. Johnson*, 135 Wn. 2d 734, 958 P.2d 260 (1998), and *Quinn Const. Co. v. King County Fire Protection Dist.*, 111 Wn. App. 19, 44 P.3d 865 (2002). The different factual posture of the instant case supports the award of fees.

The purpose of the equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits. *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407 (1983). Equitable relief should be awarded unless “injunctive relief prior to trial is necessary to preserve *a party’s rights*” pending resolution of the action. *Confederated Tribes*, 135 Wn.2d at 758 (emphasis added, citations omitted). Here, the injunctive relief was not “necessary to preserve a party’s rights” because at least seven of the TROs were brought on behalf of *non-parties*. Second, the TROs enjoined the release of records involving those found to have committed misconduct, including convicted sex offenders – actions the law does not support. CP 1343-50, 1501-03, 1821. Enforcement of the rule here is consistent with the purpose of the rule to deter plaintiffs from seeking relief to which they are not legitimately entitled. The Court should reverse the trial court and remand for an award of fees.

V. CONCLUSION

For the foregoing reasons, the Times requests that the Court overrule the exemption for 15 plaintiffs, grant the Times' its fees against plaintiffs and the districts, and strike the protective order.

RESPECTFULLY SUBMITTED this 26th day of March, 2004.

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AMENDED CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1. I am employed by the law offices of Davis Wright Tremaine LLP.
2. On March 26, 2004, I caused to be served a true and correct copy of the Respondent/Cross-Appellant Brief of Seattle Times Co. on the following per the indicated method of service:

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