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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
CLERK

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,

Appellants/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.

BRIEF OF *AMICUS CURIAE*
WASHINGTON COALITION FOR OPEN GOVERNMENT

Judith A. Endejan, WSBA #11016
GRAHAM & DUNN PC
Pier 70
2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300

Attorneys for The Washington
Coalition for Open Government

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OPEN GOVERNMENT

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I. NATURE OF THE CASE AND DECISION

On January 3, 2007 the Supreme Court granted Appellants' Petition for Review limited to three issues: (1) whether allegations of sexual misconduct that remain unsubstantiated are exempt from disclosure under the Public Disclosure Act; (2) whether letters of direction and associated documents are exempt from disclosure; and (3) whether former RCW 42.17.255 (recodified as RCW 42.56.050) is unconstitutional because it defines privacy more restrictively than the constitutional right to privacy.

This case arose from Public Disclosure Act ("PDA") requests made by Respondent/Cross Appellant The Seattle Times Company ("the Times") for records concerning teachers accused of, investigated or disciplined for, sexual misconduct within the last ten years. Washington Coalition for Open Government ("WCOG") relies on the Court of Appeals opinion below in *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 838-45, 850-53, 120 P.3d 616 (2005) for a further description of the facts in this case.

II. ARGUMENT

A. Summary of Argument

Any PDA request analysis must start with full recognition of the clear legal mandates favoring disclosure. Given these directives, a decision here should be straightforward -- the identities of all teachers at issue in this case should be disclosed because

the faulty privacy analysis from the Court of Appeals does not justify withholding. The truth or falsity of a public record investigating public employee misconduct is not relevant in a privacy analysis. The fact that an allegation may be false does not make the information "private" such that its release would be highly offensive to a reasonable person. Nor does it mean the record is not of legitimate concern to the public, which has a compelling interest in the full investigation of public teacher sexual misconduct by those accountable for such investigation. Accordingly, disclosure of all records, including letters of direction and associated documents, and teacher identities is warranted. The Washington legislature established a clear dual-pronged test for determining invasion of privacy under the PDA. In this case, application of that test invades no constitutional privacy rights of the teacher-appellants.

B. Disclosure is Presumed.

The PDA states as its initial policy that:

[Full] access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. RCW 42.17.010(11).

To fulfill that policy the legislature has mandated that "the public record subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy." RCW 42.56.030. Furthermore, the Act notes that its policy

that “free and open examination of public records is in the public interest, even though examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

Full recognition of these legislative commands requires this Court to find that the identities of public teachers accused of sexual misconduct and related public records are not exempt.

C. Releasing the Teachers’ Identities Does Not Invade Their Privacy.

The Court of Appeals below held that only “patently false” accusations of teacher sexual misconduct could be withheld under RCW 42.17.255 (now RCW 42.56.050). It found, however, that “unsubstantiated” allegations could be released. The Court of Appeals distinguished the present case from *City of Tacoma v. Tacoma News Inc.*, 65 Wn. App. 140, 827 P.2d 1094, review denied, 119 Wn.2d 1020, 838 P.2d 692 (1992), relied upon by the trial court, which ruled that the names of seven prevailing John Doe teachers could be withheld because the allegations were “unsubstantiated.” As explained below, *City of Tacoma v. Tacoma News* should be reversed because it completely mis-analyzes RCW 42.17.255/42.56.050. In addition, however, the decision of the Court of Appeals below should be reversed to the extent that it creates an unworkable exemption based upon “patently false” accusations.

The teachers at issue initially claimed that their identities were exempt under RCW 42.10.310(1)(b) (now RCW 42.56.230(2)). This 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." The applicability of this exemption turns on a finding that privacy would be violated.

The legislature unambiguously established a two-pronged test for determining when a person's right to privacy would be invaded by disclosure of public information.

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

RCW 42.17.255/42.56.050. No statutory language requires that information be disclosed only if "true," or withheld if "false" to any degree.

This statutory definition is based upon § 652(D) of the Restatement (Second) of Torts, which describes liability for publication of a matter concerning the private life of another. When RCW 42.17.255 was enacted, the legislature explained that privacy as used therein was meant to have the same meaning as the definition of privacy in *Hearst v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978), Laws 1987, Chapter 403 § 1. In *Hearst*, the court

expressly held that § 652(D) determines a privacy violation, absent a different statutory standard. Accordingly, both this Court and the legislature agree that the only privacy exemption to disclosure under the PDA requires satisfaction of two requirements, namely that disclosure be highly offensive to a reasonably person and not of legitimate public concern. This conclusion is further supported by the final sentence of RCW 42.17.255/42.56.050, which states “The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public’s right to inspect, examine or copy public records.” (emphasis supplied).

Despite this legislative admonition, the Court of Appeals in *City of Tacoma v. Tacoma News* created a new right of privacy by grafting an additional requirement from another section of the Restatement (Second) of Torts § 652(E), which describes tort liability for publicizing a false statement, similar to the tort of defamation.

By creating an alternative definition of privacy, the court in *City of Tacoma v. Tacoma News* was able to justify withholding public records that concerned an allegation that a parent had criminally abused a dependent minor.¹ Further confusing the

¹ The facts in *City of Tacoma v. Tacoma News* did not deal with the conduct of a public employee or an elected official, unlike this case,

§ 652(D) and 652(E) branches of privacy violations, Division II concluded:

We believe 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 within the meaning of RCW 42.17.255.

65 Wn. App. at 149. Division II erroneously justified this "belief" by giving an overbroad reading of *Hearst v. Hoppe*, which expressly adopted only the § 652(D) privacy definition. No mention of § 652(E) appears in that case. Furthermore, § 652(D), quoted in *Hearst v. Hoppe*, does not require a finding that the facts disclosed be "true". Rather, this tort deals with giving "publicity to a matter concerning the private life of another". 90 Wn.2d at 135. The "matter" could be true or false. Query whether public teacher misconduct even concerns that teacher's "private life"? Stretching its analysis even further, Division II then concluded that "unsubstantiated information" is not of legitimate public concern. *City of Tacoma v. Tacoma News* invented a third factor for determining when a privacy exemption would apply under the PDA. It created a new "true/false, substantiated unsubstantiated" overriding test for determining when the public will have access to

which deals with the misconduct of public teachers - - clearly raising greater public interest than in *City of Tacoma v. Tacoma News*.

information in public records that is critical to holding public officials accountable.

It is time for this Court to reverse *City of Tacoma v. Tacoma News* and hold that the direct, clear language of RCW 42.17.255/42.56.050 requires only that two factors be met before public records can be withheld on the grounds of privacy, without considering true or falsity.

While WCOG certainly agrees with the Court of Appeals below that unsubstantiated records should be released, WCOG does not agree that “patently false” records are exempt. The “patently false” finding perpetuates an unworkable analysis that rests on a determination that can be very difficult to make objectively. Allowing agencies and courts to determine whether a public record is “true,” “false,” “unsubstantiated” or “substantiated” creates impossible barriers to public access simply because of the nuanced meaning of these terms and the subjective discretion bestowed upon the “truth-finder.” A lawyer in the film “In a Civil Action” synthesized this difficulty, arguing “What is truth ? Truth is the bottom of a bottomless pit.”

Agencies and courts should focus on what the legislature told them to focus on in RCW 42.17.255/42.56.050. First, would the release of the information be highly offensive to a reasonable person? Little analysis of this factor appears in the decision below or in the *City of Tacoma v. Tacoma News*. The Court of Appeals

assumes the release of a false accusation would be highly offensive to a reasonable person, without testing that assumption. While this Court may sympathize with the release of investigative reports or allegations that prove to be false, the fact that the claims were proved baseless should exonerate the named public employee. If a requesting body publishes an allegation but omits information that establishes its falsity, the publisher could be liable for his or her wrongdoing as an act of defamation. In other words, the facts should speak for themselves. If a thorough investigation has been done and a party's name is cleared, that party's reputation is preserved. The fact that innocent teachers are falsely accused may not offend, but may inform a "reasonable person" in the public on a number of points, such as the challenges teachers face or the need for parents to address the emotional issues of a child who falsely accuses a teacher. In addition, requiring release of "false allegations" highlights a school district's obligations to fully and fairly investigate complaints, because they have an obligation to clear teachers' names if the claims against them are not true.

Second, there is no question that allegations of teacher sexual misconduct is a matter of legitimate concern to the public, irrespective of truth or falsity. This Court in *Brouillet v. Cowles Publishing*, 114 Wn.2d 788, 791 P.2d 526 (1990) stated:

Sexual abuse of students is a proper matter of public concern because the public must decide what can be done about it. The 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. Because the information sought is of legitimate public interest, we conclude that no privacy right has been violated.

114 Wn.2d at 798.

By perpetuating a "tortured true/false - substantiated/unsubstantiated" analytic framework, this Court would deny the public access to the only information they would have in order to assess the actions of public officials charged with investigations of sexual misconduct. How will the public know how our school districts are supervising, monitoring, enforcing, disciplining teachers and protecting their children if the full record of their activity in investigating claims of teacher sexual misconduct is not made open and public?

Without names of teachers, the public cannot adequately assess whether schools are properly investigating teachers accused of sexual misconduct. If a school district adequately investigates a teacher and determines the teacher has committed no misconduct, then the public can be reassured that proper steps have been taken. Instead, as outlined in the briefs of the *Times* and other *Amici*, the record in this case demonstrates how school districts may not properly investigate to determine if a teacher has committed misconduct. A common thread throughout the arguments of the *Times'* opponents in this case is teacher

protection rather than student protection, which is a perverse consequence of distorting the privacy analysis.

In sum, neither the language of RCW 42.17.255, nor its application allows the withholding of teacher identities and related records in student sexual misconduct investigations on a truth/falsity basis.

D. The PDA Does Not Violate Any Constitutional Right of Privacy.

Statutes are presumed constitutional. *Turnstall v. Bergeson*, 141 Wn.2d 201, 220, 223, 5 P.3d 691 (2000). WCOG takes strenuous issue with the appellants' challenge to this statute, RCW 42.17.255/42.56.050, which was carefully drafted by the Legislature to limit exemptions to Washington's public disclosure laws. *See Laws 1987, Chapter 403, § 1.*

The Appellants' arguments fail as a threshold matter because the information they claim is private simply is not the type of information generally protected under the constitutional right of privacy. *See e.g. Bedford v. Sugarman*, 112 Wn.2d 500, 511-12, 772 P.2d 486 (1989) ("information...requesting intimate facts about a person" may be private). In general, constitutional privacy protections prohibit the release of "intimate personal information," which is not at issue here. The performance of a public servant with respect to his or her job does not constitute intimate personal information. Even if it did, the right to nondisclosure of even

intimate personal information is not a fundamental one requiring utmost protection.

Second, the only injury the teachers would claim would be reputational. However, injury to one's reputation alone is not a constitutionally protected right. *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976). The state constitution offers no "greater protection" than the federal constitution, which requires only application of a rational basis test. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997). Here, the PDA privacy statute satisfies that rational basis test because the government has a strong interest in public disclosure, tempered by the two reasons it established to withhold public records for privacy reasons.

WCOG is confident RCW 42.56.050 will withstand constitutional scrutiny and will defer to the further analysis on this issue made by the *Times* and others, such as the Washington State Attorney General's office.

III. CONCLUSION

This case presents this Court with the opportunity to reverse *City of Tacoma v. Tacoma News, supra*. The time has come to remove the "truth/falsity/substantiated/unsubstantiated" factor read into RCW 42.17/255/42.56.050 by the Courts of Appeal with no legislative or judicial support.

The clear language of this statute requires only that documents be withheld on privacy grounds if release would be highly offensive to a reasonable person and not be of legitimate concern to the public. Releasing information of false allegations of teacher misconduct would not offend a reasonable person because the information would clear a teacher's name. This information would be of great public interest to those concerned about teacher sexual misconduct and its proper investigation. Accordingly, all of the information requested by the *Times* should be released.

Respectfully submitted this 20th day of February, 2007.

GRAHAM & DUNN PC

By Judith A. Endejan
Judith A. Endejan, WSBA# 11016
Email: jendejan@grahamdunn.com
Attorneys for The Washington Coalition
for Open Government

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