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Court of Appeals No. 54300-8-1
BY C. J. MERRITT

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

**BELLEVUE JOHN DOES 1-11, FEDERAL WAY JOHN DOES 1-5
and JANE DOES 1-2, and SEATTLE JOHN DOES 1-13
and JOHN DOE, Petitioners,**

v.

**BELLEVUE SCHOOL DISTRICT #405, a municipal
corporation and a subdivision of the State of Washington,
FEDERAL WAY SCHOOL DISTRICT #210,
a municipal corporation and a subdivision of the
State of Washington, and SEATTLE SCHOOL DISTRICT #1, a
municipal corporation and a subdivision of the State of Washington,
and
THE SEATTLE TIMES COMPANY, Respondents.**

**BRIEF OF *AMICUS CURIAE*
WASHINGTON FEDERATION OF STATE EMPLOYEES
IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

This Court should accept review of the Court of Appeals decision entered below, for the reason that the decision conflicts with a decision of the Supreme Court and a decision of Division II of the Court of Appeals, and for the further reason that this case presents an issue of substantial public interest.

II. ARGUMENT

A. Review is appropriate under RAP 13.4(b)(1) and (2).

RAP 13.4(b)(1) and (2) provides that review will be accepted when a decision of the Court of Appeals is in conflict with either a decision of the Supreme Court or another decision of the Court of Appeals.

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), held police department investigation records which did not substantiate allegations of child abuse were not subject to disclosure under the state's Public Records Act, RCW Ch. 42.17. The Court specifically held that such records violated the right of privacy of the subjects of the investigation because such records would be highly offensive to a reasonable person and are not of legitimate concern to the public. RCW 42.17.255.

The decision in Tacoma News, supra, is consistent with the holding of this Court in Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993). In

that case, the Court held that performance evaluations of public employees were not subject to public disclosure because the public interest in efficient government, and the harm which would be occasioned to that interest by disclosure, outweighed the public interest in disclosure.

The lower court decision in this case, Bellevue John Does v. Bellevue School District #405, 129 Wn.App. 832, 120 P.3d 616 (2005), conflicts with both of these decisions. The decision is squarely in contradiction to the Tacoma News, *supra*, decision. Division I held in this case that the unsubstantiated investigation records were subject to disclosure because of the "possibility" that the allegations might nonetheless be true. This is a remarkably different standard than that established in Tacoma News, where the Court held that if the employer conducted a reasonably thorough investigation, the records were exempt from disclosure. In this case, Division I of the Court of Appeals ordered the records disclosed, in spite of the finding by the trial court that the allegations were not substantiated despite reasonably thorough investigations.

Division I's decision is also more generally in conflict with the Court's analysis in Dawson v. Daly, *supra*. The Division I decision does not give the weight required by Dawson to consideration of the harm to the efficient administration of government by disclosure of unsubstantiated

allegations of misconduct. By essentially ignoring that consideration, Division I applied a different test to the release of the records in this case.

The harm to the efficient administration of government of subjecting public employees, who are charged with performing the duties of government, to the publication of unfounded allegations of misconduct certainly poses the likelihood of interfering with those employees' performance of their duties. Such allegations substantially interfere with the ability of public employees to work with their co-workers when there is a cloud of unfounded public suspicion hanging over their heads. Such unfounded suspicions also foster undeserved public mistrust of governmental employees' performance of essential duties oftentimes involving personal safety and security. The Court of Appeals, Division I, gave no weight whatsoever to these considerations.

Since Division I of the Court of Appeals' decision in this case stands in direct contradiction to the Division II of the Court of Appeals' decision in Tacoma News, *supra*, and fails to apply the test announced by this Court in Dawson v. Daly, *supra*, this Court should accept review under RAP 13.4(b)(1) and (2).

B. Review is appropriate under RAP 13.4(b)(4).

This Court should accept review under RAP 13.4(b)(4), as this case involves an issue of substantial public interest.

RAP 13.4(b)(4) provides that review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. This case presents such an issue.

The Seattle Times (respondent) can hardly be heard to argue that this Court should not accept review. *The Seattle Times* sought direct review by this Court of the trial court decision in this case, arguing that "this case involves fundamental and urgent issues of broad public import that require prompt and ultimate determination. This case also involves issues in which there is confusion and conflict among decisions of the Courts of Appeals and this court." Seattle Times Company Statement of Grounds for Direct Review, pgs. 4-5.¹

Although this case involves school district employees, the case sweep is much broader. Employees of all political subdivisions and those employed by state agencies and institutions, including those represented by the Washington Federation of State Employees, fall within the scope of the Court of Appeals' holding in this case.

The citizens of this state have liberally accepted the invitation to review the records of an open government. Public agencies, including state agencies and institutions, receive thousands of public disclosure requests for all types of public records. Citizens' interest in government and their right

¹ See Appendix A.

to an open government is undeniable. On the other hand, this Court, and the Public Records Act (Act) itself, recognize the need for some limits on access to public records. See, e.g., RCW 42.17.310 and .255. The Act specifically recognizes that it does not "prevent[] an agency from destroying information relating to employee misconduct or alleged misconduct, in accordance with RCW 41.06.450, to the extent necessary to ensure fairness to the employee." RCW 42.17.295.

RCW 41.06.450 (part of the civil service provisions governing the employment of state employees) provides in pertinent part:

(1) The director [of the State Department of Personnel] shall adopt rules applicable to each agency to ensure that information relating to employee misconduct or alleged misconduct is destroyed or maintained as follows:

(a) All such information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed[.]

RCW 41.06.450(1)(a).²

Further, RCW 41.06.455 provides:

RCW 41.06.450 does not prohibit an agency from destroying identifying information in records relating to employee misconduct or alleged misconduct if the agency deems the action is consistent with the policy expressed in RCW 41.06.450 and in chapter 42.17 RCW.

² The entire provision provides for the destruction of other records and for the retention of records under certain limited circumstances.

The civil service law pertaining to employees of state agencies and institutions contains express provisions reflecting an equally important competing interest to that of public disclosure, that being the efficient operation of state government. This was an important interest recognized by this Court in Dawson v. Daly, *supra*. These civil service statutory provisions reflect the legislature's recognition that the existence, much less the publication, of records of unfounded allegations of misconduct pose a substantial threat to the efficient operation of government.

The Division I, Court of Appeals' holding in this case, insofar as it would have application to state employees, is inconsistent with these provisions in the civil service law.

State employees frequently perform difficult jobs, placing them in positions where they are vulnerable to unfounded allegations, and which have the potential to hold them up to underserved public skepticism, mistrust and even abuse. At the same time, the fact that these employees work in such positions, including working with vulnerable children and adults, means that there is a need for the state to investigate allegations of misconduct. A chilling effect would be imposed on the conducting of these investigations if, regardless of the outcome, the fact of the allegations and facts disclosed in the investigation would be subject to public disclosure.

This case presents an issue of substantial public interest which the Supreme Court should address, particularly given the potential impact of the Court of Appeals' decision in this case on the efficient administration of government and the legitimate privacy interests of public servants of the state.

III. CONCLUSION

This Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 7th day of March, 2006.

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NO. 73939-1
(King County Superior Court Cause No. 03-2-16548-4 SEA)

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JOHN DOES 1-13 and JOHN DOE,

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Respondents,

and

SEATTLE TIMES COMPANY,

Appellant.

SEATTLE TIMES COMPANY'S
STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. NATURE OF THE CASE AND DECISION

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 from witness interviews and whether a public record requester that overturns wrongfully issued injunctions is ineligible for any attorney fee award under CR 65. Petitioner The Seattle Times Company (“the Times”) seeks direct review of certain portions of King County Superior Court Judge Douglass North’s April 25, 2003, Order for Injunction and Protective Order and accompanying Findings of Fact and Conclusions of Law improperly denying the Times access to public records related to sexual misconduct allegations against schoolteachers and attorneys’ fees and imposing a prior restraint on its “use” or revelation of certain information related to such allegations.¹

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.² The districts identified such employees, notified them, and eventually produced charts (without identifying information) to the

¹ See Seattle Times’ Notice of Appeal at 1-2.

² Findings of Fact, ¶ 2; App. 1 hereto (Willmsen Decl. in Supp. of Seattle Times Co.’s Supp. Oppos. to Mot. for Injs.) at Exs. A, C, F-G, J-K, M; App. 2 hereto (O’Hagan Decl. in Supp. of Seattle Times Co.’s Oppos. to Pls.’ Mot. for Prelim. Inj.) at ¶ 5, Ex. A.

Times.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 other allegedly identifying information.⁴ The lawsuits were consolidated, the Times was granted the right to intervene,⁵ and several plaintiffs subsequently dropped from the case when their attorney dropped them as parties or was unable to show that he had authority to represent them.⁶ The trial judge instructed that lawyer to give the Times copies of the responsive records regarding his remaining clients after redacting the names of schools and all individuals.⁷ The trial court then reviewed unredacted copies of the records in camera. The Times' attorney interviewed plaintiffs' witnesses in the presence of two Times reporters and counsel for the other parties, and a number of declarations of the witnesses and others were publicly filed. Two former district employees testified in open court about four of the Doe plaintiffs.

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"⁸ and ruled exempt "'letters of direction' to employees whose purpose is to

³ App. 1, Exs. E, K & M; App. 2, Ex. C. The districts informed teachers that the identifying information and underlying records would be released unless the districts were enjoined.

⁴ Findings of Fact, ¶¶ 4-5.

⁵ *Id.*, ¶ 1, 3.

⁶ *Id.*, ¶ 7. At least one of the original plaintiffs was dead at the time the lawsuit was filed.

⁷ *Id.*, ¶ 8.

⁸ Conclusions of Law, ¶ 10 (emphasis added).

guide and correct employee performance on the job, where there is no finding of significant misconduct.”⁹ The court also ruled that the identity of a teacher accused of sexual misconduct, the teacher’s school, and the identity of other 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.¹⁰

The court dissolved the TRO and ordered the districts to release to the Times the records relating to 17 of the teachers, including identifying information.¹¹ The court held that identifying information was exempt in the case of 15 of the teachers.¹² In those 15 cases, the court ruled that 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.¹³

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.¹⁴ This applied to the redacted names that were

⁹ *Id.*

¹⁰ *Id.*, ¶¶ 13, 14, 15

¹¹ Order, ¶¶ 5-6, 10-11, 16, 19, 21-22, 24, 26, 28, 30-31, 33-36. 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. Findings of Fact, ¶¶ 12-13, 17-18, 23, 26, 28-29, 31, 33, 35, 37-38, 40-43. Only the names of students and their parents were to be redacted. Order, ¶ 2.

¹² Order, ¶¶ 7-9, 12-15, 17-18, 20, 23, 25, 27, 29, 32.

¹³ Findings of Fact, ¶¶ 14-16, 19-22, 24-25, 27, 30, 32, 34, 36, 39.

¹⁴ Order, ¶ 1; Conclusions of Law, ¶ 19.

disclosed in documents given to the Times by plaintiffs' counsel or that were disclosed by plaintiffs' witnesses during interviews with the Times' attorney, its reporters and counsel for the other parties. All disclosures occurred weeks before plaintiffs sought a protective order. 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.¹⁵

II. ISSUES PRESENTED FOR REVIEW

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"?
2. Did the trial court err in ordering the 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?
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 was not sought until several weeks after the disclosures occurred?
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?

III. GROUNDS FOR DIRECT REVIEW

This Court should accept direct review of this case pursuant to RAP 4.2(a)(3) and 4.2(a)(4).¹⁶ This case involves fundamental and urgent issues

¹⁵ Order, ¶ 3; Conclusions of Law, ¶ 17.

¹⁶ *O'Connor v. Washington State Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001); *Amren v. City of Kalama*, 131 Wn.2d 25, 30, 929 P.2d 389 (1997); *Nast v. Michels*, 107 Wn.2d 300, 303, 730 P.2d 54 (1986); *Oliver v. Harborview Med. Ctr.*, 94

of broad public import that require prompt and ultimate determination. This case also involves issues in which there is confusion and conflict among decisions of the Courts of Appeal and this Court.

A. Decisions Conflict Regarding Access to Unsubstantiated Allegations of Misconduct.

Decisions of this Court and the Courts of Appeal conflict on whether records containing unsubstantiated allegations of misconduct are subject to release under the PDA and whether agencies can control whether records falls within the scope of an exemption. This Court has consistently held that agencies may not be given the power to determine whether a record is exempt under the PDA.¹⁷ This Court has also repeatedly held that the public has a legitimate concern in records relating to allegations of misconduct against public employees and has rejected claims of "privacy" as a basis for exempting such records. For example, in *Cowles Publishing Co. v. State Patrol*, this Court rejected a claim of "privacy" for records of internal police misconduct investigations, stating:

Wn.2d 559, 563, 618 P.2d 76 (1980); *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993).

¹⁷ See *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 256 (1990) (rejecting agency regulation guaranteeing confidentiality of the records; "agency is without authority to determine the scope of exemptions under the act"); *Amren*, 131 Wn.2d at 34 n.6 (rejecting agency's claim that court could not revisit determination that allegations were false and noting that "this court has repeatedly stated that '[l]eaving interpretation of the act to those at whom it is aimed would be the most direct course to its devitalization.'") (internal citations omitted); *Servais v. Port of Bellingham*, 127 Wn.2c 820, 834, 904 P.2d 1124 (1995) (denying agency right to decide what information in a cash flow analysis would "produce private gain and public loss" if disclosed, an element of the exemption being asserted); *Hearst v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978) (denying tax assessor the right to decide what information in notes related to property value assessments were highly offensive and not of legitimate public concern so that they could be exempt from disclosure to protect taxpayer's privacy).

[The records] involve events which occurred in the course of public service. Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life. . . . They are matters with which the public has a right to concern itself. . . . If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then . . . privacy considerations are overwhelmed by public accountability. . . . Disclosure of the officers' names would not invade the officers' right to privacy . . . matters of police misconduct are of legitimate concern to the public.

109 Wn.2d 712, 726-27, 748 P.2d 597 (1988).¹⁸

In *Brouillet v. Cowles Publishing Co.*, this Court rejected a privacy exemption for records relating to teacher sexual misconduct, stating:

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 788, 798, 791 P.2d 256 (1990).

In *Cowles Publishing Co. v. Spokane Police Department*, this Court held that a police incident report involving a drunken driving allegation against a prosecutor could not be withheld based on privacy concerns for the prosecutor/defendant. 139 Wn.2d 472, 987 P.2d 620 (1999). The Court stated, "[T]he fact that allegations have not yet been proven is not

¹⁸ See also *Amren v. City of Kalama*, 131 Wn.2d 25, 29, 34, 929 P.2d 389 (1997) (ordering disclosure of records detailing allegations against police chief that mayor deemed false and that included no conclusions by independent investigators).

persuasive of the need to provide blanket protection for purposes of a defendant's privacy . . . Rarely would criminal allegations so devastate the reputation of the suspect that nondisclosure would be necessary to protect against the effect of false accusation." 139 Wn.2d at 479.

The Courts of Appeal have also mandated disclosure of records regarding misconduct allegations without an assessment of whether the allegations are true or false or whether the conduct is deemed significant. For example, Division Two held in *Columbian Publishing Co. v. City of Vancouver* that police officers' statements regarding concerns with the chief's performance were a matter of legitimate public concern and not exempt under RCW 42.17.310(1)(b) even though no conclusions as to the truth of the allegations had been reached.

The statements entirely concern the chief's professional performance To the extent complaints occasionally shade into personal habits, they are nonetheless relevant to an assessment of the chief's job performance. Disclosure of the statements might embarrass the chief but would not violate his right of privacy.

36 Wn. App. 25, 29-30, 671 P.2d 280 (1983).

In *Ames v. City of Fircrest*, Division Two held that an internal investigation of alleged misconduct by a police chief that did not result in any charges was not exempt under the PDA and was appropriately disclosed to the public. 71 Wn. App. 284, 286-87, 857 P.2d 1083

(1993).¹⁹

Division One, in *Hudgens v. City of Renton*, held that records regarding an arrest and strip search of a woman following an arrest for DWI must be released to a freelance journalist pursuant to his PDA request at a time when the woman had already been found not guilty. 49 Wn. App. 842, 843, 846, 746 P.2d 320 (1987).

In sharp contrast to the above decisions, in *City of Tacoma v. Tacoma News*, Division Two allowed an agency to withhold records regarding charges of criminal sexual abuse involving a person who became a mayoral candidate. 65 Wn. App. 140, 152, 827 P.2d 1094 (1992). The court held that there was no "legitimate" public concern in allegations that remained unsubstantiated after reasonable investigative efforts. 65 Wn. App. at 149, 151-152.

Here, the trial court, relying solely upon *Tacoma News*, held that there is no legitimate public concern in the identities of teachers accused of sexual misconduct with students (as well as numerous other details the trial court felt could conceivably lead to identification of the teachers) when the allegations remained "unsubstantiated" after what the court deemed to be "reasonable" efforts to investigate. The trial court applied its own sliding and undefined scale as to what level of investigation was

¹⁹ The chief argued for exemption based on "effective law enforcement."

reasonable. The court relied in large part upon the district's determinations regarding whether to impose discipline as a benchmark for assessing public interest. If the district imposed punishment, and the misconduct was deemed by the judge to be "substantial," then the court found that the teacher's identity was a matter of legitimate public concern. But if the district did not impose punishment, or if the misconduct was deemed insignificant by the judge, then the public was held not to have a legitimate interest in the teacher's identity and other allegedly identifying details.

The *Tacoma News* decision improperly gives agencies the right to determine whether a subject is a matter of legitimate public concern. If the agency decides an allegation is true, the public will be deemed to have a legitimate concern in the agency's investigation and handling of the allegation. But if an allegation simply remains unproven or allegedly is false, the agency is free to decide the public has no legitimate concern with the allegation or efforts to investigate it and can deny the public access to the records. The *Tacoma News* analysis and holding conflicts with the holdings of this Court leaving agencies and trial courts to struggle daily to reconcile these conflicts while they await this Court's resolution.

B. Decisions Conflict Regarding Access to Employee Misconduct Records Not Deemed to be "Significant."

Decisions of this Court and the Courts of Appeal conflict on whether records related to a public employee's job performance can or must be withheld as exempt under RCW 42.17.310(1)(b):

- Division Three in *Ollie v. Highland School District No. 203* held that "not all information contained in personnel evaluations and personnel records of school district employees is privileged; information about public, on-duty job performances should be disclosed." 50 Wn. App. 639, 644, 749 P.2d 757 (1988).
- Division One in *Brown v. Seattle Public Schools* subsequently held that employee performance evaluations of a school principal that mentioned routine "concerns" about the principal's handling of specific incidents but not specific instances of "misconduct" were exempt under (1)(b) and thus not subject to disclosure under the PDA. 71 Wn. App. 613, 619-20, 860 P.2d 1059 (1993).
- Division Three held that there is a legitimate public concern in performance evaluations without discussions of misconduct when the employee is the city manager as performance is a subject of public interest and debate, the manager could not reasonably expect his performance evaluations to remain secret, and the evaluation informs the city council's decision regarding whether to continue to retain the city manager. *Spokane Research & Defense Fund v. City of Spokane*, 99 Wn. App. 452, 457, 994 P.2d 267 (2000).
- Division Two in *Limstrom v. Ladenburg* held that a deputy prosecutor's personnel records that discuss specific instances of misconduct must be disclosed, stating that "there is no doubt that the misconduct of a prosecutor in the performance of her duties is a matter of legitimate public concern." 85 Wn. App. 524, 534, 933 P.2d 1055 (1997).

The overlay for the above decisions is this Court's decision in *Dawson v. Daly*, which held that routine employee performance

evaluations that did not discuss "specific instances of misconduct" could be exempt under RCW 42.17.310(1)(b) as not a matter of "legitimate" public concern. 120 Wn. 2d 782, 797, 800-01, 845 P.2d 995 (1993). The Court in reaching its definition of "legitimate" suggested that RCW 42.17.330, which allows for injunctions, was "an independent basis upon which a court may find that disclosure is not required." 120 Wn.2d at 794. This Court has since clarified that Section 330 is not an exemption, but rather "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." *Progressive Animal Welfare Soc'y. v. University of Washington*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994) (emphasis in original). No appellate decision has defined "specific instances of misconduct" and what constitutes a mere "evaluation" under the *Dawson* rationale. The reasoning and holding in *Dawson* and the conflicting interpretations given to it by the Courts of Appeal create confusion for trial courts and agencies.²⁰

This Court should accept direct review to provide clearer guidance on what records can be deemed a performance evaluation, what actions fall within the court's meaning of "misconduct" and what factors are

²⁰ Misapplying *Brown and Dawson*, Judge North ruled that districts must exempt records that discuss specific instances of employee misconduct (1) if the teacher's actions did not, in the court's determination, involve "significant" misconduct, (2) if the district opted for a "letter of direction" instead of a letter of reprimand, or (3) if the district concluded the allegations were false or unfounded after adequate investigation. Findings of Fact, ¶¶ 14-16, 19-22, 24-25, 27, 30, 32, 34, 36, 39. The records here are complaints and investigative records related to teacher sexual misconduct allegations or performance evaluations that discussed specific instances of sexual misconduct and were considered during the course of an investigation.

relevant in deciding whether the public has a legitimate interest in the records.

C. Decisions Conflict Regarding the Availability of Attorney Fee Awards in PDA Injunction Cases.

In *Spokane Police Guild v. Washington State Liquor Control Board*, this Court declared: "While no provision of the act authorizes the award of actual costs and attorneys' fees to an objector who successfully obtains an injunction against disclosure, such costs and fees may be awarded where a party succeeds in getting a wrongfully issued injunction dissolved." 112 Wn.2d 30, 35, 769 P.2d 283 (1989). In *Seattle Firefighters, Local 27 v. Hollister, Division One* granted a PDA requester attorneys' fees for overturning an injunction obtained by a non-agency plaintiff. 48 Wn. App. 129, 138, 737 P.2d 1302 (1987) ("Attorneys fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order"). In contrast, this Court upheld denial of fees to a PDA requester who overturned such an injunction in *Confederated Tribes of the Chehalis Reservation v. Johnson*, suggesting that such awards were not appropriate where injunctive relief was necessary to preserve a party's rights pending resolution of the action. 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998). Courts, including the trial court here, improperly have interpreted this Court's statement in *Confederated Tribes* to mean that attorneys' fees can never be granted to a records requester against a non-agency plaintiff in a PDA case, no matter how meritless the claim for injunction.

The facts here call out for a fee award. Injunctions were sought and

obtained on behalf of people who were dead or had not authorized the lawyer to bring actions in their names. Injunctions were obtained for people who were later dropped as clients by the lawyer after investigating the facts of their cases. The Times, as the records requester, was forced to incur tens of thousands of dollars in legal fees dissolving these injunctions, has been denied access to important public records for the better part of a year, and remains restrained from "using" or revealing truthful, lawfully obtained information from these public records. Record requesters are entitled, in such circumstances, to fee awards for successfully overturning PDA injunctions, even if obtained by non-agency plaintiffs.

D. Ensuring Access to Public Records of Misconduct Investigations Is an Urgent Issue of Broad Public Import.

This case deals with the scope of the public's "legitimate" interest in, and access to, records of complaints and investigations of teachers' sexual misconduct with students. It addresses whether agencies can keep the public in the dark, and allegations and investigations under wraps, solely based on the labels assigned to the allegations and the discipline imposed.

The public has a legitimate interest in allegations of teacher sexual misconduct, including identities of the accused, regardless of whether the districts substantiate the allegations or choose not to discipline the employees. When an agency is charged with investigating complaints against one of its own, as the districts were here, the conclusion – or lack of one – and decision regarding punishment are of particular concern. Without access to a teacher's identity, the public cannot determine if the

teacher is the subject of numerous complaints, if he or she has moved from district to district, or if the district appropriately reported the allegation to law enforcement or state officials.

The public's right of access to records detailing allegations of teacher sexual misconduct and the actions school districts take in response is a matter of broad public import which requires prompt and ultimate determination by this Court for the benefit of agencies, the public, public employees, and the lower courts.

E. Resolving Prior Restraints on Information "Inadvertently" Disclosed Is an Urgent Issue of Broad Public Import.

Relying on *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984), the trial court ordered the Times not to "make use of, or reveal, names inadvertently disclosed" in records provided by plaintiffs to the Times or by witnesses in witness interviews with the Times' attorney and its reporters. Order, ¶ 1. At the time of the disclosures no protective order existed or was being sought. There was no discovery request requiring – and no court order compelling – plaintiffs to identify individuals who were investigated following sexual misconduct allegations. Plaintiffs' noncompulsory, inadvertent identifications, via poorly redacted records or statements by their witnesses, does not amount to the compelled disclosure that *Rhinehart* protects. Whether courts may expand *Rhinehart* to instances in which agencies or parties voluntarily disclose information – and order the news media not to "make use of" that

information – requires this Court’s prompt and ultimate determination.

IV. CONCLUSION

This case involves public access to identifying information in cases where serious allegations of job-related sexual misconduct have been made against public employees. In all cases those accused were public school teachers, with direct, daily, unsupervised contact with minor children in the state of Washington. The lower court’s decision – and the rationale of *Tacoma v. Tacoma News* – denies parents and other members of the public access to information about the investigations of such complaints, including the names of accused teachers.

The Supreme Court should address this important issue and clarify the scope of the public’s legitimate interest when dealing with records of misconduct investigations of public employees. For the foregoing reasons, the Times requests that this Court take immediate expedited review on the matters referenced in its Notice of Appeal.

RESPECTFULLY SUBMITTED this 14th day of June, 2003.

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BY C. J. MERRITT

STATE OF WASHINGTON)

) ss _____
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COUNTY OF THURSTON)

I, Carla Flynn certify that I am a secretary for YOUNGLOVE LYMAN & COKER, P.L.L.C., and that on the 7th day of March, I did cause to be served on the following, via United States Mail, postage prepaid or by ABC Legal Services, a true and correct copy of the BRIEF OF AMICUS CURAE WASHINGTON FEDERATION OF STATE EMPLOYEES IN SUPPORT OF PETITION FOR REVIEW, to:

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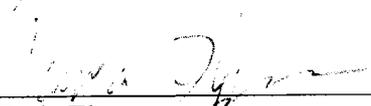
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