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COURT OF APPEALS No. 54300-8-1

CLERK OF SUPREME COURT
STATE OF WASHINGTON

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.,

ANSWER OF RESPONDENT SEATTLE TIMES COMPANY
TO PETITION OF BELLEVUE JOHN DOES 1, 2, 3, *et al.*

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I. IDENTITY OF RESPONDENT

Respondent is Seattle Times Company, publisher of The Seattle Times, Intervenor in the trial court and Respondent/Cross-Appellant in the Court of Appeals.

II. STATEMENT OF THE CASE

This case began with a request by The Seattle Times to the Respondent school districts under the state Public Disclosure Act, Chapter 42.17 RCW. The request sought documents relating to the investigation of public school teachers accused of sexual misconduct with students and the disposition of those investigations.

This is one of three cases consolidated for hearing before the Court of Appeals (Nos. 54300-8, 52304-0, and 54380-6) brought on behalf of a total of 37 teachers, seeking injunctions against release of these records. The trial court enjoined disclosure of 15 teachers' names, but ordered release of the identities of the other 22. *Bellevue John Does v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 841, 120 P.3d 616 (2005) (Appendix A to Petition for Review, hereinafter "App." p. 1). Three of the 22 teachers appealed, and The Seattle Times cross-appealed the non-disclosure of the 15 others.

The Court of Appeals reversed and ordered disclosure of all but three names where, from the circumstances, it was obvious that the

accusations were false. The present 12 Petitioners were among those whose names were withheld by the trial court, but ordered disclosed by the Court of Appeals.¹

As to the other facts covered in the Petitioners' Statement of the Case, The Seattle Times will not attempt to restate them. The court is urged to rely instead on the descriptions in the Court of Appeals' opinion. 129 Wn. App. at 838-45, 850-53 (App. pp. 4-7, 10-11). However, one point requires mention: Petitioners describe as a single category of cases those dealing with "unsubstantiated or false allegations," a characterization that recurs at various points in their Petition. (Petition for Review, hereinafter "Petition," pp. 3, 4, 6.) The Court of Appeals discussed the difference between the two at length and criticized the trial court for failing to do so: "[T]he court did not distinguish between 'unsubstantiated' and 'false.' The two terms do not mean the same thing." 129 Wn. App. at 856 (App. p. 13). It is important to recognize this fact, as much of the Court of Appeals' reasoning involves the distinction.

¹ As of this filing, two other Petitions for Review have been filed on behalf of three teachers whose identities were ordered disclosed by both the trial and appellate courts. Answers to those will be filed in due course.

III. ARGUMENT

A. Introduction.

The Petitioners argue four different bases for review by this Court under RAP 13.4: (1) that the decision of the Court of Appeals conflicts with the decision of Division Two in *City of Tacoma v. Tacoma News Tribune, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, *rev. denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992); (2) that the decision conflicts with the decision of this Court in *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); (3) that the case involves an issue of substantial public interest that should be addressed by this Court; and (4) that the case involves an issue of constitutional importance and interpretation that should be addressed by this Court. On closer examination it should be clear that none of the offered arguments justify Supreme Court review.

The Petitioners address points 1, 2 and 4 as separate arguments, and they will be answered separately below. The third point – that these are issues of substantial public importance – cannot be denied in the abstract, but the question under RAP 13.4(b) is whether the issues need to be determined by the Supreme Court. In this case, the answer is clearly no. Whether one frames the issues as sexual abuse of students, sexual predation in general, privacy rights of public employees, or the appropriate balance among all of these, the fact is that this Court has already addressed

these issues in numerous cases² that were thoroughly considered and discussed by the Court of Appeals. There is nothing unique in this case that demands yet another review by this Court.

B. The Decision of Division One in This Case Is Consistent With the Decision of Division Two in *City of Tacoma v. Tacoma News Tribune, Inc.*

The Petitioners argue that by failing to base its decision on the adequacy of the school districts' investigations, Division One's decision "sharply departed from" the holding in *Tacoma News*, which Petitioners describe as: "that false allegations, or allegations that remain unsubstantiated after reasonable investigation are not matters of legitimate public concern." (Petition, p. 6.) But that is not the holding in *Tacoma News*.

In *Tacoma News*, Division Two was addressing the argument of the Tacoma News Tribune that allegations of child abuse against a local political figure were of legitimate public interest regardless of truth or falsity. The Court of Appeals disagreed and held that courts "may consider whether information in public records is true or false, *as one factor* bearing on whether the records are of legitimate public concern,"

² See, e.g., *In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), *cert. denied*, 531 U.S. 1125 (2001); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990); *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988).

and if information “remains unsubstantiated after reasonable efforts to investigate it, that fact is *indicative though not always dispositive* of falsity.” 65 Wn. App. at 149 (emphasis added).

In this case, Division One agreed that the public as a rule has no interest in the identity of persons who are falsely accused,³ but as previously noted, refused to equate “unsubstantiated” and “false”:

This is because “unsubstantiated” often means only that an investigator, faced with conflicting accounts, is unable to reach a firm conclusion about what really happened and who is telling the truth. . . . But it is also possible that the accuser was accurately reporting inappropriate conduct. *Where that possibility exists, the public has a legitimate interest in knowing the name of the accused teacher.*

Bellevue John Does, 129 Wn. App. at 856 (App. p. 13) (emphasis added).⁴

Where that possibility **does not** exist – i.e., where accusations were obviously false – the court was willing to, and did in three cases, hide the identity of the accused. *Id.* at 855 (App. pp. 12-13).

It should also be noted that the accused in *Tacoma News* was a candidate for office, not a public employee entrusted with the education

³ The Seattle Times argued in the court below, and continues to believe, that the distinction between true and false allegations and/or adequacy of investigation applied in *Tacoma News* should not be adopted as a bright line rule in all cases; that false allegations in some instances may be matters of serious public concern. In this case, however, the balance struck by Division One is well reasoned and avoids conflict with *Tacoma News*.

⁴ The court went on to explain its reasoning as, “If a teacher’s record includes a number of complaints found to be ‘unsubstantiated,’ the pattern is more troubling than each individual complaint. Yet, if the teacher’s name in each individual complaint is withheld from public disclosure, the public will not be able to see any troubling pattern that might emerge concerning that teacher.” *Id.* at 856 (App. p. 13).

and welfare of children. The accusation in that case came from an anonymous tip. The investigations were conducted by four independent agencies – the Tacoma Police Department, the state Department of Social and Health Services, and both the Pierce and King County Prosecutors. 65 Wn. App. at 142-43.

The Court of Appeals in this case was dealing with teachers and school districts responsible for our children. The investigations were largely conducted internally by the districts, and most importantly, the court was dealing with the specific issue this Court declared in *Brouillet* to be a matter of legitimate public interest that weighs heavily against asserted rights of privacy. Under these circumstances, the court carefully harmonized its opinion with that of Division Two in *Tacoma News*, considering truth or falsity, to borrow the words of *Tacoma News*, “as one factor bearing on” disclosure, considering unsubstantiation as “indicative though not always dispositive of falsity,” and striking the balance properly in favor of disclosure except where accusations are patently false.

Compare Bellevue John Does, 129 Wn. App. at 852-56 (App. pp. 11-13) with *Tacoma News*, 65 Wn. App. at 149. The decisions simply are not in conflict.

The Petitioners also argue a forced and illogical construct that the Court of Appeals has somehow created two levels of falsity – plain falsity

and **patent** falsity (described as “beyond false”) – allegedly placing an impossible burden on school districts and teachers alike. (Petition, p. 8.) They argue that agencies “will be left guessing whether allegations are false enough.” (*Id.*)

The argument ignores the clear meaning of the word “patently” and the context in which it is used. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002) at p. 1654, defines “patently” as “clearly, obviously, plainly.” It addresses not the level of falsity, but the level of certainty. If an agency has doubts, the accusation is not clearly, obviously, plainly – i.e., patently – false, and, in the words of the Court of Appeals, “[w]here that possibility exists, [that the accuser was accurately reporting inappropriate conduct] the public has a legitimate interest in knowing the name of the accused teacher.”

Bellevue John Does, 129 Wn. App. at 856 (App. p. 13).

C. The Decision in This Case Is Consistent With the Decisions of the Supreme Court.

The Petitioners argue that the decision of the Court of Appeals is inconsistent with this Court’s decision in *Dawson v. Daly*, *supra*. Despite the length of the argument, it boils down to a claim that (1) *Dawson* distinguishes between **proven**, and merely **alleged** misconduct, and (2) the court failed to follow that distinction. But the distinction in *Dawson* is not

between proven and alleged misconduct; it is between **general** performance evaluations and **specific** instances of misconduct. *Dawson*, 120 Wn.2d at 800.

The Court of Appeals carefully analyzed the *Dawson* case and concluded:

The files we have examined contain the very materials that the files in *Dawson* did not--discussion of specific instances of misconduct and public job performance. They were generated by complaints, and virtually all of them relate solely to the public, on-duty interactions of students with teachers.

129 Wn. App. at 846 (App. p. 8) (emphasis added). This is a clear and valid distinction, entirely consistent with this Court's decision in *Dawson* and the Court of Appeals' own decision in *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993), which similarly distinguished between general performance evaluation and specific instances of misconduct.

The Petitioners conclude their discussion of these cases with the argument that the Court of Appeals "essentially assumes the allegations to be true." (Petition, p. 14.) Even the most cursory read of the court's opinion shows the court did no such thing. The court concluded, after careful analysis of all the authorities discussed in the opinion, that allegations, unless obviously false, are a legitimate matter of public concern. *See Bellevue John Does*, 129 Wn. App. at 856 (App. p. 13).

D. Neither RCW 42.17.255 Nor Its Application in This Case Affect a Constitutional Right of Privacy.

Having failed to identify any issue that would justify review of the Court of Appeals' application of case law, the Petitioners attempt to create a constitutional issue around the statutory definition of privacy in RCW 42.17.255, which restricts disclosure of public records information that "(1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." The Petitioners argue that the Legislature had no authority to adopt this definition because legislatures cannot adopt less protection than that afforded by state and federal constitutions.⁵ They assert a broader constitutional right to privacy, but they never define what the scope of that right is. (Petition, p. 17.) Had they attempted to do so, they would have discovered that the fundamental and overriding privacy right they assert is not recognized by either federal or state courts.

Surprisingly, Petitioners rely on *In re Crawford*, 194 F.3d 954 (9th Cir. 1999), for the proposition that there exists a constitutional right to **informational** privacy. But in that case the Ninth Circuit determined that disclosure was warranted, and its reasoning fully supports the constitutionality of both RCW 42.17.255 and its application in this case.

⁵ Petitioners ignore the fact that the definition was first adopted by this Court in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

In re Crawford involved compelled disclosure of personal information – specifically, Social Security numbers – by the government. In upholding disclosure, the court expressly lists one of the factors to be considered as “whether there is an *express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.*” 194 F.3d at 959 (emphasis added). Here, the Public Disclosure Act (“PDA”), RCW 42.17, *et seq.*, embodies all three of these considerations. As this Court stated in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), the PDA is a “strongly-worded mandate for broad disclosure of public records” to “be liberally construed to promote . . . full access to public records so as to assure continuing public confidence (in) . . . governmental processes, and so as to assure that the public interest will be fully protected.” 90 Wn.2d at 127-28 (in part quoting RCW 42.17.010).⁶

Moreover, the information at issue here is qualitatively different than the kind in which a privacy right to nondisclosure typically has been

⁶ Nor are the scope and contours of a constitutional “informational privacy” right at all clear, as demonstrated by the divergent approaches taken by other circuit courts. For example, the Sixth Circuit has stated that the case law does not support the existence of a “general right to nondisclosure of private information.” *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981); *see also Bedford v. Sugarman*, 112 Wn.2d 500, 512, 772 P.2d 486 (1989) (citing *J.P.* with approval); *Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000). *Cf. Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001); *Denius v. Dunlap*, 209 F.3d 944, 955-56 (7th Cir. 2000); *American Fed’n of Gov’t Employees v. Dept. of Housing & Urban Dev.*, 118 F.3d 786, 788, 791 (D.C. Cir. 1997).

recognized. In *Bedford v. Sugarman*, 112 Wn.2d 500, 772 P.2d 486 (1989), this Court noted that, under federal case law, “the right of confidentiality . . . in its broadest application, protects against disclosure only of certain particularized data, information or photographs describing or representing *intimate facts* about a person.” *Id.* at 511-12 (emphasis added). Other courts have agreed. For example, in *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144 (10th Cir. 2001), the Tenth Circuit rejected a peace officer’s assertion that he had a constitutional right to privacy in employee evaluations, or in apparently uncharged and unproven allegations of rape and assault, despite the sensitivity and stigmatizing effect of the claims. *Id.* at 1155. As to the latter, the court stated that “[i]t is irrelevant to a constitutional privacy analysis whether these allegations are true or false.” *Id.*

Clearly, the information at issue here does not constitute “highly personal” or “intimate” facts, *cf. United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578, 580 (3d Cir. 1980) (medical records); *Plante v. Gonzalez*, 575 F.2d 1119, 1135-36 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) (financial records). It is information about the conduct of public employees, in which the public has a significant and unquestionable interest. As the Court of Appeals noted, the files here “were generated by complaints, and virtually all of them relate solely to the public, on-duty

interactions of students with teachers.” *Bellevue John Does*, 129 Wn. App. at 846 (App. p. 13). The information subject to disclosure is not what happened in Petitioners’ personal lives, but their alleged sexual misconduct while acting as public educators of children, jobs they perform in view of the public and rightfully subject to public scrutiny.

The Petitioners’ privacy arguments fare no better under state constitutional rights. This Court has stated that “the state constitution affords no greater protection than the federal constitution, which requires only application of a rational basis test[,]” with regard to “the right to nondisclosure or intimate personal information, or confidentiality.” *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997); *In re Meyer*, 142 Wn.2d 608, 619, 16 P.3d 563 (2001) (stating same). Under Washington law, the interest in nondisclosure of intimate personal information is not “a fundamental right requiring utmost protection.” *See O’Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991). As a result, the interest in nondisclosure of personal information “by the State . . . is subject to diminishment when there is a legitimate state interest at stake.” *In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), *cert. denied*, 531 U.S. 1125 (2001) (citing *O’Hartigan*). *Accord State v. Clinkenbeard*, 130 Wn. App. 552, 564 (advance sheets), 123 P.3d 872 (2005) (“when there is no alleged violation

of a fundamental right . . . the defendant challenging the constitutionality of a statute must show that the law is so unrelated to the achievement of a legitimate purpose that the law is arbitrary or obsolete”) (internal citations omitted).

Here, the legitimate **state** interest is expressly stated as the **public’s** interest in disclosure of these records – the public right to “full access to information concerning the conduct of government on every level,” thereby assuring “continuing public confidence in governmental processes” and full protection of the public interest. *See* RCW 42.17.010(11); *see also Hoppe*, 90 Wn.2d at 127-28. Thus, for purposes of constitutional analysis, the state’s interest dovetails with that of the public articulated in RCW 42.17.255, namely, that the information to be disclosed be “of legitimate concern to the public.”

Alleged sexual misconduct by public school teachers clearly “is a proper matter of public concern because the public must decide what can be done about it.” *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990); *see also id.* (“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.”). Consequently, Petitioners’ contention that the government’s interest in this case is distinguishable from that of the public under the statute, (Petition,

p. 18), is untenable. As the Court of Appeals correctly concluded, the constitutional analysis under the rational basis test “does not yield a different result than the privacy definition in the Public Records Act.” *Bellevue John Does*, 129 Wn. App. at 861 (App. pp. 15-16).

RCW 42.17.255’s privacy definition embodies the almost universally recognized test where public disclosure of allegedly private information is involved. The Legislature expressly wrote into RCW 42.17.255 the meaning of “privacy” that this Court gave to that word in *Hearst v. Hoppe*, see Laws of 1987, ch. 403, § 1, thereby adopting the common-law tort standard. See *Hoppe*, 90 Wn.2d at 136. This Court in *Hoppe* noted that the tort right was “the most widely recognized and established definition of the legal right to privacy.” *Id.*

Whether one analyzes the facts under the Public Disclosure Act, or any of the constitutional standards discussed in the cases cited by the Petitioners, the records involved in this case cannot be withheld from the public in the name of privacy. The accusations regarding sexual improprieties here arose in the course of Petitioners’ public employment and bear upon their ability to perform as teachers. See *Cowles Publ’g Co. v. State Patrol*, 109 Wn.2d 712, 726, 748 P.2d 597 (1988) (stating same regarding police officers’ on- and off-duty misconduct). As such the

misconduct “does not involve private matters,” but is a matter “with which the public has a right to concern itself.” *See id.*

Based on the foregoing, it is clear that Petitioners cannot meet their very high burden of proving that RCW 42.17.255 is unconstitutional “beyond a reasonable doubt” and that “*no set of circumstances*” exists “in which the statute can constitutionally be applied,” or show specific facts demonstrating that the statute, as actually applied, violated the constitution. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 220-21, 223, 5 P.3d 691 (2000) (internal quotations omitted; emphasis in original). In fact, the argument fails to raise any constitutional issue that has not already been addressed and/or rejected by this and other courts.

IV. CONCLUSION

The Court of Appeals addressed a complex and difficult set of facts and issues in this case. After considering equally complex legal arguments, the court rendered a thoughtful and carefully reasoned decision that addressed each of the arguments now advanced by the Petitioners as grounds for review. The Seattle Times respectfully submits that these

arguments are answered in the Court of Appeals' opinion, and there is no need for further review by this Court.

RESPECTFULLY SUBMITTED this 13th day of February, 2006.

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CERTIFICATE OF SERVICE

I certify that on the 13th day of February, 2006, I caused a true and correct copy of the attached document titled:

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TO PETITION OF BELLEVUE JOHN DOES 1, 2, 3 *et. al.*

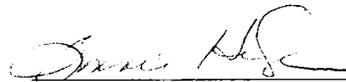
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EXECUTED this 13th day of February 2006, at Seattle, Washington.



Bonnie Hodges