

786038

NO. 54300-8-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6, 9, & 13

Appellants,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2 AND SEATTLE JOHN DOES 1-5, 7-8 & 10-12,
AND JOHN DOE,

Plaintiffs/Non-Appellants/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.

PREVAILING JOHN DOES' RESPONSE BRIEF

Tyler K. Firkins
Van Sieten, Stocks & Firkins
721 45th Street N.E.
Auburn, Washington 98002
253-859-8899

FILED
COURT OF APPEALS
2004 JUN -7 PM 4:03

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE.....	1
	A. Procedural History	1
	B. Substantive Facts	6
	1. Evidence Regarding the Efficient Operation of Schools & Letters of Direction	6
	2. A Sample of the Individual Cases.....	10
	a. Unfounded Allegation – Seattle John Doe 1	10
	b. Unfounded Allegation – Federal Way John Doe 1	13
	c. Letter of Direction – Bellevue John Doe 1	14
	d. Letter of Direction – Bellevue John Doe 2	15
III	ARGUMENT	16
	A. Standard of Review.....	16
	B. The Trial Court Properly Ruled that the Teacher’s Identities are Exempt	17
	C. Legitimate Public Concern is Defined by a Reasonableness Standard	17
	1. The <i>Brouillet</i> Holding is Inapposite.....	18

2.	The Reasonableness Standard.....	19
D.	The Trial Court Properly Ruled that Governmental Interests Would be Irreparably Harmed by Release of the Teacher’s Identities.....	24
1.	The Record Supports the Trial Court’s Ruling	24
2.	The Times’ Factual Arguments are Unsupported by the Record	27
E.	<i>City of Tacoma v. Tacoma News, Inc.</i> was Correctly Decided	35
F.	False Allegations of Sexual Misconduct are Highly Offensive.....	42
G.	The Trial Court Did Not Err in Granting the Protective Order	43
1.	Standard of Review	43
2.	The Protective Order is not Vague.....	43
3.	The Plaintiffs Timely Sought the Protective Order	44
4.	Inadvertent Disclosures Occurred During Discovery	45
H.	The Trial Court did not Abuse its Discretion in Denying Attorneys’ Fees to the Times	47
1.	Standard of Review	47
2.	The Trial Court Did Not Abuse its Discretion	48

3.	Case Law Supports the Trial Court’s Ruling.....	49
IV	CONCLUSION.....	50

TABLE OF AUTHORITIES

Washington Cases

<i>Amren v. City of Kalama</i> , 131 Wash.2d 25, 33, 929 P.2d 389, 393 (1997).....	40
<i>Brouillet v. Cowles Publ'g Co.</i> , 114 Wash.2d 788, 791 P.2d 526 (1990).....	18, 19
<i>Brown v. Seattle Pub. Sch.</i> , 71 Wash. App. 613, 860 P.2d 1059 (1993), <i>review denied</i> , 123 Wash.2d 1031, 877 P.2d 696 (1994)	21, 22, 26
<i>City of Tacoma v. Tacoma News, Inc.</i> , 65 Wn. App. 140, 827 P.2d 1094, <i>review denied</i> , 199 Wash.2d 1020, 838 P.2d (1992).....	35, 36, 37, 38, 39, 42
<i>Columbian Pub. Co. v. City of Vancouver</i> , 36 Wn. App. 25, 29, 671 P.2d 280, 283 (1983).....	41
<i>Confederate Tribes of Chehalis Reservation v. Johnson</i> , 135 Wash.2d 734, 758, 958 P.2d 260, 271 (1998).....	47, 48, 49
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 809, 828 P.2d 549 (1992).....	48
<i>Cowles Pub. Co. v. State Patrol</i> , 44 Wash. App. 882, 888, 724 P.2d 379, 384.....	17, 26, 27, 43
<i>Dawson v. Daly</i> , 120 Wash.2d 782, 845 P.2d 995 (1993).....	19, 20, 21, 22, 24, 25, 26, 41, 43
<i>Deskis v. Waldt</i> , 81 Wash.2d 1, 5, 499 P.2d 206, 209 (1972).....	46
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246	36
<i>Hudgens v. City of Renton</i> , 49 Wn. App. 842, 846, 746 P.2d 320, 322 (1987)	41

<i>Hurlbert v. Gordon</i> , 64 Wn. App. 842, 846, 824 P.2d 1238, <i>rev. denied</i> , 119 Wn.2d 1015 (1992)	35
<i>In re Rosier</i> , 105 Wash.2d 606, 616, 717 P.2d 1353 (1986)	21
<i>King v. Pipeline Co.</i> , 104 Wn. App. 338, 348, 16 P.3d 45 (2000)	43
<i>Owens v. Scott Pub. Co.</i> , 46 Wash.2d 666, 284 P.2d 296 (1955).....	38
<i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i> , 125 Wash.2d 243, 252, 884 P.2d 592 (1994).....	16
<i>Quinn Const. Co., LLC v. King County Fire Protection Dist No. 26</i> , 111 Wn. App. 19, 26, 44 P.3d 865 (2002).....	49
<i>Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.</i> , 55 Wash. App. 515, 521, 778 P.2d 1066, 1069	40, 41
<i>Tiberino v. Spokane County</i> , 103 Wn. App. 680, 689, 13 P.3d 1103 (2000).....	43
<i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 93 Wash.2d 210, 608 P.2d 254 (1980).....	17

Federal Cases

<i>U.S. v. Panhandle Eastern Corp.</i> , 118 FRD 346, 350 (1988)	45
--	----

Washington Statutes

RCW 26.44.030	32
RCW 28A.410.090	19
RCW 41.06.450	40

RCW 42.17.010(11).....	20
RCW 42.17.255	1, 18, 20, 23, 24, 37, 38, 39, 43
RCW 42.17.310(1)(b)	18
RCW 42.17.330	24

Court Rules

RAP 10.3.....	42
RAP 10.7.....	42

Other

§ 652(D) of the Restatement	36
-----------------------------------	----

I. INTRODUCTION

The trial court properly held that the identities of teachers falsely accused of sexual misconduct are exempt from disclosure under the Public Disclosure Act, recognizing the public employee's right of privacy. By this appeal, the Seattle Times seeks to abolish the right of privacy codified at RCW 42.17.255 as it pertains to school teachers and other public employees

II. STATEMENT OF THE CASE

This section of the brief will first set forth the relevant procedural history of this case. This section will then discuss the evidence adduced by the plaintiffs regarding the efficient operation of the school system. Finally, this section will examine the facts from a select number of individual cases.

A. Procedural Facts

Beginning in the latter months of 2002, the Seattle Times demanded that three (3) King County school districts, Bellevue, Federal Way, and Seattle create informational graphs from various public records. CP 649. The Times demanded that the Districts create graphs regarding substantiated and unsubstantiated allegations of sexual misconduct against teachers in their districts. Although the Districts had no obligation to create public records, the affected districts nevertheless undertook to

comply with the newspaper's demand. CP 331, 342, 15. The Districts sent out written notification to the affected teachers and set deadlines by which the affected teachers needed to obtain restraining orders prohibiting release of the teacher's identities contained in the newly created graphs.

The first lawsuit was filed on behalf of affected teachers from the Bellevue School District on January 24, 2003. CP 17. The teachers filed a motion for a restraining order, including an order sealing any reference or disclosure of their identities, whether intentional or accidental, during the proceedings. CP 34. Superior Court Judge Douglass North entered a temporary restraining order against the Bellevue School District prohibiting it from releasing identifying information regarding the plaintiffs in that lawsuit. The trial court established February 6, 2003, as the hearing date for consideration of the preliminary injunction. The trial court also entered an order permitting the Seattle Times to intervene in the event it filed an "appropriate application" to do so. CP 24.

One week later, seven (7) teachers from the Federal Way School District filed a lawsuit in King County Superior Court and obtained a nearly identical temporary restraining order from Superior Court Judge James Cayce. CP 252. On or about February 6, 2003, eighteen (18) teachers from the Seattle School District filed a lawsuit against the Seattle

School District seeking to enjoin the release of their identities to the Seattle Times.

On February 6, 2003, Superior Court Judge North heard arguments regarding consolidation of the three cases. RP 3 (2/6/03). Later that day, the King County Presiding Judge consolidated the cases to be heard by Superior Court Judge Douglass North. The trial court then set February 24, 2003 as the date set for the consolidated preliminary injunction hearing. RP 33 (2/6/03). Also on February 6, 2003, in response to an oral motion, the trial court ordered the plaintiffs to post a bond in the amount of \$10,000.00. RP 28-29 (2/6/03).

During the February 6, 2003 hearing, the court ordered plaintiffs' counsel to create informational matrixes containing more information than had been originally requested by the Seattle Times. RP 18 (2/6/03). The purpose of the matrixes was to allow the parties to have sufficient information to litigate each of the cases. RP 18 (2/6/03). Also, on February 6, 2003, the Seattle School District provided some of the documents underlying its informational graph to the plaintiffs' counsel. RP 14 (2/6/03). The trial court then scheduled a hearing for February 11, 2003. *Id.*

On February 11, 2003, the parties returned to court, and the trial court entered a temporary restraining order regarding the Seattle School

District. The trial court also entered orders extending the temporary restraining orders until the preliminary injunction hearing that was set for February 24, 2003. RP 28 (2/11/03).

After the lawsuits were filed and restraining orders entered against each of the districts, the Seattle Times submitted, for the first time, an actual public records request to each of the school districts for the documents that formed the basis for the informational graphs. RP 9-10 (2/24/03), CP 356, 371, 379. However, the school districts were prohibited by court order from complying with the public records requests. CP 55, 222, 259.

Another hearing was held on February 24, 2003. During that hearing, the trial court ordered plaintiffs' counsel to perform redactions of the documents underlying the original informational graphs, and then to provide copies of the redacted documents to the Seattle Times. RP 82, 93 (2/24/03), CP 115. The trial court then ordered the parties to appear the following week for further proceedings. *Id.*

In a hearing in March, 2003, the trial court ordered the plaintiffs and school districts to participate in discovery and make their witnesses available to the Seattle Times for interviews. CP 115. The plaintiffs and the school districts complied with the court's order. CP 115. During the discovery process, several witnesses inadvertently mentioned the names of

the affected teachers. After the Court initially indicated that it would be entering a permanent injunction in favor of many of the teachers, the plaintiffs moved for a protective order prohibiting the Seattle Times from using or divulging the identities inadvertently revealed during the discovery process. CP 115. The trial court entered the requested protective order. CP 115.

On March 25, 2003, an evidentiary hearing was held wherein the trial court took the testimony of a number of plaintiffs' witnesses, and also received into evidence a number of declarations from several witnesses. RP 1(3/25/03). The Seattle Times submitted no admissible evidence.¹

After exhaustively reviewing *in camera* the underlying public records, taking the live testimony of witnesses offered by the plaintiffs, reviewing the declarations submitted by the plaintiffs, school districts and the inadmissible hearsay declarations of Seattle Times reporters, the trial court entered detailed findings of fact and conclusions of law. CP 100. The trial court permanently enjoined the Seattle Times from obtaining the identities of teachers falsely accused of sexual misconduct, thereby upholding the teachers' constitutional and statutory right of privacy.

The Seattle Times, claiming to be the prevailing party, appealed the trial court's decision.

¹ The Seattle Times did submit a number of self serving declarations that were comprised entirely of hearsay statements of the reporters who performed the discovery interviews.

B. Substantive Facts

The trial court dealt with two categories of cases in this litigation. The first category of cases dealt with unfounded or false allegations of sexual misconduct. The second category of cases dealt with cases wherein school districts did not discipline the teacher, but instead issued what was described in testimony as a “letter of direction.” The trial court ruled the identities of teachers that fell into either category were exempt from disclosure. CP 100-115. As part of its ruling the trial court held that revealing the identities of falsely accused teachers would devastate the efficient operation of the school system. CP 112. The trial court’s rulings were based on uncontroverted evidence submitted by the plaintiffs.

1. Evidence Regarding the Efficient Operation of Schools & Letters of Direction

The trial court found that school districts use evaluation tools called “letters of direction” to guide and correct employment performance issues. CP 112 (CC10-11). The trial court also ruled that a letter of direction is a letter memorandum or oral direction, which does not impose punishment, but seeks to guide or direct the employee’s future performance. CP 112. The trial court’s findings and conclusions regarding letters of direction were derived from un-rebutted testimony offered by the plaintiffs’ witnesses.

The evidence produced by the plaintiffs, as found by the trial court, demonstrated that in cases involving a “letter of direction,” there are no findings of misconduct, but merely a letter giving supervisory direction to the employee to refrain from certain behaviors that may jeopardize the employee and the school district from baseless allegations. The letters also frequently caution the teachers to correct shortcomings in judgment to avoid the appearance of impropriety.

These letters of direction are critical to the efficient operation of the public school system. As an example, Dolores Humiston, a current Assistant Superintendent for the Mead School District, and a former WEA union representative testified:

If this Court rules that allegations that have not been substantiated by the completion of an investigation, but where a counseling letter is issued will become a public record subject to disclosure, the District will lose an important avenue for providing clear expectations to employees. It is important for the Court to understand that counseling letter is an important tool for the effective supervision of employees in the District.

CP 873-874. Similarly, Steve Pulkinen, a current Uniserv Representative, testified:

By issuing a letter of direction, the District insures that the employee is aware of District policy, thereby providing appropriate supervision of the employee. Many times also the District will determine that the teacher’s conduct does not rise to the level where discipline needs to be imposed, but may instead merit a letter of direction to assist the

teacher in using better judgment to protect him or herself, and also to protect the District. Letters of direction also permit the employee to avoid an undue waste of time concentrating their efforts on a grievance. Instead, teachers can direct their attention to classroom instruction, and professional planning. Further, the grievance process itself is very stressful, and may also impact a teacher's ability to concentrate and focus on their job.... If this Court rules that allegations that have not been substantiated by the completion of an investigation, but where a letter of direction is issued will become a public record subject to disclosure, then I will be forced to insist that the process go forward and grieve all potentially negative information held by the District. Further, maintenance of these types of records will become substantial issues in future collective bargaining agreement negotiations. It is important for the Court to understand that the letter of direction is both a supervisory and evaluative tool employed by the Districts and the Union to assist teachers in protecting themselves from false allegations.

CP 63-66.

A number of high level administrators for the school districts also testified that making letters of direction accessible as non-exempt public records would devastate the efficient and cost effective operation of the schools. CP 858-860; CP 67-69. Eliminating the utility of letters of direction would undermine the efficient operation of schools by wasting resources on unnecessary outside investigators (CP 68-9); increasing unnecessary labor-management strife (CP 859); eliminating critical evaluative tools (CP 860); reducing classroom focus by teachers (CP 64-66); decreasing staff morale (CP 69); reducing effective methods of

reminding employees of district policy (CP 68); increasing the likelihood of overwhelming the system with costly grievances and arbitrations of matters that were previously resolved by letters of direction (CP 66, 69, 873, 858).

As the trial court found, based upon the unopposed evidence submitted by the plaintiffs in this case, letters of direction are critical tools utilized by the school system. The trial court found:

The court finds that release under the Public Disclosure Act of records relating to a public employer's guidance and direction to employees in a "letter of direction" would harm the public interest in efficient government, by interfering with the employer's ability to give candid advice and direction to its employees. It would substantially and irreparably damage vital government functions because it would chill employer-employee communications by making all written communications between employer and employee subject to disclosure.

CP 100.

The unchallenged trial court findings that the public's interest in the efficient operation of government would be substantially and irreparably damaged was based upon the uncontroverted testimony submitted by the plaintiffs and the school districts. In tailoring an order that protects the efficient operation of the school system, the trial court also ruled that the identities of teachers that had been falsely accused of sexual misconduct were exempt from public disclosure.

Below is a discussion of four representative cases exemplifying the two types of cases litigated in these consolidated cases.

2. A Sample of the Individual Cases

The trial court entered findings of fact as to each individual plaintiff. The Seattle Times has not assigned error to any of the trial court's findings of fact. The findings are therefore verities on this appeal. However, to illuminate the basis for the trial court's findings and conclusions, it is helpful to review several of the factual scenarios presented. What follows are factual descriptions of several of the plaintiffs' cases that illustrate the several categories presented for consideration by this appeal.²

a. Unfounded Allegations--Seattle John Doe 1 (SD1).

Seattle John Doe 1 (SD1) was a teacher with twenty-two years of teaching experience as of 1994. Over those 22 years, SD1 did not have a single unsatisfactory performance evaluation or notation of any adverse action taken against him. CP 1321. However, on April 29, 1994, a student athlete accused SD1 of raping her. CP 1321.

SD1 was immediately placed on administrative leave. The police investigated SD1 and the allegations that had been leveled against him.

The District also hired an outside investigator to look into the serious

² The plaintiffs rely upon the findings of facts with respect to the balance of the cases and incorporate those findings by reference.

allegations of rape and torture that had been leveled against SD1. CP 1319. SD1 was forced to hire an attorney to represent him with respect to both the police and school investigations. CP 1322.

Earlier in that same year, the victim had identified a Seattle School District student of raping her on several different occasions. The accused student was expelled, criminally charged and placed into juvenile detention. CP 1320. During the ongoing investigation, the victim named another unidentified male as participating in a multiple perpetrator rape of her. At the time the victim filed a police report, she could not identify the additional assailant. CP 1320.

The victim and her mother stopped by the school and briefly met with the school counselor. The victim left and went to meet with her counselor from Christa Counseling, a Jackie McKay. That evening, Ms. McKay assisted the victim in recovering her repressed memory. CP 1321. The memory that Counselor McKay was able to recover revealed that the other assailant that had violently raped the victim was a teacher and coach at Ingraham High School. CP 1321. The victim and her mother returned to school the next morning and revealed the recovered memory to the school counselor. The accused assailant was SD1. CP 1321.

The school counselor called Jackie McKay and spoke to her about the shocking allegations. Ms. McKay informed the school counselor that

Ms. McKay believed each of the recovered memories, including those involving SD1. CP 1321.

As the investigation progressed, the victim recalled, with the help of Ms. McKay, even more harrowing memories of rape and torture. Indeed, the victim remembered that SD1, while raping her, cut open her stomach and then sutured it closed again. CP 1319. The victim also recalled being kidnapped many times and being taken to caves where she was forced to participate in Satanic rituals. During these rituals, human sacrifices took place. CP 1319.

The police investigation continued. The police asked a trained doctor to examine the victim for physical evidence. CP 1323. The doctor did locate a self-inflicted scratch on the alleged victim's stomach, but no evidence of actual suture scarring. CP 1323. The doctor was also unable to find any evidence that the alleged victim had been violently raped. In fact, the evidence revealed that the alleged victim may not have had sexual partners yet.

The alleged victim also claimed that several friends had witnessed acts of rape and torture. Curiously, when the witnesses were interviewed, they denied the allegations, even though they were identified as eyewitnesses. Some of the eyewitnesses stated that the only complaint about SD1 that the accuser had ever made was that SD1 was too negative.

The police concluded that the allegations against SD1 and the incarcerated student were “unfounded.” CP 1322. The Seattle Police Department closed the case. CP 1322. The Seattle School District informed SD1, by letter dated June 3, 1994, that there was not sufficient “evidence to substantiate the allegations.” CP 1324. SD1 was reinstated to the classroom. *Id.*

The Seattle Times continues to claim that it is entitled to the identity of SD1 under the Public Disclosure Act.

b. Unfounded Allegation—Federal Way John Doe 1 (FD1).

On April 26, 2000, FW1, an elementary school teacher, was returning to the classroom after recess together with his students. CP 1037. One of the students asked to speak privately to FW1 because she was upset. FW1 told her he would get the class started, and then they could speak in the hall privately. CP 1037.

After getting the class started, FW1 took the upset youngster into the hallway to speak with her. They sat on a couch in the hallway facing one another. CP 1037. The student explained why she was so upset. After a short time, FW1 and the student returned to the classroom. As they did so, a group of students began laughing uncontrollably. CP 1037. FW1 determined the source of the laughter was a student’s sexually charged

comment, after claiming that the young girl had been sitting on FW1's lap in the hallway.

FW1 sent two of the involved children to the office. The following day, FW1, after discussing the matter with his principal, wrote a harassment complaint against the student. CP1036. FW1 requested that the student be removed from his class. *Id.*

Even though no student claimed that FW1 actually had the student sitting on his lap, the school district investigated FW1 for misconduct. CP 1030-1052. After an exhaustive investigation, the school district determined that FW1 did not have a student sitting on his lap, and instead, appropriately filed a harassment complaint against the student making the inappropriate comments. CP 1053.

FW1 was compelled to wait for nearly two months while the school district completed its investigation. The closing letter indicated only that the allegations against FW1 were unsubstantiated. CP 1054.

The Seattle Times claims it is entitled to the identity of FW1 under the Public Disclosure Act.

c. Letter of Direction—Bellevue John Doe 1 (BD1)

On November 21, 2001, BD1 was placed on administrative leave to allow the school district time to investigate a claim that BD1 unnecessarily touched a student. CP 954. The school district had received

a complaint wherein a female student indicated that she was made uncomfortable when BD1 touched the student's knee, rubbed her neck and gave her a hug. CP 955. In response to the allegation, BD1 readily admitted the conduct, but expressed surprise that the student or the school district were concerned about his actions. CP 956.

The school district then indicated in a letter of direction that BD1 was not being disciplined. Instead, the school district explained in writing that BD1's conduct was not appropriate, and that he should refrain from unnecessarily touching students. CP 956. The matter was resolved and the teacher returned to the classroom without further incident. CP 955-56.

The Seattle Times continues to claim it is entitled to the identity of BD1.

d. Letter of Direction—Bellevue John Doe 2 (BD2).

In 1994, two females, a current and former student of the Bellevue School District, complained that BD2 made them feel uncomfortable. CP 959. The school district investigated the allegations by interviewing the young women outside the presence of BD2. Both girls related that BD2 made them feel uncomfortable. However, both girls and the district emphasized, "No one is accusing you of any sexual misbehavior." CP 960. The district issued BD2 a letter of direction requesting that he reevaluate

conduct that could be misconstrued by teenage girls. CP 960. The matter was resolved.

The Seattle Times insists that BD2 has not right of privacy and that his identity should be revealed to the Seattle Times.

After reviewing each of the individual plaintiffs' cases, the trial court carefully crafted a permanent injunction that balanced the public's legitimate interest in overseeing its public school institutions, and the teachers' right of privacy. CP 100. The trial court's permanent injunction provides the Seattle Times with every bit of information it needs to perform its legitimate watchdog function. The only information the Seattle Times was denied was the identities of falsely accused public school teachers. Unsatisfied the Seattle Times filed this appeal.

III. ARGUMENT

A. Standard of Review

Courts review Public Disclosure Act challenges *de novo*, from the same vantage point as the trial court, where the record consists only of affidavits, memoranda of law, and other documentary evidence.

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wash.2d 243, 252, 884 P.2d 592 (1994). However, where the record also consists of witness testimony, the court must review the trial court's findings of fact under the substantial evidence standard: the record must contain a

sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question. *Cowles Pub. Co. v. State Patrol*, 44 Wash.App. 882, 888, 724 P.2d 379, 384.

In the present case, the parties offered witness testimony and affidavits. The trial court made credibility assessments. As in *Cowles* then the standard of review should be the substantial evidence standard.

In this case, the Seattle Times failed to assign error to any of the findings of the trial court. Therefore, the unchallenged findings are verities for purposes of review. *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wash.2d 210, 608 P.2d 254 (1980).

B. The Trial Court Properly Ruled that the Teacher's Identities are Exempt

The trial court properly ruled that the identities of the prevailing John Does were exempt from disclosure under the Public Disclosure Act. CP 101-08, 113, 117-18. In so ruling, the trial court correctly balanced the public interest in the continuing efficient operation of its school system, with its interest in overseeing the operation of the school system. The trial court's ruling also properly gave effect to the Prevailing John Does' right of privacy.

C. Legitimate Public Concern is Defined by a Reasonableness Standard.

The trial court properly ruled that the prevailing John Does' identifies are exempt from disclosure pursuant to RCW 42.17.310(1)(b), which exempts "[p]ersonal 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." A person's right to privacy is violated 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.

1. **The *Brouillet* Holding is Inapplicable.**

The Times first contends that the trial court erred when it failed to apply the holding in *Brouillet v. Cowles Publ'g Co.*, 114 Wash.2d 788, 791 P.2d 526 (1990) to the present case. However, the holding in *Brouillet* is not applicable. In *Brouillet*, the Supreme Court ruled there is no right of privacy with respect to founded allegations of misconduct. In fact, in *Brouillet*, the publisher, Cowles, requested, "records specifying the reasons for teacher certificate revocations during the last 10 years. It wanted to use the records to prepare investigative articles on teacher sexual misconduct with students." *Brouillet v. Cowles Pub. Co.*, 114 Wash.2d at 790.

Thus, *Brouillet* dealt with a public records request pertaining to instances in which a teacher's certificate was revoked by OSPI because of founded instances of sexual misconduct. *Id.* Revocation of teaching

certificates is premised upon proof of misconduct proven by clear and convincing evidence. See RCW 28A.410.090.

Like *Brouillet*, the publisher here submitted a broad records request to several school districts. However, unlike *Brouillet*, the publisher did not seek only founded instances of sexual misconduct, but unfounded allegations as well. This case then explores whether publishers can submit broad public records requests seeking the identities of individuals who have been the subject of false or unsubstantiated claims of misconduct.

2. **The Reasonableness Standard.**

Ignored by the publisher in this case is the important distinction between the words “conduct” and “misconduct” as they are used in the PDA. This important distinction flows from Washington courts’ attempts to harmonize the restrictive definition of privacy codified by the legislature, and the protections afforded public employees under the state and federal constitutions. In attempting to give effect to both the public disclosure legislation and the constitutions, Washington courts have placed great importance on the reasonableness of the public interest in certain information.

Starting with *Dawson v. Daly*, 120 Wash.2d 782, 845 P.2d 995 (1993), the Supreme Court addressed whether a document is of legitimate

public concern under the second prong of RCW 42.17.255. The court held the public concern must be "reasonable." *Dawson*, 120 Wash.2d at 798. This analysis "contemplates some balancing of the public interest in disclosure against the public interest in the efficient administration of government." *Id.* (quoting RCW 42.17.010(11)). The court held disclosure of employees' performance evaluations could affect the public's interest in efficient government in two ways:

First, if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined. The likely result would be a reduction in the quality of performance by these employees. [D]isclosure of even favorable information may well ... incite jealousy in ... co-workers.... ... Disclosure will be likely to spur unhealthy comparisons among ... employees and thus breed discord in the workplace... Second, disclosure could cause even greater harm to the public by making supervisors reluctant to give candid evaluations. "Disclosure will be likely to chill candor in the evaluation process". (citation omitted). The quality of public employee performance would, therefore, suffer because the public employees would not receive the guidance and constructive criticism required for them to improve their performance and increase their efficiency.

Dawson, 120 Wash.2d at 799-800. Applying these concerns to the facts presented in *Dawson*, the court held the public concern was not legitimate "at least in a case such as this one where our *in camera* review ... revealed

that [the employee's] evaluations do not discuss specific instances of *misconduct* or public job performance." *Id.* at 800.

There can be little doubt that the *in camera* review in *Dawson* did reveal instances of conduct, and even allegations of misconduct. However, the court determined that only where the record establishes misconduct does the public interest become reasonable under the statute. *Id.*

The court's reasoning makes sense because it gives effect to a public employee's constitutional right to privacy. While the PDA was amended in response to the Supreme Court's decision *In re Rosier*, 105 Wash.2d 606, 616, 717 P.2d 1353 (1986), no publisher can seriously contend that the legislature was empowered to substitute a more restrictive statutory definition of the constitutional right of privacy and thereby limit the protections guaranteed by the constitutions.

After *Dawson*, Division One applied these same principles in the context of a school principal's performance evaluations in *Brown v. Seattle Pub. Sch.*, 71 Wash.App. 613, 860 P.2d 1059 (1993), *review denied*, 123 Wash.2d 1031, 877 P.2d 696 (1994). In that case, a citizen sought documents relating "to the evaluation of, and efforts to improve [the principal's] effectiveness and performance of her duties[.]" *Id.* at 615. In addition to yearly performance evaluations and self-evaluations, the

dispute included documents related to the principal's *conduct* in specific instances. *Id.*

The *Brown* court held that, under *Dawson*, "the harm outweighs the public interest in disclosure in cases where a review reveals that the evaluations do not discuss specific instances of *misconduct* or public job performance." *Brown*, 71 Wash.App. at 619. Although recognizing that some of the requested documents addressed the principal's conduct in specific incidences, the court nevertheless noted that "[t]here is no discussion of specific instances of misconduct on [the principal's] part, only shortcomings and performance criticisms, as well as praises." *Id.*

Our courts have therefore recognized and protected the constitutional right of privacy codified by the legislature and defined its contours with a reasonableness standard. Stated another way, the publishers and the public do not have a reasonable interest in every action taken by, or false allegation made against, public employees. Rather, publishers only have a legitimate interest in instances of misconduct by a public employee. *See Dawson* at 798.

In the present case, similarly, the trial court examined the various cases *in camera* to determine whether there were verified instances of misconduct. Where agencies determined that allegations were unsubstantiated or false, the trial court properly reasoned that there were

no verified instances of misconduct and determined that the identity of the educator was exempt from public disclosure. CP 112. In cases where the trial court determined that the allegations were founded, the court held the teacher's identity was not exempt. In every instance, however, the trial court held that the publisher was entitled to receive the underlying redacted records so that it could examine the methods of investigation employed by the districts.

Had the trial court ruled as the publisher in this case urges, the constitutional right of privacy would be meaningless. This Court cannot construe RCW 42.17.255 so restrictively so as to violate an individual's constitutional right of privacy. Put another way, the publisher urges this Court to adopt a rule wherein whenever any allegation is made against a teacher, no matter how baseless or patently fabricated the allegation might be, the public has a legitimate interest in the identity of that falsely accused teacher. Under the publisher's urged ruling, allegation equals fact, and the right of privacy is rendered a nullity.

No court has adopted such a radical rule. Indeed, RCW 42.17.255 and 310 is meant to give effect to the right of privacy, not limit or destroy that right as the publisher urges.

The right of privacy must protect an individual from having false allegations of sexual misconduct disseminated by the government. It

and irreparably damage vital governmental functions.

Id. In this case, the trial court found:

The plaintiffs presented evidence from school administrators and teachers union officials about the importance of candid communication between school districts and teachers about how educational duties should be performed. The court finds that release under the Public Disclosure Act of records relating to a public employer's guidance and direction to an employee in a "letter of direction" would harm the public interest in efficient government, by interfering with the employer's ability to give candid advice and direction to its employees. It would substantially and irreparably damage vital government functions because it would chill employer-employee communications by making all written communications between employer and employee subject to disclosure.

CP 100. The Seattle Times submitted no evidence to contradict the evidence submitted by the plaintiffs. Contrary to the wild and unsupported claims of the Seattle Times³, the plaintiffs submitted a procession of un rebutted evidence demonstrating harm to the efficient operation of the school system that would be wrought by the publisher's radical theory of the right of privacy.

The un rebutted evidence in this case indicates that letters of direction are critical to the efficient operation of the public school system. CP 873, 63, 859, 66. The trial court, by ruling that the public's interest in not destroying this method of supervision outweighs the public's interest

³ See discussion *infra* at section D(2) of the publisher's factually unsupported claims, wherein the publisher misrepresents and exaggerates the record.

follows then that the publisher's argument lacks merit, and the trial court's decision to protect the identities of the teachers was not error.

D. The Trial Court Properly Ruled that Governmental Interests Would be Irreparably Harmed by Release of the Teacher's Identities.

1. The Record Supports the Trial Court's Ruling

The publisher contends that the trial court erred when it applied this Court's holding in *Dawson v. Daly*. The *Dawson* court held that the term "legitimate public concern" used in the earlier cases and in RCW 42.17.255 meant "reasonable". *Dawson*, 120 Wash.2d at 798, 845 P.2d 995. Consequently, requiring disclosure where the public interest in efficient government could be harmed more than the public would be served by such disclosure is unreasonable. Accordingly documents will not be disclosed where the public concern is not "legitimate". *Dawson*, 120 Wash.2d at 798.

In addition, in *Dawson*, the Supreme Court held that RCW 42.17.330 creates "an independent basis upon which a court may find that disclosure is not required". *Dawson*, 120 Wash.2d at 793-94, 845 P.2d 995. RCW 42.17.330 states in part:

The examination of any specific public record may be enjoined if, upon motion and affidavit ... the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially

in the identity of teachers who have received such a letter of direction, properly adjudicates the competing interests.

As in *Dawson* and *Brown*, the public has no legitimate (reasonable) concern in the identities of the teachers who have received a letter of direction where the public, through the media, has received redacted records demonstrating the types of investigations and alleged conduct that results in letters of direction. Thus, the media can still serve its function of criticizing the school districts for inappropriately employing the letter of direction tool, if its review indicates such an abuse is occurring, while at the same time protecting the school district's ability to supervise its staff, and maintain staff morale.

Courts have previously blocked the disclosure of identities of individuals because such disclosure would significantly impact employee morale in cases other than *Dawson* and *Brown* as well. As an example, in *Cowles Pub'g Co. v. State Patrol*, 109 Wash.2d 712, 748 P.2d 597 (1988), a newspaper publisher sought from several law enforcement agencies the names of officers who were investigated and against whom complaints were sustained. *Id.* 109 Wash.2d at 713-14, 748 P.2d 597. In *Cowles*, as in this case, the law enforcement agencies were willing to release the facts of the complaints and investigations, but were unwilling to reveal the identities of the officers, the complaining witnesses, or of other witnesses.

In a span of several pages,⁴ the Seattle Times makes a variety of wild, but wholly unsupported, factual averments regarding how school districts investigate teachers. In doing so, the publisher cites to various portions of the record. Each of the citations relied upon by the publisher are inaccurate. What follows is a brief survey of the publisher's misstatements.

The Times asserts that school districts are afraid to discipline teachers because they may face a grievance or a lawsuit by "the teacher's union."⁵Times Brief at 32. The Times cites to CP 184 to support this claim. The record cited to is a declaration by Bellevue School District principal Jerry Schaefer. In his declaration Mr. Schaefer testifies that:

I am, and was at the time this matter happened, aware that investigations of possibly inappropriate conduct by teachers in relation to students are very serious matters. I know that if a concern for possible inappropriate conduct is raised, we as school district administrators have ethical and legal reasons to conduct appropriately thorough investigations and resolve the matter according to the results of the investigation. It is a strong professional value that we treat both students we serve and the staff who serve them in a fair manner. I know that if we fail to adequately investigate a true allegation of teacher misconduct, we have legal exposure to a student who is harmed, and that if we inadequately investigate a false allegation and unfairly discipline a teacher, we have legal exposure to the unfairly treated teacher.

⁴ See Seattle Times Brief at 32-36.

⁵ Throughout its brief the Seattle Times uses the word "union" as a pejorative term.

Id. at 714. The trial court found that disclosure of the names would hinder the ability of the law enforcement agencies to investigate alleged misconduct because without confidentiality some citizens and officers would refuse to file complaints or to provide evidence. *Id.* at 715-18. The trial court also found that disclosure of the names of the charged officers would seriously affect the morale of the agency. *Id.* Consequently, the trial court concluded that the names were exempt from disclosure. *Id.* at 716. The Supreme Court affirmed. 109 Wash.2d at 733, 734.

Similarly in this case, the uncontested evidence before this Court is that release of the identities of the individual teachers will create an incredible upheaval in the efficient operation of the school districts and will further impair already depressed teacher morale. In *Cowles*, the Supreme Court blocked release even though the allegations against the officers were founded, whereas in this case, the letter of direction cases are either unsubstantiated, or insubstantial.

The trial court correctly determined that the public's interest in the continued efficient operation of the school districts outweighs the public's right to ascertain the identities of teachers accused of, but not proven to have engaged in acts of sexual misconduct.

2. The Times' Factual Arguments Are Unsupported by the Record

experience.” Times Brief at 33 (*citing* hearsay declarations of its reporters regarding Laura Keylin). This factual assertion is inaccurate.

Even in the case of Ms. Keylin, that administrator, at the relevant time, had eight years of administrative experience, which included daily contacts with students and staff. In addition, Ms. Keylin had years of experience dealing with young women. CP 153. When Ms. Keylin interviewed the young woman who was alleged to be the victim of sexual harassment by BD3, the student adamantly denied having any problems with the teacher. CP 196.

The Times then improperly claims that “untrained administrators failed to interview the victim.” Times Brief at 33 (*citing* CP 1995). The record relied upon is a 19 page investigative report prepared by an attorney the district hired to perform the investigation. The attorney interviewed nineteen (19) witnesses. CP 1995. He also attempted to interview the alleged victim and his mother, who refused to cooperate. CP 1995-96. Far from being an untrained incompetent administrator as the Seattle Times inaccurately reports, the lawyer hired by the district performed a detailed and exhaustive investigation into the allegations. CP 2010.

Next, the publisher inaccurately claims that untrained investigators interviewed victims with the “abuser” present. Times Brief at 33 (*citing*

CP 183-184. This portion of the record, relied upon by the Times to imply that school districts fail to properly investigate allegations of abuse because they are afraid of being sued by “the teacher’s union,” instead demonstrates why school districts are actually motivated to perform full and fair investigations into every allegation of sexual misconduct.⁶

The Times goes on to claim that school district officials charged with performing investigations have little to no training. Times Brief at 33 (*citing* CP 437 & 526)⁷. The Times claims that untrained administrators have interviewed victims only in the presence of his or her **abuser**. *Id* (*citing* CP 209). Both of these allegations are inaccurate.

Ignoring the various experienced administrators, outside expert investigators, and trained attorneys who performed most of the investigations in these cases, the publisher instead focuses on principal Laura Keylin who investigated the allegations regarding Bellevue John Doe 3.⁸ Times Brief at 33. The publisher uses this single example to support its statement that district investigators “generally had little to no

⁶ *See also* equally inaccurate citations to RP 45 and 80.

⁷ Ignoring the declarations of the investigators, the Times instead cites to the inadmissible hearsay arguments of its own reporters to support this contention.

⁸ *See* RP 8-10 (Ava Davenport, a lawyer with 12 years of experience and specialized training); RP 101-103 (Ricardo Cruz, a lawyer formerly employed as a civil rights investigator with the federal government, and with further specialized training); CP 1993 (Lester Buzz Porter, a lawyer specializing in education law with years of training and experience); CP 218 (Karen Clark, administrator with over 30 years of experience); *See also* various records reflecting outside professional investigators were employed to perform investigations. CP 1319.

CP 209). CP 209 is the declaration of Jerry Schaefer. In his declaration

Mr. Schaefer testifies that:

It is true that the only time I spoke with the student about my concerns for the appearance of John Doe's relationship with her was during a meeting at which John Doe 8 was present. The reason for that is that neither I nor anyone else, to my knowledge, suspected a problem in this matter regarding inappropriate sexual conduct between the teacher and the student. I wanted to communicate with the student, and have John Doe 8 present so she would know he was hearing the same thing, about the importance of her moving on to form a relationship with the counselor at her new school, and that required both her and John Doe 8 to discontinue the relationship they had formed.

CP 209.⁹

Contrary to the accusation that a student was interviewed in the presence of her "abuser," the record actually reflects that a principal attempted to encourage a foreign exchange student to form a bond with her new school counselor. There were never any abuse allegations referenced, despite the inaccurate report of the Seattle Times.

As another example of inaccurate citations, the publisher claims that school administrators refuse to make reports of abuse against teachers or staff members until the school first does its own independent investigation. The Times then claims that few, if any, allegations ever

⁹ The Schaefer declaration explains that the student was a foreign exchange student that John Doe 8, a school counselor, had befriended and helped during her years as a junior high student. There was never any allegation of sexual misconduct. CP 209-10.

Even assuming the declarations comported with the inaccurate allegations of the publisher, one school district is not equivalent to all of the schools in the entire state of Washington, which is the inference invited by the Seattle Times. Times' Brief at 33. The Times has resorted to making up facts to support its erroneous legal position. The publisher's misstatements do not end at page 33 however.

The Times' argues that one fact in particular is "disturbing." Times Brief at 33. The disturbing fact is that when a school district believes it has grounds to impose discipline, the district will "**often**" give just an oral warning or a letter of direction according to the Seattle Times. Having used the word "often" to describe this alleged practice, the Seattle Times cites a single reference in the record, RP 58. Times Brief at 34.

RP 58 is a portion of the trial transcript wherein the Times' lawyer is cross examining Ava Davenport, a former administrator for the Seattle School District. RP 58. At the referenced page, the Times' lawyer poses a hypothetical after Ms. Davenport describes an illustrative example. In response to the hypothetical, Ms. Davenport said some, but not her, might consider issuing an oral warning rather than a letter of reprimand to a long time veteran who makes a single off color remark. RP 57-59. From this exchange, the Seattle Times concludes that school districts generically "often" give oral warnings rather than written reprimands to avoid

leave the schools. This is a remarkable and stunning allegation. The Times cites CP 211, and CP 220 to support this allegation.

CP 211 is a portion of the declaration of administrator Jerry Schaefer of the Bellevue School District. Mr. Schaefer testifies:

With school employees, however, allegations of misconduct towards students—whether they rise to the level of abuse or not—is within our area of responsibility, and we have the means to investigate by talking with available witnesses and with the alleged wrongdoers, and so we customarily seek to gather information independently of any CPS or police investigation, even though in serious cases those agencies are called.

CP 211. CP 220 is a portion of the declaration of Karen Clark, a long time Bellevue School District administrator. In her declaration, Ms. Clark acknowledges that the school district regularly reports allegations of abuse to CPS pursuant to RCW 26.44.030. Ms. Clark explains that the district has ongoing interaction with both CPS and local law enforcement agencies. Nowhere in either Mr. Schaefer’s declaration or in Ms. Clark’s declaration do the witnesses indicate that they perform their own investigations before calling CPS to make a report of abuse. Also, neither witness states that “few, if any, allegations ever leave the schools.” Times Brief at 33. To the contrary, both witnesses indicate that they regularly involve CPS and law enforcement.

- Seattle John Doe 8. CP 525 relates to Seattle John Doe 8. However, the trial court released his identity. CP 107. Therefore, SD8 is not an individual “whose records have been denied.”

Synonyms for the word numerous include copious, abundant and plentiful. “Two” is not a word that is synonymous with “numerous.” Once again then the Seattle Times has either exaggerated or misrepresented facts in its brief when it claims “many of the teachers whose records have been denied were the subject of numerous complaints.” Times Brief at 35.

These examples of exaggerations, misstatements and misrepresentations are not isolated to one section of the Times’ brief. Accurate citations to the record are mandated by rule in appellate briefs. RAP 10.3; *See Hurlbert v. Gordon*, 64 Wn.App. 386, 400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992)(sanctioning firm for erroneous and non-existent citations to the record). This Court must therefore ignore the arguments made by the Seattle Times that are premised upon non-existent, exaggerated or misstated facts.

E. *City of Tacoma v. Tacoma News, Inc. Was Correctly Decided*

The Seattle Times contends the Division II case of *City of Tacoma v. Tacoma News, Inc.*, 65 Wn.App.140, 827 P.2d 1094, *review denied*, 119 Wash.2d 1020, 838 P.2d (1992), was erroneously decided and is an

“papering” a file. Times Brief at 34. The record does not support this factual assertion.

The publisher also claims “many of the teachers whose records have been denied were the subject of numerous complaints.” Times Brief at 35 (citing CP 437, 525, 187, 152). This factual assertion is inaccurate and irresponsible. The citations relate to Bellevue John Doe 7 (CP 187), Bellevue John Doe 3, CP 437, 152, and Seattle John Doe 8 (CP 525). Therefore, the Seattle Times defines “many” as three. With respect to the “numerous complaints” allegation, the publisher’s contention is equally conflated.

- Bellevue John Doe 7. BD7 was the subject of two complaints in 90s. The first complaint took place in 1994. The student making the allegation later admitted that the allegation was a total fabrication. CP 984. Another complaint was lodged in 1998. In that complaint BD 7 was alleged to have made kissing noises and stuck out his tongue at a student. The allegations in 1998 were also investigated. The allegations were unsubstantiated, and the teacher received a letter of direction from the school district. CP 980.
- Bellevue John Doe 3. BD3, in May of 2001, the district received a complaint from a parent indicating that she was upset about her daughter’s grade. At the same time the parent complained about sexual harassment. The complaint was determined to be unfounded and the grade issue was resolved. CP 965. The following year, the sister of the prior complainant filed a complaint against BD3 on behalf of another student. When the other student was interviewed, she indicated that she had no concerns at all about BD3. CP 963. There were no other referenced complaints.

42.17.255. As a matter of common sense, one factor bearing on whether information is of legitimate concern to the public is whether the information is true or false. Using this case as an example, the information here is surely of less concern to the public if it is false than if it is true. If we are to abridge common sense by holding that agencies and courts can never consider whether information is true or false, some reason for so doing should appear on the face of the statute. None does.

Id. at 149. The *City of Tacoma* court went on to further point out that the legislature intended RCW 42.17.255 to have the same meaning as described by the *Hearst* court. Division II reasoned that since *Hearst* defined the right of privacy by the tort definition, as it was relevant in that case, then logic dictates that the appropriate section of the Restatement would be used when dealing with the various types of invasions of privacy. *City of Tacoma*, at 149-50.

The trial court in this case adopted the same reasoning with respect to those cases where the allegations remained false or unsubstantiated after reasonable investigation. The trial court held:

Due to the highly charged nature of an accusation of sexual misconduct, whether the allegation is substantiated or unsubstantiated becomes the dominant factor in determining whether release of the information would violate an employee's right to privacy. The substantiated/unsubstantiated nature of the allegation bears upon both elements of the statutory definition of the right to privacy in RCW 42.17.255. If the allegation is unsubstantiated it significantly increases the offensive nature of its revelation and if it is unsubstantiated, it is of no legitimate public interest.

anomaly. Times' Brief at 39. The publisher's contentions are without merit.

The Times begins its analysis by reasserting the exact same argument employed unsuccessfully by the News Tribune in *City of Tacoma*. *Id.* at 148. In *City of Tacoma*, the Tribune also argued that the definition of privacy codified by the legislature pertains only to §652(d) of the Restatement. *Id.* However, Division II held that RCW 42.17.255 was simply the codification of the definition of the right of privacy described by our Supreme Court in *Hearst Corp. v. Hoppe*.¹⁰ And in *Hearst* the court was only concerned with the dissemination of true information (taxpayer folios). Therefore, the court in *Hearst* did not examine the tort definition of invasion of privacy as it related to the dissemination of false information, as opposed to true information. *Hearst*, at 136.

Division II discussed the Tribune's argument, which was been resuscitated by the Times in this case, as follows:

It is the relationship of RCW 42.17.255 to the Restatement that gives the Tribune's argument whatever force it has. RCW 42.17.255 embodies Restatement § 652D, but omits any reference to § 652E. Restatement § 652D contains only the criteria for determining when true information invades privacy. Therefore, according to the Tribune, RCW 42.17.255 requires public agencies and courts to assume that all information in public records is true. The argument fails because it is contrary to the plain meaning of RCW

¹⁰ 90 Wn.2d 123, 580 P.2d 246 (1978).

CP 100-115.

In other words, the trial court, using the logic of the *City of Tacoma* holding, ruled that false or unsubstantiated allegations were highly offensive and of little public concern. CP 100-115. The court's ruling is not only consistent with the statutory requirements of RCW 42.17.255, but the ruling is logical as well.

As an example, the public has no legitimate (reasonable) concern with documents relating and republishing false allegations. In fact, where a newspaper article imputed to a school board member charges of misconduct in office and want of official integrity and fidelity to his public trust, such comments were libelous per se. *Owens v. Scott Pub. Co.*, 46 Wash.2d 666, 284 P.2d 296 (1955). Thus, the law of libel per se recognizes the inherently offensive and damaging nature of allegations of misconduct in one's employment. Yet, where a false statement can create a claim for libel per se and presumed damages because the law recognizes the offensiveness of such allegations, the Times contends that such allegations are merely embarrassing and are not offensive. The trial court properly disagreed.

The trial court further held that simply republishing false allegations is not a matter of legitimate public concern. Unlike the Seattle

Times, the trial court, did not equate allegation to fact. Rather, the court examined whether the allegations remained unproven after reasonable efforts were made to investigate the allegations. If the allegations remained unfounded after a reasonable investigation, then the trial court concluded that the reasonableness of the public's concern is greatly reduced. CP 112. In other words, while the public may be interested in scintillating scandal, such an interest is not sufficiently legitimate to overcome the employee's constitutional right of privacy.

To ignore, as the Times proposes, the truth or falsity of allegations, would be tantamount to rendering the statutory protections of RCW 42.17.255 illusory. In the Times' view, any time a publisher issues a public disclosure act request, the public agency must produce the records because the publisher demonstrated an interest reflected by its request. The publisher's argument is a tautology. The trial court rejected the Times' circular argument.

The Seattle Times cites a variety of cases that it claims contain rulings contrary to *City of Tacoma v. Tacoma News*. Times' Brief at 40. The Times first makes the assertion that this Court must rule that the public's interest in allegations of misconduct is legitimate regardless of the stage of the investigation and regardless of the veracity of the allegations.

The Seattle Times implies that a variety of other courts have adopted its stated rule.

The publisher first cites to *Amren v. City of Kalama*, 131 Wash.2d 25, 33, 929 P.2d 389, 393 (1997). But in *Amren v. City of Kalama*, the appellate court decision only dealt with the City's argument that RCW 41.06.450 implicitly exempted records from disclosure. Significantly, the appellate court in *Amren* stated:

This decision does not discuss the potential applicability of the exemptions set forth in RCW 42.17.310 because the City of Kalama expressly declined to rely on those exemptions as its basis for withholding the State Police report. See Clerk's Papers at 29.

Id., at 33.¹¹ Thus, *Amren* is inapplicable, and specifically does not stand for the proposition for which it was cited by the Times.

In *Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.*, 55 Wash.App. 515, 521, 778 P.2d 1066, 1069, another case relied upon by the Times, the Tribune filed a lawsuit against the local Health Department because the department refused to release investigative files regarding a particular ambulance company. While the court disposed of the right of privacy exemption in its holding, the privacy issue was not particularly litigated, and the Court finally concluded that no "person's" right of

¹¹ As with its inability to accurately recite the factual record, the Seattle Times appears to have equal difficulty accurately detailing the holdings in the appellate court decisions it relies upon.

privacy would be violated since the case dealt with an ambulance service and not a person. *Id.* 55 Wash.App. 515, 521. Certainly the case does not stand for the proposition claimed by the Times.

The Times also cites *Hudgens v. City of Renton*, 49 Wn.App. 842, 846, 746 P.2d 320, 322 (1987). In *Hudgens*, the appellate court ruled that DWI arrest records were not "highly offensive." *Id.* at 846. Unlike this case then, *Hudgens* dealt with information that was not highly offensive. *Id.* at 846.

The Times also relies on *Columbian Pub. Co. v. City of Vancouver*, 36 Wn.App. 25, 29, 671 P.2d 280, 283 (1983) for the proposition that the public has a legitimate concern in misconduct allegations. Times Brief at 40. However, *Columbian Pub. Co.*, does not involve allegations of misconduct. Rather the case involves statements concerning the police chief's professional performance. *Id.* at 29. Given that the case was decided a decade before *Dawson v. Daly*, *supra*, *Columbian's* continued relevance is questionable at best. In any event, the case does not stand for the broad proposition claimed by the Seattle Times.

In summary, the cases cited by the Times do not stand for the proposition that false allegations of sexual misconduct are matters of

legitimate public concern. The *City of Tacoma v. Tacoma News* case is the only case that really dealt with false allegations of misconduct.

The Times includes at pages 41-43 of its Brief unsupported factual averments. Because the factual arguments are unsupported by citations to the record, this Court must ignore the arguments. RAP 10.3 and RAP 10.7.

In summary, the trial court correctly ruled that false and unsubstantiated allegations of sexual misconduct are highly offensive and not a matter of legitimate public concern. The trial court limited its ruling to the dissemination of the identities of various teachers. The Times received all of the documents it needed to evaluate and then misstate the facts. The trial court did not err.

F. False Allegations of Sexual Misconduct are Highly Offensive.

The Times contends that releasing unsubstantiated and false allegations of sexual misconduct is not highly offensive. Brief at 43. It is hard to imagine that public disclosure of untrue rumors and false allegations does not rise to the highest level of offensiveness.

Substantially less offensive information has been deemed by courts to be “highly offensive.” As an example, the, "disclosure of performance evaluations, which do not discuss specific instances of misconduct, is

presumed to be highly offensive within the meaning of RCW 42.17.255." *Dawson v. Daly*, 120 Wash.2d 782, 845 P.2d 995 (1993). Similarly, in a case involving the disclosure of private e-mails, the Court of Appeals stated that it is "clear that public disclosure would be highly offensive to any reasonable person. "*Tiberino v. Spokane County*, 103 Wn.App. 680, 689, 13 P.3d 1103(2000)(citing *Cowles*, 44 Wn.App. at 897, 724 P.2d 379 ('[A]n individual has a privacy interest whenever information which reveals unique facts about those named is linked to an identifiable individual.')

Thus, were there are not demonstrated acts of misconduct; the disclosure of mere rumor and false allegations would be highly offensive to any individual. The Times' contention that disclosure of false allegations would not be offensive is without merit.

G. The Trial Court Did not Err in Granting the Protective Order

1. Standard of Review

A trial court's determination to grant a protective order is discretionary, and is reviewed only for an abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 348, 16 P.3d 45 (2000). The trial court did not abuse its discretion in this case.

2. The Protective Order is not Vague.

The trial court entered a protective order prohibiting the Seattle Times from using to its advantage any inadvertent revelations of the identities of the plaintiffs that took place during discovery or by way of receiving incompletely redacted documents. The protective order is simply an extension of the permanent injunction the trial court entered prohibiting the release of the plaintiffs' identities. Thus, the Seattle Times is precluded from disseminating the identities of the plaintiffs that were inadvertently revealed during the litigation. The order is easily understandable, and the trial court did not abuse its discretion in entering the order.

3. The Plaintiffs Timely Sought the Protective Order

In its analysis the Times ignores entirely the standard of review. Instead, the Seattle Times begins its analysis with a misstatement of fact. The Times states, “[P]laintiffs did not move for a protective order against the Times until seven weeks after the plaintiffs disclosed the names.” Times Brief at 55. Contrary to the Times' misstatement, the plaintiffs sought a protection as part of its original motion for a temporary restraining order. CP 115. The court did not rule on the motion until the plaintiffs renewed their motion after the Times indicated that inadvertent disclosures had occurred, and after the trial court entered the permanent injunction. Thus, the plaintiffs' motion for a protective order was timely.

The Times cites *U.S. v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 350 (1988) to support its argument that the prevailing John Does' motion for a protective order was untimely. In *Panhandle Eastern*, the court denied the protective order for two reasons. The first and controlling reason for denying the protective order was because Panhandle Eastern had failed to establish good cause. *Id.* at 349. Secondly, the court pointed out that even if good cause did exist *Panhandle's* application was untimely because it sought to preclude discovery after the date discovery was required. *Id.* at 350. The case is factually and legally irrelevant to the present case.

In summary, the Seattle Times misstates both the case it relies upon and the facts to create an argument that the plaintiffs' motion was untimely and therefore should form the basis for the appellate court concluding that the trial court abused its discretion. The Seattle Times' claims are without merit.

4. Inadvertent Disclosures Occurred During Discovery

The Times makes additional misstatements of fact in an effort to bolster another baseless argument. The Seattle Times claims that the inadvertent disclosures were not made during the discovery process. Times Brief at 57. The assertion made by the Times is factually inaccurate.

Contrary to the assertions of the Times, the trial court ordered, as part of discovery, the plaintiffs to provide the publisher with redacted copies of the underlying documents on an expedited basis. CP 115, RP (2/24/03). The trial court also ordered, over the objection of the Bellevue School District, the plaintiffs to make their witnesses available to the Seattle Times for interviews. CP 115. This was done because of the abbreviated case schedule demanded by the Seattle Times. CP 115.

The Seattle Times apparently claims that the plaintiffs could have refused to comply with the trial court's directives. However, the trial court clearly directed the plaintiffs to provide redacted copies of the underlying documents and to make their witnesses available for interviews. CP 115. The plaintiffs could not have ignored the court's order. *Deskens v. Waldt*, 81 Wash.2d 1, 5, 499 P.2d 206, 209 (1972)(ruling oral orders must be complied with).

The Seattle Times' argument that the inadvertent disclosures did not occur during discovery is contrary to the record. CP 115. The trial court entered binding order that required the plaintiffs' to comply or face contempt. The Times' argument that the disclosures occurred outside of discovery is baseless.

In conclusion, the trial court properly entered a protection order prohibiting the Seattle Times from making use of identities inadvertently

disclosed during court ordered discovery. The order is clear. The order simply gives effect to the point of the plaintiffs' original action, to preclude the dissemination of their identities.

H. The trial Court Did Not Abuse its Discretion in Denying Attorneys' Fees to the Times.

The Times finally contends that it is entitled to an award of attorney's fees from everybody involved in this case. Brief at 60-65. The Times is not entitled to an award of attorney's fees against the plaintiffs. Before addressing the merits of the Times' claim, it is first necessary to define the standard of review.

1. Standard of Review

The standard of review on an appeal of a trial court's refusal to award attorneys fees on an equitable basis is reviewed for an abuse of discretion. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wash.2d 734, 758, 958 P.2d 260, 271 (1998). In the present case, the publisher fails to argue that the trial court abused its discretion in denying its application for attorney's fees. As a consequence, the Seattle Times cannot recover attorneys' fees because it failed to include this argument in its opening brief. Where a party fails to include arguments in its opening brief, the arguments are waived and will not be considered subsequently.

Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

In *Confederated Tribes*, the respondent, Mr. Johnson, also failed to argue that the trial court abused its discretion. The appellate court refused to award attorneys fees. The Seattle Times fails to address, or even bring *Confederated Tribes* to the attention of this court. The trial court did not abuse its discretion.

2. The Trial Court Did Not Abuse its Discretion.

Assuming the Seattle Times did not waive the argument, the Times is nevertheless not entitled to an award of attorneys fees for a variety of reasons. First, the Times was unsuccessful in overturning the restraining orders on 15 of the cases. Therefore, the Times was not the prevailing party. Second, assuming the Times was the prevailing party as to those individuals wherein the trial court did dissolve the temporary restraining orders, all but three of those individuals are not parties to this appeal. This court does not have jurisdiction to adjudicate relief with respect to non-parties. Therefore, the Times' argument is without merit. Third, the trial court amended the caption and dismissed a number of the plaintiffs prior to the permanent injunction. CP 85. The Seattle Times did not timely appeal the trial court's dismissal of those plaintiffs, nor did it assign error to the trial court's dismissal of those plaintiffs here. Therefore, as to those

plaintiffs, the Seattle Times cannot recover attorneys' fees under any theory.

3. Case Law Supports the Trial Court's Ruling

A number of courts have ruled consistently with the ruling by the trial court. As an example, in *Confederated Tribes*, a case factually similar to this case, the tribe first obtained a temporary restraining order precluding the gambling commission from disseminating information under the public disclosure act. *Confederated* at 743. Ultimately, the superior court dissolved the temporary restraining order and ruled in favor of the records requester. The court stated:

The purpose of the rule permitting recovery for dissolving a restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits. (citations omitted). The purpose of the rule would not be served where injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action. Here, the trial on the merits would have been fruitless if the records had already been disclosed.

Confederated Tribes v. Johnson, 135 Wn.2d at 758.

Similarly, in *Quinn Const. Co., L.L.C. v. King County Fire Protection Dist. No. 26*, Quinn Const. Co, 111 Wn. App. 19, 26, 44 P.3d 865 (2002), the party seeking injunctive relief had no other remedy, even at trial, and the court denied the request for attorney fees. *Quinn Const.* at 35.

In the present case, the plaintiffs had no other remedy available except immediate injunctive relief to permit the plaintiffs an orderly opportunity for the trial court to review the various records. The rules concerning "over reaching" plaintiffs is not at issue here. In the present case, the plaintiffs were not seeking to extend their rights prior to trial or anticipate damages awarded at trial. Injunction was simply the only action available to them. Under the facts of the case, the rule adopted by the courts is that an award of attorney fees is inappropriate and unjust.

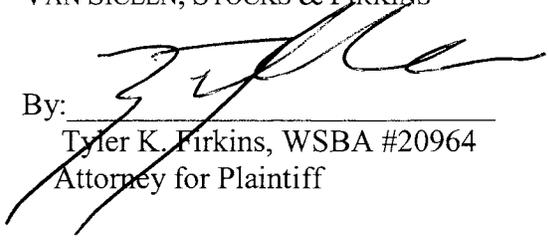
In conclusion, the trial court did not abuse its discretion in denying the Seattle Times' application for attorneys' fees.

IV. CONCLUSION

If the trial court in this case is reversed then the right of privacy codified by the legislature at RCW 42.17.255 will be meaningless. The trial court correctly ruled that the right of privacy protects teachers who have been falsely accused from being associated with allegation and rumor.

DATED this 7th day of June, 2004.

VAN SICLEN, STOCKS & FIRKINS

By: 

Tyler K. Firkins, WSBA #20964
Attorney for Plaintiff

Jessica L. Goldman
Summit Law Group
315 5th Ave. S., Ste. 1000
Seattle, WA 98104

DATED this 7th day of June, 2004 at Auburn, Washington.

A handwritten signature in cursive script that reads "Diana M. Butler". The signature is written in black ink and is positioned above a horizontal line.

Diana M. Butler

CERTIFICATE OF SERVICE

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

1. I am employed by the law offices of Van Siclén, Stocks & Firkins.
2. On June 7, 2004, I caused to be served a true and correct copy of the

Prevailing John Does' Response Brief on the following via Legal Messenger and/or

Legal Mail:

Michael W. Hoge
Perkins Coie
1201 3rd Ave., Ste. 4800
Seattle, WA 98101

John M. Cerqui
Attorney at Law
PO Box 34165
Seattle, WA 98124

Jeffrey Ganson
Dionne & Rorick
601 Union St., Ste. 900
Seattle, WA 98101

Steve P. Moen
Shafer, Moen & Bryan
1325 4th Ave., Ste. 600
Seattle, WA 98101-2539

Joyce L. Thomas
Frank Freed Roberts
Subit & Thomas
705 2nd Ave., Ste. 1200
Seattle, WA 98104

David T. Spicer
Malone, Galvin, Spicer
10202 5th Ave. NE, Ste. 201
Seattle, WA 98125

Leslie Olson
Olson & Olson
1601 5th Ave, Ste. 2200
Seattle, WA 98101-1651

Michele Earl-Hubbard
Davis Wright Tremaine
1501 4th Ave., Ste. 2600
Seattle, WA 98101-1688

FILED
2004 JUN -7 PM 4:03