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SUPREME COURT
STATE OF WASHINGTON

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NO. 78603-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT
SEATTLE TIMES COMPANY

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I. INTRODUCTION

In the 35 years since its adoption, the Public Records Act (“PRA” or the “Act”), formerly part of the Public Disclosure Act (Ch. 42.17 RCW) and now codified as Chapter 42.56 RCW, has been before this Court and the Court of Appeals many times, almost always to address claimed exemptions from its clear mandate for broad disclosure of public records. In most cases the courts have reaffirmed this mandate and its requirement that exemptions be narrowly construed.

However, when disclosure has been denied the courts have strained to articulate why the public should not have access to particular records. No matter what other rationale might be stated, it often comes down to whether the court believes the public has a **legitimate** interest in the information that is not outweighed by other concerns. That question is once more before the Court, inherent in all three issues it has identified for review.

Ironically, one of the stated purposes of the original Public Disclosure Act was to **change** the common law rule that a citizen could examine public records only if he or she could show a “legitimate interest” and that access to all other public records remained within the discretion

of the custodian of the records.¹ The Public Disclosure Act reversed that presumption, making it clear that **all** public records and documents retained by state and local agencies are available for public inspection and copying unless specifically exempted, a point emphasized by this Court on many occasions.² The Court has an opportunity with this case to reaffirm these principles, clarify the proper consideration of the public interest in the context of privacy concerns, and limit further erosion of this basic tenet of the PRA.

Under the PRA the legitimate public interest is a proper inquiry where the issue is whether disclosure would result in an unwarranted invasion of privacy under RCW 42.56.050, but it cannot be the focus in determining whether **non-private** matters should be withheld from the public; there the legitimate public interest is presumed as a matter of statute.

It should be apparent that the conduct of public employees on the job is not a private matter under any formulation of privacy. Although the Petitioners try to label this as a matter of privacy in order to trigger the

¹ See Michael C. McClintock, Steven A. Crumb & F. Douglas Tuffley, *Washington's New Public Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. 13, 25-26 (1975). See also *Steel v. Johnson*, 9 Wn.2d 347, 357-58, 115 P.2d 145 (1941).

² See, e.g., *Amren v. City of Kalama*, 131 Wn.2d 25, 30-31, 929, P.2d 389 (1997); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

public interest argument, they cannot explain how a teacher's conduct with his or her students relates to "the intimate details of one's personal and private life,"³ or constitutes anything other than public conduct. They simply argue that the public has no legitimate interest in allegations of misconduct unless and until the agency itself decides to take formal action beyond a "letter of direction." Such a rule would be plainly contrary to the stated purposes of the PRA. *See* RCW 42.56.030.

The Petitioners claim support for their position in two decisions of the Court of Appeals⁴ and even one decision from this Court.⁵ Each case discusses whether, among other things, the public's interest in particular allegations or criticisms concerning public employees or candidates is "legitimate" or "reasonable" under the particular circumstances. It may be possible to confine each of these cases to its own narrow facts and to distinguish them from the facts in this case, as the Court of Appeals did below, but the fact that these cases can be cited in support of a rule that allows agencies to control what, when, and even whether the public is entitled to know about misconduct by public employees indicates the need for much closer scrutiny of these decisions.

³ *Spokane Police Guild v. State Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989).

⁴ *Brown v. Seattle Pub. Sch.*, 71 Wn. App. 613, 860 P.2d 1059 (1993). and *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094 (1992).

⁵ *Dawson v. Daly*, 120 Wn. 2d 782, 845 P.2d 995 (1993).

In the cases presently before the Court, the legitimate public interest in investigations of sexual misconduct involving teachers and children should be beyond question. It was specifically recognized by this Court in *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990), and the Court should have no difficulty in affirming the Court of Appeals' decision that the great majority of the records at issue in this case must be disclosed. The Respondent Seattle Times Company ("the Times") respectfully asks the Court to go further, and to carefully re-examine those cases on which Petitioners rely, particularly *City of Tacoma v. Tacoma News*,⁶ and consider the extent to which they may be inconsistent with the PRA and other decisions of this Court. In the process, the Times believes the Court will conclude that the other records that remain sealed should also be disclosed.

Petitioners' constitutional challenge to the PRA definition of privacy also attacks the legitimate public interest standard. The essence of their argument appears to be that limiting privacy to satisfy a legitimate public interest under RCW 42.56.050 renders the statute unconstitutional under some as-yet undefined constitutional right of privacy. Upon closer examination of this issue the Court should find that virtually every formulation of constitutional privacy rights recognizes limits to

⁶ See 65 Wn. App. 140, 827 P.2d 1094 (1992).

accommodate legitimate public interests, particularly the kind of interests involved in this case. The Petitioners cannot meet the heavy burden required to overturn the Legislature's carefully crafted definition.

II. ISSUES FOR REVIEW

The Supreme Court in its January 3, 2007 Order limited review to three issues:

(1) whether allegations of sexual misconduct that remain unsubstantiated are exempt from disclosure under the Public Disclosure Act;

(2) whether letters of direction and associated documents are exempt from disclosure; and

(3) whether former RCW 42.17.255 (recodified as RCW 42.56.050) is unconstitutional because it defines privacy more restrictively than the constitutional right to privacy.

III. STATEMENT OF THE CASE

For its statement of the case, the Times relies on its statement at pages 1-2 of its Answer to Petition of Bellevue John Does 1, 2, 3, *et. al.* ("Answer") and the description of facts in the Court of Appeals' opinion below in *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 838-45, 850-53, 120 P.3d 616 (2005) (App. pp. 4-7, 10-11).

IV. ARGUMENT

A. Summary of Argument.

The basic rules governing disclosure of the records in this case are set out in the Public Records Act. Agencies must disclose all public

records unless a specific exemption allows withholding. RCW 42.56.210(3). Courts must construe the right of disclosure broadly and the exemptions narrowly. RCW 42.56.030. *See also Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). Parties attempting to block disclosure, the Petitioners in this case, bear the burden of proving application of a specific exemption. RCW 42.56.550.

There is no specific exemption in the PRA for allegations of sexual misconduct that the agency deems unsubstantiated. Petitioners' argument is based on misapplication of *City of Tacoma v. Tacoma News, Inc.*, *supra*, a case which is itself open to serious question.

There also is no specific exemption in the PRA for letters of direction and related documents relating to public employees' sexual misconduct, alleged or actual. Petitioners' argument is based on misapplication of *Dawson v. Daly*, *supra*, and *Brown v. Seattle Public Schools*, *supra*, both of which expressly distinguish their facts from the kind of specific allegations of misconduct present in this case.

The right of privacy recognized under the PRA and disclosure of the records in this case are entirely consistent with recognized constitutional rights of privacy. Petitioners have not met the heavy burden necessary to prove unconstitutionality.

B. Allegations of Sexual Misconduct Are Not Exempt from Disclosure Merely Because They Are “Unsubstantiated”

Petitioners argue that as long as school districts determine that allegations of sexual misconduct by teachers are unsubstantiated, the information is exempt from disclosure under the PRA. Despite the fact that the allegations relate to teachers’ interactions with students in the course of public performance of their teaching duties, Petitioners claim disclosure would violate their right of privacy. For this remarkable proposition they rely on the decision of the Court of Appeals in *City of Tacoma v. Tacoma News, Inc., supra*.

The facts of *Tacoma News* can be easily distinguished from the facts in this case, as discussed at length in the opinion of the Court of Appeals below,⁷ but the *Tacoma News* decision is also questionable authority that is inconsistent with the PRA. The decision relied on a definition of privacy not recognized in the Act; it failed to give full effect to the public’s legitimate interest in allegations concerning public officials and candidates; and it violated the mandate of RCW 42.56.030 by narrowly construing the public interest in disclosure and broadly construing exemptions of the Act.

⁷ See *Bellevue John Does*, 129 Wn. App. at 852-56 (App. pp. 11-13).

1. *Tacoma News* is Inconsistent with the PRA's Definition of Privacy.

In *Tacoma News*, a newspaper sought access to police investigation materials regarding allegations that a mayoral candidate had abused a child. The allegation, made by an anonymous informant, was investigated by four agencies, each finding that the allegation could not be substantiated. 65 Wn. App. at 142-43. The trial court upheld the city's denial of access to the police materials. *Id.* at 143. On appeal, the Court of Appeals for Division Two affirmed the trial court, finding 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." *Id.* at 149.

Invasion of privacy, as it applies in the PRA is defined as:

A person's [right to privacy] ... is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

RCW 42.56.050. The definition is drawn directly from the Restatement (Second) of Torts § 652D,⁸ which addresses publicity concerning private affairs. The court in *Tacoma News*, however, decided that the definition must be considered in tandem with Restatement (Second) of Torts § 652E,

⁸ *Hearst*, 90 Wn.2d at 136.

which addresses so called “false light” invasion of privacy,⁹ a different tort akin to defamation that has not been recognized in Washington¹⁰ and has been discredited in recent years.¹¹ From this flawed premise, the court reasoned that the question of legitimate public concern necessarily involves consideration of the truth or falsity of the information sought. Setting aside for the moment the practical problems with implementing such a rule in the context of day-to-day public records requests, the court’s reasoning does not survive closer scrutiny.

Section 652D addresses one of four separate common-law torts under the heading of “privacy.” The § 652D tort has been described by one court as the tort prohibiting “publication of private affairs of no legitimate public concern.” *Brown v. Pearson*, 483 S.E.2d 477, 483 (S.C. App. 1997). In *Hearst v. Hoppe*, this Court considered alternative formulations and expressly adopted the approach of § 652D as the appropriate definition of the right of privacy for purposes of the PRA.¹²

⁹ Section 652E provides: “One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”

¹⁰ *Eastwood v. Cascade Broadcasting Co.*, 106 Wn. 2d 466, 471-72, 722 P.2d 1295 (1986) (questioning the wisdom of adopting the tort).

¹¹ See, e.g., Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U.L. REV. 201 (1989).

¹² Many other jurisdictions have similarly applied § 652D in defining their state invasion of privacy torts. See *Perkins v. Freedom of Information Com'n*, 228 Conn. 158, 173, 635

The Legislature then expressly affirmed this intent in codifying that definition. *See* RCW 42.56.050 (citing legislative intent in Laws 1987, ch. 403 § 7).

Ignoring the Legislature's omission of any reference to § 652E or other privacy torts, the Court of Appeals in *Tacoma News* nonetheless declared that the PRA intended to link this separate tort to the definition of privacy that was adopted. Accordingly, it held that an invasion of privacy required, as a threshold matter, consideration of whether the information sought was true or false. *Tacoma News*, 65 Wn. App. at 146-49. "[U]ntil it is decided whether the information in question is true or false," the court explained, "there is no way of knowing ... [whether § 652D or § 652E] should be applied." *Id.* at 147.

Division Two thus reached its conclusion concerning true and false allegations by incorporating consideration of an analytically distinct tort that is not referenced in either the PRA or *Hearst*, a tort that is not recognized in Washington, and a presumption that the public has no legitimate interest in false information. With such fundamental flaws in

A.2d 783 (1993) (expressly adopting § 652D, finding it a "close and compelling" parallel for the privacy exemption in Connecticut's public records law) and cases cited therein; *State of Hawai'i Org. of Police Officers v. Soc'y of Prof'l Journalists*, 927 P.2d 386, 397-98 (Haw. 1996)(equating Hawaii's constitutional right of privacy with § 652D); *see also* *Detroit Free Press, Inc. v. Oakland County Sheriff*, 164 Mich. App. 656, 664, 418 N.W.2d 124 (Mich. App. 1987) (guiding its invasion of privacy determination by applying § 652D and its legitimate public concern inquiry).

the central holding of *Tacoma News*, the Court would be justified in overruling the decision. Even if the Court declines to do so, it should take this opportunity to clarify confusion caused by the decision, as evidenced in the arguments of Petitioners. First, the Court should make it clear that *Tacoma News* is not a bright-line rule placing all false and/or unsubstantiated allegations beyond the public’s legitimate concern. Second, if the Court recognizes any distinction between “true” and “false” allegations, it should also clearly distinguish between “false” allegations and those that are merely “unsubstantiated,” as Division One admonished in its decision below.¹³

2. *Tacoma News*’ Distinction Between True and False Allegations Should Not be Accepted as a General Rule.

Tacoma News can be argued for the proposition that unsubstantiated and/or false allegations¹⁴ can never be of legitimate public concern. *See Bellevue John Does*, 129 Wn. App. at 853 (quoting holding of *Tacoma News*). This sweeping proposition is faulty on its face, inconsistent with the PRA’s mandate, and contradicts persuasive authority that false allegations in many instances may be matters of serious public concern.

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

¹⁴ Division Two’s analysis conflates these distinct terms throughout the opinion, leaving unclear whether its holding applies to unsubstantiated or false allegations, or both.

Courts and legislatures have determined that the right of privacy is not absolute, and that the public has a legitimate interest in “full access to information concerning the conduct of government on every level.”

Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 33, 769 P.2d 283 (1989). Washington codifies this mandate in especially strong terms, stating:

The people, in delegating authority, *do not give their public servants the right to decide what is good for the people to know, and what is not good for them to know.* The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030 (emphasis added).

As strong as this mandate is, it takes on even greater force in situations where public officials “occupy positions of great public trust.” *See, e.g., Yellowstone County v. Billings Gazette*, 143 P.3d 135, 140 (Mont. 2006) (“[s]ociety is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual’s ability to perform public duties”); *Svaldi v. Anaconda-Deer Lodge County*, 106 P.3d 548, 553 (Mont. 2005) (ordering release of records because of teacher’s position of public trust: “As a teacher in the public schools, entrusted with the care and instruction of children, her position is one of public trust ... [and] the allegations of misconduct, assault against her students, went directly to her

ability to properly carry out her duties.”); *see also* *Linzmeier v. Forcey*, 646 N.W.2d 811, 819 (Wis. 2002) (stating that a public school teacher is in the public eye and should expect increased accountability: “[A] public school teacher is a public employee in a position of some visibility, [and] this ... supports public scrutiny of potential misconduct, particularly if it occurs in the school and classroom settings”).

In the cases here, where the teachers occupy positions of great public trust, and where allegations of misconduct bear on their ability to perform their duties, the public has a legitimate interest in knowing what allegations are made, who the allegations involve, and how allegations are dealt with. These are fundamental purposes of the PRA upon which truth or falsity should have no bearing.

Notwithstanding *Tacoma News*, many Washington courts have recognized that the PRA’s mandate for open disclosure of public records commands the release of allegations in the public record, even in instances where allegations are unfounded or false. *See, e.g., Amren v. City of Kalama*, 131 Wn.2d 25, 29, 34, 929 P.2d 389 (1997) (ordering release of report of complaints against police chief that mayor concluded were unfounded and false); *Hudgens v. City of Renton*, 49 Wn. App. 842, 843, 846, 746 P.2d 320 (1987) (holding no privacy exemption to examination of records regarding arrest and strip search of DWI defendant found not

guilty at trial); *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 29-30, 671 P.2d 280 (1983) (ordering release of complaints by police officers against chief when no conclusions had been reached and the investigation may not even have begun); *see also Ames v. City of Fircrest*, 71 Wn. App. 284, 286-87, 857 P.2d 1083 (1993) (holding records of investigation of police department and officers not exempt although investigation uncovered no criminal intent and no charges were filed).

This is consistent with what courts have held outside this jurisdiction. *See, e.g., Linzmeyer*, 646 N.W.2d at 819 (ordering release of investigative report containing allegations of “potential misconduct” against teacher even though the school district took no administrative action against the teacher and although the teacher was never arrested or prosecuted); *Svaldi*, 106 P.3d at 553 (affirming release of allegations of misconduct against teacher even though no criminal charges were filed); *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, 452 S.E.2d 776 (Ga. Ct. App. 1994) (recognizing that the public interest is served by disclosing even false claims); *Antell v. Att’y Gen.*, 752 N.E.2d 823, 826 (Mass. App. Ct. 2001) (ordering release of records containing allegations of official misconduct against police chief although two assistant attorneys general and a state police investigator found no evidence of criminal wrongdoing).

The Times is not unmindful of the fact that the government's release of unsubstantiated, and even false, allegations may have harsh consequences in some individual cases. Section 652D specifically considers this possibility.¹⁵ However, where the choice is between disclosure or denial of information concerning the conduct of agencies and public employees who serve the public, the balance has been struck by this Court and the Legislature in favor of disclosure.¹⁶ The attempt by the court in *Tacoma News* to reset this balance should be rejected.

¹⁵ Comment f discusses how people who have not sought publicity – e.g., victims, individuals who are merely accused – may nonetheless become **legitimate** subjects of public interest:

There are individuals who have not sought publicity or consented to it, but through their own conduct **or otherwise** have become legitimate subject of public interest. They have, in other words, become “news.” Those who commit crime **or are accused** of it may not only not seek publicity but may make every possible effort to avoid it, but they are nonetheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the **victims** of crime...These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and **victims**, and those who are closely associated with them.

¹⁶ Even the United States Supreme Court has recognized that publication of false statements – a step further down the road than mere disclosure – is entitled to protection where larger community interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S. Ct. 710, 721, 11 L. Ed.2d 686 (1964) (noting that in the business of keeping the public informed, even false statements must be protected: “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”) (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 337, 9 L. Ed.2d 405 (1963)).

3. *Tacoma News*' Unique Facts and Failure to Distinguish Between False Claims and Those Merely Unsubstantiated Should Limit Its Precedential Value.

Finally, if this Court chooses to retain any distinction between true and false allegations in the public record, it should at least affirm the distinctions between obviously false claims and those that only remain “unsubstantiated” that was recognized by the Court of Appeals below:

‘[U]nsubstantiated’ 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 ... [access to the information].

Bellevue John Does, 129 Wn. App. at 856. However, the court explained, where that possibility does **not** exist – i.e., where allegations of misconduct are patently or obviously false – then disclosure of information may not be of legitimate public concern. *Id.* While the Times continues to believe that this approach is still more restrictive than the PRA intended, it strikes a more appropriate balance than Division Two’s sweeping proposition in *Tacoma News* that disclosure of all false allegations can be prohibited.

Tacoma News involved the rare instance where four agencies investigated an anonymous allegation against a mayoral candidate, and all four found no evidence supporting the allegations. Division Two noted

that there was “no hint” of an inadequate investigation. 65 Wn. App. at 152. Few cases will ever involve this level of investigation. Given these unique facts and questionable value of *Tacoma News* as general precedent, the opinion should at least be limited to its narrow facts.

C. Informal Disposition of Complaints, Such as Letters of Direction and Associated Documents, Are Not Exempt from Disclosure

In *Brouillet v. Cowles Publishing*, this Court held that allegations of sexual misconduct by teachers are a matter of legitimate public concern and ordered disclosure of names of all teachers who were decertified over a 10-year period, including teachers accused of sexual misconduct with students. 114 Wn.2d at 790-91, 798. The Court stated emphatically:

Sexual abuse of students is a proper matter of public concern because the public must decide what can be done about it. The public requires information about the extent of known sexual misconduct in the schools, its nature, and the way the school system responds in order to address the problem.

Id. at 798. The Court recognized the many positive benefits arising from public access to monitoring of misconduct investigations, for example: release of information about allegations of sexual misconduct can encourage other victims to come forward; it can make victims feel less isolated; disclosure can enable the public to pressure school systems to investigate complaints and reduce false rumors or speculation. *Id.* at 791.

Petitioners argue that *Brouillet* should not apply where the accused teacher is not decertified, discharged, or otherwise formally disciplined, but only given a “letter of direction” outlining remedial action. As authority they attempt to rely on *Dawson v. Daly* and *Brown v. Seattle Public Schools*, cases which both held that individual performance evaluations were exempt from disclosure under the PRA precisely because they did **not** include allegations of misconduct.

In *Dawson*, the Court recognized a narrow exception to the PRA’s broad mandate of public disclosure for routine performance evaluations because they may contain sensitive personal information such as an individual’s family or health problems, past and present employers’ criticisms, and scores from IQ and other tests. 120 Wn.2d at 797. However, the court expressly and repeatedly narrowed its holding to evaluations that do not discuss specific instances of misconduct or the performance of public duties. *Id.* at 796, 797, 800.

In *Brown*, an employee sought personnel records that included evaluations of a school principal’s effectiveness and performance, as well as records regarding her handling of a dispute and an assault on campus. 7 Wn. App. at 615. The Court of Appeals held that the records were not subject to disclosure, noting specifically 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.*

(emphasis in original).

Petitioners argue that letters of direction are like the performance evaluations in *Dawson* and *Brown* because the subject teachers received no punishment, only “guidance.” This argument is best answered in the words of the Court of Appeals below:

[W]e read *Dawson* and *Brown* as defining a narrow exemption for routine performance evaluations. The letters of direction do not fit into that category because they were prompted by complaints about specific instances of alleged misconduct. Put another way, a district’s decision not to discipline a teacher after investigating a complaint does not convert the investigation file into a performance evaluation.

Bellevue John Does, 129 Wn. App. at 848.

More significantly, the argument advanced by Petitioners would allow an agency to withhold information about an investigation, based solely on how it decided to label the outcome, and would create an unmonitored loophole for officials who wished to keep acts of misconduct secret. As the Court of Appeals recognized, “[t]o hold that the public interest in a complaint of sexual misconduct is legitimate only if the school district has decided that discipline is warranted would violate this principle by creating an exemption that is broad, malleable and open-ended.” *Id.* at 848. *See also Hearst*, 90 Wn.2d at 131 (“[L]eaving the

interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.”).¹⁷

Indeed, as this case demonstrates, the fact that no discipline was imposed, and employees received only letters of direction, is itself a basis for legitimate public concern. *Cf. Lissner v. U.S. Customs Serv.*, 241 F.3d 1220 (9th Cir. 2001) (holding that the public was entitled to receive information explaining why the government agency mitigated a fine and whether the employees received preferential treatment).

To the extent Petitioners resist only disclosure of names on privacy grounds, they understate the legitimate public concern in knowing who are the subjects of these letters of direction. This Court has recognized that release of names of public servants involved in misconduct in the performance of their public duties is not highly offensive. *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 727, 748 P.2d 597 (1988).

The purpose of public disclosure is to ensure that public officials are “honest and *impartial* in the conduct of their public offices.” *Id.* at 719 (emphasis added). Without knowing **who** was involved in the alleged misconduct, the public cannot monitor how effectively a government agency is handling these complaints. Releasing names serves to hold both

¹⁷ See also *New York Times Co. v. Superior Court*, 60 Cal. Rptr. 2d 410, 413 (Cal. App. 1997) (“The labels of ‘personnel records’ and ‘internal investigation’ are captivatingly expansive, and present an elasticity menacing to the principle of public scrutiny of government.”).

public agencies and individual public employees accountable. *See id.* at 727; *King County v. Sheehan*, 114 Wn. App. 325, 348, 57 P.3d 307, 319 (2002) (“The legitimate media utilize lists containing names of police officers to track over time how well individual officers are performing their jobs . . .”); *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 222, 951 P.2d 357, 366 (1998) (stating that releasing the names would allow public scrutiny of government). This is especially true where the public employees are individuals who work with children. *See Brouillet*, 114 Wn.2d at 798.¹⁸

Petitioners also argue that the Court of Appeals failed to balance the public’s interest in monitoring sexual misconduct by public school teachers against the potential harm disclosure of these limited number of cases might have on the school district’s efficient administration of governmental affairs. They argue that when the interest in efficient government is considered, informal disposition of complaints “is not of legitimate concern to the public.” The argument conveniently ignores the fact that this type of inquiry and balancing is only recognized under RCW 42.56.050 in the context of truly *private* matters. It is not a general balancing test to be applied whenever the public interest is asserted.

¹⁸ *See also Linzmeyer*, 646 N.W. 2d at 819; *CBS Broadcasting, Inc. v. Superior Court*, 110 Cal. Rptr. 2d 889, 900 (Cal. Ct. App. 2001); *Department of Children & Families v. Freedom of Information Com’n*, 710 A.2d 1378, 1381 (Conn. App. Ct. 1998).

The Court in *Dawson* did find that the privacy analysis under RCW42.56.050 “contemplates some balancing of the public interest in disclosure against the public interest in the ‘efficient administration of government,’” 120 Wn.2d at 798, but that was only after it was determined that the information in routine performance evaluations could well include private matters. The information in the present cases involves public matters – interactions of teachers with students. Neither *Dawson* nor *Brown* is authority for withholding this kind of information.

Petitioners nevertheless insist that disclosing the names of accused teachers who receive letters of direction would undermine the useful function of this form of discipline. They contend that teachers would be more likely to contest these letters through a formal grievance process and that disclosure would have a chilling effect on performance appraisals and communications.¹⁹ Petitioners’ concerns are not the same as those discussed by the Court in *Dawson*. There, the concern was a routine personnel practice that affected all public employees, without regard to any accusations of misconduct. Letters of direction, by contrast, impact a limited group of employees whose conduct is deemed by the agency to warrant this particular method of censure. *E.g., Linzmeyer*, 646 N.W. 2d

¹⁹ Petitioners do not explain why routine performance evaluations, which under *Dawson* would presumably continue to be exempt from disclosure in most cases, would not address this function.

at 821 (stating that releasing allegations involving specific teachers “will not impede the ability of the vast majority of teachers to perform their jobs”).

Petitioners should not be allowed to carve out a new exception to the PRA that would, in essence, allow agencies to reach private agreements with their employees and unions based on assurances that alleged misconduct will be hidden from public scrutiny. Such agreements would violate fundamental purposes of the PRA. *See Spokane Police Guild*, 112 Wn.2d at 40 (“The law of this state is well settled, ‘promises cannot override the requirements of the disclosure law.’”) (quoting *Hearst*, 90 Wn.2d at 137); *State of Hawai’i Org. of Police Officers v. Soc’y of Prof’l Journalists*, 927 P.2d 386, 414 (Haw. 1996) and cases discussed therein; *Denver Pub. Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo. App. 1990) (rejecting the university’s argument that releasing the terms of a settlement agreement would “chill its future ability to resolve internal matters of dispute”); *accord Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 328, 890 P.2d 544 (1995).

D. RCW 42.56.050 Is Entirely Consistent With Constitutional Rights of Privacy.

Finally, RCW 42.56.050 comports with state and federal constitutional guarantees of privacy, both on its face and as applied.

Petitioners contend that the statute violates their constitutional right to privacy, but their claims fall outside even the penumbra of that ill-defined right, and they cannot come close to sustaining the high evidentiary burden required for their challenge.

As this Court has stated, “[i]t is a well-established general rule that where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 223, 5 P.3d 691 (2000). “This ‘demanding standard of review’ is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment,” and because “the Legislature speaks for the people,” the Court is “hesitant to strike a duly enacted statute unless fully convinced ... that the statute violates the constitution.” *Id.* (internal citation omitted). Here, this Court has already given its imprimatur to the statutory definition of RCW 42.56.050 in *Hearst*, and Petitioners offer no adequate reason for the Court now to depart from its own well-established precedent and strike the “right of privacy” definition as unconstitutional.

1. The Right to Nondisclosure of Intimate Personal Information Is Limited.

Under Washington law, the right to nondisclosure of even intimate personal information (sometimes referred to as “informational privacy”), is **not** a fundamental one “requiring utmost protection,” and “the state constitution offers no greater protection” than the federal constitution, which requires only application of a rational basis test. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997) (citing *inter alia O’Hartigan v. Dep’t. of Pers.*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)).

In the absence of a clear mandate from the United States Supreme Court, the federal courts have varied as to the amount of protection recognized for intimate personal information. The Sixth Circuit, for example, extends the right only to interests that implicate a fundamental liberty interest;²⁰ the Ninth and Third Circuits engage in multi-factor balancing;²¹ and the Tenth Circuit employs a three-part analysis that looks

²⁰ *See, e.g., J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (right will be triggered only when the interest at stake relates to “those personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’”).

²¹ As discussed previously, the Ninth and Third Circuits’ balancing test requires considering “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access,” and the PRA here surely constitutes such a statutory mandate and an articulated public policy “militating toward access.” *See Times’ Answer* at 10; *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *In re Search Warrant (Sealed)*, 810 F.2d 67, 72-73 (3rd Cir. 1987) (existence of express statutory mandate weighed in favor of disclosure).

first to whether the individual has a legitimate expectation that the information at issue will remain confidential.²²

The issue central to all these analyses – what constitutes “intimate personal information” of a constitutional magnitude – also remains undefined, and “the contours of the confidentiality branch” have been rightfully described as “murky.” *See, e.g., Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991). The Supreme Court has recognized the right in private medical information, *Whalen v. Roe*, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), and the personal papers of the President, *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 465, 97 S. Ct. 2777, 53 L.Ed.2d 867 (1977), but notably held in each case that disclosure did not violate the Constitution. Other courts have recognized that the right applies to medical history or status, social security numbers, and private financial matters, among other strictly personal matters. *See Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (unredacted patient files containing abortion records); *In re Crawford*, 194 F.3d at 959 (social security numbers); *Statharos v. New York City Taxi & Limousine Com’n*, 198 F.3d 317, 322-23 (2d Cir. 1999) (personal financial information); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (rape victim had privacy interest in videotape depicting

²² *Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995).

her alleged rape). *Cf. Doe v. Sundquist*, 106 F.3d 702 (6th Cir.), *cert. denied*, 522 U.S. 810 (1997) (rejecting argument that adoption records are constitutionally confidential); *Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969) (*per curiam*) (constitutional right not implicated even when police officers circulate false rumors that person has committed a crime). *See generally Bedford v. Sugarman*, 112 Wn.2d 500, 510-11, 772 P.2d 486 (1989) (surveying case law as to rights recognized as warranting constitutional protection).

Like the federal courts, Washington courts first consider whether the information subject to disclosure is of an intimate personal nature. *See Bedford*, 112 Wn.2d at 511-12 (noting that “the right of confidentiality the Supreme Court first articulated in *Whalen v. Roe* . . . in its broadest application, protects against disclosure only of certain particularized data, information or photographs describing or representing intimate facts about a person” and “[t]he case law does not support the existence of a general right to nondisclosure of private information”) (citing with approval the Sixth Circuit’s *DeSanti* decision). Even then, the right to nondisclosure may be circumscribed if a regulation is carefully tailored to meet a legitimate governmental goal. *O’Hartigan*, 118 Wn.2d at 117-18.²³ As

²³ The fact that the rational basis test is to be applied on a case-by-case basis also counsels against declaring the statute facially unconstitutional. *See, e.g., Fisher v. State*

the Times has discussed already, the public's interest under RCW 42.56.050 is the equivalent of the government's legitimate interest under this rational-basis analysis. *See* Times' Answer at 13. This Court has also recognized that even "a need for confidentiality does not necessarily mean that a statute requiring disclosure will violate the federal constitution." *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 934, 719 P.2d 926 (1986). The notion that RCW 42.56.050's privacy definition violates a constitutional right cannot be reconciled with the principles articulated in these state and federal decisions.

No matter what test is applied, a common factor to be determined is whether the individual has a legitimate expectation of privacy in the information to be disclosed to bring it within the constitutionally protected sphere. *See, e.g., Nixon*, 433 U.S. at 465 (recognizing legitimate privacy expectation in personal communications); *Nilson*, 45 F.3d at 371-72 (no legitimate expectation of privacy in expunged criminal records); *Paul P. v. Verniero*, 170 F.3d 396, 401 (3rd Cir. 1999) (considering whether information is within an individual's reasonable expectation of confidentiality, specifically, how intimate or personal, to determine whether it is entitled to privacy).

ex rel. Dep't. of Health, 125 Wn. App. 869, 880, 106 P.3d 836 (2005), *rev. denied*, 155 Wn.2d 1013, 122 P.3d 186 (2005).

2. The Type of Information Petitioners Seek to Protect Has Never Been Recognized as Warranting Constitutional Protection.

Here, Petitioners claim that they have a constitutionally protected interest in allegations of sexual misconduct with children that occurred during the course of their public employment. This type of information has never been recognized by any court as being protected by a constitutional right to privacy, nor can Petitioners claim to have a legitimate expectation of privacy in it. The very statute that creates any expectation of privacy in their personnel records also expressly encompasses RCW 42.56.050's limitation on that privacy.

The federal case most on point here is *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144 (10th Cir. 2001), in which the court held that a peace officer did not have a legitimate expectation of privacy in uninvestigated and unproven allegations of rape and assault related to his role as a public employee. *Id.* at 1155. According to the opinion, the state agency that released the information had not investigated the allegations, begun any type of disciplinary proceedings against the officer, or even provided him notice of those allegations prior to disclosing them. *Id.* at 1149. Nonetheless, and despite recognizing that “[c]ertainly, such information is sensitive in nature and considerably stigmatizes Appellant,” the court stated that “[i]t is irrelevant to a constitutional privacy analysis

whether these allegations [of criminal behavior] are true or false; the disclosed information itself must warrant constitutional protection.” Id. at 1155 (emphasis added; internal citations and quotation marks omitted). Because the peace officer had “not demonstrated a legitimate expectation of privacy in the allegations made by Defendants, he does not state a claim for the violation of his constitutional right to privacy.” *Id.*

The same analysis applies here; a public school teacher cannot claim that he or she has a constitutionally protectable interest in allegations that he or she has engaged in misconduct of a sexual nature with students in the course of public employment. *See also Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994) (holding that the only item in police officer files “so highly personal and sensitive in nature” to be withheld as constitutionally privileged were psychological evaluations of the officers; “all other items concern[ing] official, duty-connected types of information” were “clearly not privileged”); *Spokane Police Guild*, 112 Wn.2d at 38 (“the right of privacy is commonly understood to pertain only to the intimate details of one’s personal and private life,” and actions by off-duty officer performed on State-licensed premises involved no such personal intimacy).

Even more importantly, Petitioners cannot claim to have a legitimate expectation of privacy in these allegations because the only

source they can point to as creating a legitimate expectation of privacy in their employment files is the PRA itself. *See* RCW 42.56.230(2). Yet the PRA does not exempt “personnel records” in their entirety, but rather only “personal information in files maintained for employees...of any public agency *to the extent that disclosure would violate their right to privacy.*” *Id.* (emphasis added). That right to privacy, in turn, is defined by RCW 42.56.050. Thus, the PRA only exempts personnel records when the information is not of legitimate concern to the public and disclosure is highly offensive to reasonable people. *See* RCW 42.56.050. Since the statutory privacy limitation is expressly built into the exemption itself, the legitimate expectation of public employees working in Washington must be that the majority of records related to their work and their fitness for those positions will be subject to disclosure when it is of legitimate concern to the public. Here, the allegations are relevant to assessing those teachers’ ability to perform their duties, and thus are matters “with which the public has the right to concern itself.” *See Cowles Publ’g*, 109 Wn.2d at 726 (alleged police officers’ on- and off-duty misconduct “does not involve private matters”); *Brouillet*, 114 Wn.2d at 798 (alleged sexual misconduct by public school teachers “is a proper matter of public concern because the public must decide what can be done about it” and “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”); accord *State of Hawai'i Org. of Police Officers*, 927 P.2d at 405 (“information regarding a police officer’s misconduct in the course of his or her duties as a police officer is not within the protection” of state constitutional privacy right). See also *Times’ Answer* at 13-15.

3. Injury to Reputation Alone Is Not a Constitutionally Protected Interest.

The only injury Petitioners describe as resulting from disclosure would be to their reputations. See *Petition for Review* at 19-20. But the Supreme Court has held that injury to one’s reputation alone is not a constitutionally protected right. *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). To assert a constitutional deprivation in connection with reputational harm requires a showing of something more – the loss of a tangible interest, such as a change in legal status or a loss of government employment. *Id.*; see also *In re Meyer*, 142 Wn.2d 608, 620, 16 P.3d 563 (2001) (citing *Davis* with approval in holding that state sex offender registration laws did not satisfy this requirement). Even serious impairment of future employment opportunities is insufficient for stating such a claim. See *Paul*, 424 U.S. at 697. Here, Petitioners have not alleged that there has been a change in their legal status, and the fact that many are still teaching or have retired,

see Bellevue John Does, 129 Wn. App. at 860-61, confirms that their employment is not at risk. It is clear that application of RCW 42.56.050 will not even result in a harm of constitutional proportions here, so there are no grounds for declaring the statute itself unconstitutional.

It also bears noting that although Petitioners have characterized the information here as “false or unsubstantiated rumors,” *see* Petition for Review at 20, in many of the instances the question seems to be not whether a particular incident happened, but rather the significance of the incident. The Court of Appeals carefully analyzed the circumstances of each teacher’s case, and determined that in many of the instances where disclosure was warranted, the teacher did not deny the action, just the inference to be drawn from it – i.e., was the teacher’s action harassment or just a misunderstanding? The fact that discipline was not imposed does not afford additional constitutional privacy protection to the individual accused. As this Court has stated in the criminal law context, “the fact that allegations have not yet been proven is not persuasive of the need to provide blanket protection for purposes of a defendant’s privacy.” *See Cowles Publ’g. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999) (“Rarely would criminal allegations so devastate the reputation of a suspect that nondisclosure would be necessary to protect against the effect of a false accusation.”). *See also Baker v. Howard*, 419

F.2d 376, 377 (9th Cir. 1969) (per curiam) (constitutional right not implicated even when police officers circulate false rumors that person has committed a crime).

Petitioners cannot satisfy the “demanding standard of review” for showing that the statutory definition of privacy is unconstitutional “beyond a reasonable doubt,” either facially or as applied. *See Tunstall*, 141 Wn.2d at 220, 223-24 (requiring that “no set of circumstances” exists “in which the statute can constitutionally be applied,” or demonstrating specific facts – not mere speculation – that the statute, as actually applied, violated the constitution) (emphasis in original). The constitutionality of RCW 42.56.050 must be upheld.

V. CONCLUSION

Petitioners have failed to show any legitimate justification under the PRA for withholding the public records requested by the Times. They cannot satisfy the heavy burden required to overturn the PRA’s definition of privacy. The information and identities they seek to hide do not involve private matters at all; they relate to matters in which the public has a legitimate interest of the highest order. The decision of the Court of Appeals should be affirmed or, if the Court so determines, modified to release all the information requested by the Times.

RESPECTFULLY SUBMITTED this 2nd day of February,
2007.

Davis Wright Tremaine LLP
Attorneys for Respondent,
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By 
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2007 FEB -2 P 3-01 CERTIFICATE OF SERVICE

I certify that on the 2nd day of February, 2007, I caused a true and correct copy of the attached document titled:

Supplemental Brief of Respondent Seattle Times Company

to be served on the following via the methods indicated:

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EXECUTED this 2nd day of February, 2007, at Seattle, Washington.


Barbara J. McAdams