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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

THE SUPREME COURT OF WASHINGTON
No. 82374-0

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BAINBRIDGE ISLAND POLICE
GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF PUYALLUP, a
municipal corporation,

Respondent,

and

KIM KOENIG, an individual, and
LAWRENCE KOSS, an individual,

Appellants.

ANSWER TO
STATEMENT OF
GROUNDS FOR
DIRECT REVIEW

I. ANSWER

Appellants Kim Koenig and Lawrence Koss request that this Court grant direct review of the trial court's decision under RAP 4.2(a)(4). Respondents Bainbridge Island Police Guild and Officer Steve Cain agree. This case involves fundamental and urgent issues of broad public importance, and all Washington State citizens will benefit from their prompt and ultimate disposition. Specifically, this case presents issues of first impression under the Public Records Act and the Criminal Records

ORIGINAL

Privacy Act, and public agencies need a definitive, bright line ruling to guide future public records request responses.

II. STATEMENT OF THE ISSUES

1. Did the Pierce County Superior Court properly enjoin the City of Puyallup from disclosing the criminal investigation materials relating to Officer Cain, when disclosure would violate Officer Cain's privacy rights protected under RCW 42.56.240(1) and RCW 42.56.050?

2. If the Court finds that the criminal investigation materials are not exempt from disclosure, should this Court enjoin the City of Puyallup from disseminating the criminal investigation materials, when these documents constitute non-conviction data under RCW 10.97.80?

III. STATEMENT OF FACTS

Ms. Koenig filed a formal complaint of sexual misconduct against Bainbridge Island Police Officer Steve Cain. (CP 54.) The City of Puyallup Police Department conducted a criminal investigation and forwarded the information it collected to the Kitsap County Prosecuting Attorney for review. (CP 72.) The prosecutor declined to initiate any charges against Officer Cain, on the basis that there was "not sufficient evidence to establish that there was any inappropriate behavior by this police officer." (*Id.*) Further, the Mercer Island Police Department conducted an internal investigation into Ms. Koenig's complaint, and recommended that the

disposition of the investigation of Officer Cain's actions be "EXONERATED." (CP 68.) Bainbridge Island Police Chief Haney reviewed both investigations and found the allegations against Officer Cain to be "Unsubstantiated." (CP 70.)

Some time later, Ms. Koenig and Mr. Koss submitted public records requests to the City of Puyallup, requesting copies of its criminal investigation into Officer Cain's conduct. In response, the Bainbridge Island Police Guild and Officer Cain filed a motion for permanent injunctive relief in the Pierce County Superior Court on the basis that disclosure of the requested records would violate Officer Cain's privacy rights. (CP 53-100.) In the alternative, the requested materials constitute non-conviction data and therefore cannot be disseminated pursuant to RCW 10.97. (*Id.*) Despite Ms. Koenig's and Mr. Koss' request that the records be disclosed with Officer Cain's name redacted, Judge John Hickman ruled the records were exempt from disclosure under the Public Records Act, because disclosure would violate Officer Cain's protected right to privacy. (CP 254-60.) Judge Hickman entered an order granting petitioners' motion for injunctive relief, and Ms. Koenig and Mr. Koss now seek this Court's review. (CP 267-270.)

III. ARGUMENT & AUTHORITIES

A party may seek this Court's direct review of a superior court decision if the case involves "a fundamental and urgent issue of broad public

import which requires prompt and ultimate determination.” RAP 4.2(a)(4). The Bainbridge Island Police Guild and Officer Cain agree with appellants that the Court’s direct review is appropriate in this matter.

Ms. Koenig and Mr. Koss submitted public records requests for copies of a specific criminal investigation into unsubstantiated allegations of police officer sexual misconduct. However, specific investigative records compiled by law enforcement agencies are exempt from disclosure if nondisclosure is essential for the protection of any person’s right to privacy. RCW 42.56.240(1). A person’s right to privacy is invaded or violated when disclosure would be highly offensive to a reasonably person, and is not of legitimate concern to the public. RCW 42.56.050.

While the Guild and Officer Cain strongly maintain that application of RCW 42.56 and substantial legal precedent prevent disclosure of the requested records, it is undisputed that the issue framed in this case is one of first impression in Washington State. Further, the issue whether public records related to unsubstantiated allegations of sexual misconduct are subject to disclosure is one of broad public importance, as is demonstrated by the immense media coverage surrounding Ms. Koenig’s allegations, and the multiple public records requests for the criminal and the internal investigation conducted in response to those allegations.

Moreover, the Court's prompt and ultimate determination of this issue will affect more than just the individuals involved in this case; it will affect the public as a whole. RCW 42.56.550 states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4). Public agencies need established, bright line rules to follow when responding to public records requests. If uncertain whether disclosure is appropriate, public agencies will likely chose disclosure over non-disclosure in order to protect themselves from the threat of expensive fines and attorneys' fees. Such a policy is ineffective to adequately protect individuals' privacy rights, in this case individual police officers.

This is especially true, given that this Court recently held that disclosure of the identity of public school teachers involved in unsubstantiated allegations of sexual misconduct would violate their right to privacy. *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 216 and 221, 189 P.3d 139 (2008). Despite this controlling authority, the City of Puyallup was still prepared to disclose the requested

criminal investigation materials absent a court ordering otherwise. Public agencies need a prompt and ultimate decision on this issue.

This case presents a second, alternative issue which is also important to the public and requires a prompt determination. If the Court finds that the criminal investigation materials are subject to disclosure under the Public Records Act, their dissemination should still be exempt under Washington's Criminal Records Privacy Act, RCW 10.97.

RCW 10.97.080 states:

No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the records asserts the belief in writing that the information regarding such person is inaccurate or incomplete. The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.

RCW 10.97.080. "Non conviction data' consists of all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending." RCW 10.97.030(2). Further, an "individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigative, or other related files, and shall not be construed to include any information other than that defined as criminal history record

information by this chapter.” RCW 10.97.080.

“Criminal record history information” means

information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.

RCW 10.97.030(1). The term includes “information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual’s record of involvement in the criminal justice system as an alleged or convicted offender.” *Id.*

No Washington court has ruled whether RCW 10.97 prevents a public agency from allowing requestors to view criminal investigation materials relating to unsubstantiated allegations of sexual misconduct. While the Guild and Officer Cain have repeatedly maintained that these records are criminal record history information, the City of Puyallup came to the opposite conclusion. For the very same reasons discussed above, public agencies need immediate guidance whether such information may be disseminated to the public.

IV. CONCLUSION

The present case involves fundamental and urgent issues of broad public importance which require prompt and ultimate determination. Public agencies throughout the state require bright line guidance from this Court to determine whether criminal investigation materials relating to unsubstantiated allegations of sexual misconduct are subject to disclosure. Ongoing disagreement on these issue threaten individuals' rights to privacy. Therefore, the Bainbridge Island Police Guild and Officer Cain respectfully request that this Court accept direct review of this issue, uphold the trial court's order, and enjoin the City of Puyallup from disclosing the requested materials to Ms. Koenig, Mr. Koss, or any other member of the public.

Respectfully submitted this 27th day of August, 2009.

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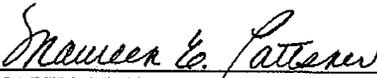
CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2009, I caused the foregoing Answer to Statement of Arrangements to be filed with the Clerk of the Court via e-mail and delivered to the following in the manner described:

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DATED this 27th day of August, 2009.



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