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82374-0
NO. ~~82803-2~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF MERCER ISLAND, a municipal corporation,

Respondent below,

and

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

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden, Judge

OPENING BRIEF OF APPELLANTS

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I. Introduction and Summary of the Case

This action was brought by the Bainbridge Island Police Guild and Officer Steve Cain to prevent the City of Mercer Island from releasing a copy of its internal investigation of Cain to appellants. It is a companion case to *Bainbridge Island Police Guild, et al. v. City of Puyallup, et al.*, Supreme Court No. 82374-0.

The City of Puyallup conducted a criminal investigation into the actions of Petitioner¹ Steve Cain, a Bainbridge Island police officer. After the investigation was concluded, the City of Mercer Island conducted an internal investigation into Cain's actions. The Mercer Island file contains the Puyallup investigation.

On March 13, 2008, the City of Puyallup received a public records request from Tristan Baurick of the *Kitsap Sun* newspaper requesting a copy of the Puyallup police department criminal investigation records involving Cain. Pursuant to RCW 42.56.540, the City sent notice to Cain indicating that the Puyallup records would be released by April 16, 2008, unless a court order enjoining release was served on the City. Cain did not seek or obtain such an order. The City released the requested records to Mr. Baurick. The release of the records resulted in articles about the incident and Cain published in the *Kitsap Sun* newspaper and on the internet,

¹ For clarity, the parties will be referred to as they were in the trial court.

The petitioners sought and obtained an injunction against the City of Bainbridge Island from disclosing both the internal and criminal investigation materials generated by the City of Mercer Island and the City of Puyallup.

The petitioners then filed an action against the City of Puyallup and respondents Kim Koenig and Lawrence Koss, who had requested copies of the Puyallup criminal investigation. Commissioner Foley of the Pierce County Superior Court refused to grant a temporary order prohibiting release of the records. The City of Puyallup promptly provided the records to respondents Koss and Koenig.

Despite the release of the records, the Pierce County Superior Court later enjoined the City of Puyallup from producing any of the criminal investigation file relating to Cain to anyone, and ordered the requestors to return the documents previously produced to them by the City of Puyallup. The Pierce County Superior Court's decision is now on appeal in this Court, No. 82374-0.

In the instant case, petitioners sought similar injunctive relief precluding the City of Mercer Island from producing its internal investigation records to respondents Koenig, Koss and Paulson. The motion was granted. This appeal followed.

We respectfully contend that the Superior Court's order is error, and directly conflicts with this Court's recent decision in *Bellevue John Does 1-11 v. Bellevue School District No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), and the public policy underlying the Public Records Act.

II. Assignment of Error

The trial court erred in granting petitioners' motion for injunctive relief as set forth in its order dated January 30, 2009, preventing the disclosure of documents requested under the Public Records Act, RCW 42.56.

III. Issues Pertaining to Assignment of Error

Four fundamental issues are presented by this appeal.

1. Does petitioner² Cain have a right to privacy in his name under the Public Records Act, where his name and the Puyallup records (which are included in the Mercer Island file) have already been released without his objection to the media, which publicized his name in relation to the incident in print and on the internet?

2. In view of the widespread prior dissemination of Cain's name and his involvement in the incident, have petitioners failed to prove the great injury required for an injunction under RCW 7.40.020?

3. Did petitioner Cain waive any privacy interest in his identity by not objecting to the release of the Puyallup records (contained in the Mercer Island records) to the *Kitsap Sun* newspaper, after he was given notice and an opportunity to do so?

4. Even if Cain's name is somehow deemed private, should the Mercer Island records be released with Cain's name redacted, under the ruling

² Cain and the Police Guild were petitioners in the court below. For clarity, they will be referred to as "petitioners" herein.

in *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008)?

IV. Statement of the Case

The Bainbridge Island police department requested the Puyallup police department to conduct a criminal investigation into sexual misconduct allegations made by requestor-appellant Kim Koenig, an attorney, against petitioner Bainbridge Island Police Officer Steven Cain. CP 142, Exhibit B to the Declaration of John R. Muenster in Opposition to Petitioners' Motion for Injunctive Relief (hereinafter "Muenster Declaration"). The allegations stemmed from actions by Cain following a traffic stop of a vehicle driven by Ms. Koenig's husband in September, 2007.

On March 13, 2008, the City of Puyallup ("the City") received a public records request from Tristan Baurick of the *Kitsap Sun* newspaper requesting a copy of the Puyallup police department criminal investigation records involving Cain. Pursuant to RCW 42.56.540, the City sent notice to Cain indicating that the Puyallup records would be released by April 16, 2008, unless a court order enjoining release was served on the City. Cain did not seek or obtain such an order. The City released the requested records to Mr. Baurick.

The release of the Puyallup records to Baurick, and apparently to others prior to Baurick, resulted in articles and commentary about the incident and Cain published in the *Kitsap Sun* newspaper, *Bainbridge Islander* newspaper, *Bainbridge Review* newspaper, and on the internet. See, e.g., CP 149, Exhibit

E to the Muenster Declaration (*Kitsap Sun* article re: Puyallup report); CP 150-154, Exhibit F to the Muenster Declaration (Declaration of Althea Paulson re: review of Puyallup records); CP 186-188, 190-201, Exhibit J to the Muenster Declaration (*Bainbridge Notebook* internet article about the Puyallup report: *BI Blue Line: Protect and serve or shred and forget?*); CP 202-2-3, Exhibit L to the Muenster Declaration (*Bainbridge Review* article citing Puyallup investigation); CP 204, Exhibit M to the Muenster Declaration (*Bainbridge Review* article, "Attorneys innocent in traffic dispute"); CP 205-206, Exhibit N-1 to the Muenster Declaration (internet posting re: claim for damages, referencing dissemination of Puyallup investigation results by police department's insurance defense attorney, Richard Jolley); CP 209-213, Exhibit N-3 to the Muenster Declaration (*Bainbridge Notebook* internet posting, re: police misconduct claim against Bainbridge Island, referencing results of Puyallup investigation, as disseminated by the Bainbridge Police Department Deputy Chief); CP 214-215, Exhibit N-4 to the Muenster Declaration (*Kitsap Sun* internet posting re: claim for damages, containing deputy police chief's reference to the Puyallup Police Department investigation and result); CP 216-217, Exhibit N-5 to the Muenster Declaration (*Bainbridge Notebook* internet posting, referencing review of Puyallup Police Department investigation); CP 218-220, Exhibit N-6 to the Muenster Declaration (internet posting by *Kitsap Sun/Bainbridge Islander*, referencing viewing of Puyallup Police Department's investigation documents by Ms. Paulson of the *Bainbridge Notebook*); CP 221-222, Exhibit N-7 to the Muenster Declaration (*BainbridgeReview.com* news article referencing Puyallup Police Department investigation and conclusion);

CP 223-226, Exhibit N-8 to the Muenster Declaration (*Bainbridge Islander* web posting re: Puyallup report); CP 228, Exhibit N-10 to the Muenster Declaration (*Bainbridge Review* article referencing Puyallup investigation and Police Guild lawsuit to prevent release of documents); CP 230, Exhibit N-12 to the Muenster Declaration (letter to *Bainbridge Review*, "Shed light on the conduct of police", referencing Guild's lawsuit to prevent Puyallup investigation from being made public); CP 231. Exhibit N-13 to the Muenster Declaration (*Seattle Post-Intelligencer* article referencing Guild's lawsuit to prevent the Puyallup and Mercer Island Police Department investigations from being released).

In the instant case, as in the companion Puyallup case, Supreme Court No. 82374-0, petitioners Guild and Cain sought injunctive relief against disclosure of the Mercer Island records. CP 48-114. Appellants filed a memorandum in opposition, supported by a declaration of Ms. Koenig and a declaration (with exhibits) by the undersigned. CP 115-241.

Despite the widespread dissemination of Cain's name and his involvement in the incident in the media, the Superior Court granted the request for injunctive relief. CP 244-245.

This appeal followed. CP 246-251.

V. Argument

A. Washington's Public Records Act

The Public Disclosure Act, formerly Chapter 42.17 RCW, was enacted in 1972 by initiative. The portion dealing with public records has since been recodified at Chapter 42.56 RCW and renamed the Public Records Act (hereinafter "PRA"). It requires that,

Each agency, in accordance with published rules, shall make available for public inspection and copying, all public records, unless the records fall within the specified exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1).

Washington courts have uniformly held that the PRA "is a strongly worded mandate for broad disclosure of public records". *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The Act must be liberally construed and its exemptions must be narrowly construed in favor of disclosure. RCW 42.56.030. *See also, Soter v. Cowles Publishing Company*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007). Simply stated, the policy behind the PRA is one of transparency, accountability of public officials and employees, and open government. In light of this general purpose, the PRA's own preamble subordinates certain individual privacy rights to the public good arising from "full access to information":

. . . Mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.56.001 and RCW 42.56.010, incorporating RCW 42.17.010 (as reproduced above). Thus, it is clear that the Legislature, in enacting the PRA, clearly intended a presumption in favor of disclosure. *Id.*

As noted above, exemptions to the PRA must be narrowly construed and, in fact, this Court regards this rule of narrow construction not as a mere guideline, but as a command:

Declarations of policy requiring liberal construction are a command that the coverage of an act's provisions be liberally construed and that its exemptions be narrowly confined.

Hearst, 90 Wn.2d at 126. Accordingly, exemptions cannot be founded upon vague notions of privacy or embarrassment, but must instead be authorized by "clearly delineated statutory language". *Id.* Consistent with the PRA's general policy of full disclosure, the burden is on the party *resisting* disclosure to "establish that the information requested comes within a specific exemption". *Spokane Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

There is no general right of privacy exemption to the PRA. In 1987, the Act was amended to overturn a prior decision of the Washington

Supreme Court. In relevant part, the intent provision of the amended Act explains the purpose of the modification:

The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court in *In re Request of Rosier*, 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) Agencies having public records should rely only upon statutory exemptions or prohibition for refusal to provide public records. . . .

Laws of 1987, Chapter 403, § 1.

As discussed below, given the mandate for broad public disclosure of government records, and the mandate that all exemptions must be narrowly construed, no exemption applies in the instant case and petitioners cannot sustain their burden of proof to deny public access to the requested records.

- B. *Petitioner Cain Does Not Have a Right to Privacy in His Name under the Public Records Act, Where His Name and the Puyallup Investigative Records (Contained in the Mercer Island File) Have Already Been Released, after Notice and Without His Objection, to the Media, Which in Turn Publicized His Name in Relation to the Incident in Print and on the Internet.*

In this Court's recent decision in the *Bellevue John Does* case, the Court concluded that under the Public Disclosure Act, the names of unidentified public school teachers who were the subjects of unsubstantiated

allegations of sexual misconduct were exempt from disclosure. The Court's decision appears to turn on the fact that the identities of the teachers were unknown to the public and to the records requestors and were therefore private. See *Bellevue v. John Does*, *supra* 164 Wn.2d at 208-210, 189 P.3d at 144, and fn.9.

Unlike the anonymous teachers in *Bellevue John Does*, Cain is not an unidentified, unknown subject. He is a named petitioner in this lawsuit. Internet websites and several newspapers, including the *Seattle Post-Intelligencer*, the *Kitsap Sun*, the *Bainbridge Review* and the *Bainbridge Islander*, have reported his name in conjunction with the incident. As noted above, the *Kitsap Sun* newspaper obtained a copy of the Puyallup investigative records pursuant to a Public Disclosure Act request. The City gave notice of the *Sun's* request to Cain. He did not file an objection or seek an injunction against the disclosure. The *Kitsap Sun* and other media outlets then ran articles about the content and/or result of the Puyallup investigation, linking Cain's name to the incident. Given this fact pattern, Cain's name is not private for purposes of the Public Disclosure Act.

C. *In View of the Widespread Dissemination of Cain's Name and His Involvement in the Incident, Petitioners Guild and Cain Failed to Prove the Great Injury Required for an Injunction Under RCW 7.40.020.*

The record developed in the court below demonstrates that Cain's name is in the public domain. The distinction between Cain's name being

in the public domain and the anonymous, unidentified teachers in the *Bellevue John Does* case is crucial because in order to get an injunction, one must show great or irreparable injury. See RCW 7.40.020. In the *Bellevue John Does* case, disclosure of the names of the teachers could cause irreparable injury because, absent such disclosure, they remain unidentified. By contrast, Cain's identity and involvement in the incident, as well as the Puyallup records themselves (contained in the Mercer Island records), are already in the public domain. There was no basis for an injunction here because Cain's identity is not private. His identity and involvement are known to the public whether or not requestors-appellants are in possession of the records. There was no showing by petitioner of great or irreparable injury.

D. *Petitioner Cain Waived Any Privacy Interests in His Identity By Not Objecting to Release of the Investigative Records to the Kitsap Sun Newspaper. After He Was Given an Opportunity to Do So.*

Columbian Publishing v. City of Vancouver, 36 Wn. App. 25, 27, 671 P.2d 280 (1983), cited in *Bellevue John Does*, *supra*, 164 Wn.2d at 213, fn.14, 189 P.3d at 146, involved a police guild's vote of "no confidence" in their police chief. After the "no-confidence" vote, the guild issued a press release noting their general concerns about the police chief to the public. In *Columbian Publishing*, the press wanted to view specific complaints the police officers made to the city about their police chief. The

court concluded the complaining officers *waived* any purported right to privacy in their specific complaints by making their general concerns known in their initial press release. *Columbian Publishing*, 36 Wn. App. at 30, 671 P.2d at 283-84. *See also Ames v. City of Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993). *Ames*, which involved a police chief's defamation suit against a city for release of information to a newspaper, held that even if the "essential to effective law enforcement" PDA exception applied, an agreed-upon press release had already revealed the relevant information. 71 Wn. App. at 296, 857 P.2d at 1089. The court noted:

Given the facts of this case, Ames [the police chief] could not have remained anonymous even had his name not been disclosed in conjunction with Fircrest's disclosure of the balance of the records.

... Furthermore, because Ames's involvement was well known, revealing his name would not hinder future investigations,

Ames, supra, 71 Wn. App. At 296.

Here, as in *Ames*, Cain could not have remained anonymous even had his name not been disclosed in conjunction with the balance of the records. As in *Ames*, his involvement in the incident is well known.

As noted above, the City of Puyallup gave petitioner Cain notice that the Puyallup records would be released to the *Kitsap Sun* unless a court order enjoining release was served on the City. No such order was received and the Puyallup records were released to the newspaper. That newspaper

and other media outlets in turn ran articles in print and on the internet about the Puyallup investigation. Petitioner Cain waived any right to privacy in his name in the records by permitting those records to be released directly to the media, with resulting media publicity. *Columbian Publishing v. City of Vancouver*, *supra*, 36 Wn. App. at 30.

E. *Even If Cain's Name is Somehow Deemed Private, the Records Should Be Released With Cain's Name Redacted, Under This Court's Ruling in Bellevue John Does 1-11, Supra.*

This Court's recent decision in *Bellevue John Does 1-11 v. Bellevue School District No. 405* (hereinafter "*Bellevue John Does*") supports disclosure of the Puyallup records to the requestors-appellants.

The *Bellevue John Does* case decided two issues:

(1) This Court concluded that under the Public Disclosure Act, the names of *unidentified* public school teachers who were the subjects of unsubstantiated allegations of sexual misconduct were exempt from disclosure.³ *Bellevue John Does*, 164 Wn.2d at 209-210, 189 P.3d at 144. The Court noted that the school districts had already disclosed numerous records documenting the nature of the allegations, types of investigations conducted, and any resulting disciplinary actions. The names of the teachers involved were changed to "John Doe" pseudonyms and other identifying information was removed. The public and the requestors did not know the

³ Requestors-appellants contend that Ms. Koenig's complaint was not "unsubstantiated".

teachers' identities. *Bellevue John Does*, 164 Wn.2d at 208, 189 P.3d at 144, fn.9.

In two different sections of its opinion, this Court noted that it is appropriate that the records regarding the investigations of the teachers were disclosed.

As will subsequently be discussed, *when allegations of sexual misconduct are unsubstantiated, the public may have a legitimate concern in the nature of the allegation and the response of the school system to the allegation.* In this case, the school districts provided the *Times* with "numerous records documenting the nature of the allegation in each case, the grade level, the type of investigation conducted, and any disciplinary action taken. But the names of the teachers were changed to 'John Doe' pseudonyms, and other identifying information was redacted."

Bellevue John Does, 164 Wn.2d at 217, 189 P.3d at 149, fn.19, quoting, in part, *Bellevue John Does 1-11 v. Bellevue School District No. 405*, 129 Wn. App. 832, at 841, 120 P.3d 616 (2005) (emphasis added).

This Court then concluded that although the names of the unknown teachers should not be disclosed, the public could continue to access the documents:

When an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern. In essence, disclosure of the identities of teachers who are the subject of unsubstantiated allegations 'serve[s] no interest other than gossip and sensation.' *Bellevue John Does*, 129 Wash. App. at 854, 120 P.3d 616. The public can continue to access documents concerning the nature of the allegations and reports related to the investigation and its outcome, all of which will allow concerned citizens to oversee the effective-

ness of the school districts' responses. The identities of the accused teachers will simply be redacted to protect their privacy interests....

Under our holding, the public can access documents related to the allegations and investigations (subject to redactions), thus maintaining the citizens' ability to inform themselves about school district operations.

Bellevue John Does, 164 Wn.2d at 221-222, 189 P.3d at 150-151 (emphasis added).

The foregoing discussion by this Court makes it clear that its decision turned on the fact that the identities of the teachers were unknown to the public and to the requestors and were therefore private. The Court made it clear that the records themselves, with redaction of the teachers' names, should be disclosed to the public.

(2) Our analysis is further fortified by this Court's second holding: letters of direction to the teachers were not exempt from disclosure under the Public Disclosure Act, but where a letter does not identify substantiated misconduct, the teacher's name and other identifying information must be redacted. *Bellevue John Does*, 164 Wn.2d at 223, 189 P.3d at 151.

Based on the foregoing, we respectfully suggest that the trial court erred in ordering non-disclosure of the entire Mercer Island file. *Bellevue John Does* holds that the public can access documents related to the allegations and investigation. 164 Wn.2d at 221-223, 189 P.3d at 150-151.

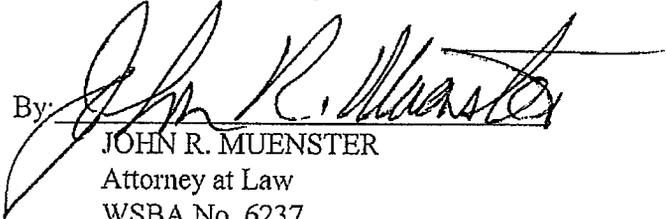
VI. Conclusion

For the reasons stated, the order granting injunctive relief should be reversed. The cause should be remanded to the King County Superior Court with instructions to deny the motion for the injunction, and to allow production of the Mercer Island public records to the requestors-appellants.

DATED this the 5th day of October, 2009.

Respectfully submitted,

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