

82374-0

NO. 82374-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF PUYALLUP, a municipal corporation,

Respondent below,

and

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

Appellants.

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

The Honorable John R. Hickman, Judge

AMENDED OPENING BRIEF OF APPELLANTS

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I. Introduction¹

This action was brought by the Bainbridge Island Police Guild and Officer Steven Cain to prevent the City of Puyallup from releasing a copy of its criminal investigation of Cain to appellants. Ironically, the same records had previously been provided by the City of Puyallup to the *Kitsap Sun* newspaper, after notice to Cain and without objection from him. The Puyallup investigation, and Cain's identity, were covered extensively in the media.²

Appellants then filed their Public Records Act requests for the same records. The Police Guild and Cain then filed this lawsuit against the City of Puyallup and Ms. Koenig and Mr. Koss (hereinafter "the requestors" or "requestors-appellants").

A Pierce County Superior Court Commissioner denied the Guild's motion for a temporary injunction. The City of Puyallup provided a copy of its investigative records on Cain to the requestors.

Despite the foregoing fact pattern, the 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.

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*

¹ This amended opening brief is submitted to correct typos on pages 4 and 15 of the brief filed June 5, 2009.

² In fact, the Bainbridge Island police department itself also provided reports about the incident to the *Bainbridge Review* newspaper, which published a front page article naming Cain and discussing the incident, in February, 2008. CP 182-183.

v. *Bellevue School District No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), other cases, 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 written decision dated October 3, 2008, further erred by entering its order enjoining the City of Puyallup from producing any of the Cain criminal investigation file to anyone, and further erred by prohibiting the requestors-appellants from keeping any copies of the materials previously produced by the City of Puyallup pursuant to the Pierce County Superior Court Commissioner's order.

III. Issues Pertaining to Assignment of Error

Four fundamental issues are presented by this appeal.

1. Does petitioner³ Cain have a right to privacy in his name under the Public Records Act, where his name and the Puyallup records 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 Cain and the Police Guild were petitioners in the court below. For clarity, they will be referred to as "petitioners" herein.

3. Did petitioner Cain waive any privacy interest in his identity by not objecting to the release of the Puyallup 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 Puyallup records be released with Cain's name redacted, under the ruling 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 107, 122. The allegations stemmed from actions by Cain following a traffic stop of a vehicle driven by Ms. Koenig's husband in September, 2007. CP 240-241.

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. CP 102, 108. 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. CP 109-110. Cain did not seek or obtain such an order. CP 102. The City released the requested records to Mr. Baurick. CP 102.

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 130 (*Kitsap Sun* article re: Puyallup report); CP 131-135 (Declaration of Althea Paulson re: review of Puyallup records); CP 166-181 (*Bainbridge Notebook* internet article about the Puyallup report: *BI Blue Line: Protect and serve or shred and forget?*); CP 182-183 (*Bainbridge Review* article citing Puyallup investigation); CP 185-186 (internet posting re: claim for damages, referencing dissemination of Puyallup investigation results by police department's insurance defense attorney, Richard Jolley); CP 189-193 (*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 194-195 (*Kitsap Sun* internet posting re: claim for damages, containing deputy police chief's reference to the Puyallup Police Department investigation and result); CP 196-197 (*Bainbridge Notebook* internet posting, referencing review of Puyallup Police Department investigation); CP 198-200 (internet posting by *Kitsap Sun/Bainbridge Islander*, referencing viewing of Puyallup Police Department's investigation documents by Ms. Paulson of the *Bainbridge Notebook*); CP 201-202 (*BainbridgeReview.com* news article referencing Puyallup Police Department investigation and conclusion); CP 203-206 (*Bainbridge Islander* web posting re: Puyallup report); CP 208 (*Bainbridge Review* article referencing Puyallup investigation); CP 210 (letter to *Bainbridge Review*,

“Shed light on the conduct of police”, referencing Guild’s lawsuit to prevent Puyallup investigation from being made public); CP 211 (*Seattle Post-Intelligencer* article referencing Guild’s lawsuit to prevent the Puyallup and Mercer Island Police Department investigations from being released).

On June 16, 2008, the City of Puyallup received a public records request from requestor-appellant Lawrence Koss requesting copies of the Puyallup records. CP 102, 111. A similar request was received from requestor-appellant Kim Koenig on July 11, 2008. CP 102, 112, 125-126. Once again, the City sent notice to Cain indicating that the Puyallup records would be released unless a court order enjoining release was obtained. CP 102, 113, 114.

This time, faced with a request from Ms. Koenig, the incident victim, petitioners Police Guild and Cain filed a complaint for injunctive relief. CP 1-32. Petitioners also filed an ex parte motion for a temporary injunction in July, 2008. CP 46-50. After reviewing the briefing and hearing oral argument, a Superior Court Commissioner entered an order allowing the City to release the Puyallup records to requestors/appellants Koss and Koenig. CP 51-52; CP 128-129.

In the court below, respondent City of Puyallup took the position that disclosure of the criminal investigative record on Cain to appellants/requestors Koss and Koenig was proper under the Public Records Act, but that Cain’s name should be redacted. CP 103-106. Requestors-appellants took the position that Cain’s name was already in the public domain due to the prior release of the records to the media and others, and that the previous disclosure

of the records to the requestors by the City pursuant to the Court Commissioner's order was proper. CP 228-237.

Despite the widespread dissemination of Cain's name and his involvement in the incident in the media, the Superior Court concluded that Cain's name was private. CP 257-259. The Superior Court also concluded that none of the investigative records should be disclosed at all, even with Cain's name redacted. CP 259. The Court ordered the requestors/appellants to return the records previously produced to them by the City of Puyallup, which had been done pursuant to the Superior Court Commissioner's order directing production. CP 269.

This appeal followed. CP 271-288. After the notice of appeal was filed, the Superior Court denied the requestors'-appellants' motion for reconsideration.

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 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, 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 Puyallup 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 Puyallup 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 Puyallup 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 Puyallup 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 Puyallup 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.⁴ *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 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.

⁴ Requestors-appellants contend that Ms. Koenig's complaint was not "unsubstantiated".

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 effectiveness 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 Puyallup 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 written decision granting injunctive relief, and the subsequent order granting injunctive relief, should be reversed. The cause should be remanded to the Pierce County Superior Court with instructions to deny the motion for the injunction, and to restore the

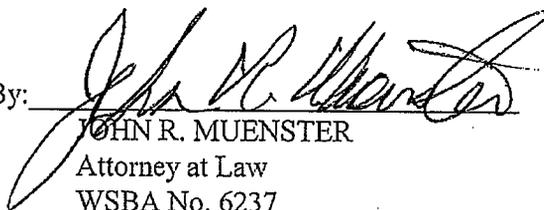
previously-produced copies of the Puyallup public records to the requestors-appellants.

DATED this the 8th day of June, 2009.

Respectfully submitted,

MUENSTER & KOENIG

By:

A handwritten signature in black ink, appearing to read "John R. Munster", is written over a horizontal line. The signature is cursive and somewhat stylized.

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Of Attorneys for Requestors-Appellants Kim
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CERTIFICATE OF SERVICE

I certify that on the date noted below I filed the above entitled document with the Clerk of the Court via e-mail. On the same date, I served the following attorneys via email:

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DATED this the 8th day of June, 2009.

MUENSTER & KOENIG

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