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STATE OF WASHINGTON

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IN THE SUPREME COURT  
OF  
THE STATE OF WASHINGTON  
No. ~~82734-0~~

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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.

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**BRIEF OF RESPONDENT CITY OF PUYALLUP**

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## I. INTRODUCTION

The Washington Public Records Act (“PRA”) places a high burden on government agencies to justify withholding public documents. If an agency chooses to withhold documents and that withholding was in error, the sword of attorney’s fees and statutory penalties pierces down upon an agency. In this case, the City of Puyallup (the “City”) received public records requests from the Appellants requesting copies of the criminal investigation records pertaining to allegations of sexual misconduct involving a Bainbridge Island police officer. The City of Puyallup was placed in the position of trying to decipher a clear rule from the court of appeals decision in *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 129 Wn.App 832, 120 P.3d 616 (2005).

In that decision, the court of appeals created a standard that required records to be released if sexual misconduct allegations were found to be “unsubstantiated” but not subject to disclosure if the allegations were “patently false.” As this court subsequently stated in its review of the court of appeals decision

Making a distinction between “unsubstantiated” and “patently false” is vague and impractical. Placing the burden on agencies and courts to determine whether allegations are patently false rather than simply unsubstantiated is unworkable, time consuming, and, absent specific rules and guidelines, likely to lead to radically different methods and conclusions.

*Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 218, 189 P.3d 139 (2008). This court's decision in *Bellevue John Does* was rendered in the interim between the City releasing the records requested by the Appellants and the trial court's decision.

This court's decision in *Bellevue John Does* provides guidance as to a public employee's right to privacy in relation to their name and identifying information being redacted from records pertaining to allegations of unsubstantiated sexual misconduct. In this case, however, the City looks to the court for guidance as to whether the protections afforded in *Bellevue John Does* extend to prohibiting the disclosure of an entire investigative record when redacting the name and identifying information of a public employee from the records would still likely result in the identity of the public employee being revealed. The City is responding in this appeal to request the court provide a bright line rule, similar to the decision in *Bellevue John Does*, which can be easily applied in this case and prospectively when faced with similar public records requests.

## **II. STATEMENT OF THE CASE**

Respondents Bainbridge Island Police Guild ("BIPG) and Steven Cain's ("Cain") statement of the case and the Appellants' statement of the case, accurately summarize the factual and procedural aspects of this case.

### **III. STATEMENT OF ISSUE**

The City believes that Respondents BIPG and Cain's issue number one and Appellants' issue number four represent the issue before the court in this appeal.

### **IV. ARGUMENT**

#### **A. Washington Public Record's Act Places High Burden on Government Agency to Justify Withholding Records**

A public agency is required to provide public records upon request unless the record requested falls within a specific exemption within the PRA. RCW 42.56.070(1). The exemptions are to be construed narrowly as the PRA has been consistently interpreted as 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 burden of proof rests on the public agency to show that a document is exempt from disclosure. RCW 42.56.550(1).

A person denied access to a public record can challenge an agency's decision that a record is exempt under the PRA. RCW 42.56.550(4). If the person challenging such decision prevails, they "shall be awarded all costs, including reasonable attorney fees" associated with the action. *Id.* In addition, the court shall award the

person denied records a monetary penalty for each day the person was “denied the right to inspect or copy” the record. *Id.* This statutory framework and case law places a daunting burden on a government agency to prove a clear exemption for withholding documents or face a lawsuit that could result in the government agency paying substantial attorney’s fees and penalties.

**B. Bright line rule establishing scope of *Bellevue John Does* decision will provide clarity in public agencies response to public records request**

In *Bellevue John Does*, this court held that public employees have a right to privacy in their identities when allegations of misconduct are unsubstantiated. 164 Wn.2d at 215-16. This holding eliminated the “vague and impractical” distinction made by the court of appeals between “patently false” claims and “unsubstantiated” claims. *Id.* at 218. This court reasoned that disclosure of teachers’ names who were the subject of unsubstantiated allegations of sexual misconduct would be highly offensive. *Id.* at 216. Moreover, revealing the names of the teachers served no legitimate concern to the public “other than gossip and sensation.” *Id.* at 221 (*citing Bellevue John Does*, 129 Wn.App. 832, 854, 120 P3d 616(2005)).

The records in *Bellevue John Does* involved unsubstantiated allegations of sexual misconduct involving numerous public school teachers.

By releasing the reports as a whole and redacting the names and other identifying information of the teachers, it would be very difficult for a person to decipher the identity of the teachers. Here, Respondents BIPG and Cain raise a legitimate issue as to whether redacting the name of a police officer when that police officer is the only subject of an unsubstantiated claim of misconduct really affords such officer a right to privacy.

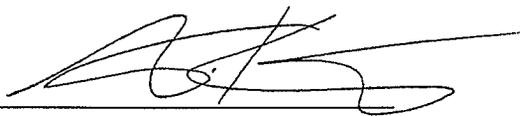
For example, from a practical standpoint, a person could simply submit a request and ask for any criminal investigative records involving Officer Doe. Under *Bellevue John Does* a cautious and prudent government agency would provide the records with Officer Doe's name redacted. This would create a fill-in the blank exercise for a requestor, as argued by Respondents BIPG and Cain. Thus, the issue of whether redacting the officer's name from the records truly provides a meaningful right to privacy is ripe for review by this court. The City seeks this court's guidance in providing a bright line rule that will enable government agencies to conduct the proper balance between the PRA's broad mandate for disclosure and the recognized right to privacy a public employee has in unsubstantiated claims of misconduct.

V. CONCLUSION

The PRA requires broad disclosure of public records unless there is a clear exemption. A government agency faces severe costs and penalties if it incorrectly asserts a record is exempt from disclosure. This court held in *Bellevue John Does* that public employees' identities are protected from disclosure in records pertaining to unsubstantiated allegations of sexual misconduct. This ruling, however, has not decided whether the right to privacy extends to the entire criminal investigative record when redaction of a public employee's name may still lead to the indirect revelation of the employee. The City seeks this court's guidance in providing a practical and workable bright line rule that will enable a government agency to fulfill its duty under the PRA while protecting an individual's right to privacy.

Respectfully submitted this 8<sup>th</sup> day of September, 2009.

**CITY OF PUYALLUP  
OFFICE OF THE CITY ATTORNEY**

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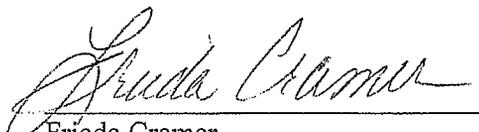
CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2009, I caused the foregoing Brief of Respondent City of Puyallup 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 8<sup>th</sup> day of September, 2009.

  
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