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No. 82374-0
Consolidated with No. 82803-2

THE SUPREME COURT OF WASHINGTON

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF PUYALLUP, a municipal corporation,

Respondent, and

THE CITY OF MERCER ISLAND,

Respondent below, and

KIM KOENIG, LAWRENCE KOSS, and ALTHEA PAULSON,

Appellants.

**RESPONDENTS' BRIEF IN ANSWER TO BRIEFS OF
AMICUS CURIAE BY ALLIED DAILY NEWSPAPERS OF
WASHINGTON, ET AL., WASHINGTON COALITION FOR
OPEN GOVERNMENT, AND THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

Robert L. Christie, WSBA #10895
Ann E. Mitchell, WSBA #39228
CHRISTIE LAW GROUP, PLLC
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Phone: (206) 957-9669
FAX: (206) 352-7875

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I. INTRODUCTION

This case involves the tension between a citizen's right to access public records and a citizen's right to privacy. By enacting the Public Records Act, the Washington Legislature specifically addressed these competing interests, exempting from disclosure specific investigative records compiled by law enforcement agencies when disclosure would be highly offensive to a reasonable person and not of legitimate concern to the public.

In interpreting privacy rights under the Public Records Act, this Court held in *Bellevue John Does 1-11 v. Bellevue School District No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), that the identities of public school teachers who are the subject of unsubstantiated allegations of sexual misconduct are exempt from disclosure, because such disclosure would violate their right to privacy. *Id.* at 205. The Bainbridge Island Police Guild and Officer Steve Cain now ask this Court to extend its holding in *Bellevue John Does* and establish a bright line rule for public agencies and superior courts to follow. Any investigation of alleged police sexual misconduct, whether criminal or "internal," that results in a finding other than sustained, should be exempt from public disclosure under RCW 42.56.240(1) and RCW 42.56.050 on the basis that disclosure would violate the officer's right to privacy.

II. ARGUMENT

A. **The Public Records Act Privacy Exemption.**

It is undisputed that, under Washington's Public Records Act, specific investigative records compiled by law enforcement agencies are exempt from disclosure if nondisclosure is essential to protect any person's right to privacy. RCW 42.56.240(1). It is also undisputed that, under Washington's Public Records Act, a person's right to privacy is invaded or violated if disclosure "(1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050. Given the holding in *Bellevue John Does*, nondisclosure is necessary to protect Officer Cain's right to privacy.

1. *The Requested Materials Are Highly Offensive to a Reasonable Person.*

When Judge Hickman and Judge Hayden exempted the requested records from disclosure, they necessarily found that disclosure would be highly offensive to a reasonable person. (CP 244-45; Puyallup CP 254-60.¹) The appellants did not assign error to these findings, and unchallenged findings are verities on appeal.² *Robel v. Roundup Corp.*,

¹ Unless otherwise identified, the CP citations refer to the Clerk's Papers from the Mercer Island appeal.

² Appellants' appellate briefing materials and assignments of error demonstrate that they are not assigning error to the trial courts' findings that disclosure of these records would be highly offensive. Instead, their

148 Wn.2d 35, 42, 59 P.3d 611 (2002). Allied Daily Newspapers³ cannot now dispute that disclosure of the requested records would be highly offensive to a reasonable person. See *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 60, 586 P.2d 870 (1978) (the Court does not ordinarily consider arguments raised only by amicus curiae).

Even if the appellants did properly assign error to these findings, an appellate court only reviews a trial court's findings of fact for "substantial evidence in support of the findings." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). "Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise." *Id.* "A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Id.* Judge Hickman's and Judge Hayden's findings are supported by substantial evidence, including Judge Hickman's *in camera* review of the requested materials. Therefore, this Court should not overturn these findings.

arguments focus on whether the requested information is of legitimate public concern.

³ For simplicity, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, The Seattle Times, Tacoma News Tribune, Tri-City Herald, and Center for Justice *Amicus Curiae* will be referred to in this brief as "Allied Daily Newspapers."

In any event, the information contained in the requested investigation materials is highly offensive to a reasonable person, because it involves the investigation into unsubstantiated allegations of sexual misconduct of a police officer. In her declaration, appellant Kim Koenig testified that she was “sexually assaulted and strangled” by Officer Cain. (CP 128.) According to appellant Althea Paulson, the investigation materials also contain information regarding a complaint of sexual misconduct against Officer Cain in the early 1990s. (CP 154-55.) This is the type of information any reasonable person would attempt to keep out of the public eye. See *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978) (sexual relations and a person’s past history he would rather forget are normally entirely private matters).

Allied Daily Newspapers unpersuasively relies upon *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), to argue that disclosure would not be highly offensive. In that case, the News Tribune requested the city’s investigation regarding allegations of a hostile work environment. *Id.* at 751-52. A city employee, Judge Michael Morgan, sought to enjoin disclosure of the records, because disclosure would violate his right to privacy under RCW 42.56.230(2). *Id.* at 756. This Court found that allegations including angry outbursts, inappropriate gender-based and sexual comments, and demeaning conduct did not rise to

the level of highly offensive. *Id.*

By contrast, the conduct alleged in this case is highly offensive, because it involves unsubstantiated allegations of sexual misconduct both from the past and the present, as opposed to mere commentary relating to a hostile work environment. *See Bellevue John Does*, 164 Wn.2d at 216 (disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person); *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 145, 827 P.2d 1094 (1992), *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992) (disclosure of unsubstantiated allegations of child abuse is highly offensive to a reasonable person).

Similarly, reliance on *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), is misplaced. In that case, the Cowles Publishing Company requested the names of law enforcement officers against whom complaints had been *sustained*. *Id.* at 713. While those investigation materials did not necessarily involve allegations of sexual misconduct, which are the most highly offensive, the Court found that disclosure of investigations dealing with complaints that were later dismissed would constitute a more intrusive invasion of privacy than disclosure of investigations that resulted in some sanction against the officer. *Id.* at 725. Further, the Court used a balancing test to determine whether disclosure of the requested records would violate the officers'

rights to privacy. *Id.* at 726. That balancing test has since been overruled. *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990).

Instead, the Court should look to its more recent *Bellevue John Does* decision, where it held that public school teachers have “a right to privacy in their identities because the unsubstantiated or false allegations are matters concerning the teachers’ private lives and are not specific incidents of misconduct during the course of employment.” *Bellevue John Does*, 164 Wn. 2d at 215-16. “The fact that a teacher is accused of sexual misconduct is a ‘matter concerning the private life’ within the Hearst definition of the scope of the right to privacy.” *Id.* at 215, citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978). Public school teachers and police officers are analogous. They are both public officials who hold important positions within local government, and police officers should be afforded the same protection from disclosure of unsubstantiated allegations of sexual misconduct.

2. *The Requested Materials Are Not of Legitimate Concern to the Public.*

In *Bellevue John Does*, this Court clearly held that the public does not have a legitimate concern in the identities of public officials who are the subject of unsubstantiated allegations of sexual misconduct, and the Court reinforced this holding in *Morgan*. *Bellevue John Does*, 164 Wn.2d

at 221; *Morgan*, 166 Wn.2d at 756 (unsubstantiated allegations are exempt from disclosure). The application of this rule in *Morgan* is distinguishable from its application in the present case and *Bellevue John Does*, because the allegations underlying the investigation in *Morgan* were not unsubstantiated. *Id.* The Court reasoned: “The Stephson Report evaluates each person’s credibility and concludes that many of the allegations are likely true, unlike in [*Bellevue John*] *Does*, where the allegations were found to be unsubstantiated.” *Id.* The *Morgan* case does not compel disclosure here.

The *Amicus Curiae* cite to various state and federal cases to argue that any investigation into a law enforcement officer’s conduct, despite the subject matter or veracity of the initial complaint, is of legitimate public concern. This Court expressly rejected that argument. *Bellevue John Does*, 164 Wn. 2d at 205. The *Amicus Curiae* are not attempting to distinguish the present case from *Bellevue John Does*; they are asking that this Court *reverse* its decision and find unsubstantiated allegations of sexual misconduct against public officers to be of legitimate public concern. The policy considerations supporting the *Bellevue John Does* decision are sound, and the Court should take this opportunity to hold that any investigation of alleged police sexual misconduct, resulting in a finding other than sustained, is exempt from public disclosure under RCW

42.56.240(1) and RCW 42.56.050.

B. Redacting Officer Cain's Name Will Not Protect His Right to Privacy.

In *Bellevue John Does*, this Court did not consider the redaction issue present in this case: whether redacting a public official's name would protect that official's right to privacy, when the requested records relate only to one individual official whose identity is known and set forth in the records request. In *Bellevue John Does*, the Seattle Times Company requested all records related to any allegations of sexual misconduct in the last ten years from three separate school districts. *Bellevue John Does*, 164 Wn.2d at 206. The school districts provided the entire set of requested records with the teachers' names and identifying information redacted. *Id.* at 217, n. 19. The issue was whether the names of the unidentified teachers subject to unsubstantiated allegations of sexual misconduct were exempt from disclosure. *Id.* at 208. It is disingenuous to argue that a straight forward application of *Bellevue John Does* mandates disclosure of materials with a single officer's name redacted.

The present case is more analogous to *Tacoma News, Inc.*, where the court held that a police incident report regarding unsubstantiated allegations of child abuse was exempt from disclosure under the Public Records Act. *Tacoma News, Inc.*, 65 Wn. App. at 142-43, 151. The court

denied the New Tribune's request for records with the victim's and informant's names redacted for two reasons. *Id.* at 152. "First, whatever information was not redacted would continue to be unsubstantiated and not of legitimate concern to the public." *Id.* at 152. "Second, identification of [one individual] would inevitably lead to the identification of others allegedly involved." *Id.*, at 152-53.

Similarly, disclosure of the requested records in this case does not become a legitimate public concern simply because Officer Cain's name can be redacted. The allegations against him were still found to be unsubstantiated. Additionally, this Court has already determined that the issue whether an investigation was adequate does not create legitimate public concern that justifies disclosure. *Bellevue John Does*, 164 Wn.2d at 221-22. Such a rule

fails to adequately protect teachers' privacy rights and incorrectly presumes that the presence of an allegation is indicative of increased likelihood of misconduct. Whether or not there was an adequate investigation should not, as a policy matter, determine the accused's right to privacy because the accused has no control over the adequacy of the investigation.

Id. at 221.

An exception that allows disclosure of the requested materials with Officer Cain's name simply redacted is one that swallows the rule. Under

the *Amicus Curiae*'s flawed rationale, every investigation of potential misconduct is of legitimate public concern, defeating any public official's right to privacy despite the highly offensive nature of the disclosure or the fact that allegations may have been unsubstantiated. Such a rule is sharply inconsistent with RCW 42.56.050 and *Bellevue John Does*, and would result in the compelled disclosure of virtually all investigation materials related to complaints against law enforcement officers, no matter how frivolous, offensive, or unfounded.

In *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006), David Koenig made a public records request for records regarding the sexual molestation of his minor child from the City of Des Moines.⁴ *Id.* at 163. The Court allowed disclosure of the requested information with the child's identifying information redacted, as enumerated in former RCW 42.17.31901. *Id.* at 189. The *Koenig* case is inapplicable to this case for two reasons.

First, in *Koenig*, it was undisputed that sexual misconduct did occur. *Id.*, 158 Wn.2d 173. By contrast, the allegations asserted against Officer Cain are unsubstantiated, thus triggering the *Bellevue John Doe* analysis and holding. Second, the *Koenig* Court was analyzed under

⁴ The David Koenig in *Koenig v. City of Des Moines* is not related to Kim Koenig, the appellant.

former RCW 42.17.31901, a statute aimed at protecting the identity of child victims of sexual assault. *Id.* at 181. That statute specifically exempted only certain identifying information from public disclosure, and the court relied on the specific legislative findings related to that statute and addressing the competing policy considerations surrounding disclosure of the identity of child victims of sexual assault when determining whether to release the requested records with identifying information redacted. *Id.* at 181 and 186. By contrast, RCW 42.56.050 exempts from disclosure any information that would violate a person's privacy rights, including an entire record itself.

Finally, the *Koenig* court stated:

The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in formation regarding the operation of the criminal justice system illegitimate or unreasonable.

Koenig, 158 Wn.2d at 168. This quotation must be taken in context with the facts of the *Koenig* case, involving sustained allegations of sexual misconduct and documents that were therefore of legitimate public concern. Disclosure was mandated under the rule, so redaction of the identity of the people involved was the best precautionary measure to help protect their privacy. By contrast, the investigation materials in this case

are not of legitimate public concern, regardless of whether Officer Cain's name is redacted. The records are exempt from disclosure, and simply redacting Officer Cain's name will not help to protect his privacy rights.

Koenig is distinguishable from this case, and the Court should deny the appellants' requests for these materials with Officer Cain's identity redacted.

C. The Court Should Reject the ALCU's "Legitimate Public Concern" Balancing Test.

The ACLU concedes that redaction of Officer Cain's name is pointless, stating: "In cases such as the present, however, redaction does not serve any real purpose – the agency's only real choice is between failing to disclose the document entirely and disclosing the practically unredacted document." (ACLU Brief, p. 10.) However, while agreeing that disclosure would be highly offensive in this case, the ACLU urges the Court to ignore the *Bellevue John Does* decision and adopt a "multi-factor analysis" to determine whether full disclosure of the records, with or without Officer Cain's name redacted, would be of legitimate public concern. The Guild and Officer Cain ask this Court to reject this flawed approach.

First, courts already have discretion to consider a broad range of factors and policy considerations when determining whether requested

information is of legitimate public concern. The *Bellevue John Does* opinion states:

While our inquiry into the legitimacy of the public's concern cannot take into account the identity of the requesting party or the purpose of the request, the legitimacy of the public's concern should be viewed in the context of the [Public Records Act]. The [Public Records Act] seeks to provide people with full access to public records while remaining mindful of the right of individuals to privacy and of the desirability of the efficient administration of government.

Bellevue John Does, 164 Wn.2d at 224-25 (internal citations omitted).

There is no reason courts cannot consider all of the factors listed in the ACLU's suggested approach without creating a new rule.

Second, the ACLU's approach wholly ignores the *Bellevue John Doe* decision, which holds that the public does not have a legitimate concern in the identities of public officials who are the subject of unsubstantiated allegations of sexual misconduct. *Bellevue John Does*, 164 Wn.2d at 221. This is a factor a court must consider when determining legitimate public interest, and in this case, it is dispositive.

Third, instituting a balancing test will make it more subjective and challenging for public agencies and trial courts to determine whether requested records are exempt from disclosure. A bright line rule is

necessary, so that public agencies can confidently withhold records when disclosure would violate an individual's right to privacy, as required by RCW 42.56.240(1) and RCW 42.56.050.

Without a bright line, public agencies will be faced with the difficult decision of protecting a citizen's right to privacy or risk paying significant legal costs and fees if a trial court disagrees with its decision. In such instances, agencies almost always choose disclosure, as the penalties for non-disclosure are simply too severe to risk, particularly for smaller municipalities. The burden is already too great on those individuals who wish to protect their right to privacy; a right that means very little if an individual can only secure it by hiring an attorney and filing a lawsuit to prevent imminent disclosure. The Guild and Officer Cain request that this Court establish a bright line rule to guide the disclosure of public records in a way that protects our citizen's right to privacy in a meaningful way and gives agencies confidence to withhold records that should not be disclosed.

D. Officer Cain Has a Recognizable Right to Privacy, Which He Has Not Waived.

RCW 42.56.050 protects a person's right to privacy if disclosure of records would be highly offensive to a reasonable person and is not of legitimate public concern. The Public Records Act unconditionally grants

this right of privacy to all individuals. Just as public school teachers have a right to privacy in their identities when complaints of sexual misconduct are unsubstantiated, law enforcement officers also enjoy this right. See *Bellevue John Does*, 164 Wn. 2d at 215. Despite the appellants' attempt to create public concern in this case, the level of public discourse surrounding requested records is completely immaterial to the elements of an individual's right to privacy as provided in RCW 42.56.050.

Washington courts adopted the Restatement (Second) of Torts § 652D, recognizing a cause of action for invasion of privacy. *Adams v. King County*, 164 Wn.2d 640, 661, 192 P.3d 891 (2008). This tort is similar to the right of privacy protected by RCW 42.56.050, in that liability is premised on the publication of a private matter that would be highly offensive to a reasonable person and not of legitimate public concern. *Id.* However, while *comment b* of this section of the Restatement provides that “[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public,” it goes on to say:

Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public records, such as the date of his birth, the fact of his marriage, his military records, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has

filed with the court. **On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.**

Restatement (Second) Torts, § 652D, *comment b* (emphasis added).

Despite the fact that appellants have tried to drum up the public's curiosity by publishing information about the incident underlying the investigation, the requested materials themselves are still protected under RCW 42.56.050 and are not open for public disclosure. No amount of media publicity can alter that fact.

Allied Daily Newspapers wants this court to allow disclosure of otherwise private records solely because the records have been disclosed or reviewed in the past and discussed in the media. Following this reasoning, if an individual's social security number or drivers license number was mistakenly released to the public, that social security number or drivers license number would become public information, which members of the public could freely republish. Such a rule creates a nonsensical loop hole that completely undermines an individual's right to privacy.

Finally, Officer Cain has not waived his right to privacy. As the ACLU acknowledges, waiver requires an individual to intentionally relinquish or abandon a known right. *City of Seattle v. Klein*, 161 Wn.2d

554, 559, 116 P.3d 1149 (2007). At no time did Officer Cain intentionally relinquish or abandon his right to privacy. Quite the contrary, he has been steadfast in his battle to preserve his right in the face of multiple legal challenges, and he should not be stripped of his constitutional and statutory right to privacy solely because he was unable to enjoin every requestor from receiving or reviewing records exempt from public disclosure.

E. The Requested Criminal Investigation Materials Are Exempt from Dissemination Under RCW 10.97.080.

The requested criminal investigation file is exempt from disclosure under the Public Records Act for the very same reasons the internal investigation file is exempt: disclosure would violate Officer Cain's right to privacy. Should this Court find that internal and criminal investigation materials are disclosable under the Public Records Act, dissemination of the criminal investigation file is still exempt under Washington's Criminal Records Privacy Act, RCW 10.97, *et seq.*

In *Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1987), the appellant requested an arrest report, citation patrol report, officer's report, and any other record prepared by the city in connection with Ms. Carnahan's DWI arrest. *Id.* at 843. The trial court held that the records were exempt from disclosure under Washington's Criminal Records Privacy Act, and Mr. Hudgens appealed. *Id.* at 843-44. The

court of appeals affirmed the trial court's finding that the requested law enforcement investigation materials could not be disclosed under RCW 10.97, *et seq.* *Id.* at 844-45. To determine whether Mr. Hudgens could view the requested records, they looked to the public disclosure act to determine whether such disclosure would violate Ms. Carnahan's right to privacy. *Id.* at 845.

Hudgens is good law in the state of Washington, and its holding furthers the purpose of the Criminal Records Privacy Act in protecting the confidentiality of individuals' nonconviction criminal history record information. *See* RCW 10.97.010. The Washington Coalition for Open Government is inviting the Court to overturn the *Hudgens* decision, but this is not the appropriate case to entertain such a request. All three trial court judges who considered this case held that disclosure of the requested records would violate Officer Cain's right to privacy, and therefore none reached the issue whether law enforcement investigation materials are criminal history record information, which cannot be disseminated under RCW 10.97. Even if this Court reaches that issue, the Guild and Officer Cain request that the Court adopt the *Hudgens* opinion and prevent the dissemination of the criminal investigation materials.

III. CONCLUSION

The Legislature specifically created an exemption to the Public Records Act when nondisclosure of documents is essential for the protection of an individual's privacy rights. While the *Amicus Curiae* make a variety of arguments in an attempt to get around this firmly established exemption, the law is clear. A person's right to privacy is invaded or violated when disclosure would be highly offensive to a reasonable person, and when disclosure is not of legitimate concern to the public.

Given the *Bellevue John Doe* opinion, the outcome in this case is also clear. Disclosure of investigation materials related to substantiated allegations of police sexual misconduct would violate an officer's right to privacy. When a requestor seeks materials related to unsubstantiated allegations of sexual misconduct by only one police officer, redacting his or her name is pointless and circumvents the purpose of RCW 42.56.050 and an individual's right to privacy.

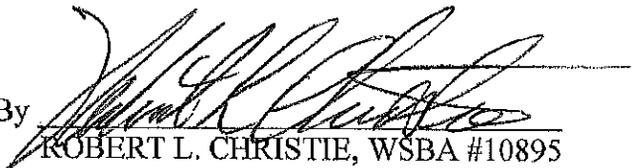
The Bainbridge Island Police Guild and Officer Cain respectfully request that this Court create a bright line rule to guide public agencies and trial courts when dealing with these types of requests: Any investigation of alleged police sexual misconduct, whether criminal or "internal," that results in a finding other than sustained, should be exempt from public disclosure under RCW 42.56.240(1) and RCW 42.56.050 on

the basis that disclosure would violate the officer's right to privacy. Under such a rule, the Court should affirm the trial courts' decisions enjoining the City of Mercer Island and the City of Puyallup from disclosing the requested records to the appellants or any other member of the public.

Respectfully submitted this 5th day of November, 2009.

CHRISTIE LAW GROUP, PLLC

By


ROBERT L. CHRISTIE, WSBA #10895
ANN E. MITCHELL, WSBA #39228
Attorneys for Respondents Bainbridge
Island Police Guild and Steven Cain

2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Telephone: (206) 957-9669

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BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I caused
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AL., WASHINGTON COALITION FOR OPEN GOVERNMENT, AND
THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON to be
filed with the Clerk of the Court via e-mail and delivered to the following
in the manner described:

William John Crittenden
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, WA 98103
(206) 361-5972
Via E-Mail

Prof. Patrick D. Brown
Seattle University School of Law
Sullivan Hall, Room 410
901 12th Avenue
Seattle, WA 98122
Via E-Mail

Michele Earl-Hubbard
Chris Roslaniec
Allied Law Group, PLLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
Via E-Mail

Margaret J. Pak
Corr Cronin Michelson
Baumgardner & Preece PLLC
1001 Fourth Avenue, Suite 3900

Seattle, WA 98154

Via E-Mail

Douglas B. Klunder
ACLU of Washington Foundation
901 Fifth Avenue, #630
Seattle, WA 98164

Via E-Mail

John R. Muenster
MUENSTER & KOENIG
1111 Third Avenue, Suite 2220
Seattle, WA 98101

Via E-Mail

Daniel P. Mallove
LAW OFFICE OF DANIEL P. MALLOVE, PLLC
2003 Western Avenue, Suite 400
Seattle, WA 9821-2142

Via E-Mail

Steven M. Kirkelie
CITY OF PUYALLUP
333 South Meridian
Puyallup, WA 98371-5913

Via E-Mail

Jeffrey S. Myers
LAW LYMAN DANIEL KAMERRER, et al.
P.O. Box 11880
Olympia, WA 98508-1880

Via E-Mail

DATED this 5th day of November, 2010.

SALIM D. LEWIS

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I caused RESPONDENTS' BREIF IN ANSWER TO BRIEFS OF AMICUS CURIAE BY ALLIED DAILY NEWSPAPERS OF WASHINGTON, ET AL., WASHINGTON COALITION FOR OPEN GOVERNMENT, AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON to be filed with the Clerk of the Court via e-mail and delivered to the following in the manner described:

William John Crittenden
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, WA 98103
(206) 361-5972
Via E-Mail

Prof. Patrick D. Brown
Seattle University School of Law
Sullivan Hall, Room 410
901 12th Avenue
Seattle, WA 98122
Via E-Mail

Michele Earl-Hubbard
Chris Roslaniec
Allied Law Group, PLLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
Via E-Mail

Margaret J. Pak
Corr Cronin Michelson
Baumgardner & Preece PLLC
1001 Fourth Avenue, Suite 3900

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ORIGINAL

Seattle, WA 98154

Via E-Mail

Douglas B. Klunder
ACLU of Washington Foundation
901 Fifth Avenue, #630
Seattle, WA 98164

Via E-Mail

John R. Muenster
MUENSTER & KOENIG
1111 Third Avenue, Suite 2220
Seattle, WA 98101

Via E-Mail

Daniel P. Mallove
LAW OFFICE OF DANIEL P. MALLOVE, PLLC
2003 Western Avenue, Suite 400
Seattle, WA 9821-2142

Via E-Mail

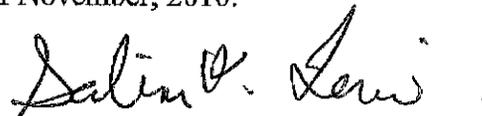
Steven M. Kirkelie
CITY OF PUYALLUP
333 South Meridian
Puyallup, WA 98371-5913

Via E-Mail

Jeffrey S. Myers
LAW LYMAN DANIEL KAMERRER, et al.
P.O. Box 11880
Olympia, WA 98508-1880

Via E-Mail

DATED this 5th day of November, 2010.



SALIM D. LEWIS