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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER,
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE)
GUILD, et al.,)
Respondents,)

No. 82374-0

v.

STATEMENT OF GROUNDS FOR
DIRECT REVIEW

THE CITY OF PUYALLUP,)
a municipal corporation,)
Respondent below,)

and

KIM KOENIG, an individual, and)
LAWRENCE KOSS, an individual,)
Appellants.)

I. Introduction

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

STATEMENT OF GROUNDS FOR
DIRECT REVIEW - 1

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1 Cain to appellants. Ironically, the same records had previously been provided by the City
2 of Puyallup to the *Kitsap Sun* newspaper, after notice to Cain and without objection from
3 him. The Puyallup investigation, and Cain's identity, were covered extensively in the
4 media.¹

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

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

11 Despite the foregoing fact pattern, the Superior Court later enjoined the City of
12 Puyallup from producing any of the criminal investigation file relating to Cain to anyone,
13 and ordered the requestors to return the documents previously produced to them by the
14 City of Puyallup.

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

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20
21 **II. Nature of the Case and Decision**

22 The Bainbridge Island police department requested the Puyallup police department
23 to conduct a criminal investigation into sexual misconduct allegations made by appellant
24

25
26 ¹ The Bainbridge Island police department provided reports about the incident to the
27 *Bainbridge Review* newspaper, which published a front page article naming Cain and discussing the incident,
28 in February, 2008.

1 Kim Koenig, an attorney, against petitioner Bainbridge Island Police Officer Steven Cain.
2 The allegations stemmed from actions by Cain following a traffic stop of a vehicle driven
3 by Ms. Koenig's husband in September, 2007.

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

12 On June 16, 2008, the City received a public records request from requestor-
13 appellant Lawrence Koss requesting copies of the Puyallup records, and a similar request
14 from requestor-appellant Kim Koenig on July 11, 2008. Once again, the City sent notice
15 to Cain indicating that the Puyallup records would be released unless a court order
16 enjoining release was obtained. This time, faced with a request from Ms. Koenig, the
17 incident victim, petitioners Police Guild and Cain filed a complaint for injunctive relief
18 and filed an ex parte motion for a temporary injunction in July, 2008. After reviewing the
19 briefing and hearing oral argument, a Superior Court Commissioner entered an order
20 allowing the City to release the Puyallup records to requestors/appellants Koss and
21 Koenig.

22 In the court below, respondent City of Puyallup took the position that disclosure
23 of the criminal investigative record on Cain to appellants/requestors Koss and Koenig was
24 proper under the Public Records Act, but that Cain's name should be redacted.
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1 Appellants/requestors took the position that Cain's name was already in the public domain
2 due to the prior release of the records to the media, and that the previous disclosure of the
3 records to the requestors by the City pursuant to the Commissioner's order was proper.

4 Despite the widespread dissemination of Cain's name and his involvement in the
5 incident in the media, the Superior Court concluded that Cain's name was private. The
6 Superior Court also concluded that none of the investigative records should be disclosed
7 at all, even with Cain's name redacted. The Court ordered the requestors/appellants to
8 return the records previously produced by the City of Puyallup to Cain's attorney.
9

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

12 III. Description of Issues

13 Four fundamental issues are presented by this appeal.

14 1. Does petitioner Cain have a right to privacy in his name under the Public
15 Records Act, where his name and the Puyallup records have already been released without
16 his objection to the media, which publicized his name in relation to the incident in print
17 and on the internet?
18

19 2. In view of the widespread prior dissemination of Cain's name and his
20 involvement in the incident, have petitioners failed to prove the great injury required for
21 an injunction under RCW 7.40.020?
22

23 3. Did petitioner Cain waive any privacy interest in his identity by not
24 objecting to the release of the Puyallup records to the *Kitsap Sun* newspaper, after he was
25 given notice and an opportunity to do so?
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1 4. Even if Cain's name is deemed private, should the Puyallup records be
2 released with Cain's name redacted, under the ruling in *Bellevue John Does I-11 v. Belle-*
3 *vue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008)?

4
5 IV. Summary of Argument on the Merits

6 A. *Petitioner Cain Does Not Have a Right to Privacy in His Name under the*
7 *Public Records Act, Where His Name and the Puyallup Investigative*
8 *Records Have Already Been Released, after Notice and Without His*
9 *Objection, to the Media, Which in Turn Publicized His Name in Relation*
10 *to the Incident in Print and on the Internet.*

11 In this Court's recent decision in the *Bellevue John Does* case, the Court concluded
12 that under the Public Disclosure Act, the names of unidentified public school teachers who
13 were the subjects of unsubstantiated allegations of sexual misconduct were exempt from
14 disclosure. The Court's decision appears to turn on the fact that the identities of the
15 teachers were unknown to the public and to the records requestors and were therefore
16 private. Unlike the anonymous teachers in *Bellevue John Does*, Cain is not an unidenti-
17 fied, unknown subject. He is a named petitioner in this lawsuit. Internet websites and
18 several newspapers, including the *Seattle Post-Intelligencer*, the *Kitsap Sun*, the
19 *Bainbridge Review* and the *Bainbridge Islander*, have reported his name in conjunction
20 with the incident. As noted above, the *Kitsap Sun* newspaper obtained a copy of the
21 Puyallup investigative records pursuant to a Public Disclosure Act request. The City gave
22 notice of the *Sun's* request to Cain. He did not file an objection or seek an injunction
23 against the disclosure. The *Kitsap Sun* and other media outlets then ran articles about the
24 content of the Puyallup investigation, linking Cain's name to the incident. Given this fact
25 pattern, Cain's name is not private for purposes of the Public Disclosure Act.

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

4 The record developed in the court below demonstrates that Cain's name is in the
5 public domain. The distinction between Cain's name being in the public domain and the
6 anonymous, unidentified teachers in the *Bellevue John Does* case is crucial because in
7 order to get an injunction, one must show great or irreparable injury. See RCW 7.40.020.
8 In the *Bellevue John Does* case, disclosure of the names of the teachers could cause
9 irreparable injury because, absent such disclosure, they remain unidentified. By contrast,
10 Cain's identity and involvement in the incident, as well as the Puyallup records
11 themselves, are already in the public domain. There was no basis for an injunction here
12 because Cain's identity is not private. His identity is known to the public whether or not
13 respondents are in possession of the Puyallup records. There was no showing by
14 petitioner of great or irreparable injury.

15 C. Petitioner Cain Waived Any Privacy Interests in His Identity By Not
16 Objecting to Release of the Puyallup Investigative Records to the Kitsap
17 Sun Newspaper, After He Was Given an Opportunity to Do So.

18 *Columbian Publishing v. City of Vancouver*, 36 Wn. App. 25, 27, 671 P.2d 280
19 (1983), cited in *Bellevue John Does*, *supra*, 164 Wn.2d at 213, fn.14, 189 P.3d at 146,
20 involved a police guild's vote of "no confidence" in their police chief. After the "no-
21 confidence" vote, the guild issued a Bremerton release noting their general concerns about
22 the police chief to the public. In *Columbian Publishing*, the Bremerton wanted to view
23 specific complaints the police officers made to the city about their police chief. The court
24 concluded the complaining officers *waived* any purported right to privacy in their specific
25 complaints by making their general concerns known in their initial Bremerton release.
26 *Columbian Publishing*, 36 Wn. App. at 30, 671 P.2d at 283-84. See also *Ames v. City of*
27

1 *Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993). *Ames*, which involved a police chief's
2 defamation suit against a city for release of information to a newspaper, held that even if
3 the "essential to effective law enforcement" PDA exception applied, an agreed-upon press
4 release had already revealed the relevant information. 71 Wn. App. at 296, 857 P.2d at
5 1089. The court noted:

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

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

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

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

15 As noted above, the City of Puyallup gave petitioner Cain notice that the Puyallup
16 records would be released to the *Kitsap Sun* unless a court order enjoining release was
17 served on the City. No such order was received and the Puyallup records were released
18 to the newspaper. That newspaper in turn ran articles in print and on the internet about
19 the Puyallup investigation. Petitioner Cain waived any right to privacy in his name in the
20 Puyallup records by permitting those records to be released directly to the media, with
21 resulting media publicity. *Columbian Publishing v. City of Vancouver*, *supra*, 36 Wn.
22 App. at 30.
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1 D. Even If Cain's Name is Deemed Private, the Puyallup Records Should Be
2 Released With Cain's Name Redacted Under This Court's Ruling in
3 Bellevue John Does 1-11, Supra.

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

7 The *Bellevue John Does* case decided two issues:

8 (1) This Court concluded that under the Public Disclosure Act, the names of
9 *unidentified* public school teachers who were the subjects of unsubstantiated allegations of
10 sexual misconduct were exempt from disclosure.² *Bellevue John Does*, 164 Wn.2d at 209-
11 210, 189 P.3d at 144. The Court noted that the school districts had already disclosed
12 numerous records documenting the nature of the allegations, types of investigations
13 conducted, and any resulting disciplinary actions. The names of the teachers involved
14 were changed to "John Doe" pseudonyms and other identifying information was removed.
15 The public and the requestors did not know the teachers' identities. *Bellevue John Does*,
16 164 Wn.2d at 208, 189 P.3d at 144, fn.9.

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

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

27 ² Appellants contend that Ms. Koenig's complaint was not "unsubstantiated".

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

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

6 When an allegation is unsubstantiated, the teacher's identity is not
7 a matter of legitimate public concern. In essence, disclosure of the
8 identities of teachers who are the subject of unsubstantiated allegations
9 'serve[s] no interest other than gossip and sensation.' *Bellevue John Does*,
10 129 Wash. App. at 854, 120 P.3d 616. The public can continue to access
11 documents concerning the nature of the allegations and reports related to
12 the investigation and its outcome, all of which will allow concerned citizens
13 to oversee the effectiveness of the school districts' responses. The
14 identities of the accused teachers will simply be redacted to protect their
15 privacy interests....

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

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

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

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

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2008 DEC -9 P 2:29 CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

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 attorney via email: CLERK

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DATED this the 9th day of December, 2008.

MUENSTER & KOENIG

By: S/Andi Anderson
Andi Anderson
Legal Assistant

STATEMENT OF GROUNDS FOR
DIRECT REVIEW - 11

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