

FILED

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APR 25 2013

No. 311767

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

ANTHONY PREDISIK and CHRISTOPHER KATKE,

Appellants,

vs.

SPOKANE SCHOOL DISTRICT NO. 81,

Respondent.

RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF

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District

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I. INTRODUCTION

While the Spokane School District (“School District”) is the named Respondent in this action, the School District has no real stake in the claim other than as the agency holding the three records at issue (each of which it determined should be produced). The School District thus submits this Response Brief more in the spirit of a “friend to the court” than as a party adverse to Appellants.

As described in more detail below, there are only three records at issue in this case. The School District determined that the three records should be disclosed because the records did not fall within any exemption allowing non-disclosure.

II. NO ASSIGNMENTS OF ERROR

The School District is not seeking review of any trial court order.

III. STATEMENT OF THE CASE

There are only four relevant facts at issue before the Court:

1. Spokane School District placed Mr. Predisik and Mr. Katke on administrative leave pending separate investigations into allegations of misconduct. (CP 12);

2. A reporter for The Spokesman-Review requested from the School District a copy of a letter sent from the School District to Mr.

Predisik notifying him that he was being placed on administrative leave. (CP 47);

3. A reporter from KREM 2 requested of the School District information in spreadsheets (regarding Mr. Predisik's and Mr. Katke's administrative leave), including the reason for the leave, how long they had been on leave, if they were being paid and the disposition. (CP 281-82);

4. In response to the above two requests, the School District identified three documents that it intended to disclose. (CP 401; Exhibits 1-3) (Exhibit 1 is an administrative leave letter to Mr. Predisik; Exhibits 2 and 3 are spreadsheets with the information sought by KREM).

IV. ARGUMENT

A. Standard of Review.

This Court reviews the Trial Court decision de novo. RCW 42.56.550(3); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 208, 189 P.3d 139 (2008). Appellants argue that the three records at issue are exempt under two separate statutes: (1) RCW 42.56.230(3); and (2) RCW 42.56.240(1). A party seeking to enjoin production of documents under the Public Records Act ("PRA") bears the burden of proving that an exemption or statute prohibits production in

whole or in part. *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

The School District determined that the records are not exempt under RCW 42.56.230(3) because: (1) disclosure of the records would not be highly offensive to a reasonable person and (2) the records are of legitimate public interest. The School District determined that the records are not exempt under RCW 42.56.240(1) for the same reasons as above and because the School District is not an investigative agency.

B. RCW 42.56.540 Is Not A Basis for Enjoining Records.

It is difficult to ascertain whether Appellants claim that RCW 42.56.540 provides an independent, stand-alone basis for enjoining records. On page 10 of Appellants' Brief to this Court, Appellants seem to assert so, but without elaboration. Such a claim might have been understandable several years ago, given that the Washington Supreme Court appears to have made just such a mistake itself. More particularly, in *Dawson v. Daly*, 120 Wn.2d 782, 794, 845 P.2d 995 (1993), the Supreme Court held that this statute "does create an independent basis upon which a *court* may find that disclosure is not required."

In *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994), ("PAWS"), however, the Washington Supreme Court subsequently recognized the apparent error of

the above dicta in *Dawson*. The Supreme Court in *PAWS* clarified that this statute does not provide an independent basis for exempting records:

In sum, the Public Records Act contains only limited and specific exemptions. Treating section .330 as an exemption, that is, as a method of withholding otherwise disclosable public records, is the exact functional equivalent of the error underlying *Rosier*. It also contradicts the Legislature's command to construe the exemptions narrowly and would render portions of the Act superfluous. We conclude that RCW 42.17.330 does not require withholding the unfunded grant proposals in their entirety.FN7

FN7. We decline to endorse our dicta in *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) that section .330 creates an independent source of exemptions. *Dawson*, at 793-94, 845 P.2d 995. ... [A]ny implication that section .330 creates an independent exemption for vital governmental interests is directly at odds with the Legislature's thrice-repeated demand that exemptions be narrowly construed....

Id. at 260-61 (emphasis added).

In 2011, the Supreme Court reinforced this holding in *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 807, 246 P.3d 768 (2011): "We agree with the *Herald-Republic* that RCW 42.56.540 does not constitute a substantive basis for a remedy. *Progressive Animal*

Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 257–58, 884 P.2d 592 (1995) (PAWS).”

C. There Is No General “Privacy” Exemption.

What is not difficult to ascertain is Appellants’ argument that releasing the three records at issue would violate their respective rights to privacy. Importantly, however, there is no general “privacy” exemption under Washington public records law. WAC 44-14-06002(2) (internal citations omitted).

Instead, “privacy” is just one element incorporated with other elements of specific exemptions that an agency or third party resisting disclosure must prove. *Id.* Again, the two exemptions on which Appellants rely are set forth in RCW 42.56.230(3) and RCW 42.56.240(1).

D. Disclosure of the Records Would Not Violate Appellants’ Right to Privacy.

As Appellants state in footnote 2 of their Brief to this Court, both exemptions on which they rely require this Court to analyze whether disclosure would violate Appellant’s right to privacy. As with Appellants, then, the School District first addresses the privacy issues.

As a threshold matter, the School District agrees with Appellants that the records at issue here contain “personal information” under RCW 42.56.230(3) in that the records contain “information relating to or affecting”

Appellants. *Bellevue*, 164 Wn.2d at 211. The Washington Supreme Court recognizes, however, that: “Personal information is exempt from production only when that production violates an employee’s right to privacy.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 412, 259 P.3d 190 (2011).

The seminal Washington Supreme Court opinion giving meaning to the “right to privacy” in the context of employee files is *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). In *Dawson*, the Supreme Court stated that an employee’s right to privacy is violated only if disclosure: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 795. The Supreme Court relied upon a separate statute, RCW 42.17.255 [now codified at RCW 42.56.050], for this conclusion:

A person’s “right to privacy,” “right of privacy,” “privacy,” or “personal privacy,” as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

Id. at 795; RCW 42.56.050. *Dawson* makes clear that Appellants must establish disclosure of the three records at issue here would be highly offensive to a reasonable person and that those three records are not of legitimate concern to the public.

1. Disclosure of the records would not be “highly offensive” to a reasonable person.

In *Dawson*, the Supreme Court elaborated on the first prong of this test and explained generally what the “right to privacy” means:

Speaking generally about the right of privacy, we have stated that the right of privacy applies “only to **the intimate details of one’s personal and private life**”, **which we contrasted to actions taking place in public that were observed by 40 other people.** *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989). The Court of Appeals has explained that the employee privacy definition protects personal **information that the employee would not normally share with strangers.** *Cowles Pub’g Co.*, at 890-91.

Id. at 796 (emphasis added). In explaining what the right to privacy means, the *Dawson* court noted that a showing of “mere embarrassment” is not sufficient to prove that disclosure is highly offensive to a reasonable person. *Id.* at 797.

Under *Dawson*, it appears the Supreme Court instructs lower courts to contrast whether the record at issue is one dealing with intimate details or one dealing with something observed by numerous others. Applying that rationale to the case at hand, it did not appear to the School District that the administrative leave letter identified intimate details of Appellants’ life. Moreover, the fact that Appellants were placed on administrative leave

pending completion of an investigation is a fact of which numerous other teachers in his school would be aware, as soon as it occurs. The spreadsheets – one concerning Mr. Predisik, and the other concerning Mr. Katke – are even more innocuous than the administrative leave letter and certainly do not identify intimate details of either employee’s lives. Like the administrative leave letter, the information contained in the spreadsheets that Mr. Predisik and Mr. Katke are on administrative leave pending completion of an investigation does not identify intimate details and is a fact of which numerous other teachers would be aware.

Appellants rely upon *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199, 189 P.3d 139 (2008) for the proposition that the three records would be highly offensive if disclosed. In that case, the Court addressed certain letters of direction issued by a school district employer to teachers. The records at issue in *Bellevue John Does* contained “criticisms and observations” of the teachers that related to their “competence”. The letters did not “mention any substantiated misconduct” by the teachers but the letters of direction did “discuss specific alleged misconduct” against the teachers. *Id.* at 211, 224. The type of alleged misconduct was “sexual misconduct against students.” *Id.* at 205. Again, the allegations of sexual misconduct discussed in the letters were deemed “unsubstantiated” by the employer. *Id.* at 215.

The *Bellevue* Court held that, because the letters of direction did not identify “substantiated misconduct” and the teachers were not otherwise disciplined or subjected to any restriction, disclosure of the letters (with the employees’ names) would be highly offensive.¹ *Id.* The *Bellevue* Court held that records which disclose unsubstantiated allegations of **sexual misconduct by a teacher toward a student** is a “matter concerning the private life” of the teacher and thus within the meaning of “the right to privacy.” *Id.* at 215 (emphasis added). According to the court “[t]he mere fact of the allegation of **sexual misconduct** toward a minor may hold the teacher up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred.” *Id.* (emphasis added).

Given the above, *Bellevue* seems to stand for the proposition that disclosure of records, which contain **descriptions** of unsubstantiated allegations of **sexual misconduct by teachers against students**, would be highly offensive to a reasonable person. At issue here is whether *Bellevue* is to be read more broadly. Appellants argue it should. The broader reading advocated by Appellants is that disclosure of records, which refer to (but do not describe) unsubstantiated allegations (of any nature), would be highly offensive to a reasonable person.

¹ As discussed later, the *Bellevue* Court held that redaction of the employees’ identities transformed the documents from “highly offensive” to “not highly offensive.” *Id.* at 224.

The School District determined that *Bellevue* should not be read as broadly as Appellants advocate, in part because of a subsequent opinion from the Washington Supreme Court, *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009). *Morgan* followed and applied the *Bellevue* case. *Morgan* provides lower courts and agencies with instruction on how the Supreme Court would apply the reasoning of the *Bellevue* case. In *Morgan*, the Supreme Court applied its reasoning from *Bellevue* to a public records request for written investigative records. The report at issue in *Morgan* pertained to a municipal court employee's hostile work environment complaint against Municipal Court Judge Michael Morgan.

The Washington Supreme Court upheld the City's decision to release a preliminary investigative record, in part because the allegations at hand were not highly offensive:

Judge Morgan claims that the report violates his right to privacy because it contains **unsubstantiated** allegations of 'inappropriate behavior,' which he contends are highly offensive. However, the allegations – including angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees – are nowhere near as offensive as allegations of sexual misconduct with a minor and do not rise to the level of 'highly offensive.'

Id. at 756 (emphasis added). *Morgan* thus seems to support the more narrow reading of *Bellevue* that the School District applied here. That is, *Morgan*

seems to stand for the proposition that not all records disclosing “unsubstantiated allegations” of misconduct will be “highly offensive.”

Applying the *Bellevue* and *Morgan* cases to the facts here, again, the Court will see upon *in camera* review of the administrative leave letter and the spreadsheets at issue that none of those records disclose or reveal any allegations of sexual misconduct by any teacher toward any student, let alone by Appellants. Moreover, as mentioned above, neither the letter nor the spreadsheets disclose any intimate details of Appellants’ personal and private life. The records merely identify that Appellants have been placed on administrative leave pending completion of an investigation into unspecified allegations – using a descriptor that is broad and vague. Nowhere do the records say or imply anything about an investigation into allegations of sexual misconduct with a minor, any more than the records state or imply it is an investigation into allegations of verbal or non-verbal misconduct with a minor. Thus, applying *Bellevue* and especially *Morgan* to the case at hand, it would appear the three records here should be produced in their entirety.

Despite the above, Appellants persist in arguing that, because the allegations against Mr. Predisik and Mr. Katke are unsubstantiated, disclosing the specific requested records would be highly offensive to a reasonable person and thus violate Appellants’ right to privacy. *See* Appellants Brief, at page 18. Moreover, Appellants seem to argue in favor

of such a broad reading of *Bellevue* that it would make every record pertaining to all unsubstantiated allegations subject to exemption from disclosure. In other words, Appellants seem to argue that an unsubstantiated allegation provides a blanket exemption for all records pertaining to the allegation regardless of what actual information might be contained within the record. Indeed, Appellants make expansive statements such as “Mr. Predisik and Mr. Katke have a right to privacy ... in the requested records” and “[a] reasonable person would be highly offended by the disclosure of information related to and arising from the unsubstantiated allegations of misconduct against Mr. Predisik and Mr. Katke.” See Appellants Brief, at pages 17, 18.

The School District, of course, does not dispute that the separate allegations against Mr. Predisik and Mr. Katke are currently unsubstantiated. However, the Court will see upon *in camera* review of the administrative leave letter and spreadsheets that none of the records describe any allegations of misconduct whatsoever, let alone the type of sexual misconduct described in the letters at issue in the *Bellevue* case. While the administrative leave letter references a broad category of misconduct, the records do not describe sexual misconduct, or, for that matter, any other specific misconduct the disclosure of which would be anywhere nearly as offensive as that described by the *Bellevue* Court (i.e., sexual misconduct against a minor). Indeed, the

records do not even describe the type of unsubstantiated allegations the disclosure of which would be anywhere near as offensive as that described by the *Morgan* Court (i.e., “angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees”). Other than identifying that Appellants are on administrative leave pending completion of an investigation into “allegations”, it cannot be deciphered from the records themselves what those specific allegations are.

In sum applying *Bellevue* and *Morgan* to the three records here, there is simply nothing in the records that describes allegations, which would be highly offensive to a reasonable person if disclosed. In particular, given the *Morgan* Court’s mandate to disclose unsubstantiated allegations in that case, it would be and is extremely difficult for the School District to understand any basis for not producing these records.

Worth mentioning is that, when the Public Records Act discusses privacy rights, it does so in the context of whether information within a **certain record** would be highly offensive. RCW 42.56.050, which defines the "privacy" rights within the Public Records Act, makes clear that “The provisions of this chapter dealing with the right to privacy **in certain public records** do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy **public records.**” (Emphasis added). Throughout

Appellants’ briefing, they make broad pronouncements about whether a reasonable person might be highly offended by disclosure of general information related to and arising from unsubstantiated allegations of misconduct against Appellants. The issue here is not whether a reasonable person might be highly offended by disclosure of general information related to the allegations against Appellants. Rather, the issue here is whether a reasonable person would be highly offended by disclosure of the specific information within the **three certain public records** at issue. The provisions within the Public Records Act dealing with the right to privacy pertain only to whether information in those three certain public records is exempt—nothing more. As to that issue, the School District was charged with asking whether the three certain records at issue contain information highly offensive to a reasonable person. This Court is now charged with asking the same issue—nothing more.

While noting the above, the School District is not oblivious to the fact that disclosure of the administrative leave letter, and perhaps the spreadsheets, would most likely be embarrassing and awkward for an employee. The Washington Supreme Court has made clear, though, that mere **embarrassment** is not sufficient to avoid disclosure of a record. *See, e.g., Dawson*, 120 Wn.2d at 797.

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2. Any Right to Privacy Possessed by Appellants' Would be Preserved by Redacting Their Names From the Records.

Given the above analysis, the School District determined that disclosure of all three records would not be highly offensive even without redacting the Appellants' names from the records. At the same time, the School District obviously does not object should this Court determine that redaction of names is appropriate. Indeed, rather than arguing for or against redaction of names, the School District simply addresses what seem to be some misunderstandings by Appellants regarding the current state of the law pertaining to redaction of names in public records. In particular, Appellants seem to assert that redaction of names serves no purpose, despite rulings from the Washington Supreme Court stating otherwise.

In *Bellevue*, the Washington Supreme Court held that “redacted letters of direction” (i.e., letters with the teachers’ names redacted) did not violate the teachers’ privacy rights because the letters were no longer “highly offensive” to a reasonable person once the names were redacted. The Court emphasized: “If a teacher's **identity is redacted**, disclosure of the redacted letter of direction is **not highly offensive**.” *Id.* at 224 (emphasis added). Further, according to the Court:

Thus, we hold that the PDA mandates disclosure of letters of direction; however, where a letter simply seeks to guide future conduct, does not mention substantiated misconduct, and a teacher is not disciplined or subject to any restriction, **the name and identifying information of the teacher should be redacted**. This result protects both the public interest in overseeing school districts' responses to allegations (letters of direction give citizens a complete picture of a school district's investigations and accompanying procedures) **and the teacher's individual privacy rights**.

Id. at 226-27 (emphasis added). Again, the Court, expressly held that redaction of names and identifying information protects “the teacher’s individual privacy rights” and transforms a record from one that would be highly offensive if disclosed to one that is “not highly offensive” if disclosed. *Id.* at 224.

Even beyond the above, in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 418, the Court pointed out that redaction of a name may be allowed or required even if the requestor can “figure out” the name. As is the case here where The Spokesman-Review already knew the identity of Mr. Predisik when making the request, the Court in *Bainbridge* recognized that it is unlikely that disclosure of a record with the name redacted would be the only circumstances in which the previously existing knowledge of a third party, paired with the information

in a public records request, would reveal more than either source would reveal alone. *Id.*

Thus, given the above, the Washington Supreme Court has clearly ruled that redaction of a name, even when the requestor knows the name, may transform a record from one that would be highly offensive into a record that would **not** be highly offensive to a reasonable person if disclosed.

Appellants attempt to distinguish *Bellevue* and *Bainbridge* on the ground that redaction of names in those two cases occurred in response to requests that were made after each agency completed its investigations. This distinction is lost on the School District. In both *Bellevue* and *Bainbridge*, the Court relied on the fact that the allegations were determined by the agencies to be unsubstantiated. It was the nature of the allegations (i.e., both that they were unsubstantiated and that they involved sexual misconduct) **combined with** the fact that the records named the accused individuals which drove the Court to determine that the records were highly offensive to a reasonable person. Redaction of the names rendered the records no longer highly offensive because the records no longer named the accused. Appellants seem to fail to grasp that it is the fact of redacting the name which makes the record no longer highly offensive—not when the name is redacted. Thus, if redaction of the

Appellants' names makes the record no longer highly offensive after an investigation, redaction of the names would equally make the records no longer highly offensive pending an investigation.

Appellants try to argue that redaction pending the School District's investigation does not protect their right to privacy because the School District has directed each of them to not to discuss the allegations pending the investigation. Appellants' argument appears to stem from a sentence in the administrative leave letter stating: "As you know, you were directed to not discuss this matter with any staff, students, or parents." (CP 401, Exhibit 1). Obviously, this sentence does not preclude Appellants from discussing the allegations with others besides staff, students or parents. In particular, this sentence does not preclude discussion with the media, or anyone other than staff, students and parents, for that matter, who inquire about the allegations.

In any event, Appellants argue that they would each only be able to discuss the allegations after the investigation. Again, however, this distinction of whether Appellants are able to discuss unsubstantiated allegations (pending the investigation) misses the point of whether redaction of their names from the **three records at issue** has any bearing on whether the records are highly offensive. Appellants seem to argue that, after the investigation, assuming the investigation results in

unsubstantiated allegations, they would each be able to respond to disclosure of the records by saying something such as “the allegations were investigated and were not substantiated.” Nothing in the record, however, prevents Appellants from making a nearly identical response pending the investigation (such as “the allegations are being investigated and are not substantiated”).

However, even if the above response were somehow deemed different, whether or how Appellants respond to the disclosure misses the point. The point is that the disclosure of the three records here would not identify the Appellants – whether pending the investigation or after the investigation. As such, Appellants would have no reason to respond to the disclosure.

Beyond the above, the *Bainbridge* Court points out that an agency can only look at the content of the document itself in determining whether an employee has a right to privacy in their identity. *Bainbridge*, 172 Wn.2d at 414 (“An agency should look to the **contents of the document**, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity”) (emphasis added). The *Bainbridge* Court pointed that the reason for a bright line rule is because otherwise agencies will be required to engage in an analysis of not just the contents of the report but the “degree and scope” of other facts. *Id.*

According to the *Bainbridge* Court, “agencies will be placed in the position of making a fact-specific inquiry with uncertain guidelines.” *Id.* In *Bainbridge*, the fact specific inquiry was the nature and extent of media coverage regarding the incident. Here, it would be the nature and extent of the investigation (i.e., is it sufficiently complete to the point where the employee can respond). If the agency incorrectly redacts the employees’ names by miscalculating the nature and extent of the facts, “the agency could face significant statutory penalties.” *Id.*

Given the above, any right of privacy (if one were to exist in the three records at issue) would clearly be protected by redaction of the Appellants’ names from the three records.

3. Disclosure of the records is of legitimate concern to the public.

Recall that the Washington Supreme Court has articulated a two-part test for violation of an employee’s right to privacy: (1) disclosure must be highly offensive to a reasonable person, and (2) disclosure must not be of legitimate concern to the public. *Dawson*, 120 Wn.2d at 795. According to *Dawson* “legitimate” is to be interpreted as “reasonable”. In *Bellevue*, 164 Wn.2d at 217 n. 19, the Court addressed this very issue in the context of personnel records that discuss unsubstantiated allegations and other personnel matters. There, the Court held that even “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.” *Id.* In *Bainbridge*, the Court echoed this same principal by again pointing out that even if allegations are unsubstantiated, both the **nature of the allegation** and the **agency response to the allegation** may be of legitimate public concern. 172 Wn.2d at 415 (emphasis added). *Bainbridge* goes on to state that “the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer.” *Id.*

Based on the above, the School District not only determined that disclosure of the three records at issue would not be highly offensive to a reasonable person, the School District also determined that disclosure (whether the Appellant’s names were redacted or not) would be of legitimate concern to the public.

Appellants argue that disclosure of the three records would serve nothing more than “gossip and sensation.” Appellants Brief at 28. The School District, to the contrary, determined that the public has a legitimate concern in the administrative leave letter and the two spreadsheets at issue in order to assess the response of the school system to the allegation. The School District concluded that its patrons would have a legitimate concern about the details of an administrative leave letter as well as a spreadsheet concerning School District employees currently on administrative leave. By

way of just one example, patrons would have a legitimate interest in assessing when the District placed the teacher on leave as compared to when the District learned of the allegations. By way of another example, patrons would have a legitimate interest in how long a teacher has been on leave. Patrons might also have a legitimate interest in who places teachers on leave. Patrons might further have a legitimate interest in what it means to be placed on leave in terms of whether a teacher is paid or whether a teacher is allowed on campus once placed on leave. Contrary to Appellants' arguments, all of these interests exist regardless of whether the School District has concluded its investigations and all of these interests exist regardless of whether Appellants' names are redacted.

Again, applying the above, the School District concluded that the three records, regardless of whether Appellants' names are redacted, do not meet both prongs of the privacy test and thus were subject to production.

As the *Bellevue* Court noted, however, redaction of an employee's name can serve two separate functions. On the one hand, it can transform a **highly offensive** record into one that is **not highly offensive** if disclosed. Equally so, redaction of an employee's name can serve to allow disclosure of information within the record (other than information that might be highly offensive—i.e., the employee's name) that is of **legitimate public interest**. 164 Wn.2d at 217. In *Bellevue*, the Court pointed out that a redacted letter

“protects both the public interest in overseeing school districts' responses to allegations (letters of direction give citizens a complete picture of a school district's investigations and accompanying procedures) and the teacher's individual privacy rights.” *Id.* at 226-27 (emphasis added). Appellants seemingly fail to note this aspect of the *Bellevue* opinion. At page 29 of Appellants' Brief, they seem to assert that redaction only served the purpose of making the records “not highly offensive.” Again, the School District did not and does not read *Bellevue* quite as narrowly as Appellants.

Regardless of how one reads *Bellevue*, in *Bainbridge* the Supreme Court made clear that redaction of an employee's name from a record may be required rather than allowing an agency to not produce an entire record. 172 Wn.2d at 417-18. The records in *Bainbridge* revealed “the nature of the Mercer Island and Puyallup Police Departments' investigations of this allegation.” *Id.* at 416. There, the Supreme Court held that “the public does have a legitimate interest in how a police department responds to and investigates ... an allegation against an officer.” *Id.* The Court relied on a prior 2006 opinion:

We have previously permitted production of a similarly redacted report even though redaction of only the person's name was insufficient to protect the person's identity. *See Koenig v. City of Des Moines*, 158

Wash.2d 173, 142 P.3d 162 (2006). In *Koenig*, the requestor had submitted a public records request specific to Jane Doe, a child victim of sexual assault. 158 Wash.2d at 178, 142 P.3d 162. Just like our current case, any production of the records of the assault whatsoever would identify Jane Doe as a child victim of sexual assault, even if her name were redacted. Relying on the express language of the statute, the court held that the provision exempted only the enumerated pieces of identifying information and not the entire report. *Id.* at 182, 142 P.3d 162.

Id. at 416-17. The *Bainbridge* Court thus held that the agency should not exempt the entire record if it can instead produce a record with only the employee's name redacted. The Supreme Court relied on the premise that once the employee's name is redacted, the employee could not establish the public's lack of a legitimate concern in seeing the record at issue.

Notably, the dissent in *Bainbridge* argued what Appellants argue here: that the records should be withheld in their entirety because the records are capable of identifying the employee, even with the name redacted. *Id.* at FN 12. Again, however, the majority opinion pointed out that (even assuming disclosure of any portion of the records would reveal the employee's identity), the inquiry into whether any other portion of the information in the record is a matter of legitimate public concern must still be made. *Id.* Here, of course, the three records contain significant amount of information besides the Appellants' names.

Given the above, whether the employee names are redacted or not, the remainder of the three records (other than their names) contain information of legitimate public concern. As such, with redacted names, the second part of the employee privacy test would not be met and both the administrative leave letter and the spreadsheets would need to be disclosed.

4. It Is Irrelevant Whether Appellants Might be Able to Appeal Subsequent School District Findings.

Appellants argue that, even if the School District were to substantiate the allegations against the Appellants, the records would nevertheless remain highly offensive if disclosed. Appellants argue that the records would remain highly offensive because they should be deemed unsubstantiated for as long as Appellants have a right to appeal the School District's determination. This argument by Appellant is irrelevant. At issue in this case is the School District's decision to disclose the three records assuming the records pertain to unsubstantiated allegations. It makes no sense for the Court to decide whether a possible appeal by Appellants might preserve the unsubstantiated nature of the allegations and thus the records. In other words, the issue before this Court would not change if the allegations are subsequently substantiated, either by the School District or by a neutral third party. At issue is whether the records, at the time of request were subject to

production based upon the unsubstantiated nature of the allegations at that time.

Moreover, even if the allegations were substantiated, it would have no impact on the three records at issue. These three records simply do not describe the allegations. So, whether the allegations are substantiated or not is of no import as to these three records.

In any event, if this Court were to address the issue raised by Appellants, case law has clearly established that it is the agency that determines whether allegations are substantiated and not some neutral adjudicator. In *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 727, 748 P.2d 597 (1988), the Washington Supreme Court framed the issue regarding substantiated allegations as one of whether the agency substantiated (or to use the word used in the *Cowles* case: “sustained”) the allegations based on an internal investigation. Contrary to Appellants’ arguments here, it did not matter to the Court whether the agency’s determination might be subject to appeal. Similarly, in *Morgan*, the Washington Supreme Court held that, just because an employee disputes substantiated allegations, it does not transform the allegations into “unsubstantiated” allegations. 166 Wn.2d at 756. It follows logically then that, just because an employee “appeals” substantiated allegations, the appeal does not transform the allegations into “unsubstantiated” allegations. Again,

contrary to Appellants' assertions, it did not matter in *Morgan* that the report could be subject to review by a hearing officer, arbitrator or court. Instead, the fact that the agency investigator substantiated the conduct was sufficient to deem the allegations "substantiated."

Given the above, in determining whether allegations are deemed "substantiated" the Washington Supreme Court in *Cowles* and *Morgan* looks to whether the agency substantiated the allegations not whether the allegations are subject to appeal or challenge.

Additionally, as a practical matter, there are certainly situations where, when confronted with the results of an investigation, an employee agrees to accept discipline (or even agrees to resign) while still "challenging" the truth of the allegations. In such a case, under Appellants' analysis there would be no opportunity for a third party neutral decision maker to "substantiate" the agency decision. Records related to the allegations/investigation in the above-described scenario would never be subject to disclosure because the agency investigation would be "incomplete" and "unsubstantiated" due to never being reviewed.

E. The School District Is Not An Investigative Agency Under RCW 42.56.240(1).

Appellants also rely on RCW 42.56.240(1) as a basis for injunctive relief. That provision exempts investigative records compiled by

investigative agencies. To qualify as an exemption under 42.56.240(1), a record (1) must contain specific intelligence or specific investigative information, (2) must be compiled by investigative, law enforcement, or penology agencies, or state agencies vested with the responsibility to discipline members of any profession, and (3) nondisclosure of the information must either be (a) essential to effective law enforcement or (b) essential for the protection of any person's right to privacy.

In claiming an exemption under RCW 42.56.240(1), Appellants would have to prove that the School District is an “investigative agency” and that the records are “specific investigation records” – as those terms are utilized by that statute.

In *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), however, the Washington Supreme Court rejected the contention that a school district is an investigative agency. The agency at issue in *Brouillet* was a school system, the Office of Superintendent of Public Instruction (“OSPI”), which has authority to revoke a teacher’s certificate. Here, of course, the School District is also a school system, but one with lesser authority than OSPI. The School District does not even have authority to revoke a teacher’s certificate. The School District’s only authority is with regard to Appellants’ employment contracts.

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More specifically, in *Brouillet*, the Washington Supreme Court explicitly distinguished “law enforcement” from the administration of a school system:

An examination of the term “law enforcement” reveals that certificate revocation involves neither criminal nor civil law enforcement. SPI administers a school system, it does not enforce law.

Law enforcement involves “[t]he act of putting ... law into effect; ... the carrying out of a mandate or command.” Black’s Law Dictionary 474 (5th ed. 1979). Because SPI “may” revoke certificates for immoral conduct, it does not carry out a command. SPI’s duties regarding revocation of teaching certificates are basically discretionary licensing decisions. Certificates “may be revoked” for grounds set out by statute. RCW 28A.70.160.

Law enforcement involves imposition of sanctions for illegal conduct. But SPI may revoke certificates for conduct which could not be illegal under the constitution, such as “immorality”, “intemperance”, or “unprofessional conduct”. The criteria governing certificate revocations defines unprofessional conduct which can justify termination, not illegal conduct. FN5

FN5. SPI has chosen to limit its broad statutory authority by regulation. See WAC 180-75-037. A teacher can still be fired for disobeying administrative rules of the state board of education and some other acts which violate no statute. See, e.g., WAC 180-75-037(2).

Finally, law enforcement involves imposition of a fine or prison term. The record in this case does not link these investigations with any SPI attempt to seek either civil or criminal penalties against the teachers. Cf. *J.P. Stevens & Co. v. Perry*, 710 F.2d 136 (4th Cir.1983) (investigation of employment practices); *Birch v. United States Postal Serv.*, 803 F.2d 1206 (D.C.Cir.1986) (investigation into criminal use of postal permits).

The definition of administration, unlike the definition of “law enforcement”, precisely describes SPI’s duties. Administration includes “[d]irection or oversight of any ... employment.” Black’s Law Dictionary, at 41.

Brouillet, 114 Wn.2d at 795-96.

The School District directs this Court’s attention to *Brouillet* given that case appears dispositive of Appellants claim that exemptions under RCW 42.56.240(1) are applicable to the records here as they allege the School District is an “investigative agency.”

Appellants instead cite to *Ashley v. Washington State Public Disclosure Commission*, 16 Wn. App. 830, 560 P.2d 1156 (1977) in support of their claim that a school district is an investigative agency. In *Ashley*, the court held that, by virtue of its statutory duties, the Public Disclosure Commission (“PDC”) was an “investigative agency” for the purposes of the former Public Disclosure Act. *Ashley*, 16 Wn. App. 830 at 834. Notably, those statutory duties included “law enforcement related powers expressly

prescribed for the [PDC]” including the power to “...enter a cease-and-desist order and to impose a civil penalty.” *Id.* at 835 (internal citations omitted).²

As discussed in *Brouillet*, whether an agency has power to impose civil or criminal sanctions or fines for illegal conduct is a key factor in determining whether an agency is an “investigative agency” for the purposes of RCW 42.56.240(1). Importantly, in *Ashley*, the law enforcement related powers expressly prescribed for the PDC included the power to impose civil penalties. By comparison, in *Brouillet*, OSPI did not have any power to impose civil penalties, but rather only had the ability to revoke a teacher’s certificate, and thus was not determined to be an “investigative agency.”

Even so, in claiming an exemption under RCW 42.56.240(1), Appellants would also have to prove that the nondisclosure of the information is either essential to effective law enforcement or essential for the protection of any person's right to privacy. As discussed, disclosure of the requested records would not violate Appellants’ right to privacy. In other words, nondisclosure of the information would not be essential for the protection of either Mr. Predisik’s or Mr. Katke’s right to privacy.

In any event, in determining whether agency investigative records relate to law enforcement, as that term is utilized in the statute, “law

² One of the statutes cited by the court in *Ashley*, RCW 42.17.395(3) – re-codified as RCW 42.17A.755 – explicitly provides that “The commission may assess a penalty in an amount not to exceed ten thousand dollars.” RCW 42.17A.755(4).

enforcement” is defined as the nondiscretionary imposition of sanctions, such as a fine or a prison term, for illegal conduct. *Brouillet*, 114 Wn.2d at 795-96. Needless to say, school districts have no power to impose either civil or criminal sanctions against teachers. Moreover, the criteria governing employment termination is defined by sufficient cause – which is hardly limited to illegal conduct.

V. CONCLUSION

Based on guiding precedent, the School District made a determination that neither the administrative leave letter nor the spreadsheets at issue here were highly offensive to a reasonable person, and that such records were of legitimate public concern. Moreover, the School District is not aware of any authority that precludes it from conducting investigations into allegations of employee misconduct, determining that those allegations are substantiated or unsubstantiated, and disclosing records accordingly. Nor is the School District aware of any authority that modifies the holding in *Brouillet* that a school system such as the School District here is not an investigative agency subject to the exemption of 42.56.240(1).

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DATED this 25th day of April, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

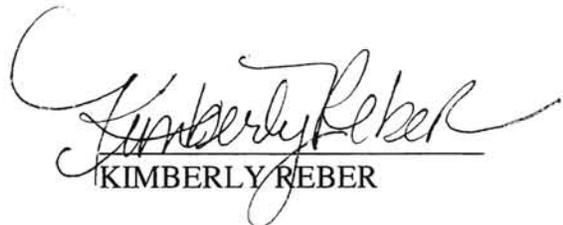
I do hereby certify that on this 25th day of April, 2013, I served a true and correct copy of the above and foregoing RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF on the following, in the method indicated:

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