

No. 90129-5

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 12, 2014, 10:10 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY PREDISIK AND CHRISTOPHER KATKE,

Appellants,

v.

SPOKANE SCHOOL DISTRICT NO. 81,

Respondent.

**BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

Margaret Pak, WSBA #38982
Enslow Martin PLLC
701 Fifth Ave., Suite 4200
Seattle, Washington 98104
Tel (206) 262-8220
Fax (206) 262-8001
margaret@enslowmartin.com

Sarah Dunne, WSBA #34869
Douglas B. Klunder, WSBA #32987
ACLU of Washington Foundation
901 Fifth Ave., #630
Seattle, WA 98164
Tel (206) 624-2184
dunne@aclu-wa.org
klunder@aclu-wa.org

Attorneys for Amicus Curiae

American Civil Liberties Union of Washington

Received
Washington State Supreme Court

SEP 26 2014

Ronald R. Carpenter
Clerk

ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICUS	1
II.	INTRODUCTION.....	1
III.	ISSUES PRESENTED	4
IV.	STATEMENT OF THE CASE.....	4
V.	ARGUMENT	6
	A. Disclosure of Personal Information Related to Unsubstantiated Allegations Violates Employees’ Rights of Privacy	6
	B. Redaction of Identity Does Not Adequately Protect Employees’ Privacy.	8
	C. Where Privacy Interests Are Not Sufficiently Protected by Disclosure of Redacted Documents, a Case-By-Case Evaluation of Various Factors Is Prudent When Assessing the Legitimate Public Concern.	9
	1. Applying the Factors to the Administrative Leave Letter, Disclosure of the Redacted Letter is Not Warranted.	13
	2. Applying the Factors to the Payroll Spreadsheets, Disclosure of Redacted Spreadsheets is Warranted.	14
VI.	CONCLUSION	17

TABLE OF AUTHORITIES

<i>Arthur West v. Port of Olympia</i> , Case No. 44964-1-II (Div. 2, filed Aug. 26, 2014)	7, 8
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wash.2d 398, 259 P.3d 190 (2011).....	2, 3, 9
<i>Bellevue John Does 1-11 v. Bellevue School Dist. No. 405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	6, 10
<i>Brouillet v. Cowles Publishing Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990)	11
<i>Brown v. Seattle Public Schools</i> , 71 Wn. App. 613, 860 P.2d 1059 (1993)	12
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993)	12
<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006)	2, 9
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009)	6, 7
<i>Predisik v. Spokane School Dist. No. 81</i> , 179 Wn. App. 513, 319 P.3d 801 (2014)	5, 6, 9
<i>Tiberino v. Spokane County</i> , 103 Wn. App. 680, 690, 13 P.3d 1104 (2000)	12

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. It supports the right of any member of the public to promote government transparency and accountability through public records requests. The ACLU is also a leading proponent of informational privacy. Where both interests are implicated, the two competing civil liberties should be evaluated on a case-by-case basis to achieve the purpose of the Public Records Act (“PRA”) with minimal harm to legitimate privacy interests.

Amicus has reviewed the documents and pleadings in this case and is familiar with the issues and arguments of the parties.

II. INTRODUCTION

This case is one of several in which the Court is confronted with the issue of whether redacted documents must be disclosed even if the disclosure may violate privacy interests protected by the PRA. The issue arises when a requester asks for documents related to a particular individual, and those documents contain some private information, but also some information of interest to the public. On one hand, the document may contain information that is useful for oversight of

government operations. On the other hand, portions of the document (such as the identity of the subject) may violate privacy. If the documents have been requested with reference to a specific individual, redaction of the individual's name in the documents would do little to protect the identity of the individual since the requester can simply "fill-in-the-blanks" with the individual's identity and provide it to third parties. In other words, there is no way to release the public portions without effectively releasing the private portions as well.

This Court adopted a bright-line rule in favor of disclosure in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) ("*Koenig*"). In *Koenig v. City of Des Moines*, the Court ordered the disclosure of redacted records even though such disclosure would not protect the privacy interests of the subject of the document request since the redacted name was already known to the requester. *Id.* at 187. This rule was applied by the lead opinion of this Court in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011) ("*Bainbridge Island*") where the Court similarly ordered disclosure of redacted records while recognizing that disclosure might not protect the subject's privacy interest in his identity. *Id.* at 416.

The present case once again raises the tension between privacy and public disclosure in the Public Records Act, and whether redaction of

personally identifying information is always sufficient to protect privacy. While *amicus* appreciates the benefits of a bright-line rule in some instances, we believe that the interests of privacy and open government are best reconciled by use of a multi-factor balancing test to determine whether there is legitimate public concern in the document. A case-by-case determination would allow agencies and the courts to meaningfully weigh the two interests implicated. Although the lead opinion in *Bainbridge Island* did not find a multi-factor test necessary to resolve that case, it left open the possibility of its use in other cases. See *Bainbridge Island*, 172 Wn.2d at 418, fn 13. *Amicus* suggests that this is such a case.

The records at issue here—one administrative leave letter and two payroll spreadsheets—are associated with two public school employees placed on administrative leave during an investigation of alleged misconduct by those employees. Under the *Koenig* bright-line rule, which the Court of Appeals applied, privacy is deemed to be protected by redaction of identities in the document, and no further analysis is needed. *Amicus* proposes instead the use of a multi-factor test to determine whether there is legitimate public concern in the redacted documents, in cases where the redaction is insufficient to actually protect privacy. Applying *amicus*'s proposed multi-factor test, the payroll spreadsheets would be disclosed but only after personal information was redacted—the

same result as under *Koenig*. The administrative leave letter, however, would not be disclosed because there is little legitimate public interest in the redacted letter, and redaction would not cure the violation of the privacy right in the individual's identity.

III. ISSUES PRESENTED

1. Under this Court's precedent, does disclosure of the unredacted documents related to investigations of unsubstantiated misconduct violate the employees' privacy?
2. Does redaction of identity adequately protect the employees' privacy?
3. Where disclosure of unredacted documents violates privacy and redaction is insufficient to protect the employees' identity, should an agency consider additional factors in determining whether there is a legitimate public concern in disclosure under the Public Records Act?

IV. STATEMENT OF THE CASE

This case involves two employees of the Spokane School District who have been placed on administrative leave pending investigations of potential misconduct. Mr. Predisik is a counselor and Mr. Katke is a teacher. The separate investigations began in November 2011 and January 2012, respectively. Mr. Predisik and Mr. Katke deny the allegations of

misconduct and the allegations have so far been unsubstantiated even though the investigation is ongoing.

The media made public records requests for information on all district employees on paid administrative leave (including names and reasons for leave if related to misconduct), and information specifically related to Mr. Predisik's and Mr. Katke's administrative leaves. The School District identified three documents for disclosure: a copy of Mr. Predisik's administrative leave letter and two spreadsheets.

The District informed both employees that they intended to disclose unredacted copies of the identified documents. The employees sought an injunction against disclosure in any form. The trial court, after viewing the documents in camera, ordered disclosure of documents after redaction of Mr. Predisik and Mr. Katke's names to protect their right to privacy. The Court of Appeals affirmed. *See Predisik v. Spokane School Dist. No. 81*, 179 Wn. App. 513, 521-522, 319 P.3d 801 (2014). The employees filed a petition for review with the Washington Supreme Court, and the School District agreed that review would be beneficial on the question of whether redaction was required. This Court granted the petition.

///

///

V. ARGUMENT

A. Disclosure of Personal Information Related to Unsubstantiated Allegations Violates Employees' Rights of Privacy.

The Court of Appeals correctly determined that the Spokane School District employees have a right to privacy in their identity. “The disclosure of their identities in connection to the unsubstantiated allegations could be highly offensive and is not of public concern.” *Predisik v. Spokane School Dist. No. 81,179* Wn. App. at 520. Relying on *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, the Court of Appeals reasoned that “disclosure of unsubstantiated allegations of other types of misconduct can be offensive because it also subjects a teacher to gossip and ridicule without a finding of wrongdoing.” *Id.*, citing *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 215, 189 P.3d 139 (2008) (“*Bellevue John Does 1-11*”). The offensiveness of the disclosure, and the harm that would accrue to the employee, has little to do with the details or type of the allegations; it is the mere suspicion of misconduct that impairs the teacher’s relationship with the community.

The School District cites *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), for the proposition that not all disclosures of records containing unsubstantiated allegations of misconduct will be “highly offensive.” *Morgan v. City of Federal Way*

was a case that involved records of an investigation into a judge's creation of a hostile work environment. This Court ordered release of the records without redaction. The Court's holding was premised on the fact that the investigation found "that many of the allegations are likely true, unlike in *Does*, where the allegations were found to be unsubstantiated." *Id.* at 756. There is, however, *dicta* that suggests the allegations made against Judge Morgan, even if unsubstantiated, do not rise to the level of "highly offensive." *Id.*

Amicus urges this Court to clarify its holding in *Morgan v. City of Federal Way*. Without clarification, courts and agencies (such as the School District here) would be invited to determine on an *ad hoc* basis what types of unsubstantiated allegations would be highly offensive if disclosed.¹ For example, the Court of Appeals recently held that redacting identifying information from an investigation report relating to unsubstantiated allegations violated the PRA because allegations of criminal theft were not "highly offensive to a reasonable person." *Arthur West v. Port of Olympia*, Case No. 44964-1-II, slip op. at 8 (Div. 2, filed

¹ Even if *Morgan v. City of Federal Way* stands for the proposition that disclosure of only serious unsubstantiated allegations rise to a level of "highly offensive," we presume that the allegations here are serious since they have resulted in multi-year-long investigations and the placement of employees on administrative leave.

Aug. 26, 2014). The Court of Appeals relied heavily on its own subjective beliefs to determine that disclosure of the employee's identity in connection with the particular allegations of misconduct would not be highly offensive. *Id.* slip op. at 9.

B. Redaction of Identity Does Not Adequately Protect Employees' Privacy.

The school employees are correct that redaction of the administrative leave letter before disclosure will do little to protect privacy, since the requestor already knows the identity of the person accused of misconduct. This is an essential difference between the present case and *Bellevue John Does 1-11*: there, multiple records were at issue, so the identity of teachers would be protected when their names were redacted from the records; here, redaction is pointless since the request itself names the counselor. As for the spreadsheets, we are uncertain whether redaction will be sufficient to protect privacy. We presume that the spreadsheets contain information for various employees and therefore the requester could not simply "fill-in-the-blanks". If the spreadsheets, however, involve a single employee only, then redaction would be meaningless for the same reasons as the administrative leave letter regarding one employee.

That point has been addressed twice by this Court, both times in favor of redaction. *Koenig v. City of Des Moines* held that exemptions in the PRA must be considered by looking solely at the content of the records released, not the context or wording of the request. *Koenig v. City of Des Moines*, 158 Wn.2d at 182. In other words, the Court held that, as a matter of law, redaction serves both to prevent disclosure of identity and to protect the subject's privacy—despite the fact the requestor already knows the information being redacted. The lead opinion applied this rule again in *Bainbridge Island*, ordering disclosure of records with the name of the officer redacted even while recognizing that redaction might not protect the officer's identity. *Bainbridge Island*, 172 Wn.2d at 418.

Here, the Court of Appeals felt it had no choice under the bright line rule of *Koenig* and *Bainbridge Island*: “Production of a redacted record is permitted even though redaction is insufficient to protect the person's identity ... [and] even if disclosure of this information would result in the court's inability to protect the identity of an individual.”

Predisik v. Spokane School Dist. No. 81, 179 Wn. App. at 521.

C. Where Privacy Interests are Not Sufficiently Protected by Disclosure of Redacted Documents, a Case-By-Case Evaluation of Various Factors is Necessary to Evaluate Whether a Legitimate Public Concern Exists.

In cases such as the present, where redaction may not effectively protect privacy interests, *amicus* urges this Court to remove the strictures faced by the Court of Appeals and instead to adopt a multi-factor test to evaluate the legitimate public concern in light of the subject's right to privacy. As this Court has noted, "While 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 PDA." *Bellevue John Does 1-11*, 164 Wn.2d at 224 (citations omitted) (listing factors such as privacy rights, efficient administration of government, evaluations of prosecutors, chilling effect on public employee evaluations). While the purpose of the PRA is to promote openness of government and disclosure of public records to enable oversight of government operations, a multi-factor analysis better accounts for the important interests protected by the PRA where disclosure is sought over the subject's "fill-in-the-blank" privacy objections.

Amicus proposes the following non-exclusive factors to determine whether a legitimate public concern is involved. This list is not exhaustive; the agency or court must consider the totality of the situation.

(a) Scope and Wording of the PRA Request

The scope and wording of the PRA request will assist courts in evaluating legitimate public concern. A request that encompasses multiple

investigations of sexual assault by public employees would allow a requester to discover a pattern of investigative methods or other misconduct by public officials. Such a request would have special value for government oversight if the requester were to seek all records involving a particular public official or group of public officials, *e.g.*, records involving all investigations conducted by a particular law enforcement officer or all records involving allegations of misconduct against a particular officer.

(b) Person(s) Implicated by the Records

Another factor to consider is the person(s) implicated by the record disclosure. The public may have a legitimate interest in knowing details of assaults if the alleged perpetrator is a public official. *See, e.g., Brouillet v. Cowles Pub Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990) (ordering disclosure of investigative records involving sexual abuse of students by teachers). A similar interest may exist if the perpetrator is not a public official, but nonetheless somebody that occupies a special position of public trust (*e.g.*, a clergy person or community center volunteer).

(c) Public Context of the Request

An agency should also take into account the public context of the request. The presence of news coverage – or even multiple public inquiries – about a matter may indicate it is of legitimate public concern,

particularly where questions about the government's conduct have been raised.

(d) Efficient Administration of Government

As already identified by this Court, another factor to consider in determining the public's legitimate concern is the impact of disclosure upon "the efficient administration of government." *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993), *abrogated on other grounds*. Government operations, including public schools, require a frank and candid flow of information internally. People must be able to express concerns about employees, managers must be able to suggest changes in employee behavior, and employees must be able to continue about their daily jobs without fear of being portrayed inaccurately or out of context in a newspaper article. When misconduct is alleged, there must be an appropriate investigation, and corrective action taken when necessary. Disclosure of the identities of employees falsely accused of misconduct however should be prevented.

While efficiency is a valid factor to consider, it is only one of many, and certainly does not deserve the primacy that the lower courts have assigned it. *See Brown v. Seattle Public Schools*, 71 Wn. App. 613, 619, 860 P.2d 1059 (1993); *Tiberino v. Spokane County*, 103 Wn. App. 680, 690, 13 P.3d 1104 (2000). Too great a concern for efficiency opens

the door to allow government to decide based on its own convenience what is good for the public to know.

1. Applying the Factors to the Administrative Leave Letter, Disclosure of the Redacted Letter is Not Warranted.

Applying the above factors to the administrative leave letter for Mr. Predisik, disclosure of the redacted letter is not warranted.

The document request at issue here specifically sought a copy of Mr. Predisik's administrative leave letter from the School District. The request was not worded to discover a pattern of investigative methods or misconduct by other school employees. Rather, the scope and wording of this request sought a particular document for a particular individual with no history of misconduct on the job. This factor weighs in favor of non-disclosure.

The person implicated by the request is an employee of the Spokane School District who apparently has never been disciplined in his 40-year career. *See* Petition for Review, p. 4. As a public school counselor, he is appropriately subject to public oversight in the performance of his job duties. If the administrative leave letter contains information relevant to the performance of his job duties, this factor would weigh in favor of disclosure. However, the allegations are so far unsubstantiated and the School District claims that no specific allegations

of misconduct are included in the letter, making this factor lean in favor of non-disclosure. *See* School District's Answer to Petition to Review, p. 11.

The request in this case was made by a reporter from The Spokesman Review. The presence of media attention, and other similar requests by media, indicates that disclosure of the letter serves a legitimate public concern. This factor weighs in favor of disclosure.

As for the efficient administration of government factor, the investigation into Mr. Predisik is not yet complete. Disclosure of the redacted leave letter could possibly interrupt the government's investigation of the allegations or impact the efficient administration of government by revealing the names of school employees currently being investigated for alleged misconduct. Here, the administrative leave letter has been requested by name, and so redaction will not protect privacy. This factor leans in favor of non-disclosure.

Accordingly, where the only factor in favor of disclosure is that the request was made by the media, the benefit to the legitimate public interest in the redacted letter is minimal, and redaction would not sufficiently cure the privacy objections, then the administrative leave letter should not be disclosed even after redaction.

2. Applying the Factors to the Payroll Spreadsheets, Disclosure of Redacted Spreadsheets is Warranted.

The result is different for the payroll spreadsheets. First, if there are many names on the spreadsheets, redaction may be sufficient to protect privacy, and there is no need for the multi-factor test—the interests in both privacy and oversight are met by the disclosure of the redacted spreadsheets. However, even if the spreadsheets each contain information about only a single employee, such that redaction is meaningless, *amicus* suggests that applying the above factors to the spreadsheets should reach the same result as would be reached by a straightforward application of *Koenig*—disclosure of redacted spreadsheets.

The scope and wording of the request sought information on all district employees on paid administrative leave (including reasons for leave if related to misconduct). Even where those allegations of misconduct are found to be unsubstantiated, the request furthers the public's oversight of government functions—how the School District handles administrative leaves of employees who are being investigated for misconduct. This factor leans in favor of disclosure.

In addition, the persons implicated by the PRA requests here are school employees to whom the public has entrusted great responsibility, and appropriately subject to greater public oversight. Again, the details of the School District's data regarding administrative leaves for school employees—how long, if paid, how many employees are on leave, and the

purpose of leaves—are of legitimate public interest. This factor applied to the spreadsheets leans in favor of disclosure.

The requests were also made by the media and the public context of the request favors disclosure. Two separate media companies, The Spokesman Review and KREM 2, made separate requests for similar information months after the School District placed the two employees on administrative leave pending investigations into allegations of misconduct. The media sought information on all district employees on paid administrative leave, specifically including two employees, suggesting that they were interested in how the School District handles administrative leaves generally and specifically to the two employees. This factor leans in favor of disclosure.

Finally, as for the efficient administration of government factor, the investigations here are not complete. Disclosure of the redacted spreadsheets might interrupt the government's investigation of the allegations or impact the efficient administration of government by revealing the names of school employees currently being investigated for alleged misconduct. It is uncertain whether redaction will protect privacy, since the request for the spreadsheets did not reference particular employees, and their identity may or may not be known to the requestor. This factor leans somewhat in favor of non-disclosure.

Accordingly, with only one factor weakly in favor of non-disclosure, the redacted spreadsheets should be disclosed over the employees' privacy objections, considering the totality of the circumstances and in light of the PRA's purpose of effective oversight of government functions. It would, however, be appropriate to redact any information about the nature of the alleged misconduct since that information coupled with the subject's identity has marginal legitimate concern to the public.

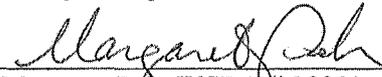
VI. CONCLUSION

For the foregoing reasons, *amicus* requests the Court to reconsider its bright-line holding in *Koenig*. Where redaction does not serve to protect the subject's privacy, *amicus* urges this Court to adopt a multi-factor test to determine whether the public interest in the documents is "legitimate" under the totality of circumstances of the request. In some instances, the subject's privacy outweighs the public's interest, meaning there is no "legitimate" public concern in the documents; in other instances, the documents contain enough information important for public oversight that they must be disclosed even though they harm the subject's privacy.

///

///

Respectfully submitted this 12th day of September, 2014.

By 
Margaret Pals, WSBA # 38982
ENSLOW MARTIN PLLC

Sarah Dunne, WSBA #34869
Douglas B. Klunder, WSBA #32987
ACLU OF WASHINGTON
FOUNDATION

Attorneys for *Amicus Curiae* ACLU of
Washington

OFFICE RECEPTIONIST, CLERK

To: Margaret Pak Enslow
Cc: W Crittenden; brownp@seattleu.edu; Tyler Hinckley; pclay@stevensclay.org; kreber@stevensclay.org; Philip Buri; Doug Klunder; Sarah Dunne; Nancy Talner
Subject: RE: 90129-5 - Predisik and Katke v. Spokane School District 81

Rec'd 9/12/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Margaret Pak Enslow [mailto:margaret@enslowmartin.com]

Sent: Friday, September 12, 2014 9:59 AM

To: OFFICE RECEPTIONIST, CLERK

Cc: W Crittenden; brownp@seattleu.edu; Tyler Hinckley; pclay@stevensclay.org; kreber@stevensclay.org; Philip Buri; Doug Klunder; Sarah Dunne; Nancy Talner

Subject: 90129-5 - Predisik and Katke v. Spokane School District 81

Dear Clerk of the Court,

Attached please find the ACLU of Washington's Motion to File Amicus Curiae Brief and Brief of Amicus Curiae of the ACLU of Washington in the above referenced matter. Counsel for the parties and amicus WCOG have agreed to accept service by email, and are cc'd here.

Thank you,
Margaret