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THE SUPREME COURT
OF THE STATE OF WASHINGTON

ANTHONY PREDISIK and CHRISTOPHER KATKE

Petitioners,

v.

SPOKANE SCHOOL DISTRICT NO. 81

Respondent

PETITIONERS' ANSWER TO BRIEFS OF AMICUS CURIAE

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I. Petitioners' Answer to Brief of Amicus Curiae Washington Coalition for Open Government (WCOG).

1. WCOG misstates and mischaracterizes the record.

The District has consistently advocated for full, unredacted disclosure of the requested records. CP 342-58; RP 33-50; Brief of Respondent Spokane School District No. 81; *see also* CP 137-48. In fact, the District has made many of the same arguments that WCOG makes in its Amicus Brief.

WCOG claims that “[n]one of the records describe any allegations of misconduct whatsoever.” WCOG Amicus Brief at 9. In discussing the records at issue, the trial court acknowledged that the documents contain information about the allegations:

Court: But you’d agree that we can’t say that there are no allegations identified [in the administrative leave letter]?

Mr. Kistler (District’s attorney): Correct. The administrative leave letter is not as innocuous as the spreadsheets that simply identify the existence of allegations.

Court: But let me go there as well. Again, it has to do with that far column to the right that use the terms[.]

...

-- but even having the title remain in the [spreadsheets] with regard to the last two words of that heading [in the spreadsheets], again, falls within the need to

address, I think, why that would not be something beyond embarrassing.

Mr. Kistler: Certainly, Your Honor. And I will address that in the course of my argument[.]

RP 35-36; *See* Ex. 1-3. While the records do not contain graphic detail of the alleged misconduct, they are not devoid of information about the alleged misconduct as WCOG claims. *Id.*

The District has objected to redacting the Petitioners' names from the records throughout this dispute. WCOG claims that “[n]one of the litigants objected to redaction of petitioners’ names, and the courts below failed to consider whether the records should be released in full.” WCOG Amicus Brief at 9. In the trial court, the District argued: “[t]he School District instead concluded that the plaintiffs’ identities could be disclosed along with the records themselves . . . none of [the records] specify allegations that are highly offensive to a reasonable person even with disclosure of the name.” RP 38. The District argued to the Court of Appeals that “it would appear the three records here should be produced in their entirety[.]” and “disclosure (whether the Appellant’s names were redacted or now) would be of legitimate concern to the public.” Br. of Respondent at 11, 21. And while the District stated that it “obviously does not object should [the Court of Appeals] determine that redaction of names is appropriate”, and at points in its appellate brief suggests that it is

indifferent as to whether redaction is ordered, the District was merely stating that it would comply with the Court's decision. *Id.* at 15, 20-25. WCOG argues that if Mr. Predisik and Mr. Katke have a privacy interest, redacting their names is proper. WCOG Amicus Brief at 12. The District has made the same fallback argument throughout this litigation.¹ RP 34; Br. of Resp. at 15, 20-25.

The record belies WCOG's claim that the proceedings were not truly adversarial.

2. CR 19(a) and *Burt v. Washington State Department of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010), do not require joinder of the requestors.

Mr. Predisik and Mr. Katke filed Petitioners' Answer to Washington Coalition for Open Government's Motion to Remand Case for Compliance with CR 19 on August 28, 2014. Amicus WCOG has repackaged most of its motion to remand in Section III. A. of its Amicus brief. This Court summarily denied WCOG's motion to remand. Mr. Predisik and Mr. Katke rely on their Answer to Washington Coalition for Open Government's Motion to Remand Case for Compliance with CR 19,

¹ Mr. Predisik and Mr. Katke disagree with the District's and WCOG's arguments, but note the similarity in the District's and WCOG's arguments to highlight the fact that the District has made many of the same arguments that WCOG claims might have been made were this a "truly adversarial" proceeding.

which they expressly incorporate herein, to respond to the arguments in WCOG's Amicus brief that are restatements of the arguments in WCOG's motion to remand.

CR 19 concerns joining necessary parties to an action. The "public interest" is not a party to this action. By its terms, CR 19(a) applies only to identifiable potential parties. CR 19 does not require joinder of a nebulous "public interest" as a party to an action.

In *Burt*, this Court held that a public records requestor was a necessary party under the circumstances and that because no other party advocated for disclosure, the necessary party's interest was unprotected in the necessary party's absence. *Burt*, 168 Wn.2d at 833-36. That no party advocated for disclosure in *Burt* was only relevant to show that the absent party's interests were not protected by the litigants. *See id.* The necessary party's interest in the action was disclosure of the records. *Burt*, 168 Wn.2d at 836. Because no party in *Burt* advocated for disclosure, no party represented the absent party's interest. *Id.* Accordingly, the Court held that the requestor was a necessary party under CR 19(a)(2) because disposition of the action in the party's absence impaired or impeded the absent party's ability to protect his interest in the action. *Burt*, 168 Wn.2d at 836; CR 19(a)(2).

Burt's comment on the absence of a truly adversarial proceeding

and the lack of an advocate for disclosure of the requested records was made in the context of analyzing the requestor's claim that *he* was a necessary party under CR 19(a)(2).² See *Burt*, 168 Wn.2d at 835-36 (“An adversarial proceeding is what ensures the protection of a *party's* interests.”) (emphasis added). *Burt* did not amend or expand the public records act (PRA) to create a new rule that every action involving the PRA must be “truly adversarial”, or that at least one party must zealously advocate for the purported “public interest” in disclosure of public records. Rather, *Burt* is a specific application of CR 19 limited to a lawsuit for an injunction preventing the disclosure of public records where the requestor is not made a party and where the subject of a public records request and the recipient of a public records request collaborate to oppose disclosure. *Burt*, 168 Wn.2d at 836 (“Given these circumstances, the trial court (pursuant to CR 19(a)) should have joined [the requestor]. . . .”).

CR 19 and *Burt* do not require this Court to remand for joinder of the requestors. The District has consistently advocated for full, unredacted disclosure of the requested records. CP 342-58; RP 33-50; Brief of Respondent Spokane School District No. 81; see also CP 137-48. Although the District has made many of WCOG's arguments, this Court

² CR 19(a) provides, in relevant part, that “A person ... shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest. . . .” CR 19(a)(2).

has nonetheless afforded WCOG an adequate opportunity to present its arguments as Amicus Curiae.

3. Disclosing the requested records will violate Mr. Predisik's and Mr. Katke's right to privacy, substantially and irreparably damage them, and is clearly not in the public interest.

Teachers who are the subjects of unsubstantiated allegations of misconduct of the type that Mr. Predisik and Mr. Katke are alleged to have committed have a right to privacy that requires school districts to withhold records that, if released, would allow identification of a teacher accused of unsubstantiated allegations of misconduct. This Court should reaffirm *Bellevue John Does 1-11 v. Bellevue School District No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), and hold that the identities of public school teachers who are subjects of unsubstantiated allegations of misconduct like the type that the Petitioners are alleged to have committed are exempt from disclosure under the PRA.

Teachers hold an unrivaled position of trust in our society; they are entrusted with the safety, wellbeing, and education of our children. For the most part, children are under the direct care and supervision of a teacher on a daily basis. "A teacher . . . is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to

be followed by the children coming under her care and protection.” *Bd. of Educ. v. Jack M.*, 19 Cal.3d 691, 566 P.2d 602, 139 Cal.Rptr. 700 (Cal. 1977). Public school teachers are also required to teach morality. RCW 28A.405.030. Accordingly, Washington teachers are required to possess and maintain a heightened level of moral character and personal fitness. *See, e.g.*, WAC 181-86-013; WAC 181-86-014; WAC 181-86-075; WAC 181-87-060.

Unlike police officers, or other public officials, parents place their children in the unsupervised care and custody of teachers for most of the year. Accordingly, teachers have an increased need to protect from disclosure unsubstantiated allegations about them that may undermine the public’s trust in the teacher and his abilities or that may destroy a teacher’s ability to effectively teach children.

Disclosing information about a certificated employee accused of the type of misconduct Mr. Predisik and Mr. Katke are alleged to have committed, particularly before an investigation is completed and before the teachers have exhausted or waived their appeal rights, is highly offensive. As this Court acknowledged in *Bellevue John Does*, the nature of an allegation can, in and of itself, be highly offensive. *See Bellevue John Does*, 164 Wn.2d at 216 n. 18. The fact of the allegation, in and of itself, can destroy a teacher’s effectiveness without regard to whether the

allegation has any factual basis.

The misconduct that Mr. Predisik and Mr. Katke are alleged to have committed is so severe that if they were convicted or pleaded guilty to the alleged misconduct, RCW 28A.410.090(4) requires permanent revocation of their teaching certificates. The danger in cases involving unsubstantiated allegations of teacher misconduct of the type that Mr. Predisik and Mr. Katke are accused of is that a teacher may lose all teaching effectiveness merely due to the nature of the unsubstantiated allegations. If, for example, the public learned that a teacher was accused of sexually assaulting a minor and that a school district was conducting an investigation into the allegations, no reasonable parent would want that teacher in her child's school. Even if the school district's investigation later exonerates the teacher, the district's subsequent finding will not likely be enough to overcome the negative effect created by disclosing the teacher's identity in connection with allegations that he engaged in egregious misconduct with a minor. It is unreasonable to believe that parents who learn that their child's teacher has been placed on administrative leave pending such a serious allegation will necessarily regain trust in the teacher if the District later finds the allegations were unsubstantiated.

Discoing information about a teacher who is the subject of

unsubstantiated allegations of misconduct can create sufficient negative public reaction that the teacher can no longer be an effective teacher. Regardless of whether the allegations have any factual basis, and without a showing of substantial and material impact on a teacher's performance, the community's loss of confidence and trust in a teacher because of the allegations against him can ultimately result in his termination.³ See RCW 28A.405.300; RCW 28A.405.310 (a school district's determination that it has probable cause to terminate a teacher is reviewed to determine whether sufficient cause exists to terminate him); see also *Hoagland v. Mount Vernon Sch. Dist. No. 320*, 95 Wn.2d 424, 428, 623 P.2d 1156 (1981) ("Sufficient cause" means "a showing of conduct that materially and substantially affects a teacher's performance."). Teaching effectiveness is "the touchstone for all dismissals." *Hoagland*, 95 Wn.2d at 430. And once a teacher's effectiveness is destroyed because of his association with the alleged misconduct, a school district may attempt to terminate him for lack of effectiveness in his position. See RCW 28A.405.210; RCW 28A.405.300; RCW 28A.405.300.310.

Disclosing information about a teacher in connection with allegations of misconduct of the type alleged against Mr. Predisik and Mr.

³ For example, less than 40 years ago, a school district could discharge a homosexual teacher for immorality and his perceived inability to effectively teach children as a result of his sexual orientation. See *Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wn.2d 286, 599 P.2d 1340 (1977).

Katke is highly offensive because disclosure of the teacher's identity in connection with the allegations has the potential to destroy a teacher's effectiveness, cost him his job, and prevent him from ever teaching again. *Hoagland*, 95 Wn.2d at 430. This Court has acknowledged that improvident dismissals have drastic consequences for teachers. *Hoagland*, 95 Wn.2d at 430. "Where a teacher is discharged, the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated." *Id.* (quoting *Wojt v. Chimacum Sch. Dist. 49*, 9 Wn. App. 857, 862, 516 P.2d 1099 (1973)).

Moreover, the mere fact that a teacher has been placed on administrative leave, regardless of whether the allegations for which the school district placed him on leave have any factual basis, calls into question their competency as teachers. *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993), (disclosure of information that may be taken to bear on an employee's basic competence is presumed to be highly offensive) *abrogated in part on other grounds by Progressive Animal Welfare Society (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994). School districts do not put teachers on administrative leave and prevent them from having contact with students for excessive tardiness or insubordination. When a school district places a teacher on administrative leave, any reasonable person would believe that the

allegations against the teacher are very serious.

The fact that people know that Mr. Predisik and Mr. Katke are on administrative leave does not prevent disclosure from violating their rights to privacy. Mr. Predisik and Mr. Katke agree with WCOG that disclosing the identity of a teacher in connection with unsubstantiated allegations violates a teacher's right to privacy if the allegation itself is highly offensive. The District knows the nature of the highly offensive allegations against Mr. Predisik and Mr. Katke. This Court has held that disclosing the identity of a teacher accused of serious misconduct is highly offensive to a reasonable person. *See Bellevue John Does*, 164 Wn.2d at 216 ("It is undisputed that disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person."). The Court of Appeals recognized that "disclosure of unsubstantiated allegations of other types of misconduct can be offensive because it also subjects the teacher to gossip and ridicule without a finding of wrongdoing." *Predisik v. Spokane School District No. 81*, 179 Wn. App. 513, 520, 319 P.3d 801 (2014). Whether disclosure of information is highly offensive is implicit in the nature of the allegation of misconduct. *See Bellevue John Does*, 164 Wn.2d at 216, n. 18.

The nature of the allegations that resulted in administrative leave for Mr. Predisik and Mr. Katke implicates their right to privacy, not the

mere fact that they are on administrative leave. *See id.* Disclosure of the requested records will not simply give further publicity to already public information, as WCOG claims. As previously stated, the requested records disclose information that has not been made public. *See Ex. 1-3.* “[I]f the record is one not open to public inspection, . . . it is not public, and there is an invasion of privacy when it is made so.” RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977). WCOG’s argument that the fact the teachers were on leave was already public information misses the point. While the staff, students, and requestors know that Mr. Predisik and Mr. Katke are on administrative leave, they do not know why, which, ostensibly, was one reason for the public records requests. Moreover, simply because some information has become public does not constitute a waiver of Mr. Predisik’s and Mr. Katke’s ability to challenge disclosure to protect their right to privacy. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 410, 259 P.3d 190 (2011).

WCOG and the District ask this Court to overrule the holding in *Bellevue John Does* that “[w]hen an allegation is unsubstantiated, the teacher’s identity is not a matter of legitimate public concern.” *Bellevue John Does*, 164 Wn.2d at 221. The allegations against Mr. Predisik and Mr. Katke are unsubstantiated. Consequently, the public has no legitimate concern in the disclosure of any information that may identify Mr.

Predisik and Mr. Katke in connection with the unsubstantiated allegations of misconduct against them. *Id.*

Redacting Mr. Predisik's name from the administrative leave letter does nothing to protect his right to privacy when the request was for Mr. Predisik's administrative leave letter. CP 47. Redacting Mr. Predisik's and Mr. Katke's names from the spreadsheets does not adequately protect their right to privacy. Due to the nature of the request in *Bellevue John Does*, the Court could adequately protect the teachers' rights to privacy by redacting their names. *See id.*; *see also Bainbridge*, 172 Wn.2d at 416 n. 11 (“[T]he general nature of the public records request in [*Bellevue John Does*] allowed the court to protect the teachers' identities by producing the records with only the teachers' names redacted.”). Unlike in *Bellevue John Does*, where the request implicated 55 current and former teachers, a requestor can easily determine the identity of the teachers on administrative leave where only two “unidentified” teachers are disclosed in response to a request for all teachers on administrative leave. *Bellevue John Does*, 164 Wn.2d at 206.

Despite the fact that KREM 2's request was not directed to a specific individual, disclosing information in response to KREM 2's request is highly offensive and of no legitimate public concern because disclosure would, at a minimum, aide in the identification of teachers who

are on administrative leave pending investigations into alleged misconduct. Once any information concerning a teacher accused of the serious type of misconduct at issue in this case is disclosed, minimal effort from the requestor is necessary to identify the accused teacher. In this case, for example, a principal is cc'd on Mr. Predisik's administrative leave letter. Ex. 1. One call to any person at the school where that principal works would allow the requestor to positively identify the identity of the teacher on administrative leave. The District disclosed Mr. Katke's administrative leave letter before it received the request from KREM 2. CP 281. Mr. Katke's administrative leave letter contains information that would easily allow the requestor to determine Mr. Katke's identity. Because Mr. Predisik and Mr. Katke are still awaiting a determination as to whether the allegations are substantiated or unsubstantiated, disclosing any information that may allow their identities to become known in connection with the allegations violates their right to privacy.

Finally, redaction does not prevent disclosure from violating Mr. Predisik's and Mr. Katke's rights to privacy. RCW 42.56.210(1) renders the PRA's exemptions inapplicable only "to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought."

Redaction of information from the records cannot prevent disclosure from violating Mr. Predisik's and Mr. Katke's rights to privacy because disclosure itself will result in the disclosure of Mr. Predisik's and Mr. Katke's identities in connection with unsubstantiated allegations of serious misconduct. RCW 42.56.210(1) is inapplicable.

For the reasons set forth herein and in the pleadings filed by Mr. Predisik and Mr. Katke in the trial court, Court of Appeals, and this Court, disclosing the records would violate Mr. Predisik's and Mr. Katke's rights to privacy. *See* RCW 42.56.050. Moreover, because there is no legitimate public interest disclosure of information concerning a teacher accused of unsubstantiated allegation of misconduct, *Bellevue John Does*, 164 Wn.2d at 221, and because of the potentially devastating effect that the disclosure would have on Mr. Predisik and Mr. Katke's ability to continue to work in their profession of choice, examination of the requested records would clearly not be in the public interest and would substantially and irreparably damage Mr. Predisik and Mr. Katke. *See* RCW 42.56.540. Disclosure is particularly improper given that the District's nearly 3-year investigation into the allegations against Mr. Predisik and Mr. Katke is still ongoing. *See* RCW 42.56.540.

4. The requested records are investigative records under RCW

42.56.240(1) and the District is an investigative agency when conducting investigations into alleged misconduct of its employees.

There is no Washington authority to support WCOG's claim that RCW 42.56.240(1) applies only in the context of law enforcement agencies and police officers. The records the District intends to disclose are specific investigative records and the District is an "investigative agency", under RCW 42.56.240(1).

The administrative leave letter and spreadsheets were created and "compiled as a result of a specific investigation focusing with special intensity upon a particular party." *Dawson*, 120 Wn.2d at 792. But for the District's investigation, the records would not exist. *See* Ex. 1-3; CP 12, 223, 281.

Like the District, WCOG relies on *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 791 P.2d 526 (1990) for the proposition that a school district is not an investigative agency. WCOG misstates the law and this Court's holding in *Brouillet* by claiming that RCW 42.56.240(1) "applies only to agencies that engage in 'the act of putting . . . law into effect,' or 'imposition of sanctions for illegal conduct,' such as a fine or a prison term." WCOG Amicus Br. at 19 (citing *Brouillet*, 114 Wn.2d at 795-96). *Brouillet* held that the Office of Superintendent of Public Instruction (OSPI) is not a "law enforcement agency" for purposes of

RCW 42.56.240(1) and that, therefore, nondisclosure of the records in *Brouillet* was not “essential to effective law enforcement.” *Brouillet*, 114 Wn.2d at 795-97. *Brouillet* does not address the exemption that Mr. Predisik and Mr. Katke claim applies, and *Brouillet* never addressed whether school districts are investigative agencies under RCW 42.56.240(1).

II. Petitioners’ Answer to Brief of Amicus Curiae Washington Association of Sheriffs & Police Chiefs (WASPC).

Like WCOG, Amicus WASPC erroneously states that the requested records contain no information about the alleged misconduct. The records are not devoid of information about the alleged misconduct. RP 35-36; See Ex. 1-3.

Disclosure of the requested records will not become less highly offensive and of legitimate public concern once the District has completed its investigation. Because a school district must err on the side of protecting students, the District is inherently incapable of being truly neutral in evaluating allegations of misconduct against teachers. To address the inherent bias where a school district conducts its own investigation and then issues discipline based on its own investigation and findings, the legislature created a statutory appeal scheme designed to

provide unbiased forum to determine whether sufficient cause exists to discharge the teacher. RCW 28A.405.300; *Hoagland*, 95 Wn.2d at 424. If the District determines that the allegations against Mr. Predisik or Mr. Katke are substantiated and issues a notice of discipline or a notice of probable cause for nonrenewal and termination under chapter 28A.405 RCW, they will have the option to file a grievance under the CBA or request an appeal under RCW 28A.405.300 and .310. *See* CP 320-23. Review by a neutral third party could result in a determination that the District had insufficient cause to issue the discipline or notice of probable cause and that the allegations were unsubstantiated. *See* RCW 28A.405.310; CP 320-23.

If a neutral third party determines that the District did not have sufficient cause to terminate Mr. Predisik or Mr. Katke, the District is required to reinstate them. *See* RCW 28A.405.310(7)(c). But if the records are released before the neutral third party determines that the allegations against Mr. Predisik and Mr. Katke are unsubstantiated, it will be nearly impossible to repair the damage caused by the prior disclosure. No parent would want their child in the classroom of a teacher who the school district determined to have engaged in egregious misconduct with a minor, regardless of whether a neutral third party later determines that the school district's decision was unsupportable.

Disclosing the requested records before Mr. Predisik and Mr. Katke have exhausted or waived their appeal rights violates their right to privacy because is highly offensive and of no legitimate public concern because the allegations remain unsubstantiated until a neutral third party determines otherwise.

III. Petitioners' Answer to Brief of Amicus Curiae American Civil Liberties Union of Washington (ACLU).

The multi-factor test that the ACLU advances for determining whether a legitimate public interest exists in the disclosure of the records addresses the valid concern that redacting an individual's name from records, in certain circumstances, affords absolutely no protection to the individual's identity and right to privacy. But the test is unnecessary in this case because the allegations are unsubstantiated, and when allegations of misconduct against teachers are unsubstantiated, there is no legitimate public interest in the disclosure of the teachers' identities in connection with the allegations. *Bellevue John Does*, 164 Wn.2d at 221.

There is no legitimate public interest in the disclosure of Mr. Predisik's administrative leave letter or in the spreadsheets, particularly when the teachers are still under investigation and when disclosure can lead to the discovery of Mr. Predisik's and Mr. Katke's identities in

connection with the unsubstantiated allegations. *See id.*

IV. CONCLUSION

Mr. Predisik and Mr. Katke respectfully request this Court to hold that the records, in their entirety, are exempt from disclosure under RCW 42.56.230(3) and RCW 42.56.240(1).

Respectfully submitted this 14th day of October, 2014.

MONTOYA HINCKLEY PLLC
Attorneys for Petitioners



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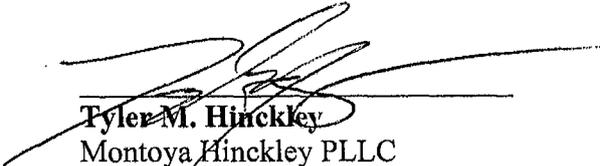
CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner identified:

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DATED at Yakima, Washington, this 14th day of October, 2014.


Tyler M. Hinckley
Montoya Hinckley PLLC

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Dear Clerk:

Attached for filing please find Petitioners' Answer to Briefs of Amicus Curiae. Thank you.

Tyler M. Hinckley

Attorney

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