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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ANTHONY J. PREDISIK and CHRISTOPHER
KATKE, Appellants,

v.

SPOKANE SCHOOL DISTRICT NO. 81, Respondent.

ON APPEAL FROM THE COURT OF APPEALS, DIVISION III
THE STATE OF WASHINGTON

RESPONDENT'S ANSWER TO AMICI

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INTRODUCTION

Under the Public Records Act, an agency must disclose personnel records that are not performance evaluations and do not – within the four corners of the document – describe alleged misconduct. This appeal concerns three documents that respondent Spokane School District 81 was ready to release. The three, a letter and two spreadsheets, stated that Appellants Anthony Predisik and Christopher Katke were on paid administrative leave pending investigations of misconduct. None of the documents described what the misconduct entailed.

Must District 81 redact the teachers' names from the three documents before disclosing them? Four Amici have filed briefs advocating a variety of answers, ranging from withholding the records to complete disclosure. Respondent Spokane School District 81 respectfully requests the Court to confirm the District's position. Because the documents do not describe allegations of misconduct, the Records Act requires their disclosure, unredacted.

I. PAID ADMINISTRATIVE LEAVE DOES NOT TRIGGER AN EMPLOYEE'S RIGHT TO PRIVACY

District 81 put Appellants Anthony Predisik and Christopher Katke on administrative leave with pay while it investigated

separate allegations of misconduct. This is similar to police departments, transit authorities, and other public employers placing employees on administrative leave during an investigation. See, e.g., Herried v. Pierce County Public Trans. Ben. Authority Corp., 90 Wn. App. 468, 475, 957 P.2d 767 (1998) (“when Pierce Transit became aware of the serious nature of the assault, it placed the entire department on paid administrative leave to prevent any further hostile conduct and then thoroughly investigated”).

On its own, paid administrative leave does not imply innocence or guilt; it merely identifies employees who may play some part in an investigation. Most people perceive this category of leave as neutral and temporary, used to protect employees while an investigation is ongoing. Releasing the names of teachers on paid administrative leave does not implicate or violate their rights to privacy.

The Public Records Act withholds from disclosure only select information in personnel records. Under RCW 42.56.230(3), the Act exempts “personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.” This

Court has characterized the provision as a "conditional-information" exemption.

In the case of a conditional exemption, specified information or records must be protected, but in furtherance of only certain identified interests, and only insofar as those identified interests are demonstrably threatened in a given case. Application of a conditional exemption will be upheld if the agency has accurately identified the nature of the specified information or record *and* properly determined that an identified interest must be protected in the given case.

Resident Action Council v. Seattle Hous. Auth., ___ Wn.2d. ___, ___, 327 P.3d 600, 606 (2013), as amended on denial of reh'g (Jan. 10, 2014).

Here, the Act requires District 81 to disclose the requested documents from Appellants' personnel files. As this Court has previously held, a request for information in teachers' personnel records raises three questions: "(1) whether the allegations constitute personal information, (2) whether the teachers have a right to privacy in their identities, and (3) whether disclosure of the teachers' identities would violate their right to privacy." Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 164 Wn.2d 199, 210, 189 P.3d 139 (2008). The answers in this case show that paid administrative leave does not trigger a teacher's right to privacy.

The first question is not in dispute -- the three records constitute personal information. Because they concern only Appellants, the documents have "information relating to or affecting a particular individual." Bellevue John Does, 164 Wn.2d at 211.

A. Paid Administrative Leave Is Not An Intimate Detail Of Private Life

The dispute is over the second and third questions. A teacher does not have a right to privacy in being placed on paid administrative leave. In Bellevue John Does, the Court addressed separately whether a teacher had a right to privacy in requested information, and if so, whether unredacted disclosure violated that right. Bellevue John Does, 164 Wn.2d at 212 (2008) ("the PDA sets forth a test for determining when the right to privacy is violated,...but does not explicitly identify when the right to privacy in question exists").

A right of privacy exists when information reveals the intimate details of a person's private life. Bellevue John Does, 164 Wn.2d at 212-13; Restatement (Second) of Torts § 652D (1977) ("every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye").

As District 81 argued below, and Amicus Washington Coalition for Open Government argues here, being placed on paid administrative leave is a public, not a private act. (District 81 Response Brief at 7-8) ("paid administrative leave...is a fact of which numerous other teachers in his school would be aware, as soon as it occurs"); (WCOG Amicus Brief at 11) ("the mere fact that one has been placed on leave is not the sort of private fact protected by the PRA's privacy test"). Paid administrative leave is a status of employment, not a private fact or reason for embarrassment or shame. It therefore does not trigger a right to privacy.

Two Amici disagree. First, Amicus ACLU argues that teachers "have a right to privacy in their identity." (ACLU Amicus Brief at 6). But this Court has refused to give blanket protection to an employee's identity. Bellevue John Does, 164 Wn.2d at 213 ("a public employee has a right to privacy in some information within a personnel file, but the scope of this right is unclear"). A teacher has a right to privacy in his or her identity when "the fact of the allegation...does not bear on the teacher's performance or activities as a public servant." Bellevue John Does, 164 Wn.2d at 215.

Paid administrative leave bears directly on a teacher's activities as a public servant. It is as public a status as the teacher's presence in school. The ACLU's argument contains the same error as that in the Court of Appeal's decision: it assumes the three requested documents disclose unsubstantiated allegations of misconduct. (ACLU Amicus Brief at 6); Predisik v. Spokane School Dist. No. 81, 179 Wn. App. 513, 520, 319 P.3d 801 (2014). They do not. (Sealed Exhibits 1-3; Order Denying Plaintiff's Motion for Summary Judgment; CP 400). The requested documents disclose that the teachers are on administrative leave, and Mr. Predisik's leave letter references an investigation into allegations of inappropriate interactions with a former student. They do not contain specific allegations of misconduct.

Because the requested documents do not detail misconduct – substantiated or unsubstantiated – the sole issue is whether disclosing the fact of paid administrative leave implicates Appellants' right to privacy. Paid leave is not an intimate detail of a person's private life.

Second, Amicus Washington Education Association argues that by agreeing the requested records contain personal information, District 81 has conceded that a right to privacy follows.

(WEA Amicus Brief at 5) (“both parties agree that petitioners are entitled to a right of privacy in the records because they contain personal information”). This is incorrect. Since Bellevue John Does, Washington courts consistently distinguish between personal information and personal information that implicates a right to privacy. Bainbridge Island Police Guild v. City of Puyallup, 172 Wash. 2d 398, 413, 259 P.3d 190 (2011) (PRA “does not explicitly identify when a right to privacy exists”); Martin v. Riverside Sch. Dist. No. 416, 180 Wn. App. 28, 329 P.3d 911 (2014) (employee “must establish that he has a right to privacy in the records and that disclosure of the records would violate his right to privacy”).

District 81 has argued throughout this litigation that Appellants do not have a right to privacy in being placed on paid administrative leave. (District Response to Summary Judgment at 9; CP 350) (“Like the administrative leave letter, the information contained in the spreadsheets...does not identify intimate details and is a fact of which numerous other teachers would be aware”); (District Response Brief at 8); (District Answer to Petition at 6). District 81 does not agree that placing Appellants on paid administrative leave implicates their rights to privacy.

Amicus WEA also argues that Mr. Predsik's administrative leave letter is a performance evaluation, exempt from disclosure under Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993). (WEA Amicus Brief at 3). This assertion has a few problems. The letter does not evaluate Mr. Predsik nor does it give any direction on how to perform his work. Instead, the letter notifies him that District 81 has placed him on paid administrative leave pending an investigation. It is akin to the letters of direction in Bellevue John Does, with one significant difference: the administrative leave letter does not contain criticism of past conduct or guidance for the future. Bellevue John Does, 164 Wn.2d at 211 ("letters of direction contain information regarding the school districts' criticisms and observations of the Doe employees that relate to their competence as education professionals")

Second, Dawson did not create an open exemption for any document kept in an employee's personnel file.

The prosecutor disclosed the contents of Stern's personnel file except for the following: (1) letters written by Stern or on his behalf seeking employment; (2) a copy of Stern's resume; (3) notes taken during Stern's employment interview; (4) a letter concerning that interview; (5) performance evaluations; and (6) requests for verification of employment.

Dawson, 120 Wn.2d at 787. The administrative leave letter does not fit in any of these categories. It certainly is not an evaluation. The letter does not comment on Mr. Predisik's competence and is simply notice of a personnel action. Dawson v. Daly, 120 Wn.2d at 797 ("employee evaluations qualify as personal information that bears on the competence of the subject employees").

In sum, the three requested documents disclose that Appellants are on paid administrative leave pending an investigation. They do not disclose allegations of misconduct. Because paid administrative leave is not an intimate detail of an employee's private life, Appellants do not have a right to privacy in the requested information.

B. Disclosing That An Employee Is On Administrative Leave Does Not Violate The Right To Privacy

If Appellants can establish they have a right not to be identified as on paid administrative leave, they must still prove that disclosure violates their right to privacy. Under RCW 42.56.050, a violation occurs "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." The dispute among Amici illustrates why Appellants have not satisfied this standard.

1. Disclosure Is Not Highly Offensive

Amicus WCOG provides a succinct argument why disclosure is not highly offensive: “the three records *disclose no offensive information about [Appellants].*” (WCOG Amicus Brief at 10) (emphasis original). At worst, being identified as an employee on paid administrative leave may be uncomfortable or embarrassing. This is not enough to justify redacting the teacher’s names from the requested documents.

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.”

Morgan v. City of Fed. Way, 166 Wn.2d 747, 756, 213 P.3d 596 (2009). Paid administrative leave is far less embarrassing than the complaints against former Judge Morgan. West v. Port of Olympia, ___ Wn. App. ___, ___, 333 P.3d 488, 492 (2014) (“allegations...might be embarrassing but hardly are *highly* offensive”).

Again, Amici WEA and ACLU disagree. Amicus WEA argues that disclosing the three documents reveals accusations of reprehensible conduct.

There are many behaviors, in addition to sexual misconduct, that society considers reprehensible, such as physical and psychological abuse. These behaviors are often considered to be even more reprehensible when the victim or victims are children.

(WEA Amicus Brief at 7). Yet the three documents do not have any description of reprehensible conduct. They disclose that the teachers are on administrative leave, a far cry from allegations of physical or psychological abuse.

As described in the following section, Amici and Appellants read allegations of misconduct into the requested records from outside the documents themselves. District 81 strongly opposes requiring an agency to construe documents more broadly than what they actually say.

Next, Amicus ACLU asks the Court to clarify Morgan v. City of Federal Way, arguing "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 offensive if disclosed." (ACLU Amicus at 7). District 81 supports every effort to reduce the guesswork in responding to Public Record Act requests. See Resident Action Council v. Seattle Hous. Auth., ___ Wn.2d ___, ___, 327 P.3d 600, 605 (2013), as amended on denial of reh'g (Jan. 10, 2014) ("In this difficult area of the law, we

endeavor to provide clear and workable guidance to agencies insofar as possible”).

But Amicus ACLU's proposed solution will make this difficult area of the law even more complex. Here, the requested documents do not contain unsubstantiated allegations of sexual misconduct and therefore should be disclosed. Furthermore, Amicus WCOG details the flaws in replacing a relatively clear set of rules with the ACLU's balancing test. (WCOG Amicus Brief at 13-17) District 81 agrees with WCOG that the proposed balancing test conflicts with established caselaw and is unworkable in practice. Agencies need fewer grey areas, not more.

2. The Public Has A Legitimate Interest In The Use of Administrative Leave

The second test under RCW 42.56.050 is whether the information is not of legitimate concern to the public. In short, the public has a legitimate interest in a public employer's use of paid administrative leave. This includes the total number of employees on leave as well as the individuals assigned and the reason given. Additionally, the public has a legitimate interest in the way District 81 carries out its investigations, protecting the rights of teachers and students. (Response Brief at 21-22) (ACLU Amicus Brief at

15-16) ("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").

Amicus WEA opposes this, arguing that the public has no legitimate interest in unsubstantiated claims against teachers. (WEA Amicus at 11-16). But unlike Bellevue John Does, this case does not involve documents that contain unsubstantiated allegations of sexual misconduct. Bellevue John Does, 164 Wn.2d at 221 ("When an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern").

In conclusion, District 81 identified three documents that responded to valid requests under the Public Records Act. These documents identified two teachers who were on paid administrative leave. They did not contain unsubstantiated allegations of sexual misconduct with students. Because paid administrative leave does not trigger a teacher's right to privacy, District 81 appropriately offered to disclose the three documents without redaction.

II. THE CONTENT OF A DOCUMENT, NOT ITS CONTEXT, MATTERS

Amici WEA and ACLU ask this Court to look beyond the four corners of a requested record to evaluate the consequences of

disclosure. District 81 respectfully requests the Court to decline the invitation.

This Court has consistently held that the content of a document, not its context, determines whether an agency must disclose it.

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. Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 414, 259 P.3d 190 (2011).

The same is true for what may be known about the allegations against Appellants. District 81's documents do not mention sexual misconduct or any allegations like those in Bellevue John Does. To make this case similar, Appellants and Amici WEA and ACLU have read sexual misconduct into the requested documents. The record on appeal, as well as the requested documents, do not support that inference. But more importantly,

this Court does not require agencies to guess what others may know about the context. Only the contents of the document determine whether to disclose. Bainbridge Island Police Guild, 172 Wn.2d at 414.

Finally, District 81 agrees with Amicus Washington Association of Sheriffs and Police Chiefs that this appeal does not present the difficult question of disclosing unsubstantiated allegations of misconduct during an investigation. (WASPC Amicus Brief at 2) (“the case before the Court does not involve any disclosure regarding the nature of the allegations that are at issue”). In other words, this appeal is about the privacy interests in paid administrative leave, not in unsubstantiated allegations of sexual misconduct.

III. DISTRICT 81 IS NOT AN INVESTIGATIVE, LAW ENFORCEMENT, OR PENOLOGY AGENCY

In Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 791 P.2d 526 (1990), this Court concluded that the Superintendent of Public Instruction was in administration, not law enforcement.

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 796. The same conclusion applies to District 81. Under RCW 42.56.240(1), its records are not exempt from disclosure. (WCOG Amicus Brief at 17).

IV. WCOG's REQUESTED REMAND WOULD BE UNNECESSARY AND FUTILE

District 81 agrees with Appellants that the parties and Amici have fully litigated and briefed the issues in this case. (Petitioners' Answer to WCOG Amicus Brief, filed August 29, 2014). Because the requestors had notice of this lawsuit and chose not to participate, giving requestors a second chance on remand would be a waste of time.

CONCLUSION

Spokane School District 81 identified three documents that responded to a valid request under the Public Records Act. Because none of these documents contained unsubstantiated allegations of sexual misconduct, District 81 prepared to release them without redactions. The four amicus briefs filed in this case confirm that District 81 interpreted the law correctly. The documents do not trigger, let alone violate, Appellants' right to privacy.

//

DATED this 14 day of October, 2014.

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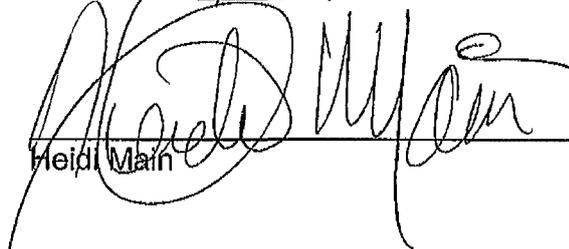
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