NO. 98807-2

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II No. 53804-1-II

THE CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

PETITION FOR REVIEW BY WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONER

The Church of the Divine Earth through its attorney Richard B. Sanders files this petition.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the published Court of Appeals Division II decision No. 53804-I-II filed on June 23, 2020 with an Order Granting Motion to Publish Opinion and Publishing Opinion.

III. ISSUES PRESENTED FOR REVIEW

A. Does *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993)[1] create a categorical exemption in the PRA for employee evaluations regardless of content?

B.

1. **Are records of public job performance "personal information" as defined in RCW 42.56.230?**

2. **Would public release of these documents "be highly offensive to a reasonable person" as per RCW 42.56.050?**

3. ***And* are job records of powerful municipal department heads not of legitimate concern to the public as per RCW 42.56.050?**

C. If so, should *Dawson* be overruled?

D. Are requests for employee evaluations under the PRA exempt from the brief explanation requirement of RCW 42.56.210(3) because they are categorically exempt under *Dawson*?

[1] Overruled in part on other grounds by *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994)

IV. STATEMENT OF THE CASE

The Church filed a Public Records Act (PRA) request with the City of Tacoma seeking "job performance evaluations, comments on job performance, document showing salary from City for each of the past 5 years for Peter Huffman and Curtis Kingsolver."[2] Eventually the City responded with the salary information however redacted all 122 pages of responsive information from job performance evaluation forms for both department heads. An accompanying privilege log justified all redactions with a single code absent any specific factual information by reference to the following:

EMPLOYEE PERFORMANCE EVALUATIONS (NO SPECIFIC MISCONDUCT)—

> These records, consisting of performance evaluations which do not discuss specific instances of misconduct, are protected from disclosure and have been withheld in their entirety based on the following authority:
>
> **RCW 42.56.230 Personal Information**
> (3) 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.
>
> **RCW 42.56.050 Invasion of privacy, when.**
> A person's "right to 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

[2] Each are powerful department heads with considerable discretionary authority over private applicants for land use permits. Peter Huffman is Director of Planning and Development Services whereas Curtis Kingsolver is Director of Public Works.

> concern to the public. 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.
>
> -AND-
>
> ***Dawson v. Daly*, 120 Wn.2d 782, 797 (1993)**

The Church filed suit to compel disclosure of the redacted material and to contest failure of the privilege log to comply with the brief explanation requirement of RCW 42.56.210(3).

The trial court granted the Church's request for in camera review of unredacted documents; however, after that review the case was reassigned to a different judge, Hon. Grant Blinn, who heard the City's motion for summary judgment of dismissal and declined the Church's request to also review the unredacted documents. Judge Blinn granted the City's motion dismissing both the claim on the merits and the separate claim alleging violation of RCW 42.56.210(3)'s brief explanation requirement.

Material redacted included job productivity, work quality, adherence to deadlines and work schedules, efficiency, work attendance, pursuit of self-development, meeting needs of internal and external customers, ability to work with others, keeping projects on schedule, examples of work performance in various categories, examples of

leadership communication and coordination, use of website, efforts to promote diversity, attendance at seminars and conferences, effect of training on job performance, challenges, solving difficult problems, etc. In short, *nothing* related to the private life of these department heads and *everything* related to their public job performance. The public was denied any information regarding the job performance, good or bad, of these powerful department heads.

The whole cover up turned on construction and application of *Dawson.* Judge Blinn struggled with confusing and seemingly self-contradictory language in the opinion ultimately concluding the opinion created a categorical exemption for performance evaluations *regardless of content*, **even if they contained no "personal information"** as required by RCW 42.56.230(3) and defined even by *Dawson*, 120 Wn.2d at 796 as "the intimate details of one's personal and private life."

Further the City included no "brief explanation" of how the redacted material fit within the claimed exemption, reasoning none was required because it didn't matter since "performance evaluations" were categorically exempt under *Dawson* regardless of content. Facts just didn't matter.

This *published* decision of the Court of Appeals affirmed based wholly on *Dawson*.

While case law provides definition to the terms "personal information," the Opinion summarily declined to engage in any analysis of how the facts and information contained in the evaluations factually fit within *any* definition of "personal information". Rather the Opinion quoted *Dawson* summarily stating "Employee evaluations qualify as *personal information* that bears on the competence of the subject employees." (emphasis added by Court of Appeals) 120 Wn.2d at 797 End of discussion. This assertion ignores *Dawson's* language "that the right to privacy applies 'only to the intimate details of one's personal and private life'" *Dawson*, 120 Wn.2d at 796, quoting *Spokane Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989) The Opinion makes no claim that the information here withheld constitutes "the intimate details of one's personal and private life" nor fits within the privacy provisions of the Restatement.

V. ARGUMENT

By way of introduction, **r**eview should be accepted because

(1) The decision of the Court of Appeals is in conflict with decisions of the Supreme Court;

(2) the decision of the Court of Appeals conflicts with other decisions of the Court of Appeals; and

(3) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (2), (4)

By ordering the opinion published the Court of Appeals certified it met the criteria of RAP 12.3 which includes (1) the decision determines an unsettled or new question of law; (2) the decision modifies or clarifies or reverses an established principal of law; (3) it is of general public interest or importance; and/or (4) it conflicts with a prior opinion of the Court of Appeals.

Under the PRA proper application of the "privacy" exemption involves a three part test: (1) is the information "personal," RCW 42.56.230(3), i.e. "only the intimate details of one's personal and private life" *Dawson*, 120 Wn.2d at 796; *and* (2) would release of the information be "highly offensive to a reasonable person" RCW 42.56.050; *and* (3) would release of the information be "not of legitimate concern to the public" RCW 42.56.050?

The legislature commands the PRA be "liberally" construed to promote the goals of open government. RCW 42.56.030. The PRA is a "strongly worded mandate for open government." *Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009), quoting *Rental Housing Ass'n of Puget Sound v. Des Moines*, 165 Wn.2d 525, 527, 199 P.3d 393 (2009) The agency bears the burden to prove an exemption to production applies.

RCW 42.56.550(1), *West v. Port of Olympia*, 183 Wn.App. 306, 311, 333 P.3d 488 (2014) The Act must be liberally construed, and its *exemptions must be narrowly construed*. RCW 42.56.030, *West*, 183 Wn.App. at 311

Any exemption to disclosure must be enumerated by the legislature. RCW 42.56.550(1) (any "refusal to permit public inspection and copying [must be] in accordance with a *statute* that exempts or prohibits disclosure…") (italics added)

The Court of Appeals did not apply the statutory test for the privacy exemption but made it up out of whole cloth. There is simply no per se statutory categorical exemption for personnel evaluations of public employees in the PRA; although the Court of Appeals read *Dawson* to create one. The Court of Appeals did not reconcile *Dawson's* claim that "information about public, on duty job performances should be disclosed" *Dawson,* 120 Wn.2d at 795 quoting *Ollie v. Highland School District* 203, 50 Wn.App. 639, 645, 749 P.2d 747, rev. den'd, 110 Wn.2d 1040 (1988). Nor did it recognize the *Dawson* opinion was premised on an evaluation "which does not discuss any specific instances of misconduct or of *the performance of public duties*…" (italics added) *Dawson* at 796 The trial court commented this "has to mean something" RP 8; however, accepted the City's argument it meant nothing, as did the Court of Appeals.

Under the Court of Appeals Opinion information in an evaluation that an employee was late to work, or didn't show up at all, or had perfect attendance, or was competent, or incompetent, or honest, or dishonest, or went to seminars to improve his skills or didn't, would all be exempt from public disclosure. Facts don't matter to the Court of Appeals analysis but do matter to the statutory privacy exemption which *is* fact based.

A. Review Should be granted because the Court of Appeals Opinion conflicts with Supreme Court and Court of Appeals precedent on the meaning of "personal information" referenced in RCW 42.56.230, and raises an issue of substantial public interest which may only be resolved by the Supreme Court.

At the threshold of any privacy exemption claim is the presence of "personal information." Without it there is no exemption although with it the analysis continues to determine if its release would be "highly offensive to a reasonable person" and, if so, whether same is not of legitimate concern to the public.

Two lines of authority define "personal information;" however the Opinion follows neither. Rather it treats personnel evaluations regardless of content as "personal information", even if they consist in whole or part information describing *public* employment activities.

This conflicts with *Dawson* which favorably references the *Spokane Police Guild'*s definition that relates "'only to the intimate details

of one's personal and private life,' which we contrasted to actions taking place in public." *Dawson,* 120 Wn.2d at 796 Thus the opinion conflicts with *Dawson* and *Spokane Police Guild* and should be reviewed for that reason.

A second line of authority defining "personal information" begins with *Hearst Corp., v. Hoppe,* 90 Wn.2d 123, 580 P.2d 246 (1978). Therein the Court relied upon Restatement (Second) of Torts sec. 652D., at 383 (1977) referencing the "private life" of another: "Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." Restatement, supra, at 386

The legislature expressly adopted the *Hearst* definition. Laws of 1987, ch. 403, Sec. 2 at 1547 ("'privacy'…is intended to have the same meaning as the definition given the word by the Supreme Court in *Hearst.*") By any measure these redactions do not relate to one's private life but rather public job performance.

The most recent affirmation of the rule is found in *Washington Public Employees Ass'n v. Washington State Center for Childhood*, __Wn.2d __, 450 P.3d 601, 608 (Wash. 2019), rejecting the claim employee birth dates associated with names are "personal information"

subject to exemption. The Court relied on *Hoppe* and *Predisik v. Spokane School Dist. No. 81,* 182 Wn.2d 896, 904 346 P.3d 737 (2015) to hold "The privacy protection afforded by the PRA is narrow, and it extends an individual the right of privacy "only in' "matter[s] concerning [their] private life." ' "

These and other Supreme Court cases conflict with the Opinion's outright claim workplace performance of public duties is always "personal information" exempt from disclosure without regard to the content. Compare, e.g. *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 726, 748 P.2d 597 (1988) (police conduct while on the job "[is] not private, intimate, personal details of an officer's life" exempt from disclosure.)

Moreover, it is a matter of substantial public interest how *Dawson* should be construed or overruled, also justifying Supreme Court review. Although petitioner reads *Dawson* to contradict the Opinion upon which it is supposedly based; only the Supreme Court may authoritatively deal with the meaning of *Dawson* let alone whether it lends itself to ambiguity or misstatement of the law. Aspects of *Dawson* support the proposition that it adhered to the traditional definition of "personal information" which relates to the details of one's private life rather than the performance of public duties; however, others construe it otherwise. At best, *Dawson* is unclear and has rightly or wrongly been construed to eviscerate

definitional precedents of "personal information." This in itself merits review as only the Supreme Court may overrule or authoritatively construe its own precedent.

B. Review should be granted because performance evaluations under existing precedent, including *Dawson,* are not categorically presumed to be highly offensive regardless of content.

Once again, the Opinion reads *Dawson* to create a categorical per se holding that personnel evaluations which do not discuss specific instances of misconduct are "presumed to be highly offensive."[3] Slip Opinion p. 7 What is left out however is *Dawson's* text that this arm of the test is premised on the absence of discussion of "any specific instances of misconduct or *of the performance of public duties.*" (italics added) *Dawson* 120 Wn.2d at 796 But here there was *only* discussion of the performance of public duties. This appears to be a repetition of the Opinion's failure to properly understand the meaning of "personal information." *Dawson* created no rule that public disclosure of "the performance of public duties" is "highly offensive," however that is the claim of the Opinion contrary to *West*, 183 Wn.App. at 315 ("…whether disclosure of particular information would be highly offensive to a

[3] "…the disclosure of performance evaluations, which do not discuss specific instances of misconduct, is 'presumed to be highly offensive.'"

reasonable person must be determined on a case by case basis.") It is inconsistent with *Dawson* in this regard as well justifying review. *Dawson* does not immunize "performance evaluations" regardless of content, unlike this Opinion which should be reviewed.

Moreover, the Opinion's claim that exemption from disclosure is appropriate except "instances of misconduct" has no basis in the statute. Although instances of misconduct in the performance of public duties should not be exempt, why should instances of exemplary service? One purpose serviced by the PRA in the quest for open government is to allow the public to evaluate not only who is doing a bad job but also who is doing a good one. This seems to come out of thin air and doesn't make sense. Review is justified for this reason as well.

C. Review should be granted because facts regarding job performance of powerful City department heads are of legitimate concern to the public, based on inconsistence Court of Appeals Division III precedent

Spokane Research & Def. Fund v. City of Spokane, 99 Wn.App. 452, 453, 994 P.2d 267 (Div. 3, 2000) is inconsistent with the Opinion's holding that performance records of powerful department heads are not of legitimate public concern. *Dawson* held records relating to a deputy prosecutor are not; however a department head, like a city manager is much different. These men are not secretaries or janitors, they command

men's lives for better or worse. Based on its reading of *Dawson* the Opinion claimed as a legal proposition employee morale would suffer if evaluations were made public and supervisors would not provide candid evaluations.

These propositions are unsupported suppositions given the force of law without regard to the statutory text. *Dawson* may be explained by the nature of the duties of the deputy prosecutor which did not appear on their face to be of legitimate concern to the public, not whether government excuses for non-disclosure should be weighed in the balance. The statute references only "not of legitimate concern to the public." RCW 42.56.050 The only issue is the "legitimate concern of the public" not every possible consequence of public disclosure.

As in *Washington Public Employees*, 450 P.3d at para. 18, there may be legitimate concerns with the release of birth dates, but that is "insufficient to warrant its exemption from disclosure under the PRA." In short, the interest in non-disclosure is not a factor to be weighed under the statute, only the reasonable justification for seeking it. The claim that it is not reasonable to seek disclosure of job performance by important city officials undermines the PRA. Review should be granted based on the Opinion's misreading of *Dawson*, as well as *Spokane Research* and *Washington Public Employees.*

D. Review should be granted because the Opinion's failure to enforce the "brief explanation" requirement of RCW 42.56.210(3) violates Supreme Court precedent

The Opinion pays lip service to *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) and *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) but fails to follow them. RCW 42.56.210(3) requires "a brief explanation of how the exemption applies to the record withheld."

In *Lakewood*, as here, the City simply redacted documents with a citation to the claimed exemption without explanation as to why or how factually the document or redaction fit within the claimed exemption. The agency must identify "with particularity" the specific record withheld and the specific exemption authorizing the withholding. *Lakewood,* 182 Wn.2d at 94

When the exemption is categorical further explanation may not be required however when other exemptions are claimed "additional explanation is necessary to determine whether the exemption is properly invoked." *Id.* at 95 See also *Sanders*, 169 Wn.2d at 846

Sanders held "Allowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render the brief explanation clause superfluous." *Id*. at 846

The Opinion however allows exactly what *Lakewood* and *Sanders* prohibit: permitting the City to simply claim a statutory exemption

without explaining, even briefly, how the documents or redactions fit within the claimed exemption. In the experience of your undersigned there is much agency resistance to fulfilling the "brief explanation" requirement. Usually the agency would prefer to concoct a list of all possible objections with reference to a code number to label each redaction accordingly. That is what Tacoma does to shortcut a substantive disclosure of exactly how factually it claims the exemption fits the document withheld or redacted. Providing a "brief explanation" is not so simple as to be left to clerical staff; however that is what Tacoma prefers.

Here, for example, the City redacted 122 pages with a single claim every redaction was justified by the privacy exemption. There was no brief explanation how each redaction constituted "personal information." What was its nature? Was it medical related? Was it a family matter? Was it an embarrassing personal experience? There was no brief explanation how each redaction would be "highly offensive." Did it involve an embarrassing incident in the person's personal life unrelated to job performance? Of if there was no legitimate concern to the public, perhaps this was a low level employee who exercised no discretion or influence over others? But there was nothing.

This Opinion provides the hole through which to drive a truck and is the one the government has sought since the enactment of section 210(3).

The City specifically cited the Opinion's handling of the brief explanation requirement as a reason to publish the Opinion: "This Court's opinion confirms that the privilege log format is acceptable and publication of this opinion will avoid further litigation on that issue." Respondent's Motion to Publish p. 5 When the City says "privilege log" it means a citation to the claimed privilege without more, a complete subversion of the "brief explanation" requirement.

Not only is the Opinion in conflict with Supreme Court precedent on this issue but it raises an issue of substantial public interest. It will be raised in every PRA case in the future as a reason to deny discovery and avoid even a brief explanation why and how the claimed exemption applies. This is yet further reason to grant review.

VI. CONCLUSION

Review should be granted on two basic issues.

First, whether *Dawson* creates a categorical exemption for employee evaluations, regardless of content—even on the job performance—is a question only this court can answer with authority. If *Dawson* does create such a categorical exemption it not only usurps the

statutory prerogative of the legislature to define exemptions but it contradicts those cases which define "personal information" in terms of the intimate details of one's personal life.

Second, the Opinion guts the "brief explanation" requirement of RCW 42.56.210(3) by inviting the agency to merely identify an alleged exempt item by simple reference to the claimed exemption without a brief explanation of how the redacted material fits within the exemption. This clearly contradicts *Sanders* and *Lakewood* and was a significant reason the Court of Appeals published the Opinion.

Respectfully Submitted this 22nd day of July 2020.

GOODSTEIN LAW GROUP PLLC

s/Richard B. Sanders
Richard B. Sanders, WSBA #2813
Attorney for Petitioner

Appendix:
Order Publishing Opinion
Opinion of Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: margaret.elofson@ci.tacoma.wa.us	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 22nd day of July, 2020, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

Filed
Washington State
Court of Appeals
Division Two

June 23, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	No. 53804-1-II ORDER GRANTING MOTION TO PUBLISH OPINION AND PUBLISHING OPINION

RESPONDENT City of Tacoma filed a motion to publish this court's opinion filed on April 14, 2020. After consideration, the court grants the motion. It is now

ORDERED that the final paragraph in the opinion which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

FOR THE COURT

PANEL: Jj. Worswick, Lee, Melnick

JUDGE

Filed
Washington State
Court of Appeals
Division Two

April 14, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	No. 53804-1-II UNPUBLISHED OPINION

WORSWICK, J. — The Church of Divine Earth (Church) filed a Public Records Act (PRA), chapter 42.56 RCW, request with the City of Tacoma (City), seeking job performance evaluations for two City employees. The City responded, redacting some material and explaining those redactions in a privilege log. The Church filed this action, alleging that the City violated the PRA. The City filed a motion for summary judgment dismissal, which the trial court granted.

On appeal, the Church argues the trial court erred in granting summary judgment dismissal because the City's redactions did not comply with the PRA's "personal information" exemption, and the City's explanations in the privilege log were insufficient.

We hold that the City properly redacted information in the performance evaluations and that the City provided adequate explanations in its privilege log. Thus, we affirm.

FACTS

Peter Huffman and Kurtis Kingsolver are employed by the City as department directors. Huffman leads the Department of Planning and Development Services, and Kingsolver leads the

Department of Public Works. These men are two of several department directors for the City. The assistant city manager directly supervised Huffman and Kingsolver in their roles as department directors.

The Church submitted a PRA request to the City, seeking, among other documents, five years of performance evaluations for Huffman and Kingsolver. The City responded, providing the performance evaluations in partially redacted form.[1]

The performance evaluations in question vary slightly depending on the year and the position evaluated. The performance evaluations generally contain four sections: (1) basic employee information, (2) rating the employee's performance based on different categories and stating specific examples of the employee's work, (3) goal setting and analysis of progress on previous goals, and (4) comments, overall rating, and signatures. The performance evaluations begin by stating the City's mission and values and basic employee information including name, division, job title, supervisor conducting the evaluation, and review time period. The City did not redact this information.

The next section involves performance expectations. This section lists different categories for evaluating the employee, such as accountability and resourcefulness in problem solving. In each category, the employee's performance is rated, ranging from "Exceeds Expectations" to "Does Not Meet Expectations." Clerk's Papers (CP) at 3. The performance evaluation contains a column next to each category for "Specific Examples." CP at 3. The City redacted the ratings and specific examples but did not redact the evaluation categories.

[1] The record on appeal includes the redacted and unredacted versions of the performance evaluations.

The third section is the employee's goal development plan which provides spaces to list employee goals, how to achieve those goals, progress on those goals, and the approximate date those goals will be completed. The City redacted the employee's listed goals, steps toward achievement, progress, and dates, but did not redact the section headings. Finally, the performance evaluations provide sections for employee comments, supervisor comments, an overall rating on the employee's performance, and signatures of the employee and supervisor. The City redacted the comments and overall rating, but did not redact the headings or signatures.

The City included a privilege log that identified and gave reasons for the redactions. The privilege log stated:

> **EMPLOYEE PERFORMANCE EVALUATIONS (NO SPECIFIC MISCONDUCT)** - These records, consisting of performance evaluations which do not discuss specific instances of misconduct, are protected from disclosure and have been withheld in their entirety based on the following authority:
>
> **RCW 42.56.230 Personal information**
> (3) 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.
>
> **RCW 42.56.050 Invasion of privacy, when.**
> 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. 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.
>
> -AND-
>
> **Dawson v. Daly, 120 Wn.2d 782, 797**[, 845 P.2d 995] **(1993)**, *overruled in part on other grounds by Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994)**.**

CP at 298. Following the production of the partially redacted performance evaluations and accompanying privilege log, the City closed the Church's request.

The Church filed a complaint, alleging that the City wrongfully redacted the performance evaluations and that the City's brief explanation in its privilege log was inadequate. The Church moved for *in camera* review of the performance evaluations and for summary judgment regarding its claims.

The City opposed the Church's motion for summary judgment, but not the Church's motion for *in camera* review. Regarding its response to the Church's motion for summary judgment, the City attached the affidavit of Catherine Journey. Journey is the City's Training and Development Manager and oversees the performance evaluation process. She explained that the City's performance evaluation process occurs annually between the employee and their direct supervisor. The review process is the same for department directors. Journey stated, "The purpose of the process is to bring out the best performance in all of our employees so that we can provide excellent service to our community." CP at 376-77. The evaluation process allows employees to raise issues regarding their work or department and provides an opportunity for supervisors to "coach the employee on a wide variety of performance issues." CP at 377. Journey stated that the effectiveness of the performance evaluation process would be "seriously undermined" if the performance evaluations were subject to disclosure. CP at 377.

By letter opinion, the trial court stated that it reviewed the performance evaluations *in camera* and confirmed that no specific instances of misconduct were redacted. It concluded that the redactions made were not of public concern and disclosure would risk detrimental effects. It continued, "There is nothing further that Defendant City of Tacoma must do with respect to the

substance of its privilege log, and all redactions reviewed *in camera* were appropriate." CP at 392. Following this, the City moved for summary judgment dismissal of the case. The trial court granted the City's motion.

The Church appeals the trial court order granting the City's motion for summary judgment dismissal. The Church petitioned the Supreme Court for direct review. The Supreme Court denied the Church's petition, and transferred the case to this court.

ANALYSIS

I. PUBLIC RECORDS ACT

The Church argues that the performance evaluations do not meet the requirements for the claimed PRA exemption and that the City violated the PRA by not providing adequate explanations in its privilege log.[2] We disagree.

A. *Legal Principles*

The PRA is a strongly worded mandate for broad disclosure of public records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). Its purpose is to increase governmental transparency and accountability by making public records accessible to Washington's citizens. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). We liberally construe the PRA to promote the public interest. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.030. When evaluating a PRA claim, we "take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or

[2] The Freedom Foundation filed an amicus curiae brief to the Supreme Court in support of the petition for direct review, raising the same arguments as the parties.

embarrassment to public officials or others." RCW 42.56.550(3). We review agency actions under the PRA de novo. *John Doe A*, 185 Wn.2d at 370-71; RCW 42.56.550(3).

We review a trial court's order granting summary judgment de novo. *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. *Performance Evaluations*

The Church argues that Huffman's and Kingsolver's performance evaluations do not meet the requirements for the claimed PRA exemption. Following our *in camera* review of the performance evaluations, we disagree.

A government agency must disclose public records upon request unless a specific exemption in the PRA applies. RCW 42.56.070(1); *Ameriquest Mortg. Co. v. Office of the Att'y Gen.*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013). The agency claiming the exemption bears the burden of proving that the withheld records are within the scope of the exemption. *Resident Action Council*, 177 Wn.2d at 428. We narrowly construe PRA exemptions. RCW 42.56.030.

Performance evaluations are not a specifically enumerated exemption in the PRA. However, RCW 42.56.230(3) may prevent disclosure of performance evaluations as "personal information." This statute exempts "[p]ersonal 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." RCW 42.56.230(3). A person's right to privacy is violated when disclosure of the information "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050.

"Employee evaluations qualify as personal information that bears on the competence of the subject employees." *Dawson*, 120 Wn.2d at 797. Because performance evaluations contain an employer's criticisms and observations, performance evaluations are not information most individuals willingly disclose to the public. *Dawson*, 120 Wn.2d at 797. As a result, the disclosure of performance evaluations, which do not discuss specific instances of misconduct, is "presumed to be highly offensive." *Dawson*, 120 Wn.2d at 797. This presumption may be overcome where the agency can effectively remove identifying information from the performance evaluations to protect employee privacy. *Dawson*, 120 Wn.2d at 797 (citing *Ollie v. Highland Sch. Dist. 203*, 50 Wn. App. 639, 749 P.2d 757 (1988)).

The presumption that disclosure would be highly offensive applies only to the first consideration of the right to privacy. *Dawson*, 120 Wn.2d at 797. For a performance evaluation to be exempt from disclosure, the governmental agency must also establish the absence of legitimate public concern. *Dawson*, 120 Wn.2d at 797. In this context "legitimate public concern" means reasonable public concern. *Dawson*, 120 Wn.2d at 798. Courts do not conduct a test that balances an individual's privacy interests against the public's interest in disclosure. *Dawson*, 120 Wn.2d at 798. Instead, courts balance the public's interest in disclosure against the public's interest in efficient administration of government. *Dawson*, 120 Wn.2d at 798.

The Church argues the City's redactions do not fall within the claimed exemption because: (1) the material is not personal information, (2) disclosure of the material would not be highly offense to a reasonable person, and (3) the material is of legitimate concern to the public. We disagree on all three points.

1. *Performance Evaluations Are Personal Information*

The Church argues that the City failed to show that the performance evaluations were personal information. The Church notes that the PRA's "right to privacy" exemption applies only to personal information, and then argues that the right to privacy extends only to the intimate details of one's personal life. Br. of Appellant at 14. The Church then argues that "here *nothing* redacted appears by context related to the intimate details of either Directors Huffman [or] Kingsolver's personal life." Br. of Appellant at 15. The Church argues that because the performance evaluations contain comments on Huffman's and Kingsolver's public job performance, the records must be disclosed. The Church is mistaken; performance evaluations are personal information.

The Church relies on a quote from *Dawson* to support its position. In *Dawson*, our Supreme Court made mention that the employee's performance evaluations at issue did not discuss "specific instances of misconduct or public job performance," in support of its holding that the records were not subject to disclosure. 120 Wn.2d at 800. But that quote is part of the court's balancing of the harms of disclosure over the public's interest; the quote does not stand for the proposition that the records were not personal information.

Performance evaluations contain an employer's criticisms and observations, and these comments are not information most individuals willingly disclose to the public. 120 Wn.2d at 797. As a result, *Dawson* explicitly stated, "Employee evaluations qualify as *personal information* that bears on the competence of the subject employees." 120 Wn.2d at 797 (emphasis added). Our Supreme Court has determined that performance evaluations are personal information.

Because performance evaluations are personal information, we next consider whether the disclosure of this personal information would violate Huffman and Kingsolver's right to privacy. As mentioned above, a person's right to privacy is violated when disclosure of the information would be highly offensive to a reasonable person, and is not of legitimate concern to the public. RCW 42.56.050.

2. *Disclosure of Performance Evaluations Is Highly Offensive*

The Church argues that disclosure of the performance evaluations would not be highly offensive to a reasonable person. We disagree.

Dawson created a presumption that the disclosure of performance evaluations would be highly offensive to a reasonable person. 120 Wn.2d at 797. This presumption may be overcome when the agency can effectively remove identifying information from the performance evaluations to protect employee privacy. *Dawson*, 120 Wn.2d at 797 (citing *Ollie*, 50 Wn. App. 639). In *Ollie*, a former school employee sought the performance evaluations as well as personnel and disciplinary records of other employees during discovery for her wrongful discharge suit. *Ollie*, 50 Wn. App. at 640-41. The school argued that the records were exempt from disclosure. *Ollie*, 50 Wn. App. 643. Division Three of this court held that "not all the information contained in personnel evaluations and personnel records of school district employees is privileged; information about public, on-duty job performances should be disclosed. Deletion of the employees' names and identifying details would protect the privacy of the employees." *Ollie*, 50 Wn. App. at 645.

Here, it was impossible to delete the identifying details to sufficiently protect the privacy of the employees. The Church requested the performance evaluations of two specific employees:

one from Public Works and the other from Planning and Development Services. One set of evaluations discusses tasks related with Public Works and the other discusses tasks related to Planning and Development. Our review of the unredacted performance evaluations clearly reveals the identity of the employee based on the information in the "specific examples" column or goals section, which details different projects or tasks related to that employee's departmental role. It would have been impossible for the City to effectively remove identifying information from the performance evaluations. Accordingly, we hold that the Church cannot overcome the presumption that disclosure of the performance evaluations is highly offensive to a reasonable person.

The Church relies on *Ollie* which stated that "not all the information contained in personnel evaluations and personnel records of school district employees is privileged; information about public, on-duty job performances should be disclosed. . . . [The school] has the burden to show information contained in the evaluations is intimate personal information." 50 Wn. App. at 645. The Church argues that the City's blanket redactions are contrary to *Ollie* and that information within evaluations regarding on-duty job performance must be disclosed. However, *Ollie* involved an employee file that contained more than just performance evaluations. Moreover, to the extent this statement in *Ollie* applied to performance evaluations, it was abrogated by *Dawson*, which created the presumption that disclosure of performance evaluations would be highly offensive. *Dawson*, 120 Wn.2d at 797. The court in *Dawson*, stated, "We hold that disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of [former]

RCW 42.17.255 [(1987)]."[3] 120 Wn.2d at 797. The Supreme Court has reaffirmed this. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. 405*, 164 Wn.2d 199, 223, 189 P.3d 139 (2008) ("In *Dawson*, we assumed a prosecutor had a right to privacy in his or her performance evaluations. *See* 120 Wn.2d at 796-99, 845 P.2d 995. We see no reason to depart from this precedent."). We hold that the performance evaluations are highly offensive within the meaning of RCW 42.56.050 and that this presumption could not be overcome by deleting the employee identifying information.

3. *No Legitimate Public Concern Justifies Disclosure*

The Church argues that legitimate public concerns justify disclosure. We disagree.

To prevent disclosure of the performance evaluations, the City must establish the absence of legitimate public concern. *Dawson*, 120 Wn.2d at 797. In determining whether an agency has met its burden, we balance the public's interest in disclosure against the public's interest in efficient administrative of government. *Dawson*, 120 Wn.2d at 798. Our courts have conducted this public interest balancing test regarding performance evaluations for a county deputy prosecutor, an elementary school principal, and a city manager. *Dawson*, 120 Wn.2d 782; *Brown v. Seattle Pub. Sch.*, 71 Wn. App. 613, 615, 860 P.2d 1059 (1993); *Spokane Research & Def. Fund v. City of Spokane*, 99 Wn. App. 452, 453, 994 P.2d 267 (2000).

In *Dawson*, a requester sought disclosure of a deputy prosecutor's personnel file, which contained performance evaluations. 120 Wn.2d at 787. The Court considered whether disclosure of the deputy prosecutor's performance evaluations was of legitimate public concern. *Dawson*, 120 Wn.2d at 797. Although the Court acknowledged that the performance evaluations

[3] RCW 42.17.255 was recodified as RCW 42.56.050. LAWS OF 2005, ch. 274, §103.

were undoubtedly of "some interest" to the public, the potential harm to efficient government that could result from disclosure weighed against disclosure. *Dawson*, 120 Wn.2d at 798-99.

The Court reasoned that disclosure could harm the public in two ways. *Dawson*, 120 Wn.2d at 799. First, if public employees knew their performance evaluations were freely available to anyone, including coworkers or the press, employee morale would be seriously undermined and employee performance would suffer. *Dawson*, 120 Wn.2d at 799. Second, disclosure of performance evaluations could prevent supervisors from providing candid evaluations. *Dawson*, 120 Wn.2d at 799. As a result, employee performance would suffer because employees are not receiving the guidance or constructive criticism that would be necessary to improve in their position. *Dawson*, 120 Wn.2d at 799. *Dawson* held that these harms to the public interest in efficient government outweighed the public interest in disclosure where the prosecutor's performance evaluations did not contain "specific instances of misconduct or public job performance." 120 Wn.2d at 800.

In *Brown*, Division One of this court considered the disclosure of an elementary school principal's performance evaluations. *Brown*, 71 Wn. App. at 617. That court applied *Dawson*'s presumption against disclosure, and then balanced public interests. *Brown*, 71 Wn. App. at 617-18. Citing the necessity for effective school district evaluation systems and that this system would be undermined by disclosure, that court held, "Legitimate public concern is lacking here for the same reasons found in *Dawson*." *Brown*, 71 Wn. App. at 619.

In *Spokane Research & Defense Fund*, a split panel of Division Three held that the performance evaluations of the Spokane city manager were subject to disclosure. 99 Wn. App. at 457. For an annual evaluation of the city manager, the city council sent 125 questionnaires to

various stakeholders in the community. 99 Wn. App. at 454. The city council hired an outside consulting firm to compile and analyze the questionnaire responses. 99 Wn. App. at 454. This information factored into the city council's decision to retain the city manager. 99 Wn. App. at 454. The Spokane Research & Defense Fund made a PRA request regarding the questionnaires and resulting report, and the city claimed the records were exempt. 99 Wn. App. at 454.

Division Three recognized that "[e]valuations of public employees ordinarily are not subject to public disclosure" because the employee and supervisor reasonably expect evaluations to remain confidential. 99 Wn. App. at 456. However, that court explained the unique position of city manager:

> The Spokane City Manager is the City's chief executive officer, its leader and a public figure. The performance of the City Manager's job is a legitimate subject of public interest and public debate. A person in the position of Spokane City Manager cannot reasonably expect that evaluations of the performance of his or her public duties will not be subject to public disclosure. Additionally, each year the Spokane City Council evaluates the job performance of the City Manager. In part, the purpose of that evaluation is to determine whether the employment of the City Manager should be continued. Because the City Council used this information in making its determination to retain the City Manager, there is a legitimate public interest in the information.
>
> We hold the public has a legitimate interest in disclosure of [the City Manager's] performance evaluation. For that reason, the information is not exempt even if it would otherwise qualify under [former] RCW 42.17.310(1)(b)[4] [(2003)].

99 Wn. App. at 457.

The case here, is most similar to *Brown*. Here, the performance evaluation process was meant to bring out the best performance in all of the City's employees so that the City may better service the public. The evaluation process allowed employees to raise issues regarding their

[4] RCW 42.17.310 was recodified as RCW 42.56.210. LAWS OF 2005, ch. 274, §103.

work or department and provided an opportunity for supervisors to candidly guide employees on a wide variety of performance issues. The City stated that the effectiveness of the performance evaluation process would be "seriously undermined" if the performance evaluations were subject to disclosure. CP at 377.

In balancing the public's interest in disclosure against the public's interest in efficient administrative of government, we hold that no legitimate public concern justifies disclosure. Preventing disclosure of Huffman's and Kingsolver's performance evaluations protects the vital functions of effective government. Unlike a city manager, Huffman and Kingsolver are two of several department directors for the City. Department directors are neither the City's leader nor public figureheads. Huffman's and Kingsolver's performance evaluations were individual conversations with a supervisor; the public was not involved at any stage of the performance evaluation process. Although department directors assume leadership and decision-making roles, their position is more analogous to a school principal.

The performance evaluations were personal information, the release of which would be highly offensive to a reasonable person, and were not of legitimate concern to the public. Accordingly, our *in camera* review shows that the City was not required to disclose unredacted performance evaluations.

C. *Brief Explanations*

As an initial matter, the Church argues that, because the Church challenged the City's previous brief explanations in a different case and prevailed, the City is collaterally estopped from arguing that its brief explanations in this case comply with the PRA. We disagree.

The party asserting collateral estoppel must show, among other elements, that the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Regarding brief explanations, the amount of detail necessary to determine whether an exemption is properly invoked depends on the nature of the exemption and the document or information withheld. *City of Lakewood v. Koenig*, 182 Wn.2d 87, 95, 343 P.3d 335 (2014). Here, the previous proceeding referenced by the Church addressed a different records request where the City withheld documents based on attorney-client privilege. The issue of a brief explanation for a previous request regarding the attorney-client privilege exemption presents a different issue than the current request for performance evaluations. Collateral estoppel does not apply.

The Church argues that the City violated the PRA by not providing adequate explanations in its privilege log. We disagree.

When an agency refuses to produce a record or part of a record, the agency must include a statement of the specific exemption and a brief explanation of how that exemption applies to the withheld record. RCW 42.56.210(3). The amount of detail necessary to determine whether an exemption is properly invoked depends on the nature of the exemption and the document or information withheld. *Koenig*, 182 Wn.2d at 95. Where a statute provides for a categorical exemption, citing the statute for that specific exemption may be a sufficient explanation. *Koenig*, 182 Wn.2d at 95. However, where no categorical exemption exists, an additional explanation is required to adequately inform the requester. *Koenig*, 182 Wn.2d at 95.

The purpose of the brief explanation is to inform the requester why the records are being withheld and provide for meaningful judicial review of the agency's withholding. *Koenig*, 182

Wn.2d at 94. As a result, the agency must provide sufficient explanatory information for a requester to determine whether the exemptions are properly invoked. *Koenig*, 182 Wn.2d at 95; WAC 44-14-04004(5)(b). Merely specifying the claimed exemption and identifying the withheld document's author, recipient, date of creation, and broad subject matter is insufficient. *See Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). The agency should identify with particularity the specific information being withheld and the specific exemption that supports the withholding. *Koenig*, 182 Wn.2d at 94.

Here, performance evaluations are not a specifically enumerated exemption in the PRA, thus, the City was required to provide additional information to explain the redactions. The City's explanation cited the personal information of the employees statute, the right to privacy statute, and a pinpoint citation to *Dawson*, where the Court explained why the performance evaluations are typically exempt. We hold that the City's brief explanation adequately provided the Church with sufficient explanatory information for the Church to determine whether the exemption was properly invoked. The citation to *Dawson* noted the page where the case specifically addresses performance evaluations, and the statutes provide the foundation of the cited *Dawson* analysis. We hold that the City did not violate the PRA's brief explanation requirement.

ATTORNEY FEES

Both parties request attorney fees. The Church requests its attorney fees based on RCW 42.56.550(4), which provides for an award of costs and attorney fees when a party prevails in a PRA action against an agency. Because the Church does not prevail in this action, we deny the Church's request.

The City summarily requests costs and attorney fees in the last sentence of its conclusion, citing only RAP 18.1. RAP 18.1(a) allows a party on appeal to recover costs or attorney fees if applicable law so grants. Additionally, RAP 18.1(b) requires a party to devote a section of its opening brief to its request for fees or costs. Here, the City fails to cite any applicable law granting it the right to recover its costs and attorney fees. Further, the City fails to devote a section of its briefing to its request. We also deny the City's request for costs and attorney fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

, C.J.

Melnick, J.

GOODSTEIN LAW GROUP PLLC

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