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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF FIFE, a Washington Municipal Corporation,  
Appellant,  
v.  
RUSSELL P. HICKS,  
Respondent.

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BRIEF OF RESPONDENT

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**ORIGINAL**

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A. INTRODUCTION

Respondent, Russell Hicks, through counsel filed a complaint with the City of Fife regarding alleged acts of employment discrimination by the Fife Chief of Police, and other high ranking members of the department. In response, the City of Fife, with involvement by its insurer, hired an investigator to inquire into the allegations. The investigator interviewed members of the police department and eventually issued a report determining that none of Hicks' allegations had merit. Fife then touted this report as proof that the City had done no wrong, including issuing a press release explaining that the investigation was "thorough" and the investigator was "diligent in their efforts to get to the truth." CP 369.

Hicks was not satisfied that the conclusions of this report were supported by the evidence, including the audio recordings of the various witnesses. Therefore, he issued a Public Records Act ("PRA") request for the documents underlying the investigation.

In response to Hicks' request, the City of Fife sued Hicks in Pierce County Superior Court asserting the documents were not subject to disclosure. Hicks brought a counterclaim for violation of the PRA. The Pierce County Superior Court agreed with Hicks and on August 3, 2012, ordered Fife to produce the requested records. Fife

did not appeal this Order, and instead, produced the records in a heavily redacted form. These redactions included Hicks' own name, his lawyer's name, his lawyer's law firm's name, address information from Washington State Patrol letters, all information that might lead to the identity of any of the witnesses in the investigation, and all information that might lead to the identity of the individuals accused of discrimination. Fife also altered the audio files of the interviews to distort the witnesses' voices resulting in incomprehensible audio. Hicks again moved the trial court to compel the disclosure of unredacted records. The Superior Court agreed, ordering Fife to produce the unredacted records within 60 days, but allowing Fife to maintain redactions of anyone accused of sexual misconduct. Fife responded with this appeal.

Here, Fife claims, incorrectly, that two exemptions apply to justify its redactions. First, Fife relies on the investigative records exemption, RCW 42.56.240(1). However, this exemption is not applicable for several reasons, including that the materials redacted are not investigatory records within the meaning of the Act, the material redacted was not compiled by the agency for criminal investigatory reasons, there was no finding that the redactions are

needed for effective law enforcement, and lastly the public has a legitimate interest in these documents.

The second exemption cited by Fife is the personal records exemption under RCW 42.56.230(3). This exemption does not apply because, as recognized in many prior Washington decisions, the public has an interest in learning about allegations of work misconduct by a Chief of Police. Furthermore, the requested documents do not violate the "right to privacy" as defined by RCW 42.56.050.

There are several other issues raised in the City of Fife's appeal, including whether an agency can file a lawsuit against a requester, lose, and still not violate the PRA; whether RCW 42.56.080 creates an exemption; and whether the manner in which the City made its redactions and alterations to the audio records is consistent with Washington law. In the end, the Superior Court was correct in Ordering the City of Fife to produce the responsive records, and this Court should affirm.

#### **B. RESTATEMENT OF ISSUES FOR REVIEW**

1. Whether the City of Fife violated the PRA by filing an unsuccessful declaratory judgment action against the requester, and then producing portions of the responsive records after receiving a

court order requiring the production and yet still withheld additional responsive records?

2. Whether the City of Fife incorrectly relied upon RCW 42.56.240(1) in redacting various material from an investigation conducted by a third party into allegations of employment discrimination by the Chief of Police and other high ranking members of the police department?

3. Whether the City of Fife incorrectly relied upon RCW 42.56.230(3) in redacting various material from an investigation conducted by a third party into allegations of employment discrimination by the Chief of Police and other high ranking members of the police department?

**C. STATEMENT OF THE CASE**

In 2011, Respondent, Officer Russell Hicks, of the Fife Police Department submitted a complaint through counsel to the City of Fife. CP 319. The complaint alleged employment discrimination by Chief Brad Blackburn, Assistant Chief Mark Mears, Commander Tim Floyd, and Dispatch Supervisor Erica Brown. CP 178. In response to Hicks' complaint, the City of Fife, not its police department, retained Bob Carden from the Prothman Company to conduct an investigation into the alleged violations. CP 371.

In an April 12, 2011 memorandum, Dave Zabell, Fife City Manager, wrote to presumably the Chief of Police, explaining that the City had received a complaint that, in part, alleged that he had “discriminated against and retaliated against [an employee] due to his race, and his request that he receive bilingual pay for his Spanish language ability.” CP 463. The same memorandum went on to explain that “[b]ased on the above-described allegations, the City has decided to conduct an internal investigation using the following procedures. (1) the City has retained an outside investigator, Bob Carden, to complete the investigation. . . .” *Id.* Shortly thereafter, Zabell also wrote to at least one witness, explaining that “[t]he City has retained Mr. Bob Carden, a former police chief for another City, to conduct the investigation and report back to me. You will be interviewed by Mr. Carden . . . .” CP 427. This same memo explains that “[t]he interview will be audio recorded and a copy will be provided to you upon request.” *Id.* Inconsistent with his prior written memorandum, Zabell later testified that the Prothman Group was actually hired by the Washington Cities Insurance Authority, the risk pool to which Fife belongs, and its assigned attorney. CP 31-32.

Eventually, the Prothman Group completed its report. CP 371.

The City Manager testified that “[n]either I, nor any of my staff

reviewed, evaluated, received or used any part of the interview transcripts, interview audio files or any other interviewer prepared documents, prior to the final report.” CP 32. The City Manger went on to explain that “[t]he final report was the only document the City used in its decision making process.” *Id.*

On October 27, 2011, between providing quotations for two news articles,<sup>1</sup> the City Manager issued a press release, CP 369, declaring that the allegations were not sustained:

The City of Fife's investigation into numerous allegations of improper conduct leveled at high ranking members of its police department is complete and has concluded that all of the allegations made earlier this year by an attorney representing two Fife Police Officers were either unfounded or not sustained.

The City Manager assured the public that its investigation was thorough:

Fife City Manager Dave Zabell said, “This was a thorough investigation encompassing over 265 investigatory hours and interviewing more than two dozen City employees within the Fife Police Department, as well as a number of people not employed by the City. We are satisfied with the level of effort put into the investigation and the professional manner in which it was conducted.”

CP 369. Zabell also stated in this press release that:

“The City took all of the allegations seriously and acted quickly to initiate an investigation. The investigators were diligent in their efforts to get to the truth and I am

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<sup>1</sup> CP 386-390 (Oct. 25 & 28, 2011 Tacoma News Tribune articles).

confident that has occurred," said Zabell adding that he "trusts that the thoroughness of the independent investigator's report satisfies all concerns."

CP 369.

On May 17, 2012, Hicks made a public records request for the material compiled in the course of investigating his complaint, CP 178, including the following:

1. All final reports made as a result of any investigations in the 2011 Whistleblower Complaint.
2. All audio recordings and accompanying transcripts from interviews of the following persons made during the investigation of the 2011 Whistleblower Complaint:
  - Dave Woods
  - Kevin Farris
  - Tommy Thompson
  - Brad Blackburn
  - Mark Mears
  - Tim Floyd
  - Erica Brown
3. All documents, emails, audio recordings, video, and electronic messages that were relied on in conducting the investigation.
4. All documents provided to any media regarding the 2011 Whistleblower Complaint, its investigation, and findings arrived at in response to that Complaint.

In response to the records request, on May 24, 2012, the City sued Hicks in an effort to establish that the investigation-related documents were not subject to the PRA because they were not public

records. CP 1-6. The City alleged, in the alternative, that the records were exempt as attorney work-product or privileged. *Id.* Finally, the City alleged that if the records were not work product or privileged, the documents would need to be redacted of certain names and identifying information. *Id.* On June 18, 2012, Hicks filed a counterclaim against the City alleging that Fife violated the PRA by filing suit rather than producing the requested documents. CP 10.

On August 3, 2012, relying on *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), the Superior Court ordered the City to disclose the underlying documents from the investigation, specifically, "all audio and written interview files and investigator-created documents used for production of final report." CP 35. As the City later acknowledged, "on August 3, 2012, the Court made a determination that the documents at issue in the Declaratory Judgment complaint must be produced." CP 25. Importantly, the City of Fife did not and does not appeal the Court's August 3, 2012 Order.

On August 22, 2012, the City disclosed redacted audio files and witness summaries. CP 190-37. The redactions were extensive, including Hicks' own name, the name of the accused, the name of Hicks' law firm, and the names of all the witnesses involved, and any

information that the City felt might shed light on the identity of any of these individuals. *Id.*

On January 25, 2013, the City moved to voluntarily dismiss its own Complaint, CP 20, and Hicks moved for summary judgment. CP 68. Hicks included a detailed chart explaining why each of the City's redactions was inappropriate. CP 95-174. On February 22, 2013, the trial court granted summary judgment determining that the City of Fife violated the PRA. CP 304-05. The trial court also determined that the vast majority of the City's redactions were improper, including redactions of Hicks' name and that of others involved in the investigation. *Id.* The Superior Court Order the City of Fife to produce unredacted copies within 60 days. *Id.* In response, the City of Fife filed this appeal. CP 303. Fife subsequently sought and received a stay of the trial court's February 22, 2013 Order.

#### D. ARGUMENT

1. The Public Records Act is Interpreted Broadly in Favor of Disclosure—Exemptions are Narrowly Construed.

"The Public Records Act 'is a strongly worded mandate for broad disclosure of public records.'" *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("*PAWS*") (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). "The stated purpose of the Public Records Act is

nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Id.*

Passed by popular initiative, *Neighborhood Alliance of Spokane Cnty. v. County of Spokane*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011), the PRA proclaims:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. As forcefully articulated by our Supreme Court:

Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

*PAWS*, 125 Wn.2d at 251. And again, in *Amren v. City of Kalama*, the Court noted:

The Act reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government. The purpose of the Act is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them.

131 Wn.2d 25, 31, 929 P.2d 389 (1997).

Given the overarching importance of open government, the PRA “shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030. “In the event of conflict between the provisions of [the PRA] and any other act, the provisions of the PRA shall govern.” RCW 42.56.030.

In assessing the City's response to Hicks' PRA request, and in determining whether the City has properly used the exemptions under the PRA, the Court should look to the broad purpose of the PRA:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030. In assessing whether the City of Fife has complied with the PRA and applied the PRA exemptions properly, there are two rules that should guide this Court. First, “since ‘the act favors disclosure, the statutory exemptions must be construed narrowly.’”

*Servais v. Port of Bellingham*, 127 Wn.2d 820, 828, 904 P.2d 1124 (1995). Second, “[t]he agency claiming an exemption bears the burden of proving that the documents requested are within the scope of the claimed exemption . . . .” *Id.* at 828–29.

**2. The City of Fife Violated the Public Records Act by Filing an Unsuccessful Declaratory Judgment Action.**

By bringing an unsuccessful legal action against the requestor, the City of Fife violated the PRA. The Washington Supreme Court has explained:

We acknowledge the plain language and conclude that an agency can initiate court action pursuant to RCW 42.56.540, but to prevail, the agency must show that one of the Public Records Act's exemptions applies. . . . the advantage to going to court is that the agency can obtain quick judicial review, curbing, but not eliminating, the accumulation of the per diem penalties.

*Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 755–66, 174 P.3d 60 (2007). To the extent the City's argument is that its production was voluntary, the Court of Appeals has rejected this argument as well:

Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties.

*West v. Thurston County*, 144 Wn.App. 573, 581, 183 P.3d 346 (2008).

In this case, the City of Fife initiated a lawsuit against Hicks. On August 3, 2012, the City was ordered to produce the documents at

issue to Hicks. The City later produced the records, albeit in a redacted form, and has not appealed the Court's August 3, 2012 Order. By filing an unsuccessful declaratory judgment action against Hicks, the City of Fife violated the PRA.

**3. The City of Fife Continues to Violate the Public Records Act by Standing on its Unjustified Redactions.**

Although the City of Fife eventually produced responsive documents after receiving a court order, the redactions made by the City are not justified by any exemption to the PRA. These redactions include, "[c]omplainant, complainant's attorney and witness names," CP 103; "witness names," CP 120; "[t]he accused in unsubstantiated/unfounded complaints," CP 128; "Witness Names, Employee Numbers and Case No's have been redacted." CP 168. Examples of the scope of redactions made by the City include Hicks' own complaint letter, CP 456; the final investigative report, CP 371; address information on Washington State Patrol letters, CP 391-92; and an example of the redacted audio files where the alterations made by the City render the audio incomprehensible. CP 218, 241.

As set forth below, the two exemptions relied upon by the City of Fife, RCW 42.56.240(1) and RCW 42.56.230(3), are not applicable. However, even if these exemptions had some relevance, the scope of the redactions and alterations made by the City go beyond what is

necessary to comply with the exemptions. For instance, redacting the information about Hicks' own attorney is not defensible. Moreover, altering the voice of every witness interviewed renders the audio incomprehensible. In *Bainbridge Island*, the Washington Supreme Court made clear that an agency cannot go so far in an effort to withhold the identity of an individual that non-exempt material is also redacted. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 418, 259 P.3d 190 (2011) (holding that "[w]e recognize that appellants' request under these circumstances may result in others figuring out Officer Cain's identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while Officer Cain's identity is exempt from production under former RCW 42.56.230(2), the remainder of the PCIR and the MIIR is nonexempt.").

Here, the City has gone too far with the implementation of redactions and the PRA is violated even if the exemptions claimed by the City were to apply to some documents, which they do not. The City's violation of the PRA continues while the City stands on these unfounded redactions.

4. The City of Fife's Redactions Are Not Supported by RCW 42.56.240(1).

Washington law provides an exemption from the PRA, in relevant part, as follows:

Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

RCW 42.56.240(1).

Washington Courts have explained that “[t]o be exempt under this provision (1) the record must be investigative in nature; (2) the record must be compiled by an investigative, law enforcement, or penology agency; and (3) it must be essential to law enforcement or essential to the protection of privacy.” *Koenig v. Thurston County*, 175 Wn.2d 837, 843, 287 P.3d 523 (2012). *See also City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 144, 827 P.2d 1094 (1992) (holding “three elements must be met. (1) The disputed documents must be specific investigatory records or contain specific intelligence information; (2) they must have been compiled by an investigative, law enforcement or penology agency; and (3) nondisclosure must be essential to either (a) effective law enforcement or (b) the protection of

any person's right of privacy."). As analyzed below, the redactions made by the City of Fife do not meet any of these three requirements.

**a) The Names Redacted by the City of Fife Are Not Investigatory Records Within the Meaning of the PRA.**

As explained in the Public Records Act Deskbook:

An investigation relating to personnel issues generally does not constitute an investigation under this exemption. For instance, investigation into job performance of a police chief by a city manager involved a "personnel" matter and not an investigation for purposes of RCW 42.17.310(1)(d) /RCW 42.56.240.

*Overstreet*, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws, §8.1(1) (2010).

Multiple Washington cases support this position. In *Columbian Publishing Co.*, several police officers from the City of Vancouver police department raised employment related complaints about the Chief of Police to the City Manager. *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 671 P.2d 280 (1983). Specifically, "[t]he officers alleged that Chief Davis is 'aloof,' lacks motivational and communication skills, 'shows no respect for his employees,' has alienated other law enforcement agencies, and is a 'task master, not a people master.'" *Id.* The City Manager was made aware of the complaint and received "13 statements of individual officers detailing their specific complaints. The statements were confidential and

anonymous, but [the City Manager] was given a key to enable him to identify the writers so that he could conduct follow-up interviews with them and discuss the complaints more effectively with the chief." *Id.*

The Columbian newspaper learned of these statements and requested the statements. *Id.* The City Manager refused, citing various statutory exceptions, including the investigative records exception. *Id.* The Columbian brought suit to compel disclosure. The trial court determined that none of the exemptions applied, including the investigative records exemption. The City of Vancouver appealed. *Id.*

In affirming the trial court, the Court of Appeals determined that the investigative records exemption did not apply. *Id.* at 30-31. There, the court reasoned:

This exemption fails to apply for several reasons. First, the City of Vancouver, as represented by its manager who is investigating the job performance of a person under his supervision, is not functioning as an "investigative, law enforcement, [or] penology agency" as the exemption requires. . . . The City argues that its manager, Mr. Grattet, is representing an investigative agency through his role as overseer of the police department. This brings us to our second reason for rejecting this exemption. We recognize that the Vancouver Police Department, when carrying out its law enforcement responsibilities, is such an agency. But even when we recognize Mr. Grattet's ultimate, but tenuous, law enforcement supervisory duties, in this case he was certainly not conducting the kind of investigation that the exemption requires. . . . This is

purely a personnel matter, not an investigation in the intended sense, i.e., one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance. Finally, the nondisclosure of the statements was not, as we have said, essential to the protection of anyone's right to privacy, nor was it essential to effective law enforcement as the exemption requires. Construing this exemption narrowly, as again we must, we find no error.

*Id.*

*Columbian Publishing Co. v. City of Vancouver*, is not the only case directly on point. In *Ames v. City of Fircrest*, the Chief of Police for the City of Fircrest brought suit against Fircrest arguing that the City wrongfully released records to The News Tribune. 71 Wn. App. 284, 286, 857 P.2d 1083 (1993). The trial court rejected the Chief of Police's theory that "the investigative records exemption to the act applied in this situation." *Id.* The Court of Appeal affirmed. *Id.* There, the Court of Appeals reasoned:

... this was not a routine investigation conducted by an established internal investigation division; it was a unique inquiry aimed at the head of the department. Revealing Ames's name would not prevent the use of established techniques in the future, as in *Cowles Pub'g Co.* Nor would it prevent witnesses or complainants from coming forward in the future. Under these circumstances, Ames's name was not exempt from disclosure.

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*Ames v. City of Fircrest*, 71 Wn. App. 284, 298, 857 P.2d 1083 (1993).

*Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), mentioned in *Ames* and relied upon by the City of Fife, is distinguished from the circumstances presented in this appeal. In *Cowles*, “[t]he trial court specifically found” that “[c]onfidentiality is necessary” for the law enforcement agency to carry out its internal affairs investigations of officers. *Id.* at 717. Here, there is no such finding. Also, in this case, the investigation is not an internal affairs investigation. Instead, the investigation at Fife was primarily into employment discrimination issues, which all employers could face, not simply law enforcement agencies. The *Cowles* Court drew a distinction between investigations into “oversight of agency performance, which was not protected, and investigations of specific individuals which could result in criminal or civil sanctions.” *Id.* at 732. The allegations in *Cowles* primarily related to alleged excessive force issues, not employment discrimination. *Id.* at 714–16.

As in *Columbian Publishing Co.* and *Ames*, the records at issue in this case relate to an investigation into how the Chief of Police was performing his job. These are not criminal investigatory records. Instead, this is a “purely personnel matter” just as in *Columbian Publishing Co.*

In any event, the actual records were already produced. The only items that remain are the City's broad redactions, including redaction of witness names and alterations to the audio recordings. As recognized by the Court of Appeals, "there is no clear categorical exemption for witness identification under the effective law enforcement prong of RCW 42.56.240(1)." *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 18-19, 260 P.3d 1006 (2011), *review granted*, 175 Wn.2d 1001 (2012). Because the materials that were redacted do not constitute criminal investigatory documents within the meaning of the PRA, this Court should affirm the trial court below.

**b) The Records at Issue Were Not Compiled for Criminal Investigatory Reasons.**

Prothman was not hired to ferret out criminal activity. The company was retained to determine if the Fife Chief of Police was violating antidiscrimination laws and otherwise participating in or condoning unprofessional behavior. The documents, including the redacted material, were not compiled for criminal investigatory reasons.

The City of Fife's City Manager testified that these records were compiled by its insurer's representative, not the City or police department. CP 31-32. In fact, while inconsistent with other statements, CP 463, the City Manager testified that the City did not

even have any of the documents in its possession. CP 32 (“Neither I, nor any of my staff reviewed, evaluated, received or used any part of the interview transcripts, interview audio files or any other interviewer prepared documents, prior to the final report. . . . The final report was the only document the City used in its decision making process.”)

To qualify for this exemption, at a minimum, the records must have been “received and retained” by the agency “in connection with the investigation.” *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 144 n.3, 827 P.2d 1094 (1992). The City of Fife cannot and does not assert that it compiled these documents. Because the City Manager testified that the City did not even receive the documents, the exemption cannot apply.

**c) There Was No finding that the Nondisclosure Was Essential to Effective Law Enforcement.**

There are multiple reasons why this requirement is not met.

First, Washington “Courts narrowly construe the ‘essential to effective law enforcement’ element in favor of disclosure.” *Overstreet*, Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws, §8.1(4) (2010) (quoting *Prison Legal News, Inc., v. Dep’t of Corr.*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005)).

Second, "law enforcement," in this context, is limited to the issuance of "sanctions for illegal conduct" such as a fine or prison term. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 796, 791 P.2d 526 (1990). Here, the redactions made by the City of Fife relate to performance issues with the Chief of Police, not a criminal investigation as is required for this exemption to apply. In fact, the Washington Supreme Court has held that documents reflecting the discipline of government employees, including those employed by a law enforcement agency, are not covered by this exemption. *Prison Legal News, Inc.*, 154 Wn.2d at 637-40.

Third, the disclosure of an investigative record does not threaten effective law enforcement if the agency has already presented the investigation to the public. *Ames*, 71 Wn. App. at 296. *See also Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999) ("At the time the Department denied the disclosure requests at issue, it had already made all the pertinent details public. Thus, there was no further information left to protect."). Here, the City of Fife placed the investigation into the public domain by issuing a press release specifically placing the quality of the investigation into the public focus. CP 369. The City cannot affirmatively discuss the quality of the investigation and the results of

the investigation with the media, and at the same time contend that the disclosure of the investigation would harm law enforcement.

Fourth, there is no open criminal case. Under Washington law, a police department is granted great discretion to withhold open criminal investigatory files. *Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712 (1997). However, once the investigation is closed, the exemption generally no longer applies and the records are presumptively subject to disclosure. *Cowles Publ'g Co.*, 139 Wn.2d at 479-80 ("In sum, we hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file.").

Fifth, there must be some specific factual finding by the trial court that nondisclosure is necessary for effective law enforcement. In *Ames*, the court held that such a finding is necessary before applying the exception: "In *Spokane Police Guild*, the court specifically noted that the trial court had heard no testimony and entered no finding that nondisclosure was essential, thus distinguishing the case from *Cowles Publ'g Co.*" *Ames*, 71 Wn. App. at 295, n.9. The Washington Supreme Court has also explained that "Unlike *Cowles Publ'g*, which was recently

before us, no testimony was taken at the trial court level in this case and there is no finding by the trial court that nondisclosure is essential to effective law enforcement." *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 37, 769 P.2d 283 (1989) (emphasis added). Again, in the present case, there was no finding of this nature by the trial court below.

For all of these reasons, the exemption does not apply.

**d) Documents Concerning a Police Chief's Performance Are of Legitimate Public Interest.**

As a threshold point, "privacy" in the context of the PRA is limited to situations where the release of documents would be (1) highly offensive to a reasonable person and (2) the documents are not of legitimate concern to the public. RCW 42.56.050. "Generally, records relating to the performance by a public employee of his or her public duties are of legitimate public concern." *Public Records Act Deskbook*, §8.1(3) (2010).

This standard is not satisfied by documents that cause "inconvenience or embarrassment." *Tacoma News, Inc. v. Tacoma-Pierce Cnty. Health Dep't*, 55 Wn. App. 515, 521 n.3, 778 P.2d 1066 (1989). Under this standard, "statements concerning a police chief's professional performance ... are relevant to an assessment of the police chief's job performance and are, therefore, of

legitimate public interest.” *Public Records Act Deskbook*, §8.1(4) (2010).

Here, the identity of an individual who is merely a witness does not satisfy this standard. Moreover, even turning to the identity of the accused, considering the role the Chief of Police plays in the community, the trust placed in the position of Chief of Police, and the affirmative actions that the City took to place these issues, including the alleged “thorough” nature of the investigation, into the public spotlight by speaking with the press and issuing a press release, the City cannot demonstrate that the trial court committed error in determining the exemption is not applicable.

**5. The City of Fife’s Redactions Are Not Supported by RCW 42.56.230(3).**

Washington law states, in pertinent part, that:

The following personal information is exempt from public inspection and copying under this chapter: ... (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 42.56.230(3)

This exemption is narrowed by RCW 42.56.050, which explains:

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 . . . .

Moreover, as noted before, it is insufficient if the release of the requested records “may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). In calculating whether there is “legitimate public interest,” the Court does not balance the individual’s privacy interest against the interest in public disclosure. *Dawson v. Daly*, 120 Wn.2d 782, 788, 795, 845 P.2d 995 (1993). Instead, the question is whether there is a reasonable basis for the documents to be of legitimate interest to the public. *Id.* at 798. Ultimately, the agency must prove that public interest requires the withholding of the requested record. *Id.*

The scenario raised in this case is anything but novel. In fact, requests concerning alleged employee misconduct by a chief of police or police personnel, form the factual background of many of the primary case authorities regarding this exemption. Many of these cases are discussed above. For instance, in *Cowles Publishing Co.*, 109 Wn.2d at 726–27, the Washington Supreme Court held that the investigation of police officers was of legitimate concern to the public. Specifically, “disclosure of the officers’ names would not invade the

officers' right to privacy . . . ." *Id.* at 726–27. Likewise, in *Spokane Police Guild*, the Court concluded that the public was entitled to know the names of police officers involved with a bachelor party at a police guild club. 112 Wn.2d at 38–39. Also, in *Columbian Publishing Co.*, the court held that there was no right of privacy permitting an agency to withhold documents related to complaints that the chief of police was improperly performing his duties. 36 Wn. App. at 29–30.

Here, the City of Fife relies on *Bellevue John Does v. Bellevue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008) and *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), and asks this Court to enlarge the holdings of these cases to cover all forms of investigations, not just allegations into sexual misconduct, and cover witnesses as well. *Bellevue John Does* involved allegations of sexual misconduct of teachers with students. 164 Wn.2d at 205–06. *Bainbridge Island* involved an allegation that an officer sexually assaulted a woman. 172 Wn.2d at 404–06. And, while the Court acknowledged the privacy interest at issue in such unfounded allegations, it also distinguished the facts in those cases from investigations into performance of a police chief:

In *Columbian Publishing Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 671 P.2d 280 (1983), an association of police officers voted no confidence in their police chief and then issued a press release noting their general

concerns. The officers then provided specific complaints to the city. *Id.* The Court of Appeals determined the complaints dealt with the police chief's performance of his public duties and, hence, the chief did not have a right to privacy in such statements. *Id.* at 30, 671 P.2d 280.

*Bellevue John Does*, 164 Wn.2d at 213 n.14.

Here, the facts of this case resemble the performance investigation in *Columbian Publishing, Co.*, and so no redactions are justified. Nevertheless, the trial court here applied *Bellevue John Does* allowing the City to redact "identifying information of the accused in regard to unsubstantiated allegations of sexual malfeasance." CP 301. Certainly, *Bellevue John Does* and *Bainbridge Island* do not require more. While Hicks chose not to appeal the trial court's decision on this question, the City's request to extend *Bellevue John Does* to non-sexual misconduct investigations involving a chief of police is without support.

Indeed, claims about sexual misconduct are unique. The Court in *Bainbridge Island* discussed this point. "[T]he offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated,' but 'is implicit in the nature of an allegation of sexual misconduct.'" *Bainbridge Island Police Guild*, 172 Wn.2d at 415 (quoting *Bellevue John Does*, 164 Wn.2d at 216 n.18).

Here, the trial court applied these principles by exempting the names of anyone accused of sexual misconduct. CP 301.

Contrary to the City's argument, the public has great interest in learning about the details of how the Chief of Police runs his office. Additionally, the public has a right to review what type of investigation occurred instead of blindly accepting the conclusions of an investigator hired by the City and the City's insurer. In this case, the investigation was one that the City initially claimed was in response to anticipated litigation. CP 31-32. While the City Manager wrote on one hand that the investigator was hired by the City, CP 463, the City Manager also asserted that the investigator was hired through the City's liability insurer. CP 31-32. Certainly, the public has an interest in testing and reviewing what kind of investigation the City actually performed, particularly when the City has placed the conclusions from this investigation into the public spotlight and represented the investigation to the public as "thorough." CP 369. The fact that this investigation was covered by The News Tribune, and the City issued a press release, only confirms that the public has an interest in the situation.

Beyond these points, the exemption does not apply because the documents at issue are not contained in any employee's personnel file, CP 31-32, the exemption would not apply to individuals who are

merely witnesses, and the redactions made, particularly the manner in which the audio recordings are distorted, go beyond merely redacting names. CP 218. For all of these reasons, the exemption for employee personnel records does not apply.

**6. RCW 42.56.080 Does Not Create An Exemption.**

The City of Fife justifies redacting Hicks' name and the name of the law firm he hired from documents by citing RCW 42.56.080, which states that "[a]gencies shall not distinguish among persons requesting records." But it is clear that the statute serves to protect requesting parties from discrimination, not the agency. Case law interpreting the statute makes its purpose all the more clear; courts apply the statute to protect the requesting party, not the agency. *Zink v. City of Mesa*, 140 Wn. App. 328, 342, 166 P.3d 738 (2007) (holding that agency could not deny request on grounds of too many requests by requesting party).<sup>2</sup>

Because the purpose of RCW 42.56.080 is to protect Hicks, not the City of Fife, the City may not use the statute as a shield from disclosure. Certainly, RCW 42.56.080 does not create an exemption to

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<sup>2</sup> The two exceptions to the statute further prove that the statute serves to protect the requesting party, not the agency. The exceptions are requests made for commercial purposes, RCW 42.56.070(9), and requests by prison inmates, RCW 42.56.565. The exceptions exist because they are the only situations in which the agency may distinguish among requesting parties to the requesting party's detriment.

the PRA. For this reason, RCW 42.56.080 does not provide a basis to redact Hicks' own name or the name of his lawyer and law firm from the documents he has requested.

**7. Respondent is Entitled to Attorneys Fees and Litigation Expenses for Appeal.**

RCW 42.56.550 provides that a prevailing requester is entitled to attorneys fees and litigation expenses, along with the Court's consideration of a per day penalty for violation. In this case, the City of Fife filed this appeal before complying with the terms of the trial court's order requiring the production of unredacted documents. Instead, the City sought and obtained a stay of the trial court's order. For the reasons set forth above, Hicks has demonstrated that the City of Fife has and continues to violate the PRA, and therefore, Hicks is entitled to attorney's fees and litigations expenses for both the trial court proceedings and this appeal.

**E. CONCLUSION**

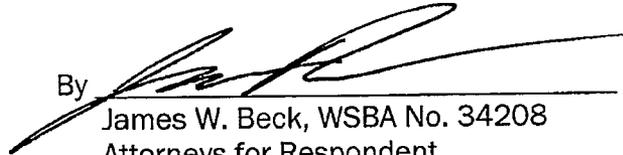
For the reasons set forth above, Respondent, Russell Hicks, respectfully requests that this Court affirm the decision of the Pierce County Superior Court.

Dated this 29<sup>th</sup> day of July, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By

  
James W. Beck, WSBA No. 34208  
Attorneys for Respondent

**DECLARATION OF SERVICE**

I, Jennifer Milsten-Holder, declare that on this 29<sup>th</sup> day of July, 2013, I emailed the Brief of Respondent addressed to the Supreme Court at [Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov), and served upon the parties indicated below:

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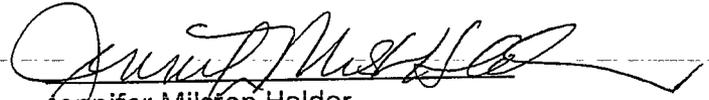
Loren D. Combs  
Gregory F. Amann  
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**Sent via:**

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 29<sup>th</sup> day of July, 2013 at Tacoma, Washington.

  
Jennifer Milsten-Holder  
Legal Secretary

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Attached for filing in .pdf format is the Brief of Respondent in *City of Fife v. Hicks*, Supreme Court Cause No. 88601-6. The attorney filing this motion is James W. Beck, WSBA No. 34208, (253) 620-6500, email [jbeck@gth-law.com](mailto:jbeck@gth-law.com).

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