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No. 54300-8

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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BELLEVUE JOHN DOE 11 and SEATTLE JOHN DOES 6 & 9,

Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5 AND  
JANE DOES 1-2, and SEATTLE JOHN DOES 1-5, 7-8 & 10-17, AND  
SEATTLE JANE DOE 1, and JOHN DOE,

Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL  
DISTRICT #210, and SEATTLE SCHOOL DISTRICT #1,

Respondents,

and

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

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**BRIEF OF *AMICI CURIAE* ALLIED DAILY NEWSPAPERS  
OF WASHINGTON, INC., WASHINGTON NEWSPAPER  
PUBLISHERS ASSOCIATION, BELO CORPORATION, AND THE  
MCCLATCHY COMPANY IN SUPPORT OF THE SEATTLE  
TIMES**

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Allied Daily Newspapers of Washington (“Allied”) is a non-profit organization representing the 25 daily newspapers serving Washington and the Washington bureaus of the Associated Press. A roster of Allied’s member newspapers is attached to this brief as Exhibit A. Washington Newspaper Publishers Association (“WNPA”) is a non-profit organization representing 123 community newspapers throughout Washington. Most of WNPA’s member newspapers are weekly or semi-weekly newspapers serving rural or suburban communities. A roster of WNPA’s member newspapers is attached to this brief as Exhibit B. Belo Corporation (“Belo”) owns 19 television stations including KING-5 T.V. in Seattle and KREM T.V. in Spokane. The McClatchy Company (“McClatchy”) owns 30 newspapers including *The News Tribune* in Tacoma and *Tri-City Herald* in the Tri-Cities. Allied, WNPA, Belo, and McClatchy collectively are referred to herein as the “Media *Amici*.”

The members of Allied and WNPA, along with KING-5 T.V., KREM T.V., *The News Tribune*, and *Tri-City Herald* serve as the primary source of news and information on matters concerning the conduct of Washington’s state and local governments and of government employees. They frequently are denied access to public records regarding investigations of wrongdoing by public employees on the basis of unduly expansive agency and judicial interpretations of the privacy exemptions in the Public Disclosure Act (“PDA”), Ch. 42.17 RCW. The interest of the Media *Amici* in this case stems from the public’s resolve that government agencies comply fully with the mandate of RCW 42.17.310(1)(b) which

restricts the disclosure of personal information in files maintained for government employees only when disclosure would violate the employee's right of privacy as that term is defined in the PDA and Supreme Court case law.

This case presents a critical opportunity to enforce the Statute's guarantee of transparent government. The Media *Amici* have a legitimate interest in addressing this issue and assuring that this Court is adequately informed on the matter.

## II. STATEMENT OF THE CASE

This case results from PDA requests made to various public school districts throughout Washington by *The Seattle Times* for public records concerning teachers accused of, investigated for, or disciplined for, sexual misconduct within the last ten years. In resulting lawsuits to enjoin several of the school districts' disclosure of the requested public records, the Honorable Douglass North of the King County Superior Court ordered that the identity of public school teachers accused of sexual misconduct is not a matter of legitimate public concern where the allegations are "unsubstantiated," are determined to be "false" after an "adequate" investigation by the school district, or are determined to be not "significant" and result in the issuance of a "letter of direction" to the teacher with no "restrictions" or "punishment" after an "adequate" investigation by the school district. CP 100-113.

In large measure, Judge North based his ruling on the wrongly-decided Division II case *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, *review denied*, 119 Wn.2d 1020, 838 P.2d 692

(1992). CP 100-113. As was the case below, trial courts and public agencies throughout Washington routinely rely on the *Tacoma News* definition of “privacy” in the PDA to deny public access to information regarding investigations of wrongdoing by public employees. This Court should interpret the PDA in a fashion that honors its language and spirit to secure the PDA’s mandate of public access in Division I.

### III. ARGUMENT

#### A. **The PDA’s Fundamental and Overriding Purpose is to Guarantee Transparent Government.**

The vital goal of Washington’s public disclosure statute is to “ensure the sovereignty of the people and the accountability of the governmental agencies that serve them.” *Newman v. King County*, 133 Wn.2d 565, 570, 947 P.2d 712 (1997). The PDA guarantees that “government of the people, by the people, for the people” does not become “government of the people, by the bureaucrats, for the special interests.” *Progressive Animal Welfare Soc. v. University of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS”). The Legislature set forth the Statute’s guiding principle in precise terms:

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. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251.

In *Koenig v. City of Des Moines*, 123 Wn. App. 285, 95 P.3d 777

(2004), this Court recently reinforced the principle that courts applying the PDA are to apply the statute as written and to interpret it broadly in favor of disclosure. The Court addressed RCW 42.17.31901 which exempts from disclosure information revealing the identity of child victims of sexual assault and defines “identifying information” to mean:

the child victim’s name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

RCW 42.17.31901. The city, in response to a parent’s request for records about the assault of his own specifically-named child, argued that the very act of disclosing *any* information to the parent would “identify” the child whose assault was discussed in the records. This Court found “the logic of the city’s argument is persuasive” but nonetheless rejected it.

[W]e cannot construe RCW 42.17.31901 in the manner the city advocates. Neither the plain language of the statute, nor any reasonable interpretation of its terms requires the exemption of entire records simply because a request names a specific child. Rather, the statute exempts specifically defined information from disclosure, and nothing more.

...

To be sure, the city does identify a troublesome hypothetical in which a requestor could speculate about the identity of a specific child victim of sexual assault, name the child in a request for records, and then receive confirmation of the child’s identity, ironically, in the form of redacted records, which may contain highly offensive and embarrassing information. But even if we were presented with such a scenario, we could not rewrite the statute or construe it in a manner contrary to its unambiguous text. Likewise, we cannot do so here.

Mindful of the legislature’s charge to construe the Act’s exemptions narrowly, we hold that RCW 42.17.31901 does not exempt from disclosure entire records pertaining to a specifically-named child victim of sexual assault.

95 P.3d at 781 (emphasis added).

**B. Under the PDA, a Privacy Interest Is Impacted Only if Disclosure Would Be Highly Offensive to a Reasonable Person and Is Not of Legitimate Public Concern.**

The nature of personal privacy interests recognized under the PDA has developed within the context of the Statute’s guarantee of public oversight. When originally codified, the PDA did not contain a definition of the term “privacy” or similar terms used throughout the Statute. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978). In *Hearst*, the Supreme Court considered how the privacy interest identified in 42.17.310(1)(c), the exemption for certain tax payer information, should be defined. The Court looked to the tort of invasion of privacy by public disclosure of private facts and adopted the standard for that tort set forth in § 652D of the Restatement (Second) of Torts:

“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.”

*Hearst*, 90 Wn.2d at 135-36 (quoting § 652D).

The Supreme Court next considered privacy interests in the context of the PDA in *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). It “refined” and significantly broadened the Act’s definition of privacy.

[T]he information sought need not be highly offensive in order to *establish* a privacy interest. Rather, we believe the better rule recognizes that an individual has a privacy interest whenever information which reveals unique facts about those named is linked to an identifiable individual.

Under this rule, we incorporate *Hearst*’s “highly offensive” test into the *second* part of the *Hearst* balancing test under which an agency must determine whether an individual’s privacy interest outweighs the public’s interest in broad

disclosure. Whenever the information in which an individual has a privacy interest is not “highly offensive”, the public interest in disclosure outweighs the individual’s privacy interest. On the other hand, if the release of the information is highly offensive, the privacy interest may outweigh the public interest.

*Id.* at 613-14.

The Legislature immediately took up the issue of privacy interests under the PDA and, by unanimous vote, statutorily reversed *Rosier*. *State v. Maxfield*, 125 Wn.2d 378, 390, 886 P.2d 123 (1994). The result was a new definitional provision in the Statute:

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. . . .

RCW 42.17.255 (emphasis added). The Legislature explained that privacy under the PDA was to have the same meaning as given in *Hearst*. Laws of 1987, ch. 403, § 1 at 1546-47.

**C. Division II Turned the PDA On Its Head By Adopting a New, More Expansive Definition of Privacy.**

In *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992), Division II ignored the unambiguous language of RCW 42.17.255 and the PDA’s basic principles of construction by adopting an entirely new and broader definition of privacy. In that case, the newspaper had made a PDA request for a police incident report concerning an allegation that a parent had criminally abused a dependent minor and for letters written to the police department in support of the parent. The newspaper believed the parent to

be a candidate for mayor. The abuse allegation was made by an anonymous, hearsay informant and was investigated by four agencies. Each of the agencies concluded the allegation could not be substantiated. The city denied the request for records under RCW 42.17.310(1)(d), the investigative records exemption. 65 Wn. App. at 144-45. The exemption applies, *inter alia*, if nondisclosure of the record “is essential to . . . the protection of any person’s right of privacy.” RCW 42.17.310(1)(d).

The court’s analysis of privacy took it far afield from the PDA standard. The court noted that at common law, as defined by the Restatement, there are four invasion of privacy torts including publication of private facts (§ 652D) – adopted in *Hearst* and in RCW 42.17.255 – and false light invasion of privacy (§ 652E), for publicizing a false statement. 65 Wn. App. at 146. Section 652E provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E. Unlike RCW 42.17.255, § 652E does not consider whether the information is of legitimate public concern.

The *Tacoma News* court acknowledged that the two Restatement sections contain different criteria and surmised that “until it is decided whether the information in question is true or false, there is no way of knowing which set of criteria should be applied” to a PDA request. 65

Wn. App. at 147. The court explained that in *Hearst*, the Court had adopted Restatement § 652D “[b]ecause the plaintiff sought records containing information the truth of which was not disputed.” *Id.* “The *Hearst* court was not dealing with records said to contain false information, and it did not preclude the application of § 652E in a case involving such records.” *Id.* Because the Supreme Court had adopted one section of the Restatement in *Hearst*, Division II reasoned it was proper to import another Restatement privacy tort standard into the PDA. *Id.* at 147-48.

The *Tacoma News* court quoted but completely ignored the operative statutory definition of privacy in RCW 42.17.255 with its unambiguous command that privacy, as the term is “used in this chapter,” is invaded “only” if disclosure of the information is highly offensive to a reasonable person “and” not of legitimate public concern. 65 Wn. App. at 148. According to the court, “[a]s a matter of common sense,” “it is contrary to the plain meaning of RCW 42.17.255” to apply the singular statutory standard to documents “whether the information is true or false.” 65 Wn. App. at 148. From this point, the court strayed even farther from the statutory language.

If RCW 42.17.255 allows agencies and courts to consider whether information in public records is true or false, it also allows them to consider whether such information has been substantiated. If information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative though not always dispositive of falsity.

*Id.* at 149. Division II apparently recognized that lack of substantiation is not equivalent to exoneration.

Having gone to great lengths to adopt a new privacy standard –

that of § 652E – the *Tacoma News* court did not bother to apply it. Rather, the court simply held that the government agencies’ conclusions that the allegation was “unsubstantiated” meant that “the requested documents were not of legitimate concern to the public” and, so, were exempt. *Id.* at 152. Of course, the “not of legitimate concern to the public” element is found only in RCW 42.17.255 *not* in the § 652E false light tort.

As this Court held in *Koenig*, Division II was required to construe the PDA according to its plain language<sup>1</sup> and in favor of public disclosure.<sup>2</sup> *Koenig*, 95 P.3d at 781. The *Tacoma News* decision did just the opposite, substituting its own policy preference for the unambiguous mandate of the Legislature. The court refused to apply the privacy standard required by RCW 42.17.255 for *all* PDA cases. Moreover, both the standard adopted and the one applied by Division II resulted from a more liberal – not more narrow – construction of an exemption and a narrower – not more liberal – construction of the disclosure right. Under the § 652E standard adopted in *Tacoma News*, there is no consideration at all for the essential element of lack of legitimate public concern, the keystone of the PDA. And, under the “unsubstantiated = false = not of legitimate concern to the public” standard the court applied, the legitimacy of public interest is determined only in reference to presumed falsity. Incongruously, under either approach, the public’s interest in monitoring government investigation of alleged wrongdoing by public servants is

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<sup>1</sup> See also *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001) (“If the statute’s meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended.”).

<sup>2</sup> See also RCW 42.17.251; *Hearst*, 90 Wn.2d at 128 (“Declarations of policy requiring liberal construction are a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined.”).

wholly dependent on the result of the very investigation the public wishes to monitor.

The Legislature having made clear its policy choices in the PDA, Division II was required to effectuate them.

**D. The Trial Court Failed to Apply RCW 42.17.255's Privacy Test.**

Judge North adhered to the new “true-false,” “substantiated- unsubstantiated” litmus test conceived by the *Tacoma News* court in determining whether the public is entitled to know the identity of public school teachers accused of sexual misconduct with their students:

whether the allegation is substantiated or unsubstantiated becomes the dominant factor in determining whether release of the information would violate an employee’s right to privacy. The substantiated/unsubstantiated nature of the allegation bears upon both elements of the statutory definition of the right to privacy in RCW 42.17.255. If the allegation is unsubstantiated it significantly increases the offensive nature of its revelation and if it is unsubstantiated, it is of no legitimate public interest.

CP 111. Thus, the trial court collapsed the two-pronged PDA privacy test into a singular analysis of the perceived truth or falsity of the allegations of abuse.<sup>3</sup>

Upon applying this standard, the trial court upheld the nondisclosure of the teacher’s name, the name of the school, and the names of school personnel involved in misconduct investigations in three situations:

- 1) Where the school issues a “letter of direction” to a teacher “to guide and correct employee performance on

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<sup>3</sup> Judge North paid lip service to the “highly offensive” prong of the privacy test by stating that “[i]f the allegation is unsubstantiated it significantly increases the offensive nature of its revelation.” CP 111. But no analysis followed.

the job” but “which does not impose punishment” and “there is no finding of significant misconduct”;

- 2) Where the allegations are “unsubstantiated” following an “adequate” investigation; and,
- 3) Where the allegations are “proven false after an adequate investigation.”

CP 112-13.<sup>4</sup> Judge North concluded that fifteen teachers fell within these three situations. He held that the allegations against seven teachers were “relatively minor” and/or resulted in a letter of direction or an oral reprimand,<sup>5</sup> the allegations against six teachers were found “unsubstantiated” or “unfounded” by the school district following an “adequate” investigation,<sup>6</sup> and the allegations against two teachers were found by the school district to be “false” after an “adequate” investigation.<sup>7</sup> CP 101-08.

**E. Application of RCW 42.17.255’s Privacy Standard Here Requires Disclosure of the Redacted Information.**

In its *de novo* review of the trial court’s opinion, this Court must apply RCW 42.17.255’s two-part privacy test. Because the teachers and the school districts fail to satisfy *both* prongs of that test, the PDA requires

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<sup>4</sup> Judge North ruled that the identity of an accused teacher should be disclosed “when the investigation of the allegations are inadequate, the allegations are deemed substantiated, or the employee is disciplined with what amounts to more than a letter of direction.” CP 113.

<sup>5</sup> These were Federal Way JD 3, and Bellevue JD 1, 2, 4, 6, 7, and 9. For example, in Judge North’s opinion, the public should not be informed of the identity of a teacher who “may have touched a female student on the buttocks while trying to move behind her in a crowded classroom” and where the principal “orally reprimanded the teacher.” CP 101 ¶ 16. His conclusion was the same in regard to a teacher who sent personal notes to students and waited for them, CP 102-03 ¶ 20, and in regard to a teacher who admitted to making unidentified “inappropriate comments” to students. CP 105 ¶ 27. Judge North *did not* determine if the investigations of Bellevue JD 1, 2, 4, 6, and 9 were “adequate.” CP 102-05.

<sup>6</sup> These were Federal Way JD 2, Bellevue JD 3, and Seattle JD 3, 5, 7, and 10. But, the court *did not* decide whether the investigation of the 2001 complaint against Federal Way JD 2 or the investigation of the allegations against Seattle JD 10 was “adequate.”

<sup>7</sup> These were Federal Way JD 1 and Seattle JD 1.

disclosure of the redacted information.

**1. Release of the Redacted Information Serves the Legitimate Public Concern in Monitoring School District Investigations of Abuse.**

To come within the meaning of RCW 42.17.255, the teachers must “establish the absence of a legitimate public concern.” *Dawson v. Daily*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993). To be “legitimate,” the public interest must be “reasonable.” *Id.* at 798. The public interest prong contemplates “some” balancing of the public interest in disclosure against the public interest in the efficient administration of government. *Id.*

Requiring disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable. Therefore, in such a case, the public concern is not legitimate.

*Id.*

In *Dawson*, the court held that although the public has a general interest in public servant accountability, that interest was outweighed by the harm to public employee morale and performance that would result from public disclosure of performance evaluations that “do not discuss specific instances of misconduct or public job performance.” *Id.* at 799-800. This court ruled likewise in *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 619, 860 P.2d (1993), regarding personnel records of a principal that also did “not discuss specific instances of misconduct or public job performance.”

Under *Dawson*, it is plain that the public interest in records that *do* “discuss specific instances of misconduct or public job performance” is legitimate under RCW 42.17.255. Without knowledge about public

employee misconduct the public simply cannot “maintain control over the instruments that they have created.” RCW 42.17.251. Only through public disclosure of such information can the public preserve “the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *PAWS*, 125 Wn.2d at 251.

Moreover, these basic tenets of the PDA require not just knowledge about when the government *sustains* an allegation of wrongdoing, but knowledge about the government’s response to and investigation of *any* such allegations. This public interest in overseeing the way the government investigates allegations of wrongdoing was recognized recently by this Court in *Koenig*. The Court considered application of the PDA privacy test in regard to police records of the sexual assault of a child victim. In applying the *Dawson* balancing test of public benefit versus public harm, the Court explained:

[W]e recognize that [these records] contain a wealth of detail about the circumstances surrounding the assault . . . . The records also contain details about . . . what resources and methods law enforcement officials used. Disclosure of this information advances the public’s interest . . . because it allows the public to gauge the overall effectiveness or ineffectiveness of law enforcement’s performance.

*Koenig*, 95 P.3d at 784 (emphasis added). The Court deemed only sexually explicit descriptions about where and in what manner the child was touched to be detrimental to the public’s opposing interest in effective law enforcement. Otherwise, the police reports were subject to public inspection. *Id.* at 785.

To “gauge the overall effectiveness or ineffectiveness” of the

school system's investigation of sexual misconduct allegations, the public has a right to know not just when the schools conclude that sexual misconduct has occurred but how public schools investigated other such allegations. Notwithstanding his improper reliance on *Tacoma News* – or his holding – Judge North agreed with this conclusion:

The court finds that the public has a concern in learning about investigations performed by school districts of sexual misconduct complaints against school teachers and in assessing the adequacy of the districts' responses and investigations. This concern is legitimate whether the allegations are sustained, deemed false, or deemed unsubstantiated.

CP 100 (emphasis added). This conclusion also plainly follows from the judgment of the Washington Supreme Court.

Sexual abuse of students is a proper matter of public concern because the public must decide what can be done about it. The public requires information about the extent of known sexual misconduct in the schools, its nature, and the way the school system responds in order to address the problem.

*Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990) (emphasis added).

To understand “the way the school system responds” to allegations of abuse, and to test the school system's conclusions, the public must know the names of accused teachers, the names of the schools involved, and the names of investigating administrators. Without such information, the public cannot make any one of many vital determinations, for example:

- whether a teacher has been the subject of more than one allegation of wrongdoing;
- whether a teacher is able to avoid an investigation by leaving one school, only to reappear at another school, or by resigning

or retiring;

- whether schools are reporting misconduct allegations to subsequent potential employers when accused teachers seek to move on to other schools;
- whether schools are reporting allegations of abuse to state agencies as mandated by law;
- whether allegations of specific wrongdoing are properly investigated;
- whether one school faces more allegations than others;
- whether the cases investigated by one administrator or school result in more “letters of direction”;
- how the level of training impacts the way administrators conduct investigations and the results of their investigations;
- how the schools differ in their definition of “trivial” – though inappropriate – wrongdoing; and
- whether “letters of direction” are being issued to avoid costly and time-consuming union disputes, or, following the decision below, are being used to avoid public disclosure.

Public access to this information is particularly important to ensure the safety of school children. As is made amply clear in this case, when teachers are accused of sexual misconduct, they are represented by a forceful union. Children, on the other hand, are represented and protected *only* to the degree that the process is open to the public.

On the other side of the scale, Judge North identified only one public interest in *nondisclosure*: “the importance of candid communication between school districts and teachers about how educational duties should be performed.” CP 100 ¶ 10. In his opinion, public disclosure in the three situations under which he approved redaction “would chill employer-employee communications by making all written communications

between employer and employee subject to disclosure.” *Id.*<sup>8</sup>

Even assuming some impact on the level of communication between schools and teachers, it is evident that the trial court deemed that impact to be outweighed by the public interest in access in the cases in which he ordered full disclosure. The obvious reason for striking such a balance is that in light of the PDA’s mandate of open, reviewable government, the public’s right to oversee the investigation of substantiated abuse allegations outweighs any concern for a diminution in the candid nature of communications between schools and teachers.<sup>9</sup>

The public’s interest in overseeing investigations of abuse is no less significant where the school concludes the conduct was minor, could not be substantiated, or did not occur. In fact, in those instances, the public interest in oversight is perhaps greater given the grave impact on children of investigations that the schools decide wrongly in the teachers’ favor. At bottom, a public school’s investigation of sexual misconduct – in and of itself – is an important act of government which must be subject to public oversight.

Here, the public oversight rights guaranteed by the PDA were usurped by the trial judge. Serving as a filter between the public and the organs of government, Judge North determined whether *in his opinion*

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<sup>8</sup> It bears noting that the unions have threatened to formally grieve all investigations if disclosure is allowed, meaning there will be *more* not less communication between employers and employees and the nature of the communication will be more formal and *more detailed*. Prevaling John Does’ Resp. Br. at 8 (quoting testimony of union representative Steve Pulkinen). Moreover, the records at issue here address specific allegations of wrongdoing against children *not* “all written communications between employer and employee.”

<sup>9</sup> In *Tacoma Library*, the court rejected the agency’s claim that release of information could lead to lowered employee morale given that “[t]he purpose of the PDA is to keep the public informed so it can control and monitor the government’s functioning.” 90 Wn. App. at 223.

investigations were “adequate,” whether “unsubstantiated” effectively means exonerated, and whether the conduct at issue though warranting a letter of direction was not sufficiently “significant” to merit public attention. These are issues of legitimate public concern which the PDA reserves for *public* oversight. RCW 42.17.251.

**2. Release of the Redacted Information Would Not Be Highly Offensive to a Reasonable Person.**

To establish an invasion of privacy, the teachers *also* must prove that release of their identities would be highly offensive to a reasonable person. RCW 42.17.255. In *Dawson*, 120 Wn.2d at 796-97, the Supreme Court addressed the “highly offensive” prong in regard to general performance evaluations of public employees. The court held that if performance evaluations do not “discuss any specific instances of misconduct” or “the performance of public duties,” their disclosure is presumed to be highly offensive. Generic information about job performance comes within “the intimate details of one’s personal and private life” to which the right of privacy applies. *Id.* at 796 (quotation marks & citation omitted).

Following *Dawson*, the “highly offensive” prong was addressed in *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998), *amended in non-relevant part*, 972 P.2d 932 (1999). The court held that release of employee names, salaries, publicly funded fringe benefits, and vacation and sick leave pay is not highly offensive because the disclosure “would allow public scrutiny of *government*.” With this information “the public could then ensure that the government is not

paying one employee twice, funneling money to non-existent employees, or engaging in nepotism.” *Id.* at 222 (quotation marks & citation omitted)

The information sought here is not general performance evaluations as in *Dawson*.<sup>10</sup> Rather, it is information about how the public schools respond to allegations of specific instances of misconduct. The fact that a misconduct investigation is conducted is a public – not private – event. As in *Woessner*, information about the identity of the accused teachers, the schools involved, and the administrators who investigated the accusations is necessary for the public to exercise its oversight rights. Public access to this vital information is not highly offensive to the reasonable person,<sup>11</sup> bearing in mind that the PDA does not simply equate the subject teachers with the “reasonable person.” *Rosier*, 105 Wn.2d at 615 (“We admit that [the] release [of documentation of power use] to police officers would ‘highly offend’ anyone who engages in illegal activity, e.g., growing marijuana; but this person is not the appropriate measure of a ‘reasonable person.’”).

Because neither of the independent prongs of RCW 42.17.255 has been satisfied, the PDA requires disclosure of the redacted information.

---

<sup>10</sup> The Prevailing John Does contend that the personnel files at issue in *Dawson* contained “allegations of misconduct.” Prevailing John Does’ Resp. Br. at 21. That statement finds no support in *Dawson*. See *Dawson*, 120 Wn.2d at 787 (describing the documents withheld from the personnel file). Moreover, contrary to the implication by the Prevailing John Does that the *Dawson* court “determined that only where the record establishes misconduct does the public interest become reasonable,” Prevailing John Does’ Resp. Br. at 21, the Supreme Court has never directly addressed the issue presented in the case at bar.

<sup>11</sup> The Prevailing John Does contend that the disclosure of “untrue rumors and false allegations” rises to “the highest level of offensiveness.” *Id.* at 42. Not only is this wrong as a matter of law as set forth above, but it can only *arguably* be said to apply as a matter of fact to the two cases where the school districts concluded that the allegations were false. CP 101, 105. There is no basis in fact for making this contention in regard to the bulk of the investigations that were redacted, where the school districts simply concluded they could not substantiate the claims or found the claims to be relatively minor.

**F. Adoption of the *Tacoma News* Standard in Division I Significantly Impairs the Public's Right to Scrutinize Government Agencies.**

Although no other reported decision has cited to or relied on the *Tacoma News* litmus test, the impact of that case has been substantial throughout Washington. In its wake, public information officers regularly seize upon the “substantiated/unsubstantiated,” “true/false” labels assigned by agency investigators to determine if the public interest in investigations of employee wrongdoing is “legitimate.” On the basis of these agency-assigned labels, agencies routinely deny newspapers access to such records *unless* those records demonstrate that the investigation sustained the allegations.

Not only is this an unworkable scheme for public records custodians, as the Federal Way School District explains, Br. of Respondent Federal Way School Dist. at 5, but it presents the public with the age-old problem of the fox minding the chicken coop. The basic premise of the PDA is that government should not – and cannot – police itself; that is a function reserved to the public. RCW 42.17.251. Agency investigation of public employee wrongdoing goes to the heart of governmental conduct and must be publicly reviewable *no matter how the agency conducts or concludes its investigation.*

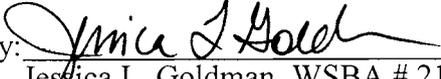
**IV. CONCLUSION**

It is of paramount importance that this Court enforce the PDA's “strongly-worded mandate for broad disclosure of public records,” *Hearst*, 90 Wn.2d at 127, hold that *Tacoma News* was decided wrongly, and rule in favor of *The Seattle Times*.

DATED this 7<sup>th</sup> day of February, 2005.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By:   
\_\_\_\_\_  
Jessica L. Goldman, WSBA # 21856

Attorneys for the Media *Amici*

**EXHIBIT A**

**ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC.**

*Daily World*, Aberdeen, WA  
*King County Journal*, Kent & Bellevue, WA  
*Bellingham Herald*, Bellingham, WA  
*The Sun*, Bremerton, WA  
*The Chronicle*, Centralia, WA  
*Ellensburg Daily Record*, Ellensburg, WA  
*The Herald*, Everett, WA  
*The Daily News*, Longview, WA  
*Columbia Basin Herald*, Moses Lake, WA  
*Skagit Valley Herald*, Mount Vernon, WA  
*The Olympian*, Olympia, WA  
*Peninsula Daily News*, Port Angeles, WA  
*The Seattle Post-Intelligencer*, Seattle, WA  
*The Seattle Times*, Seattle, WA  
*The Spokesman-Review*, Spokane, WA  
*The Daily Sun-News*, Sunnyside, WA  
*The News-Tribune*, Tacoma, WA  
*Tri-City Herald*, Tri-Cities, WA  
*The Columbian*, Vancouver, WA  
*Walla Walla Union-Bulletin*, Walla Walla, WA  
*The Wenatchee World*, Wenatchee, WA  
*Yakima Herald-Republic*, Yakima, WA  
*Lewiston Morning Tribune*, Lewiston, ID  
*The Moscow/Pullman Daily News*, Moscow, ID  
Pioneer Newspapers, Seattle, WA

## EXHIBIT B

### WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

*American Profile*  
*Anacortes American*, Anacortes, WA  
*Argus*, Burlington, WA  
*Arlington Times*, Arlington, WA  
*Auburn Reporter*, Kent, WA  
*Bainbridge Island Review*, Bainbridge Island, WA  
*Ballard News-Tribune*, Seattle, WA  
*Beacon Hill News*, Seattle, WA  
*Bothell/Kenmore Reporter*, Bellevue, WA  
*Bremerton Patriot*, Bremerton, WA  
*Camas-Washougal Post-Record*, Camas, WA  
*Capitol Hill Times*, Seattle, WA  
*Cashmere Valley Record*, Cashmere, WA  
*Central Kitsap Reporter*, Silverdale, WA  
*Channel Town Press*, LaConner, WA  
*Cheney Free Press*, Cheney, WA  
*Chinook Observer*, Long Beach, WA  
*Coupeville Examiner*, Coupeville, WA  
*Courier-Times*, Sedro-Woolley, WA  
*Daily Journal of Commerce*, Seattle, WA  
*Daily Record*, Ellensburg, WA  
*Daily Sun News*, Sunnyside, WA  
*Davenport Times*, Davenport, WA  
*Douglas County Empire Press*, East Wenatchee, WA  
*East Washingtonian*, Pomeroy, WA  
*Edmonds Beacon*, Mukilteo, WA  
*Edmonds Enterprise*, Lynnwood, WA  
*Enumclaw Courier-Herald*, Enumclaw, WA  
*Federal Way Mirror*, Federal Way, WA  
*Federal Way News*, Burien, WA

*Fidalgo This Week*, Anacortes, WA  
*Flyer*, Tacoma, WA  
*Forks Forum*, Forks, WA  
*Grandview Herald*, Grandview, WA  
*Grant County Journal*, Ephrata, WA  
*Issaquah Press*, Issaquah, WA  
*Journal of the San Juan Islands*, Friday Harbor, WA  
*Kent Reporter*, Kent, WA  
*Lake Chelan Mirror*, Chelan, WA  
*Lake Stevens Journal*, Lake Stevens, WA  
*Leavenworth Echo*, Leavenworth, WA  
*Lynden Tribune*, Lynden, WA  
*Lynnwood/Mountlake Terrace Enterprise*, Lynnwood, WA  
*Magnolia News*, Seattle WA  
*Marysville Globe*, Marysville, WA  
*Mattawa Area News*, Mattawa, WA  
*Mercer Island Reporter*, Mercer Island, WA  
*Methow Valley News*, Twisp, WA  
*Mill Creek Enterprise*, Lynnwood, WA  
*Monroe Monitor and Valley News*, Monroe, WA  
*Mukilteo Beacon*, Mukilteo, WA  
*News & Standard*, Coulee City, WA  
*Nisqually Valley News*, Yelm, WA  
*North Kitsap Herald*, Poulsbo, WA  
*Northern Kittitas County Tribune*, Cle Elum, WA  
*Northgate Journal*, Lynnwood, WA  
*Northwest Asian Weekly*, Seattle, WA  
*Okanogan Valley Gazette-Tribune*, Oroville, WA  
*Port Orchard Independent*, Port Orchard, WA  
*Prosser Record-Bulletin*, Prosser, WA  
*Quad City Herald*, Brewster, WA  
*Queen Anne News*, Seattle, WA  
*Record-Journal*, Ferndale, WA

*Redmond Reporter*, Bellevue, WA  
*Renton Reporter*, Kent, WA  
*Republic News-Miner*, Republic, WA  
*Review Independent*, Toppenish, WA  
*Sammamish Review*, Issaquah, WA  
*Seattle Sun*, Seattle, WA  
*Senior Scene*, Tacoma, WA  
*Sequim Gazette*, Sequim, WA  
*Shoreline/Lake Forest Park Enterprise*, Lynnwood, WA  
*Skamania County Pioneer*, Stevenson, WA  
*Snohomish County Tribune*, Snohomish, WA  
*Snoqualmie Valley Record*, Snoqualmie, WA  
*South Beach Bulletin*, Westport, WA  
*South County Sun*, Royal City, WA  
*South Whidbey Record*, Langley, WA  
*Sports Etc.*, Seattle, WA  
*Stanwood/Camano News*, Stanwood, WA  
*Statesman-Examiner*, Colville, WA  
*The Bellingham Business Journal*, Bellingham, WA  
*The Cascade Times*, Snoqualmie, WA  
*The Chronicle*, Omak, WA  
*The Dispatch*, Eatonville, WA  
*The East County Journal*, Chehalis, WA  
*The Enterprise*, White Salmon, WA  
*The Everett Business Journal*, Everett, WA  
*The Gazette-Record*, St. Maries, ID  
*The Goldendale Sentinel*, Goldendale, WA  
*The Herald*, Puyallup, WA  
*The Highline Times/Des Moines News*, Burien, WA  
*The Independent*, Chewelah, WA  
*The Islands' Sounder*, Eastwound, WA  
*The Leader*, Port Townsend, WA  
*The Montesano Vidette*, Montesano, WA

*The Newport Miner*, Newport, WA  
*The North Coast News*, Ocean Shores, WA  
*The North Seattle Herald-Outlook*, Seattle, WA  
*The Northern Light*, Blaine, WA  
*The Odessa Record*, Odessa, WA  
*The Outlook*, Othello, WA  
*The Peninsula Gateway*, Gig Harbor, WA  
*The Quincy Valley Post-Register*, Quincy, WA  
*The Reflector*, Battle Ground, WA  
*The Ritzville Adams County Journal*, Ritzville, WA  
*The Shelton-Mason County Journal*, Shelton, WA  
*The Star*, Grand Coulee, WA  
*The Tenino Independent*, Tenino, WA  
*The Times*, Waitsburg, WA  
*The Wenatchee Business Journal*, Wenatchee, WA  
*The Wilbur Register*, Wilbur, WA  
*The Woodinville Weekly*, Woodinville, WA  
*Tribune*, Deer Park, WA  
*Valley News Herald*, Spokane, WA  
*Vancouver Business Journal*, Vancouver, WA  
*Vashon-Maury Island Beachcomber*, Vashon, WA  
*Wahkiakum County Eagle*, Cathlamet, WA  
*Walla Walla Union-Bulletin*, Walla Walla, WA  
*West Seattle Herald/White Center News*, Seattle, WA  
*Whidbey News-Tribune*, Oak Harbor, WA  
*Whitman County Gazette*, Colfax, WA  
*Willapa Harbor Herald*, Raymond, WA

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1. I am employed by the law offices of Summit Law Group PLLC.

2. On February 7, 2005, I caused to be served a true and correct copy of Brief of *Amici Curiae* Allied Daily Newspapers of Washington, Inc., Washington Newspaper Publishers Association, Belo Corporation, and The McClatchy Company in Support of The Seattle Times on the following by messenger:

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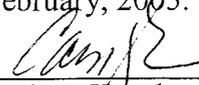
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Joyce L. Thomas  
Frank Freed Subit & Thomas  
705 Second Ave., Ste. 1200  
Seattle, WA 98104

DATED this 7<sup>th</sup> day of February, 2005.

  
\_\_\_\_\_  
Carrie J. Krogh

2005 FEB - 7 AM 11:44  
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No. 54300-8

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

---

BELLEVUE JOHN DOE 11 and SEATTLE JOHN DOES 6 & 9,

Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5 AND  
JANE DOES 1-2, and SEATTLE JOHN DOES 1-5, 7-8 & 10-17, AND  
SEATTLE JANE DOE 1, and JOHN DOE,

Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL  
DISTRICT #210, and SEATTLE SCHOOL DISTRICT #1,

Respondents,

and

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

---

**DECLARATION OF KEN OLSEN IN SUPPORT OF THE  
SEATTLE TIMES**

---

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Attorneys for Allied Daily Newspapers  
of Washington, Inc., Washington Newspaper  
Publishers Association, Belo Corporation, and  
The McClatchy Company

2006 FEB - 7 AM 11:44

2006 FEB 7 11:44 AM

I, KEN OLSEN, DECLARE AS FOLLOWS:

1. I am an investigative reporter for *The Columbian* in Vancouver, Washington and I make this declaration on personal knowledge.
2. In response to public disclosure requests to government agencies in regard to investigations of agency employee wrongdoing, *The Columbian* regularly is denied access to investigations where the allegations are said to have been “not sustained.” These denials are made in reliance on *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, review denied, 119 Wn.2d 1020, 838 P.2d 692 (1992). Several recent examples follow.
3. The Washougal Police Department conducted an investigation of Police Officer Robert Ritchie. The City demoted him for exercising poor judgment in using his Taser repeatedly on a woman who refused to sign a dog complaint. On April 7, 2004, *The Columbian* submitted a request to the City for records concerning any complaints about Officer Ritchie. The City refused to produce records concerning “unsubstantiated” complaints against Officer Ritchie as well as “unfounded” claims against the City for use of excessive force.
4. The City of Vancouver placed Lt. Howard Anderson on paid administrative leave on February 20, 2004 following allegations that he made inappropriate comments to several department employees and tried to force his way into the hotel room of one employee during a training trip to Phoenix. *The Columbian* requested access to all records involving the investigation of Lt. Anderson. The City refused to produce records

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1. I am employed by the law offices of Summit Law Group PLLC.

2. On February 7, 2005, I caused to be served a true and correct copy of the Declaration of Ken Olsen in Support of The Seattle Times on the following by messenger:

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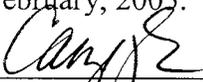
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705 Second Ave., Ste. 1200  
Seattle, WA 98104

DATED this 7<sup>th</sup> day of February, 2005.

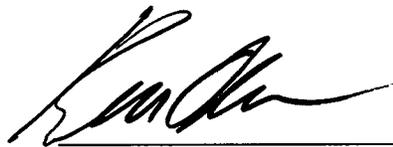
  
\_\_\_\_\_  
Carrie J. Krogh

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COMMUNICATIONS DIVISION

containing information about complaints which resulted in internal affairs investigations, but no discipline, on the basis that these complaints were “not sustained” or the individual was “exonerated.”

5. On June 26, 2004, Clark County Sheriff Deputies Don Slagle shot Tabitha DeSousa and Deputy John O’Mara shot her dog even though it was fleeing in a residential neighborhood. *The Columbian* requested disclosure of past internal affairs investigations involving the two deputies involved in the shooting. Clark County denied a substantial portion of the key records requested because the investigation concluded that no misconduct occurred and because no discipline was imposed.

**EXECUTED in Vancouver, Washington, this 23<sup>rd</sup> day of November, 2004.**



---

**Ken Olsen**

No. 54300-8

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COURT OF APPEALS

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

---

BELLEVUE JOHN DOE 11 and SEATTLE JOHN DOES 6 & 9,

Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5 AND  
JANE DOES 1-2, and SEATTLE JOHN DOES 1-5, 7-8 & 10-17, AND  
SEATTLE JANE DOE 1, and JOHN DOE,

Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL  
DISTRICT #210, and SEATTLE SCHOOL DISTRICT #1,

Respondents,

and

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

---

**DECLARATION OF SEAN ROBINSON IN SUPPORT OF THE  
SEATTLE TIMES**

---

Jessica L. Goldman  
SUMMIT LAW GROUP PLLC  
315 Fifth Avenue South, Suite 1000  
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(206) 676-7062 (Phone)  
(206) 676-7063 (Fax)

Attorneys for Allied Daily Newspapers  
of Washington, Inc., Washington Newspaper  
Publishers Association, Belo Corporation, and  
The McClatchy Company

I, SEAN ROBINSON, DECLARE AS FOLLOWS:

1. I am an investigative reporter for *The News Tribune* in Tacoma and I make this declaration on personal knowledge.

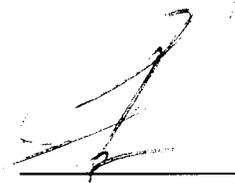
2. The Washington State Patrol conducted an investigation of Tacoma City and Police Department employees in regard to former Tacoma Police Chief David Brame who fatally shot his wife Crystal and himself. On April 28, 2004, the State Patrol provided the records of that investigation to the City.

3. *The News Tribune* has made repeated public disclosure requests to the City of Tacoma for the State Patrol records. The City has largely denied the records requests, producing only a heavily redacted fraction of the requested documents. The City has not released the bulk of the investigative records and has publicly declared that records of “unsubstantiated” allegations will not be released. The City’s primary justification for not producing these records is *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, review denied, 119 Wn.2d 1020, 838 P.2d 692 (1992). **The City employs that ruling as a comprehensive shield, denying not only names of employees, but the nature of the allegations and all information related to the investigation of the allegations.**

4. **As a result of the City’s denial of the public disclosure requests, the public is denied any opportunity to measure the quality**

and effectiveness of the investigation and is forced to defer blindly to a government agency described as “culturally corrupt” by the Washington Attorney General and the Chief of the State Patrol.

EXECUTED in Tacoma, Washington, this 15<sup>th</sup> day of November, 2004.

A handwritten signature in black ink, appearing to read 'Sean Robinson', is written above a solid horizontal line.

**Sean Robinson**

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1. I am employed by the law offices of Summit Law Group PLLC.

2. On February 7, 2005, I caused to be served a true and correct copy of the Declaration of Sean Robinson in Support of The Seattle Times on the following by first class mail, postage pre-paid:

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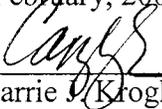
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Joyce L. Thomas  
Frank Freed Subit & Thomas  
705 Second Ave., Ste. 1200  
Seattle, WA 98104

DATED this 7<sup>th</sup> day of February, 2005.

  
\_\_\_\_\_  
Carrie J. Krogh

FILED  
COMPTON COUNTY CLERK  
2005 FEB - 7 AM 11:43