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NO. 73939-1

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BELLEVUE JOHN DOE 11 and SEATTLE JOHN DOES 6, 9 & 13,
Appellants/Cross-Respondents,
and

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5 &
JANE DOES 1-2, and SEATTLE JOHN DOES 1-5, 7-8, 9-12 & JANE DOE
1 & JOHN DOE,
Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT NO. 405, FEDERAL WAY SCHOOL
DISTRICT NO. 210, and SEATTLE SCHOOL DISTRICT NO. 1,
Respondents,
and

THE SEATTLE TIMES COMPANY,
Respondent/Cross-Appellant.

BRIEF OF RESPONDENT FEDERAL WAY SCHOOL DISTRICT

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I. STATEMENT OF THE CASE

The parties with the most direct interest in the outcome of this matter are clearly the current and former school district employees (“Does”) and the Seattle Times. The Federal Way School District (“FWSD”), however, writes to emphasize to the Court the impact of this matter on FWSD, as one of the public entities whose records are at issue in this case.

FWSD has not taken a position as to whether or which of the records of any of the individual Does in this matter should be released, and does not intend to do so before this Court. Therefore, no detailed statement of the facts relating to the individual Does is required. All that is required in this regard is the barest procedural history of this matter.

The Seattle Times record requests in this case—for records pertaining to the alleged sexual misconduct of teachers, for a period of ten years prior to the request—were made over a year ago, in early December 2002. CP 800. In response to the request, FWSD staff spent considerable time identifying the current and former employees whose records might be included within the Seattle Times request, and pursuant to RCW 42.17.330, notified or attempted to notify each of those current and former employees of the request and of FWSD’s intent to comply with the Seattle Times request. CP 801. A number of those current and former employees

joined in the action seeking an injunction preventing the release of the records, which action was filed on January 31, 2003. CP 1.

After a number of hearings, and after considering hundreds of pages of employee records and extensive briefing, Judge North settled upon a decisional matrix driven by a determination of whether allegations of misconduct had been founded (in which case the records must be disclosed); had been determined to be unfounded after adequate investigation (in which case the records need not be disclosed under *Tacoma v. Tacoma News*, 65 Wn. App. 140, 827 P.2d 1094 (1992)); had been inadequately investigated (in which case the records must be disclosed); or had been adequately investigated but resulted only in a letter of direction relating to job performance, rather than discipline for misconduct (in which case the records need not be disclosed under *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) and *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993)). CP 110-13. Judge North applied this matrix to the seven FWSD Does, CP 100-102, and ordered FWSD to release the records relating to four of the Does and to withhold the records relating to the other three, CP 117. This appeal followed.

II. ARGUMENT

FWSD does not take a position as to whether Judge North's particular determinations with respect to the various FWSD Does was correct or incorrect.¹ The various attorneys representing the Does, and the attorneys representing the Seattle Times, will ably address those issues. Rather, FWSD writes to ensure that the Court has the benefit of a school district's perspective as it considers this matter. Although the District has little direct interest in the outcome of the matter, the Court should understand the impact that cases such as this one have on it, as well as the potential implications of the Court's decision.

A. Public entities require clear rules in order to respond to public records requests.

Requests for public records pursuant to Ch. 42.17 RCW, whether from individuals or the press, are frequent occurrences for all public entities, and perhaps all the more so for school districts given the visible and critical role of school districts in educating and in some ways caring for our children. Many requests may be answered with a minimum of staff time

¹ To say that the FWSD is not directly interested in the outcome of the individual cases is *not* to say that the FWSD is not interested in ensuring public access to public records, or protecting employee privacy, or striking the appropriate balance between the two. But because those issues will be addressed by the parties to this case who are most directly affected by them, the FWSD confines its discussion to the broader implications of the Court's decision, and in particular, its impact on school districts and other public entities.

and expense, but a great many others require significant staff time and, frequently, consultation with legal counsel. Except for copying charges—which are often the least significant element of cost involved in responding to records requests—these costs are borne by the school district. RCW 42.17.300. This is so even where, as here, it takes over a year and extensive litigation to fully resolve the record request. During the course of such a request, the school district is required to incur significant legal expenses, along with very high demands on limited staff resources.

This is, of course, the lot of the public entity under Ch. 42.17 RCW. But these significant and ongoing costs serve to underscore the need for clear guidelines for public entities to apply when responding to public records requests. This is all the more so when the records requested relate to current and former employees. While the entity may, in other contexts, simply err on the side of disclosure in the face of ambiguities in Ch. 42.17 RCW, that option is not so conclusively efficient where employee records are at issue. In this context, a determination to favor disclosure often results in litigation by the employee, as happened in this case. A determination to favor nondisclosure surely would have resulted in litigation by the Seattle Times. In short, the current state of the case law meant that extensive litigation in this matter was nearly inevitable.

Because public entities will continue to receive public record requests such as the Seattle Times requests that led to this litigation, it is important that, to the extent possible, the Court provide guidance that is clear and readily applicable to future records requests. Whatever decisional guidelines the Court settles upon in this matter should enable public entities to determine with confidence that particular records either are or are not subject to public disclosure. During Judge North's consideration of this matter below, the Bellevue School District astutely addressed this matter, and in particular, suggested that the approach that Judge North was at that time considering and eventually adopted—which is in many cases dependent upon a determination of the adequacy of each investigation of misconduct—would not produce the kind of clear rule that public entities would be able to apply with confidence in future cases. CP 74. To the extent such unpredictable—if not entirely subjective—rules can be avoided, FWSD urges the Court to do so.

B. Public entities require the flexibility to resolve unfounded or questionable allegations of employee misconduct in a manner that will not lead to unnecessary litigation.

In the proceedings below, FWSD expressed concern regarding the continued viability of its (and many other public entities') practice of issuing letters of direction as an evaluative tool where allegations of

employee misconduct cannot be founded but also are not clearly unfounded. Chuck Christensen, FWSD's Director of Human Resources, described the process of investigation and issuance of either discipline or, where discipline cannot clearly be supported, an evaluative letter of direction:

3. Upon receiving a complaint of misconduct, whether it is sexual misconduct or any other type of misconduct by certificated personnel, the [Federal Way School] District first investigates thoroughly the allegations in an attempt to ascertain whether the allegations can be substantiated. Where allegations of misconduct are substantiated, the District imposes discipline appropriate to the circumstances.

4. In some instances when the investigation creates specific and difficult issues in ascertaining whether an allegation is founded, the District may instead choose to issue a letter of direction to a teacher, rather than impose discipline that may result in further labor-management issues, such as the filing of a grievance. By issuing a letter of direction, the District insures that the employee is aware of District policy, thereby providing appropriate supervision of the employee. At the same time, the employee is not obligated to waste his/her time going through a grievance process that also wastes valuable District resources. This process of investigation, and issuing letters of direction, is a valuable tool for both the District and the Union in representing its members.

CP 859. Judge North apparently agreed that such letters of direction, "whose purpose is to guide and correct employee performance on the job, where there is no finding of significant misconduct," should be exempt from public disclosure. CP 112.

Were the Court to reduce the protection from public disclosure currently extended to letters of direction, public entities would lose much of the benefit of this important supervisory vehicle. If employees know that a letter of direction—which, again, is not the result of a finding of misconduct—will be subject to public disclosure, the District believes that employees will be nearly as likely and motivated to grieve or challenge the issuance of such a letter as they currently are to grieve or challenge the imposition of discipline (such as reprimand, suspension or termination) imposed for actual misconduct. CP 860. Despite the letter of direction serving merely as an evaluative, supervisory tool, employees will view the potential public disclosure of such letters as threatening their professional reputations, and therefore worthy of vigorous challenge. This expectation of additional and otherwise-unnecessary challenges is confirmed by the Washington Education Association. CP 65 (“If this Court rules that allegations that have not been substantiated by the completion of an investigation, but where a letter of direction is issued will become a public record subject to disclosure, then I will be forced to insist that the process go forward and grieve all potentially negative information held by the District. Further, maintenance of these types of records will become substantial issues in future collective bargaining agreement negotiations.”).

Given the utility of letters of direction in evaluating and supervising employees (including responding to allegations of misconduct that cannot be substantiated), and given the threat to the utility of this tool the prospect of public disclosure of letters of direction poses, FWSD urges the Court to rule clearly that such letters, absent a finding of misconduct by the entity, are exempt from public disclosure.² Such a ruling is easily supported by the Public Disclosure Act and by prior ruling of this Court.

RCW 42.17.310(1)(b) exempts from disclosure “[p]ersonal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy.” This right to privacy is invaded or violated if disclosure “(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.17.255. This Court has held that: “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,

² It bears emphasis that the letter of direction is not a mechanism by which public entities sidestep their duty to fully investigate allegations of employee misconduct. The FWSD, for one, takes this obligation very seriously. However, common sense dictates that while there are certainly cases where misconduct may either be clearly established (and punished) or ruled out, there are necessarily also a good many cases where such determinations simply cannot be made. Without letters of direction, public entities would either be forced to treat the majority of these troublesome cases as if the employee had been cleared, or alternatively, seek to punish employees even though there are serious questions as to whether there has been any wrongdoing at all. Neither outcome benefits public entities or the people they serve.

in such a case, the public concern is not legitimate.” *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995, 1004 (1993). In addition, “disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255.” 120 Wn.2d at 797, 845 P.2d at 1004. Given the evaluative and supervisory nature of letters of direction, and particularly given the significant harm to efficient government should public entities be required to disclose such letters, *Dawson* requires that letters of direction, absent a finding of misconduct, be exempt from public disclosure.³

III. CONCLUSION

The Federal Way School District takes no position regarding the merits of the individual Doe cases facing the Court in this matter. However, FWSD urges the Court to be mindful of the impacts of its ruling in this case on public entities such as school districts as they attempt to respond efficiently to public records requests. Public entities require clear guidelines

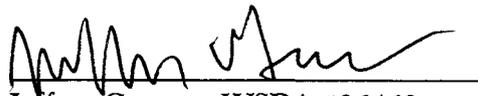
³ The *Dawson* Court also found an additional and independent basis for protecting evaluative materials in RCW 42.17.330, which allows a court to enjoin disclosure where it “would clearly not be in the public interest and . . . would substantially and irreparably damage vital governmental functions.” 120 Wn.2d at 793-94, 845 P.2d at 1002. Given the harm to public entities’ evaluation and supervision processes should letters of direction be disclosed to the public, RCW 42.17.330 is a further basis for holding that such letters are exempt from public disclosure.

that can be confidently applied in each case, so that unnecessary and protracted litigation may be avoided.

In addition, public entities must have the flexibility to use letters of direction to employees as evaluative and supervisory tools. The effectiveness of this reasonable practice will be greatly diminished should such letters be subject to public disclosure, and should employees therefore justifiably feel motivated to challenge the issuance of such letters. The Court should therefore rule that letters of direction not resulting from a finding of misconduct are exempt from public disclosure.

RESPECTFULLY SUBMITTED this 19th day of February, 2004.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent via messenger BRIEF OF RESPONDENT FEDERAL WAY SCHOOL DISTRICT to the following:

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