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No. 73939-1

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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BELLEVUE JOHN DOES 1-11, FEDERAL WAY JOHN DOES 1-5  
AND JANE DOES 1-2, and SEATTLE JOHN DOES 1-13 and JOHN  
DOE,

Appellants,

vs.

BELLEVUE SCHOOL DISTRICT #405, a municipal corporation and a  
Subdivision of the state of Washington, FEDERAL WAY SCHOOL  
DISTRICT #210, a municipal corporation and a subdivision of the state of  
Washington, and SEATTLE SCHOOL DISTRICT #1, a municipal  
corporation and a subdivision of the state of Washington, and

THE SEATTLE TIMES COMPANY

Respondents.

FILED  
2005 FEB 14 PM 3:36

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AMENDED BRIEF OF APPELLANT BELLEVUE JOHN DOE #11

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ORIGINAL

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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error.

1. The trial court erred in entering Finding of Fact #29: a) that the complaints against Bellevue John Doe #11 were thoroughly investigated; b) that the police had documented a pattern of inappropriate behavior; c) that inappropriate conduct was arguably sexually motivated; d) that there was a founded basis for the complaint; that Bellevue John Doe #11's identity should be released.

2. The trial court erred in its Conclusion of Law #2, relying solely on RCW 42.17.310(1)(b) for its analysis in determining whether to disclose Bellevue John Doe #11's identity.

3. The trial court erred in its Conclusion of Law #7: a) that the adequacy of an investigation determines falsity or unsubstantiation of allegations; b) that the party objecting to disclosure bears the burden of proving the adequacy of the investigation.

4. The trial court erred in its Conclusion of Law #12 that the identities of teachers is of legitimate concern to the public if the investigation is inadequate.

5. The trial court erred when it failed to follow its own conclusions of law #11 and #15 that identities should not be released if the misconduct involved did not warrant discipline and then ordered disclosure of Bellevue John Doe #11's identity despite the fact that he was not disciplined.

### B. Issues Related to Assignments of Error.

1. May a court rely on hearsay for the truth of the matter asserted?
2. Does evidence of allegations, alone, constitute substantial evidence of the truth or falsity of allegations?

3. Does the public have an interest in the identity of a teacher where no specific conduct is involved?
4. Is a teacher presumed guilty of allegations until he proves otherwise on a record where no administrative or other hearing process occurred?
5. Will disclosure of Bellevue John Doe #11's identity violate his right of privacy?
6. Will disclosure of Bellevue John Doe #11's identity violate vital governmental interests?
7. Will disclosure of Bellevue John Doe #11's identity violate his constitutional right of due process?
8. Will disclosure of Bellevue John Doe #11's identity violate his constitutional right of privacy?

### III. STATEMENT OF THE CASE

Bellevue John Doe #11 (Bellevue #11) taught in the Bellevue School District and retired six and a half years ago after a 30 year teaching career.<sup>1</sup> CP 1908.<sup>2</sup> Students, parents, and teachers alike regularly praised his teaching skills.<sup>3</sup> Bellevue #11 was professional.<sup>4</sup> He was responsible and well organized.<sup>5</sup> He was dedicated to the school and a wonderful

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<sup>1</sup> Declaration of Teacher A at 1.

<sup>2</sup> **Bellevue John Doe #11 has a motion to take new evidence on appeal pending before the Court. Any reference in this brief to the proposed new evidence (Declarations of Teachers A, B & C) is submitted as offer of proof;**

<sup>3</sup> See Declarations of Teachers A, B and C and Principal 1 offered in support of motion to take additional evidence on review.

<sup>4</sup> Declaration of Teacher A at 2; declaration of Teacher C at 1.

<sup>5</sup> Declaration of Teacher A at 2; declaration of Teacher C at 1.

teacher.<sup>6</sup> Other teachers, who worked closely with him for many years, considered it a privilege to work with him.<sup>7</sup>

He worked adjacent to Teacher B in classrooms separated by large glass windows. These windows allowed the teachers to view each other's classrooms.<sup>8</sup> Their classrooms were also connected by doors, which were often left open.<sup>9</sup> Teacher B observed that Bellevue #11's classes were well organized and structured for student success.<sup>10</sup>

He also worked closely for many years with Teacher A.<sup>11</sup> From 1992 until he retired, he and the teacher shared teaching spaces.<sup>12</sup> Their classrooms were also connected on the other side by doors. Their rooms were separated by large glass windows.<sup>13</sup> They shared both an office and a working environment with their students.<sup>14</sup> Teacher A regularly observed Bellevue #11 teaching.<sup>15</sup> Bellevue #11 was always professional.<sup>16</sup> He was also very clear with his students about his

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<sup>6</sup> Declaration of Teacher B at 3.

<sup>7</sup> Declaration of Teacher A at 2.

<sup>8</sup> Declaration of Teacher B at 3.

<sup>9</sup> Declaration of Teacher B at 3.

<sup>10</sup> Declaration of Teacher B at 3.

<sup>11</sup> Declaration of Teacher A at 1.

<sup>12</sup> Declaration of Teacher A at 1.

<sup>13</sup> Declaration of Teacher A at 1.

<sup>14</sup> Declaration of Teacher A at 1.

<sup>15</sup> Declaration of Teacher A at 1.

<sup>16</sup> Declaration of Teacher A at 1.

expectations and he stressed consistency in every aspect of his assignments.<sup>17</sup>

Then in 1992, two girls set in motion a pattern of accusations that have now come back to haunt him, six and a half years after his retirement.

M and C talked on the bus with two other girls about Bellevue #11. CP 1897; 1006-1008. One of them talked about hearing “stuff” about him and another told a story that she had heard that Bellevue #11 had “come on” to a girl from the previous year. CP 1896-97; 1005-1007. The girl telling the story made M. promise that she wouldn’t tell anyone about it. CP 1895; 1004-1006 (Pg. 2).

Sometime after this conversation, M reported to a teacher that Bellevue #11 was “perverted” and rested his hands on girls’ buttocks. CP 1894; 1003-1005 (p. 1). She reported to the principal that Bellevue #11 was too close to her in the classroom.<sup>18</sup> She alleged neither to the teacher nor to the principal that Bellevue #11 had inappropriately touched her. The school principal notified the Bellevue Police Department.

A detective called M’s mother to advise of the allegation and to set up a time for an interview. CP 1894; 1003-1005 (p. 1). The detective

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<sup>17</sup> Declaration of Teacher A at 1.

<sup>18</sup> Declaration of Principal at 1.

interviewed M in the presence of her mother. CP 1894; 1003-1005 (p. 1). M changed her story to the detective. She reported to the detective that Bellevue #11 had asked her during class if she was talking or working. CP 1894; 1003-1005 (p. 1). She alleged that he put his hand on her buttocks while he did so. CP 1894; 1003-1005 (p. 1). The detective did not question her about the inconsistency between her initial report to the school and her later report to the detective. Two days later, M had not cleaned up her desk area at the end of class. CP 1895; 1004-1006 (p. 2). She called the detective and alleged that Bellevue #11 snapped her bra strap. M referred the detective to her friend, C. She also told the detective about the girl from the year before whom she'd discussed with her friends on the bus.

The detective interviewed C in the presence of the principal. CP 1896; 1005-1007 (p. 3). Upon questioning, C alleged that Bellevue #11 grabbed her bra strap when he told her to clear her desk. CP 1895-96; 1004-1007 (p. 2-3). She also repeated the same story that he had touched her buttocks while asking if she was working. CP 1896; 1005-1007 (p. 3).

The detective tracked down the student from the prior year and interviewed her. Student R made no allegations of misconduct against Bellevue #11. CP 1896; 1005-1007 (p. 3). One of the four girls from the

bus, E, admitted that no inappropriate touching had occurred with her. CP 1897; 1006-1008 (p. 4).

The detective concluded that the allegations did not constitute criminal conduct. CP 1897; 1006-1008 (p. 4). At most, the officer indicated that there was an issue of inappropriate behavior, but did not conclude that it happened. CP 1897; 1006-1008 (p. 4). The detective did no further investigation to determine the veracity of the girls' allegations, and closed the file as unfounded. CP 1893; 1002-1004 (p. 1).

The principal met with Bellevue #11 about the complaints. Bellevue #11 was concerned about them.<sup>19</sup> He surmised that perhaps the crowded classroom could contribute to any inadvertent, but not inappropriate touching.<sup>20</sup> He and the principal visited the classroom and devised ways to clear bookbags from walkways and otherwise clear some space.<sup>21</sup> Principal #1 continued to supervise Bellevue #11 for two more years with no further incident.<sup>22</sup>

Then, Principal #2 arrived at the school as the new principal. She soon demonstrated an ineffective and even destructive management

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<sup>19</sup> Declaration of Principal 1 at 1.

<sup>20</sup> Declaration of Principal 1 at 1.

<sup>21</sup> Declaration of Principal 1 at 1.

<sup>22</sup> Declaration of Principal 1 at 1.

style.<sup>23</sup> She did not listen effectively and often misrepresented the facts.<sup>24</sup> She would not substantiate complaints, but rather took a student's word at face value, siding with the student over a teacher.<sup>25</sup> After two years, Principal #2 was reassigned to a position out of schools and into the main office.<sup>26</sup> But not before she mishandled several student incidents.

In one, Teacher B requested that an angry and violent student be removed from Teacher B's classroom.<sup>27</sup> Principal #2 refused to accommodate the teacher's request, directing that Teacher B just not worry about the boy's behavior.<sup>28</sup> Principal #2 took no action until later in the Spring, when a parent reported that this boy might have a gun. Only then did she call the police to investigate. The detective discovered that the boy had sat in the classroom for two days with a loaded gun and a list of people he was going to shoot, of which Teacher B was one.<sup>29</sup> Principal #2's solution was to put curtains on the doors to the hallway so outsiders couldn't see into the classroom.<sup>30</sup>

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<sup>23</sup> Declarations of Teachers B and C.

<sup>24</sup> Declaration of Teacher A at 2.

<sup>25</sup> Declaration of teacher A at 2.

<sup>26</sup> Declaration of Teacher B at 3; Declaration of Teacher A at 3.

<sup>27</sup> Declaration of Teacher B at 1.

<sup>28</sup> Declaration of Teacher B at 1.

<sup>29</sup> Declaration of Teacher B at 1.

<sup>30</sup> Declaration of Teacher B at 1.

Principal #2 also handled a complaint against Bellevue #11. One of Bellevue #11's students, Y, decided that she did not like him and wanted to make trouble for him.<sup>31</sup> Y ran with a fast crowd that seemed to spread rumors and enjoyed gossip.<sup>32</sup> She enjoyed power and influence over her peers.<sup>33</sup>

Y also spent time in detention and Saturday school, where she had difficulty following directions.<sup>34</sup> When confronted with her behavior, she would challenge authority and attempt to avoid responsibility for her actions in various ways.<sup>35</sup> She had an ability to sweet talk her way out of situations.<sup>36</sup>

On January 5, 1996, Y reported to the school counselor that Bellevue #11 "looks her up and down." CP 1898; 1007-1009; (1996 – p. 1). She claimed that she was not the only one this happened to. CP 1898; 1007-1009; (1996 – p. 1). Y asked that the school counselor not tell anyone about her accusation. CP 1898; 1007-1009; (1996 – p. 1).

Five days later, she returned to the counselor's office with four of her friends, two of whom were there for "moral support." CP 1898; 1007-

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<sup>31</sup> Declaration of Teacher A at 2

<sup>32</sup> Declaration of Teacher C at 1.

<sup>33</sup> Declaration of Teacher A at 1.

<sup>34</sup> Declaration of Teacher A at 1.

<sup>35</sup> Declaration of Teacher A at 1.

<sup>36</sup> Declaration of Teacher C at 1.

1009; (1996 – p. 1). This time, Y claimed that Bellevue #11 grabbed her buttocks for no good reason. CP 1898; 1007-1009; (1996 – p. 1). Her friend, R, reported that Bellevue #11 also grabbed her buttocks by “scooting” her to a different position. CP 1898; 1007-1009; (1996 – p. 1). A third girl accused Bellevue #11 of inappropriate touching, but she would not be specific.

The day after this meeting, the fifth girl, who was there for “moral support,” confided to the counselor that the third girl who had made non-specific complaints had lied and her mother had grounded her for it. CP 1899; 1008-1010 (2<sup>nd</sup> report, p. 2). But the fifth girl also claimed that there was yet another girl, who had been inappropriately touched by Bellevue #11. CP 1899; 1008-1010 (2<sup>nd</sup> report, p. 2).

Y received a lot of attention from other students after making her allegations.<sup>37</sup> Y’s also alleged to another teacher that Bellevue #11 had touched her “bosom.” CP 1899-1900; 1008-1011 (2<sup>nd</sup> report, p. 3). Yet another student reported that Y had complained that Bellevue #11 had spanked her. CP 1911; 1020-1022. Y had made neither of these accusations to the counselor.

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<sup>37</sup> Declaration of Teacher C at 1.

The school notified the Bellevue Police Department and a detective was assigned to the case. CP 1903; 1012-1014. The detective arrived at the school and met with the principal and vice principal. CP 1907; 1016-1018. The detective discussed with the vice principal the incident in 1993 and asked the VP to submit her notes from the principal's meeting with Bellevue #11, which she had retained, but were not part of Bellevue #11's personnel file. CP 1907-08; 1016-1019. Her notes imply that there was a third allegation of inappropriate touching in 1993, which is not supported by the 1993 police report. CP 1914; 1023-1025.

The detective interviewed all of the complaining witnesses once over the course of one day. CP 1907-1913; 1016-1024. Each girl, who was called in to speak with the detective, prefaced the meeting by volunteering that she knew that the detective had come to ask her about Bellevue #11. K was the first girl interviewed. K advised that Bellevue #11 was old and she'd heard stories about him. CP 1909; 1018-1020. K complained that Bellevue #11 had written her locker combination on a piece of tape and had stuck it on her upper inside thigh, just below her crotch. CP 1909; 1018-1020. But CB, who alleged that she saw the incident, reported it differently to the detective. CB stated that Bellevue #11 peeled a piece of tape off the front of K's leg, not her inner thigh. CP

1911; 1020-1022. To explain the possible context of this allegation could reveal Bellevue #11's identity.

The detective did not inquire into the inconsistent tape stories. She did not ask whether CB and K were friends or if they had talked about the incident before reporting to her. CB finished the interview by stating that she, herself, had not experienced any inappropriate contact from Bellevue #11. When KA was interviewed, she, too, reported no inappropriate touching. CP 1911; 1020-1022.

When the detective interviewed Y, she repeated her story that Bellevue #11 had touched her buttocks. She alleged to the police officer for the first time that he had grabbed her breast in the same incident. CP 1909; 1018-1020. The officer did not probe why Y's first two reports to the school counselor omitted the accusation about Bellevue #11 touching her breast, when the incident was alleged to have occurred at the same time as the bottom patting incident. Y also did not report any alleged spanking, which she had reported to another student. The officer did not ask her to explain her omission.

The detective next interviewed M, who repeated the "scooting" allegation, but this time alleged that Bellevue #11 put his hands on her hips, not on her buttocks as she had originally charged. CP 1910; 1019-

1021. The detective did not ask M about the inconsistency. M also complained that Bellevue #11, while kneeling between her and another student, KT, to demonstrate a procedure, reached up and patted both of them on the buttocks. CP 1910; 1019-1021.

KT's story was not consistent. She alleged that the class was sitting down while Bellevue #11 was explaining something to the class. CP 1911; 1020-1022. Neither she nor M were paying attention and so Bellevue #11 allegedly walked up behind them and slapped his hand on their buttocks, saying, "Pay attention now." CP 1911; 1020-1022. The detective did not ask why M reported that Bellevue #11 was kneeling when it happened and KT reported that he walked up behind them when it happened. The detective did not ask how the class could be sitting down and yet both M and KT's bottoms could be exposed for a slap.

CW reported to the detective that Y had come to her on January 4<sup>th</sup> crying because Bellevue #11 had allegedly slapped (not grabbed) her buttocks. CP 1912; 1021-23. CW felt very badly for Y and had encouraged her to talk. According to Y's reports to others, as of the 4<sup>th</sup>, Bellevue #11 had only stared at her, but had not engaged in any touching. CP 1913; 1022-1024.

CW went on to report that Bellevue #11 had patted her on the buttocks before, but she would not be specific. CP 1912; 1021-1023. The detective did not ask CW about her friendship with Y, nor did she inquire about what CW might feel constituted “moral support.”

She did not ask these questions of the last student either. LG advised that nothing had ever happened to her, but she had seen the buttock patting behavior. CP 1912; 1021-1023. She could not be specific about who was alleged to have been touched or when it was alleged to have happened. CP 1912; 1021-1023. The detective did not ask either of these girls why they had not reported this conduct prior to the interview.

After taking the complaints, the detective made no investigation to substantiate or negate the allegations. She did not interview Bellevue #11. Rather, she turned the matter back to Principal #2.

As was her habit, Principal 2 made no inquiry to substantiate or negate the allegations. She did not interview the teachers, who taught in classrooms adjacent to Bellevue #11, and who regularly observed him teaching in the classrooms. Principal #2 did not speak with any non-complaining students who were present in the class when the alleged conduct was to have occurred. These students were in positions to regularly see both the conduct of Bellevue #11 and the conduct of the

complaining witnesses. Principal #2 arranged for no independent observation of Bellevue #11 in his classroom.

Principal #2 did not check the grades or discipline records of these girls, nor did she seek any other background information about the girls that would indicate their reliability, veracity, and/or motives. She did not make any further inquiry into the inconsistencies of the students' allegations. She took no notice that one of the girls had recanted her story to Teacher A, confiding that she had been pressured by Y.<sup>38</sup>

Most importantly, she did not interview Bellevue #11 except to advise him of the allegations. CP 1917; 1026-1028. She refused to provide him the identities of the complaining students. She allowed Bellevue #11 no opportunity to defend or otherwise rebut the allegations. CP 1918; 1027-1029. She concluded the matter by issuing a letter to Bellevue #11 and to his file that misstated the detective's findings (e.g., the detective had said a pattern of rumors had developed, which Principal 2 characterized as a pattern of conduct). CP 1920; 1029-1031.

Bellevue #11 was tremendously distraught over the allegations.<sup>39</sup> He broke down with Teacher A.<sup>40</sup> Because Bellevue #11 was not

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<sup>38</sup> Declaration of Teacher A at 1.

<sup>39</sup> Declaration of Teacher A at 1.

<sup>40</sup> Declaration of Teacher A at 1.

disciplined or reprimanded, he had no opportunity for any administrative hearing or other process by which he could defend against the accusations.

All he could do was go back to teaching, which he did. As far as Bellevue #11 knew, that was the end of the matter. He continued teaching for another year and a half until he retired after 30 years at normal retirement age. There was no further incident.

Five and a half years later, The Seattle Times raised the specter again when it issued a request to the Bellevue School District under the Washington Public Disclosure Act, Chapter 42.17 RCW. The Times requested all files and records relating to allegations of sexual misconduct against teachers. CP 98. The Bellevue School District notified Bellevue #11 of the request. CP 7, 20.

Bellevue #11 did not object to the Times' access to his file. But because his file contained no evidence that rebutted the allegations, he did not want his identity released. He, together with 36 other teachers, filed an action in King County Superior Court to enjoin the school districts from releasing their identities to The Seattle Times. CP 98, 14-21. The trial court granted The Seattle Times' motion to intervene in the action. CP 98.

Relying solely on hearsay allegations contained in school records that were submitted to the trial court along with 36 other teacher files for in camera review, Judge North substantively determined that the allegations against Bellevue #11 were substantiated. CP 105. The trial court ordered that his identity be released to The Seattle Times. CP 105. Bellevue #11 appealed to Division One of the Court of Appeals. CP 123. Division One stayed the execution of the trial court's order pending appeal. The Times also appealed, petitioning for review to the Washington Supreme Court. CP 223. The appeals were consolidated. Bellevue #11's argument follows.

#### IV. ARGUMENT

Because this case was decided solely on the basis of documentary evidence and legal argument, the Court's standard of review is de novo. RCW 42.17.340; *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997).

A. Background and Purpose of Washington's Public Disclosure Act. The present version of Chapter 42.17 RCW was first adopted by voter initiative in 1972. *Amren*, 131 Wn.2d at 30. The Act provides citizen access to full information regarding governmental conduct so long as such disclosure does not impede the efficient administration of

government or invade the privacy of individuals. RCW 42.17.010(11). Its purpose is to provide a mechanism by which the public can be assured that its public officials are honest and impartial in the conduct of their public offices. Cowles Publishing Company v. The State Patrol, 109 Wn.2d 712, 719, 748 P.2d 597 (1988). The section at issue in this case governs the disclosure of public records. RCW 42.17.250 et. seq.

The Act mandates that upon request, an agency produce for inspection all public records, save for those falling under specific exemptions. RCW 42.17.260. A public record is broadly defined as a) any writing b) containing information relating to the conduct or performance of government c) prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. RCW 42.17.020(36). Documents that do not relate to the *conduct* or *performance* of government do not qualify as public records. For instance, verification requests seeking information about an employee's position, salary and length of service relate neither to conduct of government nor to performance of any governmental function. Dawson v. Daly, 120 Wn.2d 782, 789, 845 P.2d 995 (1997). Those records do not serve the purpose of the Act and therefore should not be disclosed.

But in Oliver v. Harborview Medical Center, 94 Wn.2d 559, 566, 618 P.2d 76 (1980), the court held that a public hospital's patient records were public records as defined by the Act. It reasoned that the records related to governmental conduct, such as health services administration. Oliver, 94 Wn.2d at 566. Although the records contained personal patient information, the court held that such content does not change the characterization of the record itself. Rather, such private information could be redacted from the otherwise public record through the express exemptions provided for in the Act. Oliver, 94 Wn.2d at 567.<sup>41</sup>

Similarly, in Tiberino v. Spokane County, 103 Wn. App. 680, 13 P.3d 1104 (2000), Division Three recently held that the personal e-mails of a fired employee constituted a public record because they were the reason for Ms. Tiberino's discharge and were printed in anticipation of her suit against the county. Tiberino, 103 Wn. App. at 688. The court nevertheless held that the content of the e-mails should not be disclosed because it was the fact of the e-mails that was of public import, not their content. Tiberino, 103 Wn. App. at 691.

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<sup>41</sup> The court expressly did not reach the issue of whether the patient's personal information should be redacted because neither party raised that issue. Oliver, 94 Wn.2d at 567.

In this case, The Seattle Times seeks records relating to allegations of sexual misconduct by Washington State teachers. Because the district's response to those allegations constitute "conduct" of government or the "performance" of a governmental function, the records qualify as public under the Act.<sup>42</sup> It is for this reason that Bellevue #11 has not objected to disclosure of the records themselves. Indeed, the Times has had in its possession all of the underlying records since this suit commenced.

But Bellevue #11 does object to the disclosure of personal information contained within those records, namely, his name and other personally identifying information. He objects because this disclosure of this information a) is not related to governmental conduct; b) does not serve the public purposes on which the Times justifies its request; c) violates his right of privacy; d) harms vital governmental interests; e) violates his Constitutional due process and privacy rights under the state and federal Constitutions.

B. Exemptions from the Act. In adopting the WPDA, Washington citizens recognized that disclosure of some public records or information would not further the Act's purpose of public review of governmental

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<sup>42</sup> See *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 790 P.2d 526 (1990) (Way school system responds to known sexual misconduct in schools is of legitimate public concern).

conduct or performance. Disclosure of these records would not further governmental accountability. Accordingly, the Act contains numerous express exemptions from the Act. See e.g. RCW 42.17.310(1)(a) – (fff).

The Act exempts, inter alia, records relating to:

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.

...  
[and]  
...

Investigative records compiled by . . . law enforcement . . . the nondisclosure of which is essential to . . . the protection of any person's right to privacy.

RCW 42.17.310(1)(b) and (d). For those records that are otherwise disclosable, but contain personal data, the Act allows agencies to redact from documents disclosed any information that would violate personal privacy or vital government interests. RCW 42.17.310(2). Thus, if a record contains both exempt and non-exempt material, the exempt material may be redacted while the remaining material is disclosed. Amren, 131 Wn.2d at 32.

In this case, Bellevue #11's identity does not qualify as a public record and disclosure would violate his right to privacy under RCW 42.17.310(1)(b), (d), and 42.17.310(2). It would also harm vital

government interests in contravention of RCW 42.17.310(2). Each is addressed in turn.

1. Right of Privacy. When first adopted, the WPDA did not define what constitutes a violation of privacy. In Hearst Corp. v. Hoppe, 90 Wn.2d 123, 135-36, 580 P.2d 246 (1978) (Disclosure of taxpayers' names in conjunction with real property tax records does not unreasonably invade privacy), the Washington Supreme Court looked to the common law tort of invasion of privacy to hold that an individual's privacy is violated if disclosure of the subject information (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. Restatement (Second) of Torts §652D at 383 (1977). The court cited with approval the comment to the Restatement, which described and explained what is a personal or private matter:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself . . . Sexual relations, for example, are normally entirely private matters, as are . . . some of his past history that he would rather forget. . . . When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Hearst, 90 Wn.2d at 136. This test was later codified in RCW 42.17.255.

A person objecting to disclosure bears the burden of demonstrating both prongs of the privacy test. Hearst, 90 Wn.2d at 123.

a) Disclosure highly offensive to reasonable person. A privacy interest exists whenever information, which reveals unique facts about those named, is linked to an identifiable individual.” In re Rosier, 105 Wn.2d 606, 613, 717 P.2d 1353 (1986). Personal information that employees would not normally share with strangers is private. Dawson, 120 Wn.2d at 796. For instance, in State Human Rights Comm’n v. Seattle, 25 Wn. App. 364, 607 P.2d 332 (1980), the records requester believed he was the victim of unfair hiring practices. He demanded production of the employment applications, submitted to the agency, which included information regarding the applicants’ education, criminal history, work experience, previous salaries, disabilities, reasons for leaving former employment, etc. The court held that the names of the applicants should be redacted from the records, concluding, “It cannot be disputed by any reasonable person that the public disclosure of material contained in answers to the above questions would or could be highly offensive to the five applicants.” Comm’n, 25 Wn. App. at 370.

Similarly, in Dawson v. Daly, the court protected from disclosure the performance evaluations of prosecutors, who maintained files on an

expert defense witness. The Court noted that employment records would contain references to family problems, health problems, past and present employers' criticism and observations, military records, scores from IQ tests and performance tests, many of which most individuals would not willingly disclose publicly. Dawson, 120 Wn.2d at 797. See also, Brown v. Seattle Public Schools, 71 Wn. App. 613, 860 P.2d 1059 (1993) (disclosure of principal's performance evaluations highly offensive where no specific instances of misconduct). Brown, 71 Wn. App. at 618.

But the factual event of an employee's conduct on the job is not private. Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 726, 748 P.2d 597 (1988). In Cowles, a newspaper sought records of all complaints against police officers that were ultimately determined to be true. Cowles, 109 Wn.2d at 714. The court held that the officers' names could not be redacted from the records because the police officers' conduct while on the job was not private and therefore not offensive to a reasonable person. Cowles, 109 Wn.2d at 727. Similarly, a person's identity in conjunction with disability records is not offensive, because the illnesses are not "unpleasant, disgraceful, or humiliating." Seattle Firefighters Union Local No. 27 v. Hollister, 48 Wn. App. 129, 136, 737 P.2d 1302 (1987).

This case presents a different situation. In this case, police officers collected sexual misconduct allegations by complaining students. They determined that, on their face, the allegations were not criminal. They could find no evidence of criminal intent. Accordingly, they referred the matter back the District, which did no investigation to determine the truth or falsity of the allegations. Rather, it issued a letter of direction to the teacher. Because the teacher was not disciplined, he was afforded no opportunity for hearing or any other administrative procedure to either substantiate or dispose of the allegations.

The record in this case contains only paraphrases of the students' allegations. The record does not even contain actual student statements. There is no determination if the non-criminal conduct actually occurred, or is false.

In *Cowles*, the supreme court stated that pending investigations of misconduct of any nature would constitute a more intrusive invasion of privacy than the release of files resulting in some sanction to the officers. *Cowles*, 109 Wn.2d at 725. In our society, allegations of sexual misconduct relating to children are even more onerous than other types of alleged misconduct. A person charged with sexual misconduct is forever tainted – regardless of the ultimate conclusion reached after investigation.

Indeed, the Legislature recognized this when it declared that reports of child abuse shall “be maintained and disseminated with strictest regard for the privacy of the subjects of such reports so as to safeguard against arbitrary, malicious or erroneous information or actions.” RCW 26.44.010; Tacoma v. Tacoma News, 65 Wn. App. 140, 149-50, 827 P.2d 1094 (1992). There can be no doubt that disclosure of a person’s identity in conjunction with uninvestigated allegations of sexual misconduct, is highly offensive to a reasonable person.

b) The identity of Bellevue #11 is of no legitimate public concern. Bellevue #11 must also show that his identity is of no legitimate concern to the public. What constitutes a matter of legitimate public interest is a matter of community mores or common decency. *Restatement (Second) of Torts* §652D at 391. That is, where does the line cross from the dispense of information, to morbid or sensational prying into private lives for its own sake? *Restatement (Second) of Torts* §652D at 391. In Washington, public interest is “legitimate” if it is “reasonable.” Dawson, 120 Wn.2d at 798. *In Cowles*, the court held that instances of actual officer misconduct is a matter with which the public has a right to concern itself. Cowles, 109 Wn.2d at 726.

In Brouillet v. Cowles Publishing Company, 114 Wn.2d 788, 791 P.2d 526 (1990), a newspaper sought “records specifying the reasons for teacher certificate revocations during the last 10 years.” Brouillet, 114 Wn.2d at 790. 86 of the 89 teachers had voluntarily relinquished their certificates without a formal hearing, as was their right. Brouillet, 114 Wn.2d at 792. As in Cowles, the fact of teacher misconduct was not disputed. Although not asked to pass on the issue, the court nevertheless affirmed the public interest in receiving the underlying records because, “[T]he extent of *known* sexual misconduct in the schools, its nature, and the way the school system responds [to it] is of legitimate public concern. Brouillet, 114 Wn.2d at 798, 801 [emphasis added].

By contrast, Division Two held that the public has no legitimate interest in the investigative records of unsubstantiated allegations of sexual abuse. Tacoma v. Tacoma News, 65 Wn. App. 140, 827 P.2d 1094 (1992) *review denied*, 119 Wn.2d 1020 (1992). In Tacoma News, the court reasoned that consistent with the common law tort of invasion of privacy upon which the statute is based, the public has no legitimate interest in false information. Tacoma News, 65 Wn. App. at 146. The court concluded that because three separate agencies had determined that the allegations were unsubstantiated, the public had no legitimate interest

in knowing either the identity of the accused or the contents of the investigative files. Tacoma News, 65 Wn. App. at 151-52.

In this case, however, the underlying agencies did not investigate whether the alleged conduct actually occurred. They simply recorded the allegations, and issued a letter to Bellevue #11. The crux of the issue then, is whether disclosure of Bellevue #11's identity in conjunction with allegations of misconduct, serves a legitimate public interest or constitutes conduct justifying public scrutiny. To answer the former, the Court must balance competing public interests: the interest in knowing, versus the public's competing interest in the efficient administration of government. Dawson, 120 Wn.2d at 798. The answer to the latter is necessarily contained within the balancing test.

1) The public has no interest in knowing the identity of Bellevue #11. The purpose of the WPDA is to allow citizen oversight of governmental *conduct*. The purpose is to keep the public informed so that it can control and monitor the government's functioning. See RCW 42.17.010(11); In re Rosier, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986). The public has no right under the statute to examine records that do not relate to the conduct or performance of government. RCW

42.17.010(11). The Act does not authorize the scrutiny of individuals. *In re Rosier*, 105 Wn.2d at 611.

In this case, the Seattle Times requested all records relating to allegations of sexual misconduct for the purpose of monitoring how the school district responded. This is an appropriate and sanctioned request under the Act. But disclosure of Bellevue #11's identity shifts scrutiny away from the district, and onto Bellevue #11. If there is no substantial evidence of misconduct by him, then there is no act of government that entitles The Seattle Times to monitor him.

The question then becomes, is there substantial evidence in the record that the allegations of sexual misconduct are true? As to Bellevue #11, not only is there no substantial evidence, there is not one iota of evidence that the allegations are true.

a. Double and triple hearsay not evidence of conduct. The trial court in this case erroneously relied upon summary reports of allegations to find that the allegations against Bellevue #11 were substantiated. CP 105. It is a basic tenet of evidence law that hearsay is not admissible to prove the truth of the matter asserted. ER 801-802. This is not a technicality. Hearsay is not admissible because it is not reliable.

In this case, the record regarding the alleged conduct contains no statements of the students making the allegations – sworn or otherwise. It consists solely of type-written reports by police detectives that summarize each complaining witness’s allegations. There is nothing in the record that evidences the source of the type-written reports (e.g. Were the witness interviews taped? Did the detectives take hand-written notes?). There is nothing in the record upon which to verify the accuracy of the detectives’ summaries of the allegations. For example, did the detectives use appropriate interviewing techniques? What language did the students use in describing the alleged conduct? Did the detectives quote the students verbatim or did they paraphrase? Did paraphrasing change the meaning or connotation of the allegations? Did the detectives leave out contextual data or edit the statements in any way?

In Peaster Independent School District v. Glodfelty, 63 S.W.3d 1 (2001), the Texas Court of Appeals addressed the issue of what constitutes evidence of sexual misconduct in the context of a teacher contract renewal hearing. In *Peaster*, a student alleged a consensual sexual relationship with his teacher. A hearing was conducted in which the evidence regarding the allegation came solely in the form of hearsay evidence. The complaining student offered no testimony or affidavit. Peaster, 63 S.W.3d

at 6. The district voted not to renew the teacher's contract on the basis that she had engaged in that activity. Peaster, 63 S.W.3d at 10.

The Texas Court of Appeals held that hearsay evidence constitutes substantial evidence of *allegations*, but it does not constitute evidence of the truth of the alleged conduct. Peaster, 63 S.W.3d at 12. The court cautioned that holding otherwise would create a dangerous precedent that would leave teachers particularly vulnerable to fabricated accusations by disgruntled students or parents. Peaster, 63 S.W.3d at 14. It noted with concern the offensiveness of the school district's position that the charges are presumed to be true unless the targeted teacher proves his or her innocence. Peaster, 63 S.W.2d at 16.

It defies all rules of evidence and notions of fair play to rely upon unreliable double and triple hearsay as substantial evidence that Bellevue #11 committed the alleged acts. There is not one iota of evidence that the allegations against Bellevue #11 are true. Where there is no evidence of conduct by Bellevue #11, he is not a governmental actor under the WPDA and therefore should not be the subject of public scrutiny.

b. Number of allegations not evidence that conduct occurred. The trial court also erroneously relied on the number of accusers in the record to determine that the investigation was thorough and

the allegations substantiated. CP 105. On the surface, numerous accusers alleging similar conduct seems to be compelling evidence of guilt. But accusations often come from groups of students.

In *In re Heather B.* 369 Md. 257, 799 A.2d 397, a middle school student together with a six other students, alleged that a male teacher had sexually abused them. *Heather*, 369 Md. at 261. A detective interviewed the alleged victims and witnesses, who described inappropriate touching, among other acts. The detective interviewed Heather again, who expanded on her previous statements. *Heather*, 369 Md. at 261. After receiving the complaints, a detective turned the matter over to an investigator, who began an investigation. *Heather*, 369 Md. at 262.

The investigator noticed some minor inconsistencies and he was bothered by some of the language attributed to the teacher. *Heather*, 369 Md. at 262. Later, the investigator learned that one of the students had recanted his story, explaining that he had made the allegation because he was angry with the teacher. *Heather*, 369 Md. at 262, n.5. Another student later testified that she lied because Heather had told her what had happened and she just wanted to help. *Heather*, 369 Md. at 264.

When confronted with this information, Heather finally admitted that the allegations were false. *Heather*, 369 Md. at 263. She begged the

detective not to tell her father for fear he would ground her. Heather, 369 Md. at 263. All seven of those students admitted that they made false allegations.

This is not an isolated occurrence. In Reichardt v. Flynn, 374 Md. 361, 823 A.2d 566 (2003) (Students asserting false allegations of sexual misconduct against teachers have absolute privilege in defamation action), the dissent discussed at length the statistics that allegations of sexual misconduct against teachers have risen sharply in the last few years. These false charges provide a means for a student to get revenge on a teacher for some perceived wrong. Reichardt, 374 Md. at 394. For instance, in Chicago, a substitute teacher, who disciplined a class and told them he would leave a note for their regular teacher, was accused the next day by 10 students of molesting them. Reichardt, 374 Md. at 394.

The most compelling example of false accusations occurred in Washington during the same timeframe as the accusations against Bellevue #11. Numerous children in the now infamous Wenatchee sex ring accused Sunday school teachers of child rape and other despicable acts of molestation. In the beginning, the sheer number of children complaining made guilt seem the only conclusion. But in the end, the charges were false.

In this case, two cliques of girls accused Bellevue #11 of snapping bra straps and patting their buttocks. The girls knew of and bolstered their accounts with rumors of other girls' alleged complaints from prior years. Some of them came forward only for "moral support" nevertheless making accusations.

The detectives on the case only interviewed the complaining witnesses. No basic investigation into the truth of the allegations occurred. On their face, the girls' allegations were inconsistent. But no one in the district followed up on those inconsistencies. No one appeared to be disturbed that these girls began the interviews by volunteering that they knew exactly what and who the meeting was about. No one investigated whether any of the girls had recently received an unsatisfactory grade by Bellevue #11 or whether he had recently disciplined them in any way. No inquiry was made as to any motive by the girls to lie or what their relationship to each other was.

No one went to the classroom to see if the girls' stories could physically be possible or probable. No one interviewed any of the other non-complaining students of Bellevue #11. No one interviewed any other teachers of the students. Had they, they would have learned that one girl had recanted her story to that teacher. Knowledge of that fact should have

alerted the district to investigate further. Instead, the district simply advised Bellevue #11 of the allegations and issued him letter. It refused to provide him with the identity of his accusers, affording Bellevue #11 no opportunity to respond.

Our adversarial system was structured as the best means to ascertain the truth. Only by obtaining evidence on both sides of an issue can it reliably and properly be decided. Where the record in this case consists solely of allegations, with absolutely no investigation into the truth of the allegations, it would be a reckless violation of our system of law and notion of fair play to hold that the number of allegations themselves constitutes substantial evidence of misconduct.

c. Inadequate investigation does not support disclosure of identity. On the same analysis, the trial court violated basic tenets of law in concluding that the identity of a teacher must be disclosed if the investigation was inadequate. The foundation of our system of law is predicated on the presumption that conduct must be proven by the person alleging it. In criminal law, the accused is innocent until proven guilty. In civil law, a plaintiff bears the burden of proving tortious conduct.

Inherent in the trial court's conclusion is the fundamental error that Bellevue #11 is guilty of the allegations until he proves his innocence. This is because disclosure of Bellevue #11's identity does not further scrutiny of the district in investigating the allegations. Rather, disclosure of his identity shifts scrutiny away from the District and onto him, personally. But the public has no right to scrutinize him unless he is a government actor. Where there is no evidence that he committed the alleged conduct, there is no conduct to scrutinize. Thus, his identity furthers no purpose of the Act. To hold otherwise relegates teachers to the status of second class citizens.

d. Retired status of Bellevue #11 reinforces lack of public interest in his identity. The lack of legitimate public interest in the identity of Bellevue #11 is compounded by the fact that he has been retired for nearly seven years. A lapse of time is a factor to be considered with other facts when considering legitimate public interest. *Restatement (Second) of Torts at 393.* The subject matter may still be important, but the identity of the party is a different matter. *Restatement 2d of Torts at 393.* Bellevue #11 retired after a full and complete career in teaching. The public interest will not be served by scrutinizing him now as a retired individual, no longer in the public schools.

e. Tracking of teacher does not justify release of identity. The Times also asserts that it needs Bellevue #11's identity so that it may track whether he moved from school to school as a predator. An *in camera* review by the Court will quickly determine whether that concern warrants disclosure. In this case, as seen from the unredacted documents for the Court's *in camera* review, there is no issue of school hopping by Bellevue #11.

2) Efficient administration of government precludes disclosure of Bellevue John Doe's identity. Even if The Times could demonstrate some legitimate interest in Bellevue #11's identity, the Court must balance that interest against the efficient administration of government. In *Dawson v. Daly*, the court held that whatever interest the public might have in prosecutors' performance evaluations was outweighed by the harm to government administration if they were to be released. The Court reasoned that employee morale would be seriously undermined if the public had access to performance review and the quality of the work would deteriorate. *Dawson*, 120 Wn.2d at 799.

As the trial court in this case acknowledged, allegations of sexual misconduct are highly charged. Care must be taken in the dissemination of records and identities of accused teachers to ensure the efficient

administration of government. If the Times' rule is adopted that the identities of teachers must be disclosed on allegations only, erosion of the efficient administration of government will occur in many ways:

a. Effective teaching damaged. Under the Times' rule, a teacher known as a tough grader or another with a reputation for exacting standards, could have their reputations destroyed by the false accusation of one student. *Reichardt*, 374 Md. At 392. Whether or not ultimately shown to be "unsubstantiated" a.k.a. "unproven," the teacher is forever tainted. *Reichardt*, 374 Md. At 392. Teachers will do what they must to avoid these accusations.

Teachers will be afraid to hold children accountable academically or behaviorally. Rather than incur the wrath of children who receive poor grades, teachers will be more inclined to move them along. Behaviorally, the classrooms will deteriorate into chaos. Teachers will not risk disciplining unruly students for fear of reprisal. Teacher morale will be seriously undermined and their performance will likely suffer. The quality of education for Washington children will suffer both from lack of learning environment and from lack of academic rigor.

b. Demand for full evidentiary hearings. Teachers who are accused of sexual misconduct, no matter how slight, will demand full

evidentiary administrative hearings to resolve the issue. In just the last few years, complaints against teachers have soared (from 1-2 per year to 30-50 per year in Texas; from 5% to 25% of WEA counsel workload in Wisconsin, from 1-2 calls per week to one or two per day in Maryland). Reichardt, 374 Md. at 395. The sheer number of complaints has become a tremendous investigatory cost to the public as school administrators and police detectives are called in to respond to these complaints. If full and complete investigations are required for each and every accusation of misconduct – even those not involving criminal conduct as in this case, the already stretched resources of our schools will be further shifted from the classroom to investigation.

c. Teachers will leave or never enter the profession. Teachers in this state must become educated and certified to teach. It is specialized training for a specialized profession. If their names are published in conjunction with uninvestigated allegations of non-criminal sexual misconduct, they are forever tainted. They will never again regain their position in the community and how other people view them. Reichardt, 374 Md. at 394. If they apply for a job, administrators will take the safest course and not hire them – regardless if the allegations were ultimately proven to be unsubstantiated. Reichardt, 374 Md. at 394.

As a state and as a country the public has a crying need for teachers. In this decade, the United States will need 2.2 million new teachers for public schools because of attrition, retirement, and anticipated growth in enrollments. Reichardt, 374 Md. at 393. The need for new teachers in high poverty areas is even more acute. Reichardt, 374 Md. at 393. 6% of the teaching force leaves the profession every year and 20% of new hires leave teaching with three years. Reichardt, 374 Md. at 393. In urban districts, 50% of teachers leave the profession in the first five years of teaching. Reichardt, 374 Md. at 393.

Smart would-be teachers will simply choose not to enter the profession. Reichardt, 374 Md. at 393. Others will leave through early retirement or otherwise quit to avoid the ever-increasing chance that false allegations will haunt them long after they have left the teaching profession. Washington cannot afford to lose good teachers because the Times wants to unjustifiably vilify them for monetary gain.

d. Students' power harms their education. The Times' proposed rule will cripple children's education by the very children it was designed to serve. Students already know that there are some words that will get them "nowhere" with administrators and some words that will get them "everywhere." Reichardt, 374 Md. at 394-395.

Students' knowledge that they can ruin a teacher's career by the very accusation of misconduct is a dangerous weapon in young hands. These children do not have the emotional maturity to understand the consequences of their actions. But they certainly understand and will use available methods to vent their anger on a teacher with whom they are displeased, without fully comprehending the import of their words. Giving students unfettered power in this way will chill the student/teacher relationship and their learning process.

e. Chill on candid direction by administrators. If a teacher's reputation and career can be ruined on allegations alone, administrators will be reluctant to issue any types of written directives to teachers. Any existing documentation will be sooner destroyed. The very accountability the public seeks will be harder to track.

f. Public interest in protecting reputations. Disclosure of identities in conjunction with uninvestigated allegations of non-criminal sexual misconduct will hamper the public interest in protecting reputations. Sexual allegations are highly charged. It is an area where suspicion lingers long after allegations have died or have been shown to be false or unsubstantiated. Our legislature recognized this when it directed that reports of child abuse must be disseminated with great care

to avoid publication of erroneous reports. RCW 26.44.010. The Times' rule would destroy reputations and livelihoods on nothing more than allegations and without regard to falsity.

2. Disclosure of Bellevue #11's Identity Harms Vital Government Interests. Disclosure of Bellevue #11's identity does more than hurt the efficient administration of government. It harms vital government interests. Under RCW 42.17.310(2), information may be redacted from public records to the extent that disclosure of that information would violate vital governmental interests. Washington courts have not yet addressed what constitutes a "vital government interest." The dictionary defines the term "vital" as "of the utmost importance . . . ." and as "taking priority in consideration over all factors or elements." *Webster's Third New International Dictionary* (1976) at 2558.

When used in the context of governmental interest, it is difficult to imagine an interest more vital than a constitutional interest. Article 9, §1 of the Washington Constitution states, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . ." An "ample education" reaches further than just reading, writing and arithmetic. It must also equip the state's children for their role as citizens and as potential competitors in the marketplace of

ideas. Seattle School Dist. #1 of King County v. State, 90 Wn.2d 476, 517, 585 P.2d 71 (1978).

In this case, adopting the rule urged by the Times will violate the government's vital interest in providing an ample education for the state's children. As discussed above, publicly branding teachers as sexual abusers, absent any evidence that the conduct actually occurred, will seriously undermine the quality of education provided to the children of the state. In a time when schools are already hurting for teachers, potential teachers will recoil from the thought of incurring such risk to their livelihoods and to their personal and professional reputations. The smart ones will opt out of teaching in favor of safer, more lucrative occupations.

Existing teachers will get the message that they are sitting ducks. They will cease to give candid reviews of student progress, so as to avoid provoking an accusation that will forever haunt them. An overall degradation in academic rigor will be the result. Requiring proper student deportment will give way to allowing unruly behavior so as to avoid false allegations of abuse. This will undermine the learning environment.

Giving children the unfettered power to destroy teachers' reputations and livelihoods on immature caprice in no way prepares them

to be the kind of citizens Washington state seeks to nurture. Handing over this power to children will give administrators pause before issuing formal direction and guidance to teachers. Fewer things will be reduced to writing, undermining the public's ability to monitor school operations.

The public has a right and an obligation to hold government accountable to ensure the safety of the students in schools in this state. What the Times proposes does not further that goal. Its motivation lies instead in a desire, indeed, an essential need to sell sufficient readership to earn a profit. Splashing teachers' names indiscriminately on the front page of its newspaper will achieve the sensational interest it seeks to sell newspapers, but it will violate the vital governmental interest in providing the constitutional mandate of an ample education to the children of this state. Bellevue #11's identity should not be released to the Times.

C. Disclosure of identity violates Bellevue #11's Constitutional right of due process. Disclosure of Bellevue #11's identity in conjunction with uninvestigated allegations sexual misconduct would violate his Constitutional right of due process under the United States and Washington Constitutions. The 14<sup>th</sup> Amendment of the United States Constitution prohibits states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The

language of Art. 1 §3 of the Washington Constitution mirrors its federal counterpart.

The constitutional provision guarantees a person the right to due process when the state seeks to deprive him of a constitutional interest. Nguyen v. State Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 522, 29 P.3d 689. In essence, the government must provide both notice to a citizen and an opportunity for that citizen to be heard before depriving him of any constitutionally protected interest. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507 (1975). In Washington, an individual has a constitutional property interest in his professional license. Nguyen, 144 Wn.2d at 526-27. He also has a constitutional liberty interest in his professional reputation. Nguyen, 144 Wn.2d at 527. In Nguyen, a physician's license was revoked on allegations of sexual misconduct with his patients.

The court held that because of the constitutional interests at stake, an administrative body was required to meet a heightened standard of proof -- clear and convincing evidence as opposed to mere preponderance -- in a license revocation hearing. Nguyen, 144 Wn.2d at 527. In reaching its conclusion, the court applied the three factor balancing test articulated in Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893 (1976): a) the

interest affected; b) the risk of erroneous deprivation of such interest; and the governmental interest in added fiscal and administrative burden that additional process would entail.

The court in *Nguyen*, reasoned that a license revocation proceeding was quasi-criminal in that the proceeding was for the protection of the public and brought because of alleged misconduct. Thus, “its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose.” *Nguyen*, 144 Wn.2d at 528. It also noted that risk of erroneous revocation was high where the agency acts as investigator, prosecutor, and decision-maker and where appellate review gives great deference to an agency decision. *Nguyen*, 144 Wn.2d at 530. Finally, it noted that the public is dependent upon the provision of healthcare and has a tremendous interest in ensuring that qualified physicians are not erroneously delicensed. *Nguyen*, 144 Wn.2d at 533.

A teacher’s interest in his certificate and professional reputation deserves no less protection than a physician’s or an attorney’s. The same private and public interests are at stake. The teacher has an interest in the teaching certificate, livelihood, and professional reputation. The public is dependent upon the provision of education to its children and has an interest in ensuring that teachers are not erroneously targeted and

removed. Publication of Bellevue #11's name would impermissibly subject him to public reprimand and indelibly harm both his reputation and his ability to obtain employment, all without any of the procedural safeguards mandated by the federal and state constitutions. *See States v. Briggs*, 514 F.2d 794, 797 (5<sup>th</sup> Cir. 1975) (public branding of an individual where not named as a defendant by grand jury violates fourteenth amendment).

The Alaska Supreme Court recognized this in *O'Leary v. Superior Court, Third Judicial District*, 816 P.2d 163 (1991). In *O'Leary*, a grand jury was charged with investigating charges of sexual misconduct in a high school. *O'Leary*, 816 P.2d at 165. Upon conclusion of the investigation, the superior court ordered that the grand jury's findings, conclusions and recommendations be released to the public. The supreme court reversed in part, holding that the report should be released with some of the interested parties' names and identifying information redacted. *O'Leary*, 816 P.2d at 165. It reasoned that reputation interests are entitled to a measure of due process protection. *O'Leary*, 816 P.2d at 169. It cited with approval from *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37, 91 S.Ct. 507 (1971) that:

Where the State attaches a badge of infamy to the citizen, due process comes into play . . . .

Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Constantineau, 400 U.S. at 436-37 (state could not post woman's name preventing her from purchasing alcohol without notice and hearing).

The court observed that a grand jury's procedures are not well designed to provide balanced fact finding. O'Leary, 816 P.2d at 174. The interested parties had no notice or opportunity to be heard, no ability to call witnesses on their own behalf, no right to cross-examine witnesses and no right to present their arguments. O'Leary, 816 P.2d at 174. It concluded that where the grand jury's recommendations reflected adversely on individuals in a manner unsupported by substantial evidence, those parties' names should be withheld. O'Leary, 816 P.2d at 174-75.

Division Three agreed with this reasoning in a different context. In Dunning v. Pacerelli, 63 Wn. App. 232, 818 P.2d 34 (1991), the Department of Social and Health Services determined that employees of a boys' ranch had failed to report suspected child abuse as required by RCW 26.44.030. Dunning, 63 Wn. App. at 36. The Department posted their names on the central registry in Olympia as child abusers, without

providing any prior hearing to the individuals. *Dunning*, 63 Wn. App. at 234. Division Three held that posting of the individuals' names in connection with sexual misconduct allegations, without prior hearing, stated a cause of action for due process violations. *Dunning*, 63 Wn. App. at 243-44.

In this case, the Times asks that the government release the name of Bellevue #11 in conjunction with allegations of misconduct. Bellevue #11 was afforded no hearing and no opportunity to be heard. Indeed, he was not even advised of who his accusers were so that he could meaningfully respond. To release his name prior to any hearing or administrative process substantively related to these allegations would be a gross violation of his constitutional right of due process under the state and federal constitutions.

D. Disclosure of Bellevue #11's identity violates constitutional right of privacy. Article 1 §7 of the Washington Constitution provides that "No personal shall be disturbed in his private affairs . . . without authority of law." The Fourth and Fourteenth Amendments of the United States Constitutions provides similar protection. In interpreting these provisions, Washington courts have adopted the federal courts' holdings that the interest in confidentiality, or the non-disclosure of personal

information is a constitutional interest to be protected, but it is not a fundamental one. O'Hartigan v. Department of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991). Accordingly, courts apply a rational basis analysis in determining whether government disclosure of personal information meets constitutional muster. O'Hartigan, 118 Wn.2d at 118. That test allows disclosure of information so long as it is carefully tailored to meet a valid governmental interest and provided the disclosure is no greater than is reasonably necessary. O'Hartigan, 118 Wn.2d at 118.

In this case, the Times has stated no valid governmental interest in the disclosure of Bellevue #11's identity. It asserts that it is entitled to see how the school districts respond to allegations of sexual misconduct. But the release of Bellevue #11's identity does not further that purpose.

The Times also asserts that it is entitled to track whether Bellevue #11 moved from school to school during his career, thus endangering a larger pool of students. But this purpose presumes that Bellevue #11 is a menace to students, when there is no evidence supporting that determination. Further, because Bellevue #11 is retired, any concern is now moot. The Times simply wants a fishing expedition on which it has no basis.

Finally, the federal and state constitutions require that disclosure be no greater than necessary to achieve the governmental interest at issue. Any danger that Bellevue #11 was a menace can be easily confirmed or dismissed by an *in camera* review of the records by the Court. Disclosure to the Times is not necessary.

#### V. CONCLUSION

Bellevue #11 respectfully requests that the Court deny the Times' request for disclosure of his identity in conjunction with uninvestigated non-criminal allegations of sexual misconduct to which he had no opportunity to respond in a hearing or other administrative proceeding.

RESPECTFULLY SUBMITTED THIS 11<sup>th</sup> day of February, 2005.



Leslie J. Olson, WSBA #30870  
Attorney for Appellant,  
Bellevue John Doe #11

No. 54300-8

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

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BELLEVUE JOHN DOES 1-11, FEDERAL WAY JOHN DOES 1-5  
AND JANE DOES 1-2, and SEATTLE JOHN DOES 1-13 and JOHN  
DOE,  
*Appellants/Cross-Appellants,*

v.

BELLEVUE SCHOOL DISTRICT #405, a municipal corporation and a  
Subdivision of the state of Washington, FEDERAL WAY SCHOOL  
DISTRICT #210, a municipal corporation and a subdivision of the state of  
Washington, and SEATTLE SCHOOL DISTRICT #1, a municipal  
corporation and a subdivision of the state of Washington,  
*Respondents,*

*And*

THE SEATTLE TIMES COMPANY  
*Respondent/Cross-Appellant.*

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**CERTIFICATE OF SERVICE**

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The undersigned certifies under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

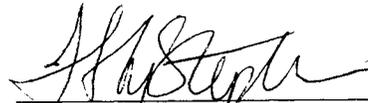
I am employed at Olson & Olson, PLLC. On February 14, 2005, the Amended Brief of Appellant Bellevue John Doe #11 was filed with the Clerk of the Court, Washington State Court of Appeals, Division One, 600 University, Seattle, Washington, and true and correct copies were sent via the method indicated to the following individuals:

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Signed at Seattle, Washington this 14<sup>th</sup> day of February, 2005.

  
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Holly Stephenson