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DIVISION ONE OF
THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

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,

Plaintiffs,

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 subdivision of the State of Washington,

Defendants,

and

SEATTLE TIMES COMPANY,

Intervenor/Defendant.

No. ~~52304-0~~ 54300-8

SEATTLE JOHN DOE #6'S REPLY BRIEF TO RESPONDENT/CROSS-APPELLANT BRIEF OF SEATTLE TIMES

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ORIGINAL

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I. STATEMENT OF THE CASE

Seattle John Doe 6 ("S6") was a substitute teacher at a juvenile detention facility in 1993 when he was accused of poking a female student in the upper right breast area. CP 1714. The student told another teacher at the facility about the alleged poking and that teacher contacted at the Program Supervisor's office. CP 1716. Both the student and S6 were interviewed separately, by the Program Supervisor's office (the student was interviewed first at the Supervisor's office, then was sent back to her class, and then S6 was contacted and interviewed in the Supervisor's office). *Id.* S6 stated that he did touch her in the shoulder area and that this was a normal attention getting behavior on his part. *Id.* On that same day, written statements were taken from S6 and the student. CP 1714, 1715.

In a report from King County Department of Youth Services dated June 7th, 1993, it states that Child Protective Services was notified and a report was taken, and that three students who were in the class at the time of the alleged poking were interviewed and written statements were taken from them. CP 1718. On July 12, 1993, Ricardo Cruz, Executive Director of Human Resources for the Seattle Public Schools notified S6 that he was investigating the incident. CP 1720. Mr. Cruz emailed the

administrator of the Juvenile Detention Facility and stated he did not feel comfortable firing S6 based on the witnesses' statements and the administrator responded that no further investigation was necessary and that it may be advisable to offer some training to S6 dealing with behavior disorder children. CP 1722, 1723.

On September 7, 1993, S6 wrote a letter to Mr. Cruz stating that he had taken classes including, Classroom Management Within a Diverse Culture, Ethnic Culture and Learning Styles, Child Abuse and Neglect Training, Working with Women of Color, and also informed Mr. Cruz that he no longer wished to substitute at the Juvenile Detention Center but would like to teach at another location on occasion if a substitute teacher was needed. CP 1724, 1725. Mr. Cruz responded that he believed there was insufficient evidence to prove that S6 poked a female student in the breast area, but felt that S6's attention getting techniques were not appropriate for a teacher, "particularly in a setting as [blank] school." CP 1726. Mr. Cruz stated that "you are *cautioned* that further incidents of this nature *could lead to disciplinary action*, including removal from the substitute roster (emphasis added)." Mr. Cruz stated that he would defer to the administrator as to whether S6 would be assigned to [blank] programs. *Id.* S6 retired from teaching in 1995.

II. ARGUMENT

1. This Court May Consider the Exemption Set Forth In RCW 42.17.310(1)(d).

Seattle Times contends that Appellants belatedly argued their records should be exempt based on RCW 42.18.310(1)(d) as it was not raised below and has been waived. Seattle Times' Brief pg. 25 n. 19. S6 submits that he has not waived his right to brief issues under RCW 42.18.310(1)(d).

Washington Courts allow new legal theories to be presented for the first time on appeal in PDA cases. In *Confederated Tribes of Chehalis Reservation v. Johnson,* a case involving the PDA, the Tribes asserted two new legal grounds on appeal in support of their position. *Confederated Tribes,* 135 Wash.2d 734, 744, 958 P.2d 260,264 - 265 (1998). The Tribes claimed that time restraints involved in pursuing the action limited their ability to adequately brief and argue all legal theories at the trial court level. *Id.*

The Court allowed the Tribes to raise the new arguments on appeal. *Id.* The Supreme Court noted that it had previously permitted an agency to argue new legal theories for nondisclosure on review of a public disclosure decision. *Id.* The court cited its decision in *Progressive Animal Welfare Soc'y (PAWS) v. University of Wash.,* 125 Wash.2d 243,

253, 884 P.2d 592 (1994), where it allowed new grounds to be raised on review where the agency had had little time or opportunity to develop its legal position before being required to act, and where review was de novo.

Similarly, in the instant case, at the trial level one attorney represented several John Does, the trial court proceedings were abbreviated and occurred shortly after litigation was commenced. Similar to the cases cited above, there was little opportunity for counsel representing several John Does to fully explore and brief all legal issues.

Additionally, judicial review of all agency actions taken or challenged under RCW 42.17.250 through RCW 42.17.320 of the Public Disclosure Act are de novo. RCW 42.17.340(3); *Progressive Animal Welfare Soc'y (PAWS) v. University of Wash.,* 125 Wash.2d 243, 884 P.2d 592 (1994). This court stands in the same position as the trial court and therefore no prejudice results in considering briefing on RCW 42.17.310(1)(d).

2. The Plain Language of RCW 42.17.310(1)(d) Does Apply to the School District Records.

The Seattle Times cites in a footnote that "the plain language of exemption (1)(d) establishes that it cannot apply to the school district records here and that the districts were not engaged in 'law enforcement,'" citing *Brouillet v. Cowles Publ'g,* in support of this notion. Seattle Times

Brief, pg. 25, n. 19. Seattle Times conveniently omits the remaining portion of the statute, which reads as follows in italics:

> RCW 42.17.310(1)(d) exempts specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement *or for the protection of any person's right to privacy* (emphasis added).[1]

Seattle Times also failed to mention that after the *Brouillet* Court determined that the revocation of teacher certificates was not law enforcement it went on to analyze the case under the second part of exemption 1(d)—whether the disclosure of records violated the privacy rights of teachers and students. *Brouillet v. Cowles Publishing Company,* 114 Wash.2d 788, 797-798, 791 P.2d 526, 531 (1990).

Therefore S6 respectfully requests the Court to apply the exemption set forth under RCW 42.17.310(1)(d) which exempts from disclosure of specific investigative records where it is essential for the protection of S6's right to privacy.

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[1] *Dawson v. Daly* held that "records 'are specific investigative records' if they were 'compiled as a result of a specific investigation focusing with special intensity upon a particular party. The investigation involved must be 'one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance." 120 Wash.2d 782, 792-793, 545 P.2d 995 (1993).

3. The Public has no legitimate interest in knowing the identity of S6 who was exonerated of allegations of sexual misconduct.

S6 incorporates his arguments set forth in his Brief regarding arguments that the public has no legitimate public concern in the names of teachers who were exonerated of allegations of sexual misconduct (as supported by *City of Tacoma v. Tacoma News*). Rather than restating those arguments here, S6 prefers to address specific arguments Seattle Times raised in its Responding Brief is support of its arguments for his name disclosure.

The fatal flaw in Seattle Times' arguments in support of a legitimate public interest is its attempt to generalize facts pertaining to all individual 18 John Does as one simple homogenous set of circumstances. In its broad generalizations, Seattle Times misrepresents the notion that the public has a legitimate public concern in the identities of the respective John Does. It is apparent that Seattle Times' justification for the disclosure of names disintegrates upon a review of S6's file.

The concerns that Seattle Times list as a basis that name disclosure is a legitimate public interest were never present with respect to S6. Seattle Times states that in its review of the records of all John/Jane Does it generally found that untrained administrators failed to interview the

victim, or interviewed the victim only in the presence of the alleged abuser; that accused teachers were not always removed from the classrooms during investigations forcing the witnesses and alleged victims to have daily contact with him or her while an investigation was under way; that the school districts entered into settlement agreements with accused teachers, and purged their files of any complaints so that other districts could not detect a history of misconduct. Seattle Times Brief pg. 33-34.

Seattle Times argues that the names of accused teachers and school personnel should be disclosed so the public can evaluate whether untrained personnel handled the complaints of sexual abuse, whether there was an inadequate evaluation, whether the districts are fulfilling their statutory duties and forwarding complaints to OSPI, CPS or police. Seattle Times' Brief, pg. 37. Seattle Times argues that unless the public has the name of the teacher, it would be impossible to determine whether teachers move from district to district preying upon children. Seattle Times Brief pg. 37.

Upon a review of the investigation into S6 it is apparent that none of these concerns is present. The alleged incident took place on June 1, 1993, when the student informed a person identified as "lead worker" of her allegations against S6. CP 1718. The lead worker then notified an

administrator in the Program Supervisor Office and notified CPS. CP 1716. The student who made the allegations, and three other girls who allegedly saw the incident, were interviewed and written statements were obtained by the student and S6. *Id.* The students were interviewed separately from S6. After an initial investigation, Ricardo Cruz, Executive Director of Human Resources of the Seattle City Public Schools, became involved in the investigation and ultimately concluded that the allegations were unsubstantiated. CP 1726.

At the time of the investigation into S6, Ricardo Cruz was an attorney and an experienced human resources manager who had extensive training in investigation protocols and specifically had experience in handling investigations into allegations of sexual misconduct. RP 103. After a thorough investigation, Mr. Cruz made the determination that the allegations were unsubstantiated and that no disciplinary action was warranted. CP 1726, RP 109.

As can be gleaned from a review of the redacted documents in S6's file, none of the concerns the Seattle Times listed in its argument to support the disclosure of names is present. The student was interviewed by competent personnel outside the presence of S6, witnesses were carefully interviewed, CPS was notified, no settlement agreements were reached, S6's file was not purged, he had no history of prior complaints of

sexual misconduct, and he retired from substitute teaching in 1995--so there is no concern or need for the public to monitor him to determine if he was shifted from district to district since he has not been employed by the State for nearly ten years. *See generally* CP 1713-1726. Most importantly is the fact that since 1995, S6 has not been performing a government function. There is absolutely no legitimate public interest in the name of S6 and the public scrutiny of government, as promised by the PDA, has been fulfilled. If S6's name were identified, then the PDA's mandate will have been thwarted as his name disclosure would subject his to individual scrutiny, which the courts have repeatedly said is not the purpose of the PDA. *See Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 218, 951 P.2d 357, 364 (1998) (stating that "the basic purpose and policy of RCW 42.17 was 'to allow public scrutiny of government, *rather than* to promote scrutiny of particular individuals who are unrelated to any governmental operation.'")

Likewise, a review of S6"s records shows that the release of names of the school and personnel involved in the investigation is not in the public interest. The redacted records give the public extensive information to evaluate the government's handing of the investigation of S6. *See generally* CP 1713-1726. The initial teacher who handled the complaint followed proper protocol by immediately informing the

administrator of the school about the student's allegation, and notifying Child Protective Services. Ricardo Cruz became involved and conducted interviews as well. A determination was made that the allegations were unsubstantiated and that the incident did not involve sexual misconduct but rather the incident showed that S6 was not adequately trained to deal with the juvenile offender population, which attended the school. The investigators recognized this problem and Ricardo Cruz and S6 agreed that he should take classes on how to deal with that difficult population. *See* CP 1722, 1723. Public scrutiny of government has been achieved without the release names.

Based on the policies set forth in *Tacoma News* (that the identities of persons accused and exonerated of allegations of sexual misconduct are not in the public interest)[2] and the fact that Seattle Times has failed to show why the public has a legitimate interest in the identity of S6, S6 respectfully requests his name be protected from disclosure.

4. The disclosure of S6's identity is highly offensive

The investigation into S6 revealed that the allegations against him were unsubstantiated and therefore the release of his name is highly

[2] On page 42 of its brief, Seattle Times argues that *Tacoma News* could be upheld if limited to its facts because the court stated that there was "no hint" of an inadequate investigation. Similarly, a review of S6's records reveals no hint of an inadequate investigation and therefore the limited holding in *Tacoma News*, for which Seattle Times advocates, is applicable to S6.

offensive. Seattle Times cites *Cowles Publ'g. v. State Patrol* for the proposition that public employees are not entitled to withhold their names based on privacy. Seattle Times' Brief pg. 44. Seattle Times fails to mention the major distinction of *State Patrol* from the instant case, which is the allegations against the officers accused of misconduct in *State Patrol* were sustained. See *Cowles Publ'g v. State Patrol*, 109 Wash.2d 712, 714, 748 p.2d 597, 598 (1986). Importantly, in *State Patrol,* the newspapers amended their original request to include those records or files generated by complaints, which were deemed to be true. *Id.* Therefore, it is inaccurate to characterize *State Patrol* as holding that disclosure of names never implicates privacy concerns as this case did not evaluate the impact on privacy when the complaints were unsubstantiated. *State Patrol* is distinguishable from the facts pertaining to S6, as the allegations against him were unsubstantiated.

Likewise, Seattle Times relies upon *Columbian Publ'g Co. v. City of Vancouver*, for the notion that complaints against a public officer must be disclosed even if the investigations were not complete. Again, this case is distinguishable. In *Columbian,* the court found that privacy concerns were not implicated because the Vancouver Police Association waived any claim of privacy by its individual members by choosing to "go public" with its complaints as it did. *Columbian Pub. Co. v. City of Vancouver,*

36 Wn. App. 25, 30, 671 P.2d 280, 284 (1983). The court stated that "one cannot go to the press with vague complaints about a public official's job performance and then hide behind a claim of personal privacy when disclosure of specifics is requested." *Id.* This case did not discuss the impact if the allegations of misconduct were found untrue. In fact, in *Columbian*, the Vancouver Police Associate issued a vote of no confidence to the Chief of Police based on the complaints issued against him and thus, the truth or veracity of the complaints was not an issue. *Id.*

It in inaccurate to state that the PDA precedent does not contemplate truth, falsity and completeness before any disclosure can be made, as alleged by Seattle Times, since many cases before *Tacoma News* analyzed facts where false allegations were never an issue, such as *State Patrol* and *Columbian.* No Washington case has had occasion to determine whether it is highly offensive to disclose names of those who were accused but exonerated of allegations of sexual misconduct.[3]

Rather than restating the arguments of why unsubstantiated allegations of sexual misconduct against a minor is highly offensive to a reasonable person if his name is disclosed, S6 instead refers the Court to S6 Brief pgs. 18-22. S6 respectfully requests that the Court consider the

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[3] *Tacoma News* stated that "we need not decide whether truth or falsity is a factor bearing whether information in public records would be highly offensive to a reasonable person if disclosed." 65 Wash. App. 140, 149 fn.10, 827 P.2d 1094, 1099 (1992).

highly offensive nature of name disclosure and as guidance to consider cases such as *Booth Newspapers, Inc. v. Kalamazoo School District,* to determine the impact that mere accusations of sexual misconduct could have upon the accused and why name disclosure would be highly offensive to the reasonable person.[4] See *Booth Newspapers,* 181 Mich. App. 752, 450 N.W.2d 286 (1989).

Seattle Times improperly states that decisions from other jurisdictions do not support withholding of the identity of teachers accused of misconduct. Seattle Times Brief pg. 45. Seattle Times cites to several cases to support its position but leaves out critical information that sets those cases apart from the instant case. In *Department of Children & Families v. Freedom of Info. Comm'n,* 710 A.2d 1378 (Conn. App. C6. 1998), the court ordered disclosure of employee's names who were disciplined for their connection with a death of a child in the employees' care. 710 A.2d at 1379. In *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. Ct. App. 2001), again, the officer was disciplined and the allegations involved inappropriate relationship with another police officer while on duty. 60 S.W. 3rd at 599. *Palmer* has no bearing on the instant case because

[4] As stated in S6's opening brief, we are not requesting the Court to adopt the analysis in *Booth Newspapers* since that case employed a balancing test, which is impermissible in Washington. Rather *Booth's* articulation of the devastating impacts of allegations of sexual misconduct supports the notion that disclosure of the accused' names is highly offensive.

discipline was involved and the allegations did not pertain to sexual misconduct with a minor, which has far more devastating impacts on those who are accused, especially those accused who were exonerated. Those cases are especially irrelevant as to S6 who was exonerated of allegations of sexual misconduct and was never disciplined. See CP 1726.

5. There is no legitimate interest in the identities of the teachers as the harm to the public interest in efficient administration of government would outweigh the benefit of disclosure.

While S6 has nothing substantially further to add to this argument as it was thoroughly discussed in his opening brief (See S6 Brief pg.30-32), S6 emphasizes that the school districts introduced evidence at the trial court that vital governmental operations would be interfered with if teachers who were given a letter of direction were subjected to name disclosure. CP 40, 63-66. Without explanation, Seattle Times states there is no admissible evidence that such harm would exist as the statements of union and district personnel are inadmissible as they are based on speculation and hearsay and lack foundation. Seattle Times Brief pg. 30 n.21. The documents were introduced at trial and therefore must have been admissible and Seattle Times did not raise an objection or state in its assignments of error the lack of evidentiary basis with respect to any of these documents. Such an objection has been waived. Therefore S6

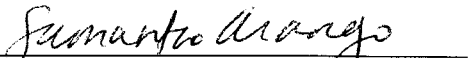
respectfully requests the court to consider these documents from school districts and union members as they provide great insight as to why the disclosure of names of teachers given a letter of direction would interfere with efficient government administration. See CP 40, 63-66.

III. CONCLUSION

Seattle John Doe #6 respectfully requests the Court to deny the Times' request for disclosure of his identity or the identities of the school and school personnel in conjunction with allegation of sexual misconduct and that the Court uphold the denial of attorney's fees against him.

RESPECTFULLY SUBMITTED THIS 28 day of May, 2004.

MALONE GALVIN SPICER, PS



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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:

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