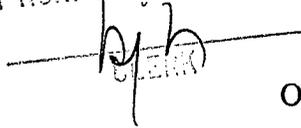


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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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,

Petitioners,

v.

BELLEVUE SCHOOL DISTRICT #405, a municipal corporation and
subdivision of the State of Washington, FEDERAL WAY SCHOOL
DISTRICT #210, a municipal corporation and subdivision of the State of
Washington, and SEATTLE SCHOOL DISTRICT #1, a municipal
corporation and subdivision of the State of Washington, and
SEATTLE TIMES COMPANY,

Respondents.

RESPONDENT SEATTLE TIMES COMPANY'S ANSWER TO
AMICUS CURIAE BRIEFS OF AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON AND WASHINGTON EDUCATION
ASSOCIATION

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I. INTRODUCTION

Respondent Seattle Times Company (“the Times”) is filing this single answer to the Amicus Curiae Brief of American Civil Liberties Union of Washington (“ACLU Brief”) and the Supplemental Brief of Amicus Curiae Washington Education Association in Support of Petitioners (“WEA Brief”).

Both briefs proceed from the underlying assumption that under the Public Records Act¹ (“PRA”) the public has no legitimate interest in monitoring the conduct of individual teachers unless they are found to have committed serious misconduct. Until that happens, they argue, the legitimate public interest is confined to the conduct of those who manage and administer the public schools. The argument ignores the fact that public school teachers are also government employees whose daily conduct is at the heart of the state’s education system established by law and funded by the public. The legitimate public interest in how they interact with their students should be beyond question.

These *amici* also argue that anonymous and informal disciplinary procedures are essential to efficient administration of schools; that disclosing names of teachers who are investigated will lead to more formal proceedings and time-consuming challenges to disciplinary measures.

¹ Ch. 42.56 RCW.

There is no doubt that many government activities could be managed more efficiently with closed doors and sealed files, but the PRA demands public scrutiny and accountability “at all levels of government.” Promises of confidentiality should not be allowed to become a bargaining chip in negotiating teacher discipline.

The ACLU and WEA each suggest solutions to the obvious problem caused by hiding the identities of teachers accused of misconduct, particularly the problem of anonymous repeat offenders. These range from assigning “numerical identifiers” and pseudonyms, to the ACLU’s proposal that the trial court’s approach be applied on a case-by-case basis. These proposals are unworkable, in no small part because they seem to assume that determinations ultimately will be made by the courts. Access to public records under the PRA was never intended to be adjudicated on a case-by-case basis. Government agencies themselves are charged with promptly making public records available unless there is a specific exemption, narrowly construed, that excuses disclosure of specific information. The decision of the Court of Appeals below² provides the kind of clear guidance that agencies require to fulfill this responsibility; the proposals of these *amici* do not.

² *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 120 P.3d 616 (2005)

The more serious flaw in these proposals is the fact that they allow administrators to avoid disclosure by the way they characterize the outcome of investigations and the discipline they choose to apply. These *amici* argue that school administrators should be allowed to hide the accused teacher's identity as long as the outcome of their investigations can be labeled as "unsubstantiated," and/or the discipline they choose is confined to a "letter of direction". Under the PRA control over release of information cannot be left to such unchecked discretion of a government agency without undercutting the purposes of the Act.³

In support of these arguments, both *amici* offer a variety of assertions and hypotheticals that do not survive close examination. Many are answered by the PRA itself, by the decisions of this Court addressed in prior briefing, and by the reasoned analysis of the Court of Appeals below. Others are addressed in this Answer.

II. ARGUMENT

A. The Public Has a Legitimate Interest in the Conduct of Individual Teachers

The ACLU acknowledges the language of RCW 42.17.010(11) that "full access to information concerning the conduct of government on every level must be assured" (ACLU Brief, p. 6) but it argues at page 7

³ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978) ("[L]eaving the interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.")

that the identity of a teacher under investigation is outside the scope of this mandate unless actual misconduct is proven: “[I]f the misconduct didn’t occur, the only actual governmental action is the investigation.” Again, at page 15, it argues, “if the allegation is false, there is no misconduct (or government conduct of any kind); there is no need for public oversight.” Yet both the ACLU and the WEA recognize that “teachers occupy positions of public trust” (WEA Brief, p. 8) and when there is teacher misconduct, “[the] improper actions are taken under color of law, with apparent state imprimatur.” (ACLU Brief, p. 6.) They also acknowledge that “[m]ultiple Washington cases have recognized the importance for public oversight of disclosing the identity of government employees involved in misconduct.”⁴ ACLU Brief, p. 7.

Public school teachers are government employees charged with educating and training children in an educational system authorized and funded by the public. The *amici* focus on the administration of that system as the only governmental activity, and when teacher misconduct is alleged they assume that the process of investigation is the only governmental conduct of interest to the public. They argue that the names

⁴ Citing *Brouillet v. Cowles Publishing*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990); *Spokane Police Guild v. State Liquor Control Board*, 112 Wn.2d 30, 769 P.2d 283 (1989).

of accused teachers are unimportant as long as details of the investigation are disclosed.

The *amici* readily accept the fact that an administrator or supervisor within the educational system is engaged in governmental activity, but they conveniently ignore the vital role and responsibility of individual teachers in carrying out the central governmental purpose of the school system – *i.e.*, teaching children. The public has an independent interest in the conduct of teachers as government employees that is at least as important as the interest in the conduct of administrators and investigators. That interest is ongoing and does not depend on whether a school district formally decides that the teacher has committed misconduct.

The fact that school districts might release anonymous details of an investigation allows scrutiny of the process and the conduct of investigators, but the conduct of the individual teacher is totally insulated from the scrutiny and accountability the PRA is intended to guarantee. The fundamental flaw in this approach is highlighted when one considers an ordinary request for public records relating to an individual teacher by name.

The PRA request by the Times in this case was made in connection with a general investigation of sexual misconduct by teachers. As a result,

much of the argument in the briefs of these *amici* centers on how to provide information without identifying the subjects of investigations. But what if the requester already knows the name and is asking for records relating to investigations of sexual misconduct by the named teacher? Redacting the name would be a meaningless gesture, but refusing the records would deny the public any information about the investigation – information that the *amici* admit is necessary under the PRA. *See, e.g.,* ACLU Brief, pp. 5-6 (“the public needs sufficient information to determine whether the agency has acted properly . . . [and] whether the allegations were adequately investigated.”)

The Court of Appeals in this case recognized that disclosure of names is essential to allow the public to monitor both the conduct of the teacher and the conduct of the investigation.⁵ Both are matters of legitimate public interest, and the PRA requires nothing less.

B. Governmental Efficiency Is Not Justification for Withholding Information Under the Public Records Act.

Much is made by both *amici* of the purported need for informal and anonymous resolution of sexual misconduct complaints. They argue that without assurances of confidentiality and informal letters of direction, frank communications about corrective action will be stifled. The WEA

⁵ *Bellevue John Does*, 129 Wn. App. at 856.

argues that “[g]iving employers the option of . . . letters of direction, which do not sanction the employee, is extremely valuable to the efficient operation of schools” WEA Brief, pp. 18-19. Perhaps more telling, the ACLU argues that unless confidentiality can be assured, administrators will “tend to make findings of ‘patently false’ in questionable cases, so as to protect teachers. Any other result will lead teachers to file grievances, resulting in time-consuming disciplinary hearings.” ACLU Brief, p. 10. (Emphasis added.)

The disturbing suggestion here is that the Court should allow promises of confidentiality to be used as bargaining chips in dealing with complaints of teacher misconduct, to avoid the inconvenience of more formal proceedings. This Court has soundly rejected similar arguments in other contexts⁶ and should do so here. The PRA itself recognizes “that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

There is a reference in the preamble to the PRA to “the desirability of the efficient administration of government,” but immediately following those words is the statement, “full access to information concerning the

⁶ See, e.g., *Spokane Police Guild v. State Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989) (“The law of this state is well settled, ‘promises cannot override the requirements of the disclosure law.’”) (quoting *Hearst*, 90 Wn.2d at 137.)

conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” RCW 42.17.010(11). Nothing in the statute calls for balancing governmental efficiency against the public interest in disclosure. Only if a court finds that disclosure of a specific public record “would clearly not be in the public interest and . . . would **substantially and irreparably** damage vital governmental functions” may disclosure of that record be enjoined. RCW 42.56.540 (emphasis added.)

The ACLU and WEA draw their arguments in favor of efficient government from *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), which, in the context of disclosing **personal** private information, considered the possible impact on the conduct of government in determining whether there was legitimate public interest in disclosure. The case is discussed at length in prior briefing.⁷ It is enough to reiterate here that the Court in *Dawson* expressly limited its findings to a case in which performance evaluations “**do not** discuss specific instances of misconduct or public job performance.” *Dawson*, 120 Wn.2d at 800 (emphasis added.) The investigative records in this case involve both allegations of misconduct and public job performance.

⁷ See, e.g., Supplemental Brief of Respondent Seattle Times Company at pp. 18-20.

The record in this case, discussed at length by the Court of Appeals at *Bellevue John Does*, 129 Wn. App. at 842-46, 850-52, offers ample evidence of the dangers involved in relying on anonymous and informal disposition of sexual misconduct complaints. For example, four of the eight teachers whose names were ordered redacted by the trial court were the subjects of more than one complaint.⁸ Each received a “letter of direction,” but no further discipline. *Id.* at 842. Other examples of this troubling pattern, which the WEA denies exists (WEA Brief, pp. 6-7) are found throughout the record.⁹ Without names to tie multiple complaints together, the public has no way to monitor the conduct of repeat offenders.¹⁰

C. Teachers’ Legitimate Privacy Interests Are Not Threatened by Disclosure.

The PRA exempts disclosure of “personal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy.” RCW 42.56.230(2) (emphasis added.) This Court in *Dawson v. Daly, supra*, recognized that

⁸ *Bellevue John Does* 3, 6, 7 and 9, discussed at *Bellevue John Does*, 129 Wn. App. at 842-44.

⁹ See discussion at pp. 7-22 of Respondent/Cross-Appellant Brief of Seattle Times Company.

¹⁰ *Amici* suggest the use of pseudonyms or identifying numbers to answer this problem, but this approach would not address the serious problem of repeat offenders moving to other school districts or situations where records relating to a specific teacher by name are requested.

personal matters include such things as family and health problems, IQ and other test scores, and criticisms contained in performance evaluations, but not discussions of specific instances of misconduct or public job performance. *Dawson*, 120 Wn.2d at 797.

In *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), the Court distinguished between “private matters” and “events which occurred in the course of public service,” and found that “[i]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer’s life They are matters with which the public has a right to concern itself.” *Id.* at 726.

The same is true for instances of misconduct of a teacher while on the job.

It should be clear that truly private matters remain protected under the PRA and the decisions of this Court, but matters relating to on-the-job conduct of public employees are legitimate matters of public concern that should be disclosed. The WEA ignores this logic and argues, in essence, that a public employee’s conduct on the job should be treated as a personal and private matter unless there are instances of proven misconduct. It argues that the legitimate public interest in the problem of sexual abuse of students, recognized by the Court in *Brouillet*, is confined to **known** sexual misconduct. WEA Brief, pp. 8-9. Anything short of that the WEA would protect as a matter of personal privacy, even if it involves activities

in the course of public job performance. This is illogical and inconsistent with both the spirit and the letter of the PRA.

The question of how to treat totally fabricated allegations against a teacher is a legitimate issue, but it is not truly a matter of privacy. No matter how obviously false an accusation may be, if on its face it relates to the teacher's job performance, the subject is not a private matter, but an area of public concern. The confusion in the arguments of *amici* stems from the natural and understandable desire to spare the teacher publicity about charges that are obviously false – that is, to keep the information private.

The *amici* assume that access to such information will automatically lead to publication in which the facts may be “portrayed inaccurately or out of context in a newspaper article” and teachers will have “no opportunity to clear their name.” ACLU Brief, pp. 8-9. The record in this case and, in particular, the discussion of charges in the Court of Appeals opinion below suggests otherwise. For example, from the court's discussion of the charges against Federal Way John Doe 1 and Seattle John Does 1 and 7 at *Bellevue John Does*, 129 Wn. App. at 850-51 and 854-55, it is obvious that the teachers were falsely accused. It is hard to see how identifying them in the discussion that exonerated them would have caused harm; if anything, it would assure that their names were

cleared. It is usually the lack of complete information that encourages rumors.

The Court of Appeals decided to withhold the names of these three teachers under an expansive interpretation of privacy not found in the language of RCW 42.56.230(2) or elsewhere in the PRA. *See Bellevue John Does*, 129 Wn. App. at 854-55. The Times disagreed with this reasoning in part for the reasons discussed above. *Id.* at 853-54. However, if this Court chooses to affirm the result, teachers will be protected not only in their private lives, but also have added protection where accusations concerning their official conduct are obviously or “patently” false. As to all other allegations of misconduct relating to their public duties, the conclusion of the Court of Appeals is compelling and better serves the stated purposes of the PRA:

As these case files show, it is much easier to label an accusation “unsubstantiated” than to say with confidence that it is false. . . . [I]t is possible that the accuser misunderstood the words, misinterpreted the intent, or even fabricated the entire event. But it is also possible that the accuser was accurately reporting inappropriate conduct. Where that possibility exists, the public has a legitimate interest in knowing the name of the accused teacher.

Id. at 856.

**D. Answers to Miscellaneous Arguments of *Amici Curiae*
ACLU and WEA.**

1. The Possibility of Judicial Review as a Deterrent.

The ACLU acknowledges that giving school districts the discretion to determine whether teachers' names will be redacted "could potentially lead to biased decisions" and "self-serving determinations." ACLU Brief, pp. 13-14. At one point it even suggests that supervisors might "make findings of 'patently false' in questionable cases, so as to protect teachers." *Id.* at 10. The ACLU argues that the possibility of judicial review and the threat of penalties and attorney fees under RCW 42.56.550 are "powerful factors" in deterring such improper actions. The facts of the present case refute this argument. If, as in this case, a school district can effectively defer the question of disclosure by notifying individual teachers and their representatives, the district is immune from these sanctions.

**2. Nondisclosure Under The Criminal Records
Privacy Act.**

The ACLU cites provisions of the Criminal Records Privacy Act ("CRPA") as analogous authority for not disclosing unsubstantiated allegations. ACLU Brief, pp. 16-17. The CRPA at RCW 10.97.050 restricts dissemination of "nonconviction data" – essentially criminal charges that do not result in a conviction. The ACLU admits, however,

that the public has a greater interest in oversight of public misconduct than private misconduct. *Id.* It also overlooks the fact that protection for nonconviction data does not apply while proceedings are pending:

Any criminal history record information which pertains to an incident for which a person is currently being processed by the criminal justice system . . . may be disseminated without restriction.

RCW 10.97.050(2). The name of the accused and details of the accusation are readily available to the public throughout the process. *See also, Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1988).

3. Testimony Before the Trial Court.

The ACLU argues that because of the trial court's ability to assess witness credibility, factual findings based on testimony are not reviewed *de novo* and "must be accepted as verities if not challenged on appeal" ACLU Brief, p. 3. In this case, the two witnesses in question were presented by speakerphone and not in person (RP 7, 101); the Court of Appeals found correctly that the trial judge's findings relevant to this case were based on the written declarations and records, not the telephonic testimony (*Bellevue John Does*, 129 Wn. App. at 841); and regardless, the factual findings were adequately challenged by the Times on appeal. *See* Discussion at pp. 21-24 of Reply Brief of Seattle Times Company.

4. Authorities From Other Jurisdictions Distinguished.

The WEA cites several cases from other jurisdictions in support of its position. In each case there are clear distinctions from the established law in Washington.

The WEA cites *Booth Newspapers v. Kalamazoo School District*, 450 N.W.2d 286 (Mich. App. 1989) in support of the argument that disclosure of allegations of sexual misconduct against a teacher is an invasion of privacy. Unlike the investigations in this case, the Michigan court noted “of particularly persuasive import” the fact that the information pertained to “bare allegations that have not and will not be adjudicated” because of the parties’ voluntary settlement. *Id.* at 288. Also, unlike the Washington PRA, which has a specific definition of invasion of privacy at RCW 42.56.050, the court noted that the Michigan legislature “made no attempt to define the right of privacy”, which left the court to determine its parameters on a case-by-case basis. *Id.* at 287-88. The most important distinction, however, is the fact that the *Booth Newspapers* case **predates** this Court’s decision in *Brouillet*, in which the Court expressly held to the contrary, that “[b]ecause the information sought [regarding teacher sexual misconduct] is of legitimate public

interest, we conclude that no privacy right has been violated.” *Brouillet*, 114 Wn.2d at 798.

The WEA also cites a West Virginia case, *Manns v. City of Charleston Police Dept.* 550 S.E.2d 598 (W.Va. 2001) and other cases cited therein, in support of its argument that investigative records prompted by complaints should be subject to nondisclosure for the same reasons as personnel evaluations. The *Manns* case involved a far-ranging request for police internal investigative records and information which, as a matter of published policy and procedure, were to be “treated with the strictest of confidence.” The issue was whether the information fell within a West Virginia statute protecting “information of a personal nature such as that kept in a personal, medical or similar file.” *Id.* at 602. It is not persuasive authority for overturning this Court’s distinction in *Dawson v. Daly* between performance evaluations and investigations of misconduct.

III. CONCLUSION

Both *amici* are asking this court to allow school administrators to keep sexual misconduct complaints anonymous as long as they are determined by the administrator to be unsubstantiated. They argue teacher privacy, governmental efficiency, and all the negative results that allegedly follow public disclosure of these records. In the end, however, they cannot refute the conclusion of this Court in *Brouillet* that “sexual

abuse of students is a proper matter of public concern [and] [b]ecause the information sought is of legitimate public interest, we conclude that no privacy right has been violated.” *Brouillet* 114 Wn.2d at 798. The decision of the Court of Appeals should be affirmed or, if the Court so determines, modified to release all the information requested by the Times.

RESPECTFULLY SUBMITTED this 12th day of March, 2007.

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EXECUTED this 12th day of March, 2007, at Seattle, Washington.



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