

786038

FILED  
APR 25 2006  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

COURT OF APPEALS No. 54300-8-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

\_\_\_\_\_  
BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6 & 9,  
Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5  
AND JANE DOES 1-2, AND SEATTLE JOHN DOES 1-5, 7-8, & 10-17,  
AND SEATTLE JANE DOE 1 AND JOHN DOE,  
Plaintiffs/Cross-Respondents,

v.

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

THE SEATTLE TIMES COMPANY,  
Respondent/Cross-Appellant.

\_\_\_\_\_  
ANSWER OF RESPONDENT SEATTLE TIMES COMPANY  
TO PETITION OF SEATTLE JOHN DOE #9

\_\_\_\_\_  
Marshall J. Nelson, WSBA #04746  
Lissa Wolfendale Shook, WSBA #35179  
Davis Wright Tremaine LLP  
Attorneys for  
Seattle Times Company

2600 Century Square  
1501 Fourth Avenue  
Seattle, Washington 98101-1688  
(206) 622-3150 Phone  
(206) 628-7699 Fax

FILED  
2006 MAR 10 PM 4:01  
COURT OF APPEALS  
CLERK OF COURT

## TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENT.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT .....	2
A. The Decision of the Court of Appeals Violates No Constitutional Right of Privacy. ....	2
B. The Court of Appeals Properly Weighed Privacy and Public Interests.....	5
IV. CONCLUSION.....	6

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES</b>	
<i>Bellevue John Does v. Bellevue School District #405</i> , 129 Wn. App. 832, 120 P.3d 616 (2005).....	2, 4, 6
<i>Brouillet v. Cowles Publishing Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	4, 5, 6
<i>Cowles Publishing Co. v. State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597 (1988).....	5
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993).....	5
<i>In re Detention of Campbell</i> , 139 Wn.2d 341, 986 P.2d 771 (1999), <i>cert. denied</i> , 531 U.S. 1125 (2001).....	5
<i>Lawrence v. Texas</i> , 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).....	3
<i>O'Hartigan v. Department of Personnel</i> , 118 Wn.2d 111, 821 P.2d 44 (1991).....	5
<i>State v. Clinkenbeard</i> , 130 Wn. App. 552, 123 P.3d 872 (2005).....	2, 3

**STATUTES**

RCW 9A.44.093(1).....	3, 4
RCW 42.17.255 .....	6

**MISCELLANEOUS**

U.S. Constitution, Amendment XIV.....	2
---------------------------------------	---

## I. IDENTITY OF RESPONDENT

Respondent is Seattle Times Company, publisher of The Seattle Times (“the Times”), Intervenor in the trial court and Respondent/Cross-Appellant in the Court of Appeals.

## II. STATEMENT OF THE CASE

For its Statement of the Case, the Times refers to its Answer filed February 13, 2006, opposing the Petition for Review of Bellevue John Does 1, 2, 3, *et al.*, in this case,<sup>1</sup> supplemented by the following statement.

As the Court of Appeals explained in its opinion below, the Petitioner Seattle John Doe #9 was a teacher who

gave rides to students on three separate occasions in the early 1990’s, violating a restriction against being alone with students that had been imposed based on his prior misconduct. He questions whether his files are too old to be responsive to the Times request, but the investigation occurred within the identified time period of 1992 to 2002. Although the investigation found no evidence of misconduct during the rides, the district imposed further restrictions and conditions on further employment because of the violation of the original restriction. The teacher retired and surrendered his teaching certificate in the summer of 1995, thereby forestalling any further investigation or discipline. The trial court ordered his identifying information released on the basis that the allegations were well founded and he was disciplined.

---

<sup>1</sup> A third Petition for Review was filed on behalf of other teachers whose identities were ordered disclosed by both the trial and appellate courts. Respondent is filing a separate answer to that petition.

*Bellevue John Does v. Bellevue School Dist. #405*, 129 Wn. App. 832, 858-59, 120 P.3d 616 (2005). The Court of Appeals rejected his initial arguments against disclosure: (1) that his alleged misconduct was outside the ten-year scope of the Times request; and (2) that “the purpose of the Public Records Act is to scrutinize the conduct of government, not individuals.” *Id.* at 859. In this Petition Seattle John Doe #9 argues that disclosure violates constitutional rights of privacy and due process under the Fourteenth Amendment. U.S. Constitution, Amendment XIV.

### III. ARGUMENT

#### A. The Decision of the Court of Appeals Violates No Constitutional Right of Privacy.

Seattle John Doe #9 cites, without page reference or discussion, the Court of Appeals’ decision in *State v. Clinkenbeard*, 130 Wn. App. 552, 123 P.3d 872 (2005), for the proposition that a teacher’s right to privacy is protected by the Fourteenth Amendment. *See* Petition at 5. *Clinkenbeard* does acknowledge the existence of a penumbral right of privacy under the U.S. Constitution, but beyond that, the decision and its reasoning are wholly consistent with the Court of Appeals decision below and actually refute much of the Petitioner’s argument.

In *Clinkenbeard*, a 62-year-old school bus driver had carried on a relationship with a girl who rode his bus, beginning from the time the girl

was 12, but not fully consummated until after the girl turned 18. *See id.* at 557-58. Mr. Clinkenbeard appealed his conviction for first-degree sexual misconduct with a minor, in part on the ground that the statute in question unconstitutionally criminalized “consensual, private, adult sexual conduct,” in violation of due process, equal protection, and privacy rights under the Fourteenth Amendment. The court rejected these arguments.<sup>2</sup> *See id.* at 561-68.

The privacy right asserted in *Clinkenbeard* has nothing to do with public disclosure or unwanted publicity; it involves instead, “the degree to which government may *regulate* private, adult, consensual sexual behavior . . . .” *Id.* at 563 (emphasis added.) Addressing the U.S. Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), on which Mr. Clinkenbeard relied, the Court of Appeals noted:

Moreover, even if *Lawrence* did establish that heightened review was required in some cases of private, consensual, adult sexual activity, the decision specifically points out that *these protections do not apply to cases that may involve minors*, those who are vulnerable to coercion, and those who are situated in relationships where consent may not easily be refused. [Citation omitted.] RCW 9A.44.093(1)(b) addresses conduct where all three potential situations are present, as it prevents much older adults from abusing their access to students in order to exploit these students sexually.

*Id.* at 563 (emphasis added.) The court went on to conclude:

---

<sup>2</sup> The conviction was reversed on other unrelated grounds. *See id.* at 557, 572.

The state's interest in protecting children from sexual exploitation and abuse is a compelling government objective that justifies at least some regulation of sexual conduct, even where it infringes on the right to privacy. Courts show even greater deference to the determinations of the state in the context of education. [Citations omitted.]

*Id.* at 564.

Both the *Lawrence* and *Clinkenbeard* cases address only government interference with private relationships, *not* public disclosure or unwanted publicity.<sup>3</sup> However, the principles reflected in the above quotations are the same as those underlying the Court of Appeals decision in this case:

The public is legitimately concerned with knowing the names of the teachers in order to protect students and monitor the performance of the districts. The privacy exemption in the Public Records Act permits withholding the teacher's identity only if the accusation of misconduct is patently false.

*Bellevue John Does*, 129 Wn. App. at 838-39. They also mirror the reasoning and conclusions of this Court in *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), on which the Court of Appeals relied:

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

---

<sup>3</sup> Although not asserted by Seattle John Doe #9 in this Petition, this so-called informational privacy right is discussed at length in the Times' Answer to the Petition for Review of Bellevue John Does 1, 2, 3, *et al.*, at 9-15.

public interest, we conclude that no privacy right has been violated.

*Id.* at 798.<sup>4</sup>

Seattle John Doe #9 has shown no basis, constitutional or otherwise, for disturbing these well-reasoned principles.

**B. The Court of Appeals Properly Weighed Privacy and Public Interests.**

Seattle John Doe #9 asserts without citation that the Court of Appeals decision here places “public records disclosure principles” above rights to privacy and due process, and that this Court should “render a decision more accommodating of the competing principles of public disclosure and privacy rights.” *See* Petition at 4-5. But this Court has already addressed and rejected the same contention in *Brouillet*, holding that balancing privacy and public disclosure interests “is not called for” under the Public Disclosure Act. *See Brouillet*, 114 Wn.2d at 798. If there is a legitimate issue of public concern, disclosure is required, even though disclosure of the information “may cause inconvenience or embarrassment to public officials and others.” *Brouillet*, 114 Wn.2d at 793. *See* RCW 42.17.255.

---

<sup>4</sup> *See also In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), *cert. denied*, 531 U.S. 1125 (2001); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *O’Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); *Cowles Publ’g Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988).

The Court of Appeals applied this rule in its decision below, finding no legitimate public concern with charges that are obviously or patently false,<sup>5</sup> but “[w]here that possibility exists [that charges may be true], the public has a legitimate interest in knowing the name of the accused teacher.” *Bellevue John Does*, 129 Wn. App. at 856. Whether this is characterized as “balancing” or simply proper application of the rule in *Brouillet* and RCW 42.17.255, it should be clear that no further balancing of rights should be necessary or even permitted in this case.

Seattle John Doe #9 has suggested no interpretation of the Public Disclosure Act that has not already been addressed by this Court and properly applied by the Court of Appeals below.

#### IV. CONCLUSION

The Times respectfully submits that there are no issues of public importance raised in this Petition that require this Court’s attention. The Court should decline review.

---

<sup>5</sup> The Times argued in the court below, and continues to believe, that false allegations in some instances may be matters of serious public concern. However, the court rejected that argument as a bright-line rule.

RESPECTFULLY SUBMITTED this 10th day of March, 2006.

Davis Wright Tremaine LLP  
Attorneys for Seattle Times Company

By   
Marshall J. Nelson, WSBA #04746  
Lissa Wolfendale Shook, WSBA #35179

CERTIFICATE OF SERVICE

I certify that on the 10<sup>th</sup> day of March, 2006, I caused a true and correct copy of the attached document titled:

ANSWER OF RESPONDENT SEATTLE TIMES COMPANY  
TO PETITION OF SEATTLE JOHN DOE #9

to be served on the following via the methods indicated:

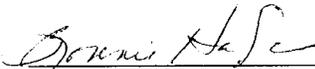
Leslie Olson Olson & Olson 1601 Fifth Avenue, Suite 2200 Seattle, WA 98101-1651  <b>Via Electronic Mail &amp; U.S. Mail</b>	Jeffrey Ganson Dionne & Rorick 601 Union Street, Suite 900 Seattle, WA 98101  <b>Via U.S. Mail</b>
Michael Hoge Perkins Coie 1201 3 <sup>rd</sup> Avenue, #4800 Seattle, WA 98101  <b>Via Electronic Mail &amp; U.S. Mail</b>	John Cerqui 2445 3 <sup>rd</sup> Ave. S. MS 32-151 PO Box 34165 Seattle, WA 98124  <b>Via Electronic Mail &amp; U.S. Mail</b>
Steve Paul Moen Shafer, Moen & Bryan 1325 Fourth Avenue, Suite 940 Seattle, WA 98101-2539  <b>Via Electronic Mail &amp; U.S. Mail</b>	Joyce L. Thomas Frank Freed Subit & Thomas 705 Second Avenue, Suite 1200 Seattle, WA 98104-1798  <b>Via Electronic Mail &amp; U.S. Mail</b>
Jessica Goldman Summit Law Group 315 Fifth Ave., Suite 1000 Seattle, WA 98104  <b>Via Electronic Mail &amp; U.S. Mail</b>	Harriet Strasberg 3136 Maringo SE Olympia, WA 98501  <b>Via Electronic Mail &amp; U.S. Mail</b>

2006 MAR 10 PM 4:02

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
NOV 11 2005

Shelley Hall Stokes Lawrence PS 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3099 <b>Via Electronic Mail &amp; U.S. Mail</b>	Tyler K. Firkins Van Siclén, Stocks & Firkins 721 45 <sup>th</sup> Street N.E. Auburn, WA 98002-1381 <b>Via Electronic Mail &amp; U.S. Mail</b>
--	---

EXECUTED this 10th day of March, 2006 at Seattle, Washington.

  
\_\_\_\_\_  
Bonnie Hodges