

54300-8

54300-8

2

78603-8

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

BELLEVUE JOHN DOE 11 and SEATTLE JOHN DOES 6 and 9,

Appellants,

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

Plaintiffs/Non-Appellants/Respondents,

v.

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

Respondents; and

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

2005 FEB 18 PM 12:59
FILED
CLERK OF COURT

AMENDED APPELLANT BRIEF OF SEATTLE JOHN DOE #6 TO
INCLUDE CORRECT CITATIONS TO CLERK'S PAPERS

David T. Spicer, WSBA 11188
Samantha Arango, WSBA 31967
MALONE GALVIN SPICER, PS
10202 5th Ave. NE, #201
Seattle, WA 98125
Phone: (206) 527-0333
Fax: (206) 527-3433

ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 3

III. ARGUMENT..... 9

 A. Standard of Review..... 9

 B. The Trial Court Erred By Ordering The Release Of Seattle John Doe #6’s Name. 11

 1. Seattle John Doe #6 was not disciplined upon the conclusion of the investigation into allegations against him..... 12

 2. There Is No Evidence That Shows SJD #6 Was Removed From The List Of Substitutes. 14

 C. The Identity Of A Teacher Accused Of Sexual Misconduct Where The Allegations Are Unfounded or Unsubstantiated Is Highly Offensive And Is of No Legitimate Public Concern 15

 1. The disclosure of names is highly offensive..... 15

 2. The name of appellant is not of legitimate public interest..... 20

 D. 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. 29

 E. The Trial Court Erred By Placing The Burden On The Party Opposing The Disclosure To Prove The Adequacy Of The Underlying Investigation..... 32

 F. Disclosure of Seattle John Doe #6’s Identity Harms Vital Government Interests. 34

 G. Disclosure of Names of School Officials..... 35

V. CONCLUSION..... 38

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 32, 929 P.2d 389 (1997)..... | 15 |
| <i>Booth Newspapers</i> , 181 Mich.App. 752, 755, 450 N.W.2d 286 (1989).. | 16, 22 |
| <i>Brown v. Seattle Public Schools</i> , 71 Wash. App. 613, 619, 860 P.2d 1059 1993)..... | 28 |
| <i>City of Tacoma v. Tacoma News, Inc.</i> , 65 Wn.App. 140, 827 P.2d 1094 (1992)..... | 18 |
| <i>Cowles Publ'g Co. v. State Patrol</i> , 44 Wn.App. 822, 897, 724 P.2d 379 (1986)..... | 16 |
| <i>Dawson v. Daly</i> , 120 Wash.2d 782, 796, 845 P.2d 995 (1993)..... | 16 |
| <i>Dawson v. Daly</i> , 120 Wash.2d at 798, 845 P.2d 995..... | 26 |
| <i>Halloran v. Veterans Admin.</i> , 874 F.2d 315 (5th Cir. 1989). | 24 |
| <i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 136, 580 P.2d 246 (1978) | 15 |
| <i>Id.</i> | passim |
| <i>Id.</i> at 143 | 19 |
| <i>Id.</i> at 149. | 19 |
| <i>Id.</i> at 309. | 32 |
| <i>Id.</i> at 323, citing <i>Department of the Air Force v. Rose</i> , 425 U.S., at 360- 361, 96 S.Ct., at 1599 (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965))..... | 25 |
| <i>Id.</i> at 331. | 24 |
| <i>Id.</i> at 758 | 17 |
| <i>Oklahoma Publishing Co. v. District Court</i> , 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977)..... | 32 |
| <i>Ollie v. Highland School District</i> , 50 Wn.App. 639, 645, 749 P.2d 757 (1988)..... | 22 |
| <i>Rosenfield v. United States Dep't of Justice</i> , 57 F3d 803 (9 th Cir. 1995). 24 | |
| <i>Tacoma Public Library v. Woessnem</i> , 90 Wn.App. 205, 951 P.2d 357 (1998)..... | 9 |
| <i>Tacoma Public Library v. Woessner</i> , 90 Wn.App. 205, 218, 951 P.2d 357 (1998)..... | 22 |
| <i>Tarnopol v. Federal Bureau of Investigation</i> , 442 F. Supp. 5 (1977). | 24 |

Statutes

RCW 42.17.010 21
RCW 42.17.010 (11)..... 26
RCW 42.17.255 14, 16, 26
RCW 42.17.310(1)(b)..... 2
RCW 42.17.310(1)(d)..... 15
RCW 42.17.310(2)..... 31
RCW 42.17.310(2)..... 15
RCW 42.17.340(3)..... 9
RCW 42.17.340(3)..... 9

Other Authorities

CP 107..... 1
CP 108..... 8
CP 116, 133-135 8
CP 1714..... 3, 4
CP 1714-1726 21
CP 1715..... 3
CP 1716..... 3
CP 1718..... 4
CP 1718-19 4
CP 1720..... 4
CP 1722..... 4
CP 1723..... 5
CP 1724-25 5
CP 1726..... passim
CP 18, 263-322 7
CP 40, 63-66 27, 28
CP 49, 73..... 29
CP 49, 74..... 30
CP 92, 100..... 10, 11
CP 92, 107..... 1, 7, 10
CP 92, 111..... passim
CP 92, 112..... 12, 26
CP 92, 113..... 2, 34
CP 92, 114-115 2
ROP pg. 119..... 13

I. ASSIGNMENTS OF ERROR

1. The trial court erred in its Findings of Fact #35 by ordering that the Records should be released to the Seattle Times with **only** student names and their parent's names redacted. CP 107.

Should the name of Seattle John Doe 6 and the location of where he works be released to the Seattle Times where the investigation into the allegation of misconduct was found to be unsubstantiated? (Assignment of Error 1.)

2. The trial court erred in its Finding of Fact #35 that Seattle John Doe #6 was removed from the list of substitutes to be used at the detention facility. CP 92, 107.

Can there be a finding that Seattle John Doe #6 was removed from the list of substitutes to be used at the detention facility when there is no evidence in either the oral testimony or in the investigative records that he was so removed? (Assignment of Error 2)

3. The trial court erred in its Finding of Fact #35 that the incident with Seattle John Doe #6 involved more than a mere letter of direction. CP 92, 107.

The trial court concluded that a "letter of direction" means a "letter, memorandum or oral direction, which does not impose punishment, but seeks to guide or direct the employee's future performance." Can there be a finding that Seattle John Doe # 6 was issued more than a letter of direction when he was never punished, but merely cautioned and advised about his attention-getting techniques? (Assignment of Error 3)

4. The trial court erred in its conclusion of law #7 that the determination that an allegation is false or unsubstantiated depends upon whether the investigation is adequate to make that determination. CP 92, 111.

Did the trial court impose an unreasonable and impossible burden on the teacher seeking to prevent disclosure of his name when that teacher relied

on the fact that not only was a thorough investigation conducted but that the allegation was unsubstantiated? (Assignment of Error 4)

5. The trial court erred in its Findings of Fact #12 when it ruled that the identity of an accused teacher is a matter of legitimate public concern when the investigation of the allegation is inadequate. CP 92, 113.

Does the after-the-fact determination by a court of the adequacy of an investigation into allegations of sexual misconduct substantially interfere with government efficiency by essentially forcing teachers to grieve every allegation of misconduct? (Assignment of Error 5)

Should the court be able to craft a rule that would penalize a teacher with name disclosure if the school agency failed to conduct an adequate investigation into the allegations? (Assignment of Error 5)

Should the court be able to craft a rule that would thwart the basic purpose of the Public Disclosure Act in government accountability by directing scrutiny to the individual school employee? (Assignment of Error 5)

6. The trial court erred in its conclusion of law #19 by not extending the protective order to names revealed in testimony presented in open court during the hearing on the injunction. CP 92, 114-115.
7. 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.

II. STATEMENT OF THE CASE

On June 1, 1993, Seattle John Doe #6 (hereafter “SJD #6”) was a substitute teacher in the Seattle Public School District and was working in a school program involving behaviorally troubled students being held in detention. CP 1714. As per the instructions of the regular teacher, SJD #6 was to have the class watch a video, write a summary, and answer a worksheet. CP 1714. (For purposes of reference to this particular school program, appellant will use the term “X-Schools”) SJD #6

It was during this particular class period that a female student alleged that SJD #6 poked her in the breast area three times. CP 1715. After the student complained to another teacher that SJD #6 poked her, the student was then taken to a program supervisor’s office where she again alleged that SJD #6 poked her in the “breast area.” CP 1716. SJD #6 was then contacted and asked to respond to the allegations both verbally and in writing.

SJD #6 wrote a statement on June 1, 1993 responding to the allegations against him. CP 1714. In the statement, he explained that during the class, he was instructing students to stay on task with their assignment. Because some female students were talking and ignoring him, he advised that he touched the back or shoulder of the girls to get their

attention. CP 1714. SJD #6 further explained that when he attempted to get the attention of the complaining student, she turned around quickly and this resulted in possibly touching the top front of her shoulder. He stated that he did not touch the student anywhere else. CP 1714.

Based on the allegation, Child Protective Services, was notified and a report was taken. CP 1718-19. A program supervisor then interviewed and received written statements from three other girls who were in the classroom at the time and allegedly saw the incident. CP 1718. The supervisor believed it was inappropriate for SJD #6 to poke students as an attention getter. CP 1718.

On July 12, 1993, Ricardo Cruz, the Executive Director of Human Resources for the Seattle Public Schools, informed SJD #6 in writing that he was under investigation for the allegation and needed to formally respond. CP 1720. On July 16, 1993, Ricardo Cruz interviewed SJD #6, and SJD #6 again stated that he tapped the students on their shoulders to get their attention but denied touching the complaining student in the breast area. CP 1722.

Ricardo Cruz was not comfortable firing SJD #6 as a substitute teacher based on the witness statements he had. CP 1722. On July 28, 1993, a supervisor for the school determined that further investigation was

not necessary in the matter. He suggested that it “*may be advisable*” to offer some training to SJD #6 on dealing with behaviorally troubled children (emphasis added). CP 1723.

In a letter dated September 7, 1993, SJD #6 responded to Mr. Cruz’s letter of July 12, 1993 and advised that he thought it best not to teach in this particular school program (involving troubled students), but that he would like to continue teaching at the X-schools on occasion if they needed a substitute teacher there. CP 1724-25. In response, Ricardo Cruz wrote a letter dated September 13, 1993, stating “After a review of the facts in this matter I have concluded that there is insufficient evidence to prove that you poked a female student in the breast area with your finger.” CP 1726.

Because SJD #6 acknowledged that he had tapped the backs of 3 females and got in the face of one student in order to get her attention, Mr. Cruz found this was inappropriate conduct given the detention setting in the school. Particularly, Mr. Cruz stated “You are cautioned that further incidents of this nature could lead to disciplinary action, including removal from the substitute roster.” CP 1726. Mr. Cruz also suggested that SJD #6 meet with the supervisor of the X-schools and that if the supervisor believed that it would be appropriate to assign him (SJD #6) to

the school in the future, he (Mr. Cruz) would so instruct the Substitute office. Importantly, Mr. Cruz, concluded his letter by stating that “I appreciate the forthright manner in which you have addressed this issue and I trust that there will be no recurrence of this type of conduct in the future.” CP 1726.

Thereafter, SJD #6 taught school for two more years and retired from teaching in 1995.

SJD #6 reasonably believed that the investigation into this single allegation against him had been thoroughly reviewed and was now closed. Specifically, he had been assured that following the investigation, it had been determined that the allegations against him were unsubstantiated. He was only cautioned that incidents (such as touching students on the shoulder) *could* lead to possible disciplinary action.

The investigation spanned over three months following the incident in the classroom. It involved fellow teachers at the X-schools, the complaining female student and some of her classmates, and SJD #6 himself. The investigation also included the involvement of the Program Director, the Executive Director of Human Resources at Seattle Public Schools, as well as Child Protective Services. The ultimate determination of this investigation that happened over ten years ago was that the

allegation was unfounded and no disciplinary conduct was imposed upon SJD #6.

Beginning in November, 2002, the Seattle Times requested that the Seattle School District, along with other school districts, produce all documentation pertaining to sexual misconduct against school teachers over the past ten years. CP 18, 263-322. Because SJD #6 had a single allegation against him within the time requested by the Seattle Times, he was subject to the disclosure request.

Despite an investigation determining that the allegation against SJD #6 could not be substantiated, and that he was counseled as opposed to disciplined, the trial court ruled as follows:

While the District's investigation could not substantiate the allegation that he had poked a female student in her breast three times, he admitted that he did poke students to get their attention and got in a student's face for the same reason. The District found that this was inappropriate behavior, particularly when dealing with the student population being held in detention. John Doe #6 was removed from the list of substitutes to be used at the detention facility and therefore this incident involved more than a mere letter of direction.

CP 92, 107.

The trial court ordered that records involving this incident be released to The Seattle Times, including the name of SJD #6,

but the student names and the names of their parents be redacted.

Id.

A timely appeal was filed by SJD #6 along with Seattle John Doe #9, Seattle John Doe #13 and Bellevue John Doe #11. CP 108. These appellants also sought an emergency motion before the Commissioner for the Court of Appeals to extend the trial court stay precluding release of the appellant teacher names pending court review on the merits of the appeal. **Appendix A.** Commissioner Ellis denied the emergency motion. **Appendix B.**

Appellants then filed an emergency motion with the trial court seeking to extend the stay pending filing their motion before the Court of Appeals panel seeking a stay pending appellate review pursuant to RAP 17.7. The trial court granted the temporary extension of the stay for thirty days. CP 116, 133-135. Appellants then filed a motion with an appellate panel to modify Commissioner Ellis' opinion. The Appellate Court granted the stay enjoining release of appellants' names pending full review on the merits of this appeal. **Appendix C.**

Ultimately, review was sought by The Seattle Times before the Supreme Court, and these appeals were ultimately consolidated

before the Supreme Court. By Order of the Supreme Court dated May 4, 2004, this case was transferred to this Appellate Court.

III. ARGUMENT

A. Standard of Review.

Judicial review of all agency actions taken or challenged under the statute shall be de novo. RCW 42.17.340(3). The appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence"; thus, a reviewing court is not bound by the trial court's findings. *Tacoma Public Library v. Woessnem*, 90 Wn.App. 205, 951 P.2d 357 (1998).

Because of the public policy implications involved in both the individual's right to privacy and the public's right to government accountability, appellant submits RCW 42.17.340(3) mandates that the appellate court stand in the same position as the trial court and review the entire record de novo.

Although there was limited witness testimony with respect to SJD #6, this testimony did nothing to supplement the documentary record, and it is unclear what weight if any, the trial court placed on this testimony.

If the Court should decide not to review the entire record de novo because of the live testimony, appellant submits that the Court review only

Finding of Fact #35 under the substantial evidence standard. Appellant submits there is no evidence to support this Finding of Fact. See generally, Assignments of Error #2 and #3.

B. The Trial Court Erred By Ordering The Release Of Seattle John Doe #6's Name.

The trial court incorrectly ruled that SJD #6's records should be released to the Seattle Times with only student names and their parents' names redacted and authorizing the disclosure of SJD #6's identity. CP 92, 107. The trial court's determination that SJD #6 was issued more than a letter of direction was hinged on its presumption that SJD was removed from the list of substitutes at that facility. *Id.*

The trial court's Finding of Fact #10 states that release of information under the Public Disclosure Act (hereafter "PDA") relating to a public employer's guidance and direction to an employee in a "letter of direction" would harm the public interest in efficient government by interfering with the employer's ability to give candid advice and direction to its employees. CP 92, 100.

1. Seattle John Doe #6 was not disciplined upon the conclusion of the investigation into allegations against him.

In a review of the investigative records of SJD #6, it is apparent on the face of the documents that at most he was issued a letter of direction and not a reprimand. CP 1726. SJD #6 was only cautioned not to use his attention getting techniques again in that particular school setting. *Id.* There was no discipline involved and it was only suggested to SJD #6 that he take classes on working with at-risk students, which he completed and was commended for this action by Ricardo Cruz. CP 1726.

The record established with the trial court showed no substantiation of any inappropriate misconduct and that the investigators merely cautioned SJD #6 about his attention getting methods, and therefore the trial court erroneously determined that SJD#6's name should be released to the Seattle Times. Such a ruling is in direct contravention of the trial court's Findings of Fact No. 10 which states that the release of teachers' names who were issued a letter of direction would harm the public interest in "vital government functions because it would chill employer-employee communications. . ." CP 92, 100. Because Seattle John Doe #6 was at most issued a letter of direction, the disclosure of his name would harm "vital government functions."

Additionally, the trial court ruled in contravention of its own conclusions of law. In Conclusion of Law #11, the court distinguished between a “letter of direction” and “a letter of discipline.” The court stated: “By a ‘letter of direction’ this courts means a letter, memorandum, or oral direction which does not impose punishment, but seeks to guide or direct the employee’s future performance. By ‘letter of reprimand’ this court means a letter or memorandum finding that the employee *has engaged in significant misconduct and either formally reprimanding the employee or imposing restrictions on the employee’s future assignments or duties.*” (emphasis added). CP 92, 112.

The investigation of SJD #6 did not result in a finding that he engaged in any misconduct much less “significant misconduct.” That alone reflects error of the trial court in its Finding of Fact No. 10. Additionally, SJD #6 was neither formally reprimanded nor had any restrictions imposed on his future assignments or duties as he elected not to teach at that particular school. Yet the trial court found that Seattle John Doe #6 was issued a letter of reprimand and not a letter of direction. Such a conclusion contravenes the trial court’s own legal criteria and standards as set forth in Conclusion of Law #11.

2. There Is No Evidence That Shows SJD #6 Was Removed From The List Of Substitutes.

The decision for John Doe #6 not to return to teaching in that school was his voluntary decision and not as a result of discipline stemming from the investigation into the student's allegations. CP 1724-25 (Seattle John Doe #6 stating "I don't think that I should teach at the (blank) anymore. But I would like to teach at the (blank) on occasion if they need a substitute there."). Similarly, in a letter from Ricardo Cruz dated September 13, 1993 to SJD #6, Mr. Cruz stated "you are cautioned that further incidents of this nature could lead to disciplinary action, *including removal from the substitute roster* (emphasis added)." CP 1726. This correspondence between SJD #6 and Mr. Cruz demonstrates that the no evidence exists that he was removed from the substitute roster as a means of discipline. Additionally, the testimony of Ricardo Cruz reveals that he deferred his decision to the administrator as to whether SJD #6 should be reassigned to other schools in the program. ROP pg. 119. Cruz did not know if there was a follow up meeting between SJD #6 and the administrator. *Id. at 118*. Therefore, there is no evidence to support the trial court's finding that he was removed from the list of substitutes to be used at the detention facility as form of discipline.

**C. The Identity Of A Teacher Accused Of Sexual Misconduct
Where The Allegations Are Unfounded or Unsubstantiated Is
Highly Offensive And Is of No Legitimate Public Concern**

The trial court's ruling that unsubstantiated allegations of sexual misconduct are both highly offensive and of no legitimate public concern should be affirmed. CP 92, 111.

1. The disclosure of names is highly offensive.

School teachers have a privacy interest in their names when they are targets of rumors and unsubstantiated allegations of sexual misconduct. The Washington Public Disclosure Law ensures that an individual's right to privacy is protected. RCW 42.17.255. In enacting changes to the law in 1987, the legislature intended that the meaning of right to privacy have the same meaning as the case of *Hearst Corp. v. Hoppe*. RCW 42.17.255. The *Hearst* court cited with approval the comment to the Restatement, which described and explained what a personal or private matter is:

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 Corp. v. Hoppe, 90 Wn.2d 123, 136, 580 P.2d 246 (1978).

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

Additionally, for those records that are otherwise disclosable, but contain personal data, the Act allows agencies to redact from documents produced 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 v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997).

Washington cases have held that an individual has a privacy interest whenever information, which reveals unique facts about those named is linked to an identifiable individual. *Cowles Publ'g Co. v. State Patrol*, 44

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).

Wn.App. 822, 897, 724 P.2d 379 (1986); *See also Dawson v. Daly*, 120 Wash.2d 782, 796, 845 P.2d 995 (1993)(stating that “The employee privacy definition protects personal information that the employee would not normally share with strangers.”). Due to the highly charged nature of allegations of sexual misconduct with school children, it cannot be doubted that a teacher wrongfully accused of such conduct would share this information with strangers. Therefore, a teacher’s privacy interest is impacted if he is implicated in unsubstantiated allegations of sexual misconduct.

The public disclosure of names of teachers who were wrongfully accused of sexual misconduct is highly offensive. RCW 42.17.255 states that an invasion of the “right of privacy” occurs if disclosure of information about a person is both highly offensive and of no legitimate public concern. The trial court held, “if the allegation is unsubstantiated it significantly increases the offensive nature of its revelation.” CP 92, 111. This conclusion is correct.

In *Booth Newspapers*, 181 Mich.App. 752, 755, 450 N.W.2d 286 (1989), a Michigan appellate court prohibited the disclosure of the identity of a teacher who was accused of sexual misconduct. *Id.* The Court stated “it goes without saying that the mere fact that an accusation has been

made, particularly if it is ultimately found to be untrue, is capable of inflicting embarrassment, humiliation, and destruction of reputation of those names.” *Id.* at 758.

It is undeniable that allegations of sexual misconduct, especially when they are unsubstantiated, impact the privacy interest of the teacher who has been wrongly accused of such an allegation. The public disclosure of names of teachers who were the targets of rumors or unsubstantiated claims rises to the highest level of offensiveness. While the public records statute contemplates that an examination of public records may cause inconvenience or embarrassment to public officials or others², a name linked with allegations of sexual misconduct, even when unsubstantiated, could stigmatize and destroy the reputation of the teacher. Such a result is more than mere embarrassment and would be prohibited from disclosure under the Public Disclosure Act.

Given the fact that 1) teachers have a privacy interest in their names when the names can be linked to allegations of sexual misconduct; 2) that allegations impact their privacy interest; 3) the potential repercussions the disclosure of identities of school teachers wrongfully accused of sexual misconduct; and 4) the legislature’s recognition that intimate details

² *See* RCW 42.17.340(3)

spread before the public gaze could result in an invasion of privacy, it is highly offensive to a reasonable person to disclose the name of a teacher whereby allegations of sexual misconduct have been unsubstantiated.

2. The name of appellant is not of legitimate public interest.

The trial court's conclusion, that if an allegation is unsubstantiated it is of no legitimate public interest, is correct and should be upheld. CP 92, 111. The court stated:

Due to the highly charged nature of an accusation of sexual misconduct, whether the allegations is substantiated or unsubstantiated becomes the dominant factor in determining whether release of the information would violate an employee's right to privacy. The substantiated/unsubstantiated nature of the allegation bears upon both elements of the right to privacy in RCW 42.17.255. If the allegation is unsubstantiated it significantly increases the offensive nature of its revelation and if it is unsubstantiated, *it is of no legitimate public interest.* (emphasis added)

Id.

The appellate court in *City of Tacoma v. Tacoma News, Inc.*, 65 Wn.App. 140, 827 P.2d 1094 (1992) held that an unsubstantiated allegation of child abuse was not of legitimate public concern. *Tacoma News* involved a newspaper's request for a police incident report (on a mayoral candidate who was investigated for child abuse) and several letters that related directly to the subject matter of the investigation. *Id.* at

143. The investigation determined that the allegations of child abuse were unsubstantiated. *Id.*

The court found that despite the changes to the public disclosure laws in 1987, the legislature intended to incorporate the meaning of “right to privacy” as interpreted by the Restatement and the common law tort of invasion of privacy. *Id.* at 149. Since the Restatement and the common law allow consideration of whether information is true or false, the Washington legislature intended to allow public agencies and courts to consider whether information in public records is true or false, as one factor bearing on whether records are of legitimate public concern. *Id.*

Under the reasoning in *Tacoma News*, this Court must consider whether the underlying allegations of sexual misconduct were substantiated or unsubstantiated. The final assessment on the investigation determined there was insufficient evidence to support the allegation against Seattle John Doe #6. CP 1726. The information of the investigation into Seattle John Doe #6 has been provided to the Seattle Times, redacted of his name, the student, the school and school personnel. The question then becomes whether the public has a legitimate interest in knowing the name of Seattle John Doe #6 and when the allegations against

him were determined to be unsubstantiated. The answer is that there is no legitimate public interest in the name of Seattle John Doe #6.

In *Tacoma News*, the newspaper attempted to argue that the disputed documents should be released redacted only of names of the alleged victim and informant. 65 Wn.App. at 152, 827 P.2d 1094. The court rejected this argument and found that redaction would accomplish nothing because whatever information was not redacted would still be unsubstantiated and therefore was not of legitimate public concern and that identification of the parent would inevitably lead to the identification of others allegedly involved. *Id.* This reasoning can be applied to the current situation. Under *Tacoma News*, none of the documents pertaining to the investigation of Seattle John Doe #6 should have been released as the allegations were unsubstantiated and therefore, the disclosure is both highly offensive and of no legitimate public concern. However, the school district turned over all of the documents of the investigation redacted **only** of names, schools and school personnel involved in the investigation. Therefore, the school district went above and beyond its duty under the Public Disclosure Act and turned over documents that were not required to be disclosed.

Additionally, assuming that the public does have a legitimate interest in knowing how the school district handled the investigation of allegations of sexual misconduct, it still does not have a legitimate interest in knowing the names of the teachers and the schools. The stated purpose of the Public Disclosure Act is that “full access to information concerning the 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.

The letter and spirit of the Public Disclosure Act were fulfilled when the school districts turned over the documents to the Seattle Times with the redactions. This is especially true with respect to Seattle John Doe #6. Government accountability to the public has been satisfied because the documents in the Seattle Times’ possession includes all notes taken by the investigator, the complaint of the student accuser, Seattle #6’s written response to the allegations, correspondence between the Executive Director of Human Resources for the Seattle Public Schools and the School Administrators, and the letter of direction issued to Seattle John Doe #6. These documents reveal that a thorough investigation took place and contain why the determination that the allegations were unsubstantiated. CP 1714-1726, generally. The government’s conduct has

been accounted for with these documents and there is no legitimate public interest in knowing the names of the teacher and the school, especially since the allegations were unsubstantiated.

Cases in Washington and in several other states have redacted the names of individuals to protect his or her privacy interest. In *Ollie v. Highland School District*, 50 Wn.App. 639, 645, 749 P.2d 757 (1988), the court of appeals found that although information about public, open-duty job performances should be disclosed, “deletion of the employee’s names and identifying details would protect the privacy of the employees.” *Ollie*, 50 Wn.App. 639, 645, 749 P.2d 757 (1988).

Likewise, in *Tacoma Public Library v. Woessner*, 90 Wn.App. 205, 218, 951 P.2d 357 (1998), the appellate court found it was an invasion into privacy to disclose the name and address of an individual and connect that name to certain precise information. *Id.*

Booth Newspapers, Inc. v. Kalamazoo School District, *supra*, is a case that has a factual scenario very close to the one at issue in this appeal. A newspaper company had requested copies of tenure charges of an allegation of sexual misconduct against a teacher and the settlement reached between that teacher and the school district. *Booth*, 181 Mich.App. 752, 752, 450 NW2d 286 (1990). The appellate court upheld

the determination that the requested documents should be disclosed redacted of the teacher and student identities involved in the allegations.

Id. Particularly, the court held that:

The disclosure of the requested information, if redacted of personal identities, does not amount to an intrusion upon privacy, given the evolving concepts of common-law privacy. The embarrassment derived from disclosure is its stigmatization of specific person affected by allegations of wrongdoing; it follows that disclosure of the factual content of the requested information redacted of the identities has little, if any, potential for embarrassment resulting from public disclosure.³

Id. at 756.

Cases construed under the Freedom of Information Act⁴ repeatedly hold that the names of individuals, if redacted, would protect the individual's privacy interest. For example, one case found that the privacy interest of a person investigated by the FBI did not warrant exempting from disclosure under FOIA records documenting whether the FBI abused its law enforcement mandate by overzealously investigating political

³ It is anticipated that the Seattle Times will object to the significance of this case, first because it is an out of state decision, and second, because Michigan is allowed to employ a balancing test. But it should be noted that this case discusses the devastating impacts that the mere *accusation* of misconduct could have upon the accused and that accusations alone are capable of inflicting embarrassment, humiliation, and destruction of reputation of those named. This case is cited for its thoughtful articulation of the consequences of identity disclosure in such a situation and can be useful in shedding light on why such a disclosure is both highly offensive to the reasonable person and of no legitimate public interest.

⁴ In interpreting Washington's Public Disclosure Act, our courts have looked to the federal courts and their interpretation of FOIA. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 960 P.2d 447 (1998)

protest movement, in light of the fact that the names and identifying information concerning those investigated could be redacted. *Rosenfield v. United States Dep't of Justice*, 57 F3d 803 (9th Cir. 1995).

Another case likewise held that it was proper to withhold from the documents released the names and subjects of the investigative report, as well as identifying information concerning the subjects. The court explained that public disclosure of the fact that certain persons had been the subject of an FBI investigation would likely cause them embarrassment and possibly harassment. *Tarnopol v. Federal Bureau of Investigation*, 442 F. Supp. 5 (1977).

Finally, the Fifth Circuit overruled a district court's determination that the release of names related to a government investigation would not implicate the privacy interests because names were not "intimate" information. *Halloran v. Veterans Admin.*, 874 F.2d 315 (5th Cir. 1989). The court stated in both FOIA and other contexts involving privacy concerns, it has long been the rule that our concern is not with the identifying information *per se*, but with the connection between such information and some other detail--a statement, an event, or otherwise--which the individual would not wish to be publicly disclosed. *Id.* at 331.

Importantly, the *Halloran* court cited with approval the notion that the purpose of FOIA is a basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language and focuses on the citizens' right to be informed about what their government is up to. *Id.* at 323, citing *Department of the Air Force v. Rose*, 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Again, in citing the U.S. Supreme Court, the 5th Circuit stated “if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.” *Id.*

Seattle Times is in possession of all documents that pertained to the investigation SJD #6 redacted only of his name, the student's name, the school and the personnel involved in the investigation. The redactions do not render the documents incomprehensible and the public can get a full accounting of government conduct in this matter. The disclosure of the name of SJD #6 not inform the citizenry about the activities of their government. This is especially true when the allegations were unsubstantiated and when SJD #6 has been retired from teaching since 1995. The Times has not articulated why there is a legitimate public

interest in knowing the redacted information. Therefore, this information should remain protected from disclosure.

D. 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.

Although the legislature prohibits the use of a balancing test to determine whether information should be disclosed, courts, including the Supreme Court, have stated that RCW 42.17.010 (11) contemplates some balancing of the public interest in disclosure against the public interest in the “efficient administration of government.” *See Dawson v. Daly*, 120 Wn.2d at 798. The *Dawson* court held that the term “legitimate public concern” used in the earlier cases and in RCW 42.17.255 meant “reasonable.” *Dawson*, 120 Wash.2d at 798, 845 P.2d 995. Consequently, requiring disclosure where the public interest in efficient government could be harmed more than the public would be served, is unreasonable. Accordingly documents will not be disclosed where the public concern is not “legitimate.” *Dawson*, 120 Wash.2d at 798, 845 P.2d 995.

The Trial court below relied on the *Brown* and *Dawson* cases to conclude that there is no legitimate public interest in the disclosure of information where the school teacher received a “letter of direction” as opposed to a “letter of reprimand.” CP 92, 112. The court went on to

define a “letter of direction” to mean a memorandum or oral direction which does not impose punishment, but seeks to guide or direct the employee’s future performance. *Id.* By “letter of reprimand” this court means a letter or memorandum finding that the employee has engaged in significant misconduct and either formally reprimanding the employee or imposing restrictions on the employee’s future assignments or duties. *Id.*

This conclusion was based upon declarations by public school officials who stated reasons why vital governmental operations would be interfered with by such a disclosure. In his declaration, Steve Pulkien, a current Uniserv Representative stated that, “It is important for the Court to understand that the letter of direction is both a supervisory and evaluative tool employed by the Districts and the Union to assist teachers in protecting themselves from false allegations.” CP 40, 63-66. He also stated that “If this Court rules that allegations that have not been substantiated by the completion of an investigation, but where a letter of direction is issued will become public record subject to disclosure, then I will be forced to insist that the process go forward and grieve all potentially negative information held by the District.” *Id.*

This is a sensible rule and should be upheld. If the Court allows the disclosure of names where a teacher was issued a letter of direction after

an investigation into the allegations reveal that they were unsubstantiated, then there will be a devastating interference with teacher morale and labor management of teachers. It is clear that the letter of direction is a critical tool for both labor and management in the efficient operation of the public schools. CP 40, 63-66. Therefore, the harm to the efficient administration of government outweighs the public interest in disclosure and thus the public does not have a legitimate public interest in disclosure. *Brown v. Seattle Public Schools*, 71 Wash. App. 613, 619, 860 P.2d 1059 (1993).

Seattle John Doe #6 was issued a letter of direction after an allegation of inappropriate conduct was found unsubstantiated. See generally, CP 1726. Under the reasoning set forth under *Dawson* and *Brown*, the public does not have a legitimate public interest in the release of his name as such disclosure would harm the efficient administration of government.

E. The Trial Court Erred By Placing The Burden On The Party Opposing The Disclosure To Prove The Adequacy Of The Underlying Investigation.

The trial court set forth a dangerous rule when it concluded that:

The determination that an allegation is false or unsubstantiated depends upon whether the investigation is adequate to make that determination. Consequently, a party asserting that the court should find that disclosure of information would violate an employee's right to privacy because the information is false or unsubstantiated, has the

burden of convincing the court of the adequacy of the investigation which supports that determination.

CP 92, 111.

This rule substantially harms the public interest by causing a tremendous interference not only with the efficiency of government administration but with education as an institution. During the trial court the Bellevue School District submitted a comment advocating against creating a rule that would allow a court to judge the adequacy of an investigation. CP 49, 73. The school district pointed out that “although this case . . . is in a posture in which the Court has *in camera* access to the records at issue, and may form impressions from the records as to whether reasonable efforts were made to investigate, that will not be the situation as to most requests under the Public Records Laws for records relating to alleged employee misconduct.” *Id.* Importantly, the School District noted the prejudice this rule creates as it would require courts to evaluate an investigation with the benefit of hindsight. *Id.* Such hindsight is problematic especially if a court is looking into an investigation years after it was conducted, and after much of the material related to it may no longer be in existence. *Id.* The school district also cites potential harm to the teacher with an after-the-fact evaluation of the investigation: “The release of teachers’ names in unsubstantiated cases should not turn on the

adequacy of districts' investigation, in part because an inadequate investigation may be as likely to fail to clear an "innocent accusee" as it is to fail to confirm the misconducts of a "guilty accusee." CP 49, 74. The Bellevue School District has made some sensible observations, which should not be ignored.

Common sense dictates that this burden will reap a terrible injustice upon the teachers. This injustice is demonstrated by Seattle John Doe's situation. Seattle John Doe #6 was led to believe that a full and proper investigation of the allegations against him was proper, and after the conclusion, he continued with his life and has been in retirement for about 9 years. Had he known that a court could later determine that his name should be disclosed because the school district failed to conduct a proper investigation, he might have hired a lawyer or pursued a grievance to exonerate his name. It is the reliance of the school teacher upon the proper investigation into allegations of misconduct that is so disturbing here. The teachers should not be penalized by having their name disclosed if an improper investigation occurred.

Given the very real consequences this rule, that the individual seeking to enjoin disclosure of his name has to prove the underlying investigation into the allegations of sexual misconduct were adequate,

F. Disclosure of Seattle John Doe #6's Identity Harms Vital Government Interests.

Disclosure of Seattle John Doe #6'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*, ** at 2558.

In this case, adopting the rule urged as set forth by the trial court will violate the government's vital interest in providing an ample education for the state's children. As discussed above, publicly branding teachers as a sexual abuser, 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 public will opt out of teaching in favor of safer, more lucrative

occupations. The chilling effect on the education industry could be disastrous.

G. Disclosure of Names of School Officials

The names of the school officials disclosed during testimony should also not be disclosed to the public because the identity of SJD #6 can easily be inferred through the disclosure. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977), cited in the protective order, is not applicable to the present case. In *Oklahoma* reporters were present during a detention hearing for a juvenile alleged to have committed second-degree murder. *Id.* at 309. Afterwards, the boy's picture and name was published and broadcast in the county's newspapers, radio, and television. *Id.* At a subsequent closed hearing, the court entered a protective order to protect the boy's identity. *Id.* at 309. The Supreme Court held that the First and Fourteenth Amendments did not permit the state court to prohibit the publication of widely disseminated information obtained at court proceedings that were open to the public. *Id.* at 310 -11. In making its decision, the court relied upon the fact that the hearing was a public hearing and that members of the press were present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. *Id.* at 311. No party made any objection to the presence

of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. *Id.*

In the present case, the Seattle Times, although a member of the press, is also a party in the suit. The Seattle Times was present at the hearing, not in its capacity as a news observer and reporter, but a party with a vested interest in the suit. The hearing was definitely not a public hearing. The present case is easily distinguishable from *Oklahoma* and therefore the names of the school officials should not be disclosed.

It is appellant's intention to incorporate all arguments and policies that were argued against the public disclosure of his name to apply equally to precluding disclosure of the name of the school and names of personnel who were involved in the investigation of SJD #6. Appellant cites with favor the trial court's Conclusion of Law #14 which holds that:

the name of the school and the name of school personnel involved in the investigation or interviewed in the course of the investigation must be redacted to protect the privacy interest of an accused teacher. Generally, the teacher's identity can be deduced from knowing the name of the school, the year and subject taught, and the school personnel involved. Thus, these facts must be redacted when the allegations remain

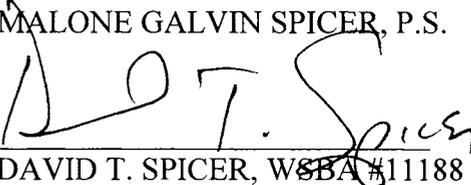
unsubstantiated or are proven false after an adequate investigation. CP 92,
113.

V. CONCLUSION

Seattle John Doe #6 respectfully requests that the Court deny the
Times' request for disclosure of his identity in conjunctions with
allegations of sexual misconduct.

RESPECTFULLY SUBMITTED THIS 9th day of February 2005.

MALONE GALVIN SPICER, P.S.



DAVID T. SPICER, WSBA #11188
SAMANTHA M. ARANGO WSBA #31967
Attorneys for Seattle John Doe #6

CERTIFICATE OF SERVICE

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 Malone Galvin Spicer, PS. I caused to be sent via email and U.S. Mail, postage prepaid on February 9, 2005, a true and correct copy of the Amended Appellant Brief of Seattle John Doe #6 to
Include Correct Citations to Clerk's Papers and Certificate of Service to:

Mr. Steven P. Moen
Shafer, Moen, & Bryan, PS
1325 - 4th Avenue, Suite 600
Seattle, WA 98101-2539

Mr. Michael W. Hoge
Perkins Coie, LLP
1201 - 3rd Avenue, Suite 4800
Seattle, WA 98101-3099

Mr. Jeffrey Ganson
Dionne & Rorick
999 - 3rd Avenue, Suite 2550
Seattle, WA 98104-4001

Ms. Michele L. Earl-Hubbard
Davis, Wright, Tremaine
1501 - 4th Avenue, Suite 2600
Seattle, WA 98101

Mr. Tyler K. Firkins
Van Sieten, Stocks, and Firkins
721 - 45th Street NE
Auburn, WA 98002-1381

John M. Cerqui
Seattle Public Schools/Gen Counsel,
MSc 32-151
PO Box 34165
Seattle, WA 98124-1165

Alison Page Howard
Attorney at Law
1501 4th Ave., #2600
Seattle, WA 98101-3225

Leslie Jean Olson
Olson & Olson PLLC
1601 5th Ave., #2200
Seattle, WA 98101-1625

Harriet Strasberg
Attorney at Law
3136 Maringo SE
Olympia, WA 98501

Shelley M. Hall
Stokes Lawrence, PS
800 Fifth Ave., #4000
Seattle, WA 98104-3099

FILED
2005 FEB 10 PM 12:59

Signed at Seattle, Washington this 9th day of February, 2005.

A handwritten signature in black ink, appearing to read "Renee Hollinshed", written over a horizontal line.

Renee Hollinshed

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,

Intervener/Defendant.

NO. 52304-0-1

EMERGENCY MOTION TO
STAY ENFORCEMENT OF
TRIAL COURT DECISION
AND FOR TEMPORARY
RESTRAINING ORDER

RECEIVED
COURT OF APPEALS
DIVISION ONE
FEB 10 2005

Comes now Appellant, Bellevue John Doe #11, by and through his counsel of record, Leslie J. Olson; Appellant, Seattle John Doe #6, by and through his counsel of record, David T. Spicer and Samantha Arango; Appellant, Seattle John Doe #9, by and through his counsel of record Steven P. Moen; and Appellant, Seattle John Doe #13, by and through his counsel of record, Joyce L. Thomas, and collectively request the following relief:

I. RELIEF REQUESTED

1. That the Court hear this motion on an emergency basis because the Appellants will suffer irreparable harm if it is not heard by May 25, 2003.
2. For an order staying enforcement of the trial court's decision, ordering the disclosure of the names and other identifying information of the Appellant John Does to The Seattle Times pending appellate review.

II. PORTIONS OF THE RECORD RELIED UPON

1. Complaint;
2. Findings of Fact and Conclusions of Law on Order for Injunction and Order for Injunction and Protective Order;
3. Declaration of Margo Holland in Support of Motion to Reconsider Release of John Doe No. 13; and

Emergency Motion To Stay Enforcement Of Trial Court Decision And For Temporary Restraining Order

4. Letters of direction currently in camera in superior court chambers of the Honorable Douglass North.

III. STATEMENT OF THE CASE

In approximately November 2002, the Seattle Times requested under the Public Disclosure Act, that the Seattle and Bellevue School Districts disclose copies of all records relating to any allegations of sexual misconduct by teachers in the last 10 years, including the names, teacher certificate numbers and other personally identifying information of the teacher/subjects of the investigations. The teachers filed a complaint for injunctive relief in King County Superior Court.

The trial court entered a temporary restraining order preventing The Seattle Times from publishing any identifying information, including the names of the teachers and their teacher certificate numbers pending resolution of the matter. On April 25, 2003, the trial court ordered that the names of some teachers be redacted. It ordered that the names and other identifying information of the Appellants be released to The Seattle Times. It stayed the effective date of its order for 30 days to allow time for the Appellants to seek appellate counsel, file an appeal, and move for a stay of enforcement of the trial court order pending appeal.

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

The Appellants' Notice of Appeal was filed May 9, 2003. The trial court's stay of its order expires May 25, 2003.

III. GROUNDS FOR RELIEF SOUGHT AND DISCUSSION

1. Emergency Nature of the Motion.

RAP 17.4(b) allows a party to present a motion to a commissioner of the Court on less than the required notice under the rules. In this case, the Appellants can provide the requisite 10 days' notice to Respondents under RAP 17.4(a). But the Court calendar on the regularly scheduled motions day is already filled. Appellants cannot wait for relief until a day when the regular court calendar is not filled because the trial court's stay of its order releasing confidential information to The Seattle Times will expire on May 25, 2003. Appellants respectfully request that the Court hear their motion on an emergency basis before May 25, 2003.

2. Motion for Stay and Injunctive Relief.

Appellants respectfully request that the Court stay enforcement of the trial court's Order for Injunction and Protective Order, which releases to the Seattle Times, their names, teacher certificate numbers, and other personally identifying information in conjunction with information contained in their personnel files concerning investigations of alleged

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

misbehavior. An appellate court has authority to stay enforcement of a trial court decision upon such terms as are just. RAP 8.1 (b)(3). In considering a motion to stay enforcement, the appellate court will:

- a. Consider whether the moving party has demonstrated debatable issues on appeal; and
- b. Balance the injury to the moving party if the relief was not granted against the injury suffered by the non-moving party if a stay were imposed.

RAP 8.1 (b)(3). In applying this rule, "courts apply a sliding scale, such that the greater the inequity, the less important the inquiry into the merits of the appeal" *Boeing Co. v. Sierracin Corp.*, 43 Wn.App. 288, 291, 716 P.2d 956 (1986). Where the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, an appellate court will stay enforcement of a judgment, unless the appeal is totally devoid of merit. *Boeing Co.*, 43 Wn.App. at 291.

In *Boeing Co.*, Boeing sued Sierracin Corp., claiming that Sierracin had breached a confidential relationship with Boeing and violated the Uniform Trade Secrets Act. *Boeing Co.* 43 Wn.App. at 289. The trial court entered an injunction restraining Sierracin from using any of Boeing's data in its business operations. *Boeing Co.*, 43 Wn.App. at 289. Sierracin moved the Court of Appeals for an order staying the

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

injunction pending appeal. *Boeing Co.*, 43 Wn.App. at 289. Boeing argued that only in extraordinary circumstances should an injunction be stayed, but the Court of Appeals rejected that argument. *Boeing Co.*, 43 Wn.App. at 290, 291-92.

Instead, it observed that Sierracin would most probably be forced out of business if the stay were not granted and it concluded that Sierracin had made the requisite showing of debatable issues on appeal. Although the court noted that Boeing would also suffer an adverse effect, it determined that the harm could be redressed with a supersedeas bond. *Boeing Co.*, 43 Wn.App. at 292. The court granted the stay.

In cases involving the Public Disclosure Act, Chapter 42.17 RCW, appellate courts recognize that stays of orders to disclose public records must be granted pending review; otherwise, the appeal would be moot. This occurs even though parties seeking to prevent disclosure do not always prevail on appeal. *See, Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998); *Columbian Pub. Co. v. City of Vancouver*, 36 Wn.App. 25, 671, P.2d 280 (1983).

In this case, the issue on appeal also concerns whether certain records must be released to The Seattle Times under the PDA. Chapter 42.17 RCW. Appellants are seeking to stay the release of their identities in conjunction with confidential records from their employee personnel files pending appellate review of whether The Seattle Times is entitled to the information. If the stay of the judgment is not granted, then the school districts will be compelled by the Order to provide the information to The Seattle Times, who will then, in turn, be entitled to publish the information.

Under RAP 2.1 and 2.2, the Appellants are entitled to an appeal as a matter of right. If the Times is allowed to publish the information pending appeal, the Appellants will be deprived of their right to appeal, because the publication of the information is an irreparable act. If the Appellants ultimately prevail on appeal, the damage will have been done, namely, The Seattle Times will have used information to which it was not entitled.

The harm to the Appellants if this information is wrongly released is significant and irreparable. The Appellants were the subject of accusations of an embarrassing nature. They were not accorded the

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

benefit of any due process in the resolution of those accusations. They were simply informed of the accusation and the Districts' conclusions after the fact. The Districts placed its information concerning the accusations in their personnel files, with no opportunity for the teachers to meaningfully respond, appeal, or seek other relief. Now, the trial court has, from multiple layers of hearsay, made a substantive ruling on whether the teachers, in fact, engaged in such conduct.

This information and characterization of the contents of their personnel file, released in conjunction with their personally identifying information, will be tremendously embarrassing to them on a personal and professional level. The trial court's erroneous substantive determinations about their conduct could adversely affect their professional standing and their ability to earn a living.

Because the fruits of the Appellants' appeal would be destroyed if the stay is not granted, they need only show that their appeal is not completely devoid of merit. This they can do. The Seattle Times seeks their personally identifying information, including their names, under Washington's Public Disclosure Act. The Act exempts from disclosure

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.

RCW 42.17.310(1)(b). The right to privacy is invaded or violated "only if disclosure of information about the person: (1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.17.255.

In Tacoma Pub. Library v. Woessner, 90 Wn. App. 205, 951 P.2d 357 (1998), 972 P.2d 932 (1998), Division Two held that the release of employee names and identification numbers *together with* the employees' job classification, salary and benefits information would be highly offensive to a reasonable person. As described above in this case, the release of the Appellants' names and other personally identifying information in conjunction with the records concerning the Districts' investigations of alleged misconduct would be highly offensive. At the very least, it is fairly debatable that it would be highly offensive to a reasonable person.

The Appellants can also demonstrate that debatable issues exist as to whether the public has a legitimate interest in knowing their identities as follows:

Emergency Motion To Stay Enforcement Of Trial Court Decision And For Temporary Restraining Order

Bellevue John Doe #11. The trial court in this case relied exclusively on a Division Two case that set forth the wrong standard for determining whether confidential personnel records should be released. In *Tacoma v. Tacoma News*, 65 Wn. App. 140, 827 P.2d 1094 (1992), the court held in the context of police and DSHS investigative records, that a trial court should make a substantive determination of whether allegations contained in public records are true or false when determining whether the records are of legitimate public concern. In *Tacoma*, the court ruled that unsubstantiated reports of child abuse about a mayoral candidate should not be released under the PDA. *Tacoma*, 65 Wn. App. at 151.

But a trial court cannot and should not be allowed to make a substantive determination of whether allegations are true or false on a sketchy record of multiple layers of inadmissible hearsay contained in a personnel file. This is especially true when the trial court's determination becomes of record and is thus subject to the principles of res judicata and collateral estoppel upon which his accusers can rely in the future. But the trial court did exactly this to conclude that the allegations that Bellevue John Doe #11 touched certain girls on their bottoms, were true, despite the fact that neither the Bellevue Police Department nor the Bellevue School

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

District made the same conclusion or saw fit to take any criminal or disciplinary action against him at all. It is fairly debatable that the trial court used a flawed test to determine whether the disclosure of Bellevue John Doe #11's name, in conjunction with the contents of his personnel file, is a matter of legitimate public interest.

Moreover, the trial court in this case failed to follow its own rule. In this case, the trial court specifically concluded that the identities of employees should not be released if they received only a letter of direction. The court defined a letter of direction as "a letter, memorandum or oral direction, which does not impose punishment, but seeks to guide or direct the employee's future performance." Findings and Conclusion, p. 16. Bellevue John Doe #11 was issued a letter of direction by the Bellevue School District, which imposed no discipline, but rather asked him for his input in changing classroom behavior policies for his protection as well as for the students. He, together with the school district, identified alternate behavior patterns to protect himself and the students. He was not reprimanded or disciplined in any way. Nevertheless, the trial court determined that John Doe's name and all other personally identifiable records about him should be released to the Seattle Times.

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

Under its own reasoning, the trial court erred in ordering the release of Bellevue John Doe #11's information.

Bellevue John Doe #11's identity is also not of legitimate public interest because the conduct was found neither to be criminal nor even, in fact, sexually motivated. The Seattle Times' request related to allegations of sexual misconduct. The trial court in this case did not find that the conduct was sexually motivated. The trial court stated that whether the teacher's alleged touches on the students' bottoms was sexually motivated was at most "arguable." Where there was no finding that John Doe's conduct was sexually motivated, it is outside the scope of the Seattle Times' request and his identity is not of legitimate public concern.

At present, counsel does not have the full trial court record. She therefore does not yet know if it is in the record that John Doe has been retired from teaching for several years. This fact, too, supports the conclusion that his identity is not of legitimate public concern

Seattle John Doe # 6. In this case, an incarcerated offender made an allegation against John Doe #6 claiming that he poked her three times in the breast. The school where the alleged incident took place, CPS and the Juvenile Detention Center all investigated the allegation. John Doe #6

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

was interviewed on several occasions. A statement was obtained from the alleged victim. Three of her friends who allegedly witnessed the incident were interviewed as well. Ricardo Cruz, an attorney and experienced Human Resources administrator, re-interviewed John Doe #6. After completing this investigation, the claims of sexual misconduct were found to be unsubstantiated.

No discipline was imposed upon John Doe #6. Because John Doe #6 had acknowledged touching the alleged victim on her back or shoulder to get her attention, the school found that he should not have used this method to get this student's attention and stated that it may be advisable to offer John Doe #6 some training in dealing with behavior disordered children.

In a letter dated September 7, 1993, John Doe #6 informed Mr. Cruz that he had taken classes in handling at-risk students. In this letter, John Doe #6 stated that he no longer wished to teach at the Juvenile Detention Center but that he would like to continue substitute teaching at the Interagency Schools. In a reply letter from Mr. Cruz dated September 13, 1993, Mr. Cruz reaffirmed his findings that there was insufficient evidence to prove the allegations of sexual misconduct but cautioned him

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

that his methods of getting his students' attention were not appropriate in that particular school setting. Specifically, Mr. Cruz stated "you are *cautioned* that further incidents of this nature could lead to disciplinary action, including removal from the substitute roster." (emphasis added) Such action constitutes at most a letter of direction.

The Seattle Times now seeks to publish this information in conjunction with personal identification about John Doe #6. It is a debatable issue that the release of this information would be highly offensive to a reasonable person.

It is also a debatable issue that the name and other personally identifiable information of John Doe #6 would be of any legitimate public concern. Finding of Fact #10 states that release under the Public Disclosure Act of records relating to a public employer's guidance and direction to an employee in a "letter of direction" would harm the public interest in efficient government by interfering with the employer's ability to give candid advice and direction to its employees.

In a review of the investigative records of John Doe #6, at most he was issued a letter of direction. John Doe #6 was cautioned not to use his attention getting techniques again in that particular school setting. John

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

Doe #6 was offered to take classes on dealing with at-risk students, which he completed and was commended for this action by Ricardo Cruz. The decision for John Doe #6 not to return to teaching in that school was his own voluntary choice and was not as a result of discipline stemming from the investigation into the student's allegations. Despite the record established at the trial court that there was no substantiation of sexual misconduct and that the investigators merely cautioned John Doe #6 about his attention-getting methods (which amounts to at most a letter of direction) the trial court determined that John Doe's name and all other personally identifiable records about him should be released to the Seattle times. Such a ruling is in direct contravention of the trial court's finding of Fact, No. 10 which states that the release of teacher's names who were issued a letter of direction would harm the public interest in "vital government functions because it would chill employer-employee communications. . ."

Additionally, the trial court ruled in contravention of its own conclusions of law. In Conclusion of Law #11, the court distinguished between a "letter of direction" and "a letter of discipline." The court stated, "By a 'letter of direction' this court means a letter, memorandum or

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

oral direction which does not impose punishment, but seeks to guide or direct the employee's future performance. By 'letter of reprimand' this court means a letter or memorandum finding that the employee *had engaged in significant misconduct and either formally reprimanding the employee or imposing restrictions on the employee's future assignments or duties.*" (emphasis added)

The investigation of John Doe #6 did not result in a finding that he engaged in significant misconduct. Neither was he formally reprimanded nor were any restrictions imposed on his future assignments or duties as he elected not to teach at that particular school. Yet the trial court found that John Doe #6 was issued more than a letter of direction. Such a conclusion is in contravention of the trial court's legal standards as set forth in Conclusion of Law #11. Therefore, it is a debatable issue whether John Doe #6 was issued more than a letter of direction.

John Doe #6's identity is also not of legitimate public concern because the allegations of sexual misconduct were found to be unsubstantiated after a thorough investigation and the conduct was not in any way sexually motivated. Because John Doe's conduct was not

sexually motivated and the allegations were found to be unsubstantiated, his identity is not of any legitimate public concern.

Finally, John Doe's identity is not of any legitimate public concern because he has been retired from teaching for nine years and is no longer an employee in any school district. It is a debatable issue that the public has any legitimate interest in knowing his identity in conjunction with the investigation of this particular isolated incident.

Disclosure of the identity of John Doe #6 pending appellate review would be highly offensive to him by causing irreparable harm to his reputation and is not of any legitimate public interest as the allegations revealed no misconduct and no discipline was imposed on him. Furthermore, the public interest would be harmed by such disclosure as it would substantially and irreparably damage vital governmental functions.

Seattle John Doe #9. The trial court inferred, from a July 6, 1995 letter in the School District's file, that the allegations against this teacher were "well founded" (Finding of Fact No. 38); yet there is nothing in the record which shows (a) that the allegations occurred or were investigated during the ten-year period set forth in the newspaper's public disclosure request, or (b) that the court considered the fact that, regardless

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

of the age of the allegations, this teacher was no longer certificated and employed in public education

Seattle John Doe #13. The investigation of John Doe #13 was triggered by allegations that when the girls' basketball team took a trip to Astoria, Oregon that he had taken some of the girls, one at a time, to the beach, without other adults present, asked personal, non-sexual questions of the girls, and requested that one of the girls ride in his car on the trip to keep his six (6) year old son, who was a passenger, company. During the course of its investigation, the Seattle School District interviewed the female basketball players who never reported any sex-based touching nor sexually motivated comments by John Doe #13.

Upon conclusion of its investigation, the Seattle School District determined that the allegations were substantiated, that John Doe #13 had exercised poor judgment, but that the conduct did not rise to the level of sexual misconduct. Accordingly, the Seattle School District did not issue a letter of reprimand to John Doe #13, but, rather, issued a letter of direction. *See* Declaration of Margo Holland dated March 20, 2003. The letter of direction requested that the teacher enroll in a class on proper interaction with female students, attend a one (1) hour training session

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

with the affirmative action office, and submit proof of completion of the course work. John Doe #13 fully complied with the provisions of the letter of direction. The Seattle Times now seeks to publish this information, edited at its discretion, in conjunction with his name and other personally identifying information about him. It is fairly debatable that the release of this information would be highly offensive to a reasonable person.

Similarly, it is fairly debatable that the name and other personally identifiable information of Seattle John Doe #13 is not of legitimate public concern. The trial court specifically found in Finding of Fact No. 10, that release under the Public Disclosure Act of records relating to a public employers' guidance and direction to an employee was not in the public interest:

[Releasing] a letter of direction would harm the public interest in efficient government by interfering with the employer's ability to give candid advice and direction to its employees. It would substantially and irreparably damage vital government functions because it would chill employer/employee communications by making all written communications between employer and employee subject to disclosure.

Findings of Fact, No. 10 at 4. Seattle John Doe #13 was issued a letter of direction by the Seattle School District for his protection and that of the
Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

students. He, together with the school district, identified training which would assist him and his students. He was not reprimanded or disciplined in any way. Nevertheless, the trial court determined that John Doe's name and all other personally identifiable records about him should be released to the Seattle Times in direct contravention of its Finding of Fact, No. 10. Under its own reasoning, the trial court erred in ordering the release of Seattle John Doe #13's information.

John Doe's identity is also not of legitimate public interest because the conduct was never found to be sexually motivated. Indeed, the trial court itself found itself that the conduct was not sexually motivated. Since there is no finding that John Doe's conduct was even sexually motivated, his identity is not of any legitimate public concern. Thus, it is fairly debatable that the public has no legitimate interest in knowing his identity in conjunction with the investigation in his personnel file and such disclosure would be highly offensive to a reasonable person.

V. CONCLUSION

The Appellants have an emergent need for a stay of enforcement of the trial court's order and enjoining the Times from publishing any personally identifiable information about the Appellants pending appeal.

Emergency Motion To Stay Enforcement Of Trial Court Decision And For
Temporary Restraining Order

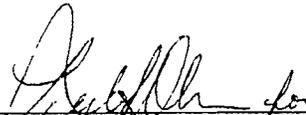
Without it, their appeal is moot and their damage is irreparable. Their issues on appeal are fairly debatable. They respectfully request that the Court grant their motion.

RESPECTFULLY SUBMITTED THIS 9th day of May, 2003.



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

Olson & Olson, PLLC
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
(206) 625-0085



Steven P. Moen, WSBA #1143
Attorney for Plaintiff,
Seattle John Doe #9

Shafer, Moen, & Bryan, PS
1325 - 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 624-7460



David T. Spicer, WSBA #11188
Samantha Arango
Attorney for Plaintiff,
Seattle John Doe #6

Malone, Galvin, Spicer, PS
10202 - 5th Avenue NE, Suite 201
Seattle, WA 98125
(206) 527-0333

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

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,)

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,)

Respondents,)

and)

SEATTLE TIMES COMPANY,)

Respondent Intervenor.)
_____)

No. 52304-0-1

COMMISSIONER'S RULING
DENYING EMERGENCY
MOTION FOR STAY

Four teachers affected by a trial court order allowing the disclosure of information by their school districts to the Seattle Times (Times) have moved for a stay pending appeal. The motion is denied.

FACTS

Beginning in November 2002, the Times made public disclosure act requests to school districts throughout the State and to the Office of the Superintendent of Public Instruction for information regarding current and former

teachers accused of, investigated, or disciplined for sexual misconduct within the last 10 years. The Bellevue, Seattle, and Federal Way School Districts provided information but withheld identifying information without claiming any exemption. These districts notified the affected individuals and some of them filed suit against the districts to enjoin the release of the information. The trial court granted a motion by the Times to intervene.

The court then reviewed the information as it related to each of the 32 affected teachers in these three districts. It ordered a release as to 17 of them and enjoined the release of information as to the other 15. Of the 17 teachers whose information is to be released, 4 filed a notice of appeal and moved on an emergency basis for a stay of the trial court order. These individuals object to the release or publication of their names or teacher identification numbers in conjunction with the details of the complaints and the action taken by the school district as a result of the complaints. As only 4 of the teachers have thus far appealed, and as only those 4 have moved for a stay, this ruling does not address any aspect of the other 28 cases.¹

In making its individualized determinations, the trial court utilized a framework apparently urged by the teachers. It inquired into the allegations and investigation done in each case and barred the release by the school districts of information regarding allegations found to false, unfounded, or unsubstantiated (7 cases). Based on evidence presented by the teachers, it found a basis to

¹ The time to appeal has not yet run so it is still possible that other individuals and/or the school districts may appeal. The Times may also still file a cross appeal.

distinguish between cases where the district's response amounted to a reprimand or more serious action and cases where the district's response amounted to a letter of direction, barring the release of information in the latter (8 cases). In the 17 cases where the court ordered a release of information, 3 were decided on the ground that counsel could not prove representation of the affected individual and the other 14 were decided on the ground that the allegations were founded and/or the district took action more serious than a letter of direction.

The four affected teachers are Bellevue School District John Doe 11 (JD 11), and Seattle School District John Does 6, 9, and 13 (JD 6, 9, and 13 respectively).

As to JD 11, the trial court found:

The complaints were thoroughly investigated by the Bellevue Police Department. The police did not find a basis for the filing of criminal charges but documented a pattern of inappropriate behavior which was arguably sexually motivated. There is a founded basis for the complaint and the allegations are more than trivial.

As to JD 6, the trial court found:

While the District's investigation could not substantiate the allegation that he had poked a female student in her breast three times, he admitted that he did poke students to get their attention and got in a student's face for the same reason. The District found this was inappropriate behavior, particularly when dealing with the student population being held in detention. John Doe #6 was removed from the list of substitutes to be used at the detention facility and therefore this incident involved more than a mere letter of direction.

As to JD 9, the trial court found:

The investigation revealed that the allegations as to John Doe #9 were well founded and a disciplinary letter dated July 6, 1995 was issued to him.

As to JD 13, the trial court found:

The allegations against John Doe #13 were investigated by the District in a nine page report dated March 20, 1997 and followed up in a four page report dated April 2, 1997. The District reprimanded John Doe #13 in a letter from Tom Weeks dated August 19, 1997. John Doe #13 admitted that he had taken girls (from his basketball team), one at a time, to the beach without any other adults along when the team took a trip to Astoria, Oregon. He admitted that he asked personal questions of girls on his teams and repeatedly asked to have one of the girls on his team ride in his car on the trip. Mr. Weeks' letter directed him to contact the Employee Assistance Program to enroll in a class or workshop on how to properly interact with female students, have a one hour training session with the affirmative action office and submit proof of completion of required course work. The District found many of the allegations to be well founded and reprimanded John Doe #13.

Each of the four teachers requests a stay. The teachers additionally request that the Times be barred from publishing their names or other identifying information.

RULE GOVERNING STAYS

The appellate court "has authority" to grant a stay pending appeal. RAP 8.1(b)(3). The language of the rule clearly implies that there is no right to a stay and that granting a stay is a matter of discretion. In deciding whether or not to grant a stay, the court will consider whether there are debatable issues on appeal and compare the injury that would be suffered by the moving party if a stay is not imposed with the injury that would be suffered by the non moving party if a stay is imposed. RAP 8.1(b)(3).

POSITIONS OF THE PARTIES

Appellants allege there are four debatable issues: (1) whether the release of this information would be highly offensive, (2) whether the information is of a legitimate public concern, (3) whether the trial court correctly characterized the district's action in these four cases as a reprimand, and (4) whether the trial court failed to follow the standards it set out for determining what information would or would not be released. Appellants allege the harm they will suffer is the potential for damage to their reputations.

The Times contends that the Supreme Court has determined that allegations of sexual misconduct by teachers is a matter of legitimate public concern and that there is no basis for disputing the trial court's factual determinations. The Times alleges that a stay is not consistent with the intent of the public disclosure act and that it will be harmed by any delay in its ability to use information legitimately disclosed pursuant to the act.²

The school districts indicated orally that they support the motion for a stay but have not submitted briefing or otherwise argued the matter.

DECISION

Appellants have requested an order barring the Times from publishing their names or other identifying information. Appellants intend for this bar to extend to information regardless of how the Times obtained it. But the trial court carefully distinguished between information that became available to the Times

² The Times contends that identifying information is necessary because teachers move to other districts and reoffend.

as a result of this public disclosure act request and information it may have acquired in some other way. It issued a protective order limited to information that came to light as a result of the request. It did not purport in any way to rule as to how the Times could use information it may have acquired other than through the public disclosure act request. Counsel could cite no authority for going beyond this limitation and to the extent appellants request relief not addressed by the trial court or which extends beyond the information at issue in this suit, their request is denied.

Appellants list four potential issues on appeal. But their arguments boil down to a dispute about the trial court's factual determinations. In essence, they each challenge the determination that the allegations have been found to be "true" or that the districts took action more serious than a letter of reprimand.³

There may be some disagreement about the trial court's methodology but for the purpose of this motion, it is not really in dispute.

There is no dispute that the information relating to these 4 individuals must be disclosed under the public disclosure act unless it is protected by an exception.⁴ The only exception at issue is RCW 42.17.310(1)(b) which allows the withholding of "[p]ersonal information in files maintained for employees ... to the extent that disclosure would violate their right to privacy". Privacy is invaded only if the disclosure would be "highly offensive" and "is not of legitimate concern to

³ JD 9 raised an issue as to whether the allegations fell within the 10 year window of the Seattle Times request but offered no evidence that it did not. As the district's action clearly fell within the relevant time frame, JD 9 has not at this point demonstrated any debatable issue and this issue will not be further addressed.

⁴ The public records act is to be liberally interpreted and its exemptions are to be narrowly construed. RCW 42.17.251.

the public". RCW 42.17.255. The court found that the public has a concern in learning about investigations performed by school districts of sexual misconduct complaints against teachers. This is consistent with Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 791 P.2d 526 (1990). It held that information pertaining to allegations determined to be false, unsubstantiated, or unfounded was not of legitimate concern to the public within the meaning of the public disclosure act. This is consistent with Tacoma v. Tacoma News, Inc., 65 Wn. App. 140, 827 P.2d 1094 (1992).⁵ It made a determination that releasing information where the district did no more than issue a letter of direction would harm the public interest by interfering with the employer's ability to give candid advice and direction to its employees. This is consistent with RCW 42.17.330.

Appellants contend there is an issue about whether the release of the information would be "highly offensive". But the trial court decided this issue in their favor. Otherwise it would not have needed to inquire into whether the release was a matter of public interest. Appellants contend there is an issue about whether the release of this information is of legitimate concern to the public. This point can hardly be argued. The Supreme Court has said it is, the trial court found it was, and appellants have presented no argument suggesting it is not. It seems self evident that how the public school districts investigate and resolve allegations of sexual misconduct involving teachers and students is a matter of legitimate public concern. The first two issues are not debatable.

⁵ The Times does not believe that Tacoma v. Tacoma News remains good law but it is not necessary to address this issue for the purpose of this stay motion.

Issue 3 is a factual dispute. Did the trial court correctly characterize the districts' actions? Appellants quibble about terminology but the trial court clearly realized that whether an action is a "reprimand" or a "direction" did not depend solely on the words that may or may not have been included in formal correspondence. There is support in the record for its determination in each of these four cases. This issue may be "debatable" but only just barely so. Issue 4 depends on the factual determinations made as to the district's actions. The trial court failed to follow its own methodology only if its factual determinations are incorrect. Appellants four stated issues thus really amount to a factual challenge.

At oral argument, appellants raised another concern. At its root is the contention that the trial court has decided the allegations made in these cases are "true" without providing appellants their due process rights to contest them. But the trial court has not adjudicated the underlying allegations. Using Tacoma v. Tacoma News as its guide, the court looked at the underlying allegations, investigations, results and actions to determine whether the information disclosed was reliable enough to be of legitimate concern to the public and thus subject to disclosure under the public disclosure act. Determining whether the underlying allegations are true or not is neither the focus nor the result of this action.

Debatability is not a particularly high standard. But the issues appellants urge seem to involve only factual disputes. There is evidence in the record supporting the trial court's factual determinations. If these issues are debatable, they are not very persuasive.

This court must also consider the harms each side might suffer from granting or denying a stay. Appellants will lose the fruits of their appeal if a stay is not granted. Conversely, any delay will undermine the purposes of the public disclosure act. Even a cursory reading of public disclosure act cases shows it is common for a stay to be granted pending appeal but that does not mean a stay should be granted in every case.

Considering the thoroughness with which the trial court approached this matter, the relative weaknesses of the issues appellants pose for the appeal, and the strong public interest in timely disclosure under the public disclosure act, this does not appear to be an appropriate case to exercise the appellate court's discretion to stay the effect of a trial court order. The motion for a stay shall accordingly be denied.

Now, therefore, it is hereby

ORDERED that the motion for a stay is denied.

Done this 22ND day of May, 2003.



Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF OHIO
2003 MAY 22 PM 3:47

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

APPENDIX C
PPS. 1-4

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

June 19, 2003

Tyler K. Firkins
Vansiclen Stocks & Firkins
721 45th St NE
Auburn, WA, 98002

David Tennant Spicer ✓
Malone Galvin Spicer PS
10202 5th Ave NE Ste 201
Seattle, WA, 98125-7472

Michael W Hoge
Perkins Coie
1201 3rd Ave Ste 4800
Seattle, WA, 98101-3099

Samantha Marion Arango
Malone Galvin & Spicer
10202 5th Ave NE Ste 201
Seattle, WA, 98125

Sean M Phelan
Frank Freed Roberts Subit & Thomas
705 2nd Ave., Ste. 1200
Seattle, WA 98104-1798

Joyce L. Thomas
Frank Freed Roberts Subit & Thomas
705 2nd Ave., Ste. 1200
Seattle, WA 98104-1798

John Michael Cerqui
Seattle Public Schools/ Gen Cnsl Office
MSc 32-151
PO Box 34165
Seattle, WA, 98124-1165

Steve Paul Moen
Shafer Moen & Bryan PS
1325 4th Ave Ste 600
Seattle, WA, 98101-2539

Lester Porter
Dionne & Rorick
999 3rd Ave Ste 2550
Seattle, WA, 98104-4001

Michael John Killeen
Davis Wright Tremaine LLP
1501 4th Ave Ste 2600
Seattle, WA, 98101-1688

Jeffrey Ganson
Dionne & Rorick
999 3rd Ave Ste 2550
Seattle, WA, 98104-4001

Michele Lynn Earl-Hubbard
Davis Wright Tremaine LLP
1501 4th Ave Ste 2600
Seattle, WA, 98101-1688

Leslie Jean Olson
Olson & Olson PLLC
1601 5th Ave Ste 2200
Seattle, WA, 98101-1625

APPENDIX C
P. 2

Page 2
No. 52304-0-1

JUN 20 2003

MALONE GALVIN SPICER

CASE #: 52304-0-1
BELLEVUE JOHN DOES 11, ET AL., APPS VS BELLEVUE SCHOOL DISTRICT 405
ET AL, RESPS

Counsel:

Please find enclosed a copy of the Order Granting Motion to Modify the Commissioner's ruling entered in the above case today.

The order will become final unless counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

enclosure

hek

APPENDIX C
p. 3

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

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,)

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,)

Respondents,)

and)

SEATTLE TIMES COMPANY,)

Respondent Intervenor.)

No. 52304-0-1

ORDER GRANTING
MOTION TO MODIFY

RECEIVED
COURT OF APPEALS
DIVISION ONE
FEB 10 2005

Appellants Seattle John Does #6, #9 and #13 and Bellevue John Doe #11
have moved to modify the commissioner's May 22, 2003 ruling denying their
motion for a stay. We have considered the motions under RAP 17.7 and have
determined that they should be granted.

Now, therefore, it is hereby

ORDERED that the motion to modify is granted; and it is further

ORDERED that the portion of the trial court order requiring disclosure as
to the four appellants is stayed pending appeal.

APPENDIX C
P. 4

Done this 19th day of June, 2003.

[Handwritten signature]

Colman, J.

Ajid, J.

FILED
COURT OF APPEALS DIV. 3
2003 JUN 19 PM 3:44