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CLERK IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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

Petitioners,

vs.

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

THE SEATTLE TIMES COMPANY

Respondents.

PETITIONERS
SUPPLEMENTAL BRIEF OF APPELLANTS BELLEVUE JOHN DOE
#11 AND SEATTLE JOHN DOE #6

Leslie J. Olson
Olson & Olson, PLLC
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101
T) 206-625-0085
F) 206-625-0176

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II. ISSUES PRESENTED

1. Does the Chapter 42.56 RCW provide for the redaction of individual identities from unsubstantiated allegations of misconduct?

2. In the alternative, is RCW 42.56.050 unconstitutional as applied to individual identities linked to unsubstantiated allegations of misconduct?

III. STATEMENT OF THE CASE

The statement of the case has been set forth in the briefs of the petitioners to Division One of the Court of Appeals. Bellevue John Doe #11 and Seattle John Doe #6 rely primarily on those briefs for their statements of the case.

In short, The Seattle Times sought records of allegations of sexual misconduct in the Seattle, Bellevue and Federal Way School Districts. The records were released to them with the identities of the complaining students and the teachers redacted.

The individual teachers sued for declaratory judgment that the records should be produced in a redacted form. The trial court concluded that records should not be redacted, "When the investigation of the allegations is inadequate, the allegations are deemed substantiated, or the employee is disciplined with what amounts to more than a letter of

direction." *John Does v. Bellevue School Dist.*, 129 Wn.App. 832, 841, 120 P.3d 616 (2005).

On appeal, Division One articulated a more stringent rule:

School districts must disclose the names of teachers who have been accused of misconduct of a sexual nature, even when the districts have concluded after investigation that the allegations are unsubstantiated or too minor to justify discipline. The public is legitimately concerned with knowing the names of the teachers in order to protect students and monitor the performance of the districts. The privacy exemption in the public records act (Act). RCW 42.17.250-.348) permits withholding the teacher's identity only if the accusation of misconduct is patently false.

Bellevue John Does, 129 Wn.App. at 838.

This Court accepted review on the issues articulated in section II above. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #400*, 149 P.3d 376 (2007).

IV. DISCUSSION

A. Chapter 42.56 RCW Does Not Authorize Disclosure of Identities in Conjunction with Unsubstantiated Allegations of Sexual Misconduct.

The crux of the issue in this case is whether allegations, which, over a period of time, have not been established as true, justify disclosure of the individual identities, who are the target of those allegations.

Chapter 42.56 RCW was enacted to provide a mechanism by which the public could monitor the honesty and impartiality of government conduct. Cowles Publishing Company v. The State Patrol, 109 Wn.2d 712, 719, 748 P.2d 597 (1988); In re Rosier, 105 Wn.2d 606, 611, 717 P.2d 1353 (1986). Its focus remains steadfastly on the conduct of government; it does not authorize the scrutiny of private facts about individuals. In re Rosier, 105 Wn.2d at 611.

For example, information about an employee's position, salary and length of service relate neither to conduct of government nor to performance of any governmental function. Dawson v. Daly, 120 Wn.2d 782, 789, 845 P.2d 995 (1997). Similarly, the Act does not authorize disclosure of employee performance evaluations where there are no specific instances of misconduct. Brown v. Seattle Public Schools, 71 Wn. App. 613, 860 P.2d 1059 (1993)

By contrast, an employee's actual misconduct on the job is a governmental function and subject to public inspection. Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 714, 726, 748 P.2d 597 (1988). (Identities of police officers disclosed in conjunction with sustained complaints against them).

But in this case, Washington courts have not conclusively resolved how the Act applies to individual identities in conjunction with unsubstantiated allegations of misconduct. Division One reasoned that the public has no interest in false information, but then held that the identities of individuals must be disclosed in conjunction with unsubstantiated allegations unless the allegations were “patently false.” *John Does*, 129 Wn.App. at 838.

In so doing, the court implicitly presumed that the truth of unsubstantiated allegations of misconduct are true. In reaching its decision, Division One relied in part on its prior holding in *Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1987), *review denied*, 110 Wn.2d 1014 (1988). In *Hudgens*, the unredacted records of a woman’s arrest for drunk driving and subsequent strip search were subject to disclosure. *Hudgens*, 49 Wn. App. at 846.

Division One’s reliance on *Hudgens* is misplaced. Aside from the fact that no party argued the offensive nature of the disclosure, the material distinction in this case is that probable cause existed to arrest the woman. Probable cause is the:

Existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime.

State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981) (citations omitted). See also, *Black's Law Dictionary*, p. 1365 (1951) (Probable Cause. Reasonable cause. An apparent state of facts found to exist upon reasonable inquiry . . . which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed. *Brand v. Hinchman*, 68 Mich. 590, 36 N.W. 664.).

Unsubstantiated allegations of misconduct do not rise to the level of probable cause. To be substantiated, an allegation must have been established as truth or verified by true or competent evidence. *Black's Law Dictionary*. P. 1597. (1951).

In *National Archives & Records Admin v. Favish*, 541 U.S. 157, 158 L.Ed 2d 319 (2004) the Supreme Court reversed the Ninth Circuit to hold that allegations of governmental misconduct are insufficient to warrant disclosure of records. (Records requester not entitled to records regarding investigation into suicide of presidential aide).

The Court reiterated the long-standing rule that courts accord to a government the presumption of legitimacy in its conduct. *Favish*, 158 L.Ed 2d at 319. The Court cautioned that, "Allegations of government misconduct are "easy to allege and hard to disprove," *Favish*, 158 L.Ed

2d at 335, citing Crawford-El v. Britton, 523 U.S. 574, 585, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998).

Recognizing its responsibility to protect individuals from the “uncontrolled release of information compiled through the power of the state,” the Court held that any requester alleging government misconduct bears the burden of producing some evidence to support the allegations of misconduct before disclosure of records is justified. *Favish*, 158 L.Ed 2d at 335. The Court emphasized that “courts must insist on a meaningful evidentiary showing.” *Favish*, 158 L.Ed 2d at 335.

Division One erroneously made the opposite presumption. It presumed that unsubstantiated allegations of misconduct are true and then placed the burden on the targeted individuals to prove that they were patently false. In so doing, it erred. Consistent with the Supreme Court and established tenets of our system of law, the burden properly rests with the records requester to show some evidence that allegations of governmental misconduct are true.

Until the requester makes an evidentiary showing that previously unsubstantiated allegations have some truth, the requester is not entitled examine the individuals who are the subject of those unsubstantiated

allegations. Redaction of individual names is the appropriate method by which to release governmental records and protect individual identities.

Because neither the trial court nor the Court of Appeals in this case correctly applied the law or the burdens of proof, remand is required to determine the proper redaction of records in this case.

B. RCW 42.56.050 is unconstitutional as applied to the individuals in this case because it does not provide the minimum protections afforded under the federal constitutional right to privacy.¹

Under the guidance articulated by the United States Supreme Court in *Favish*, this Court may resolve the issue in this case on the statutory grounds articulated in Section A *infra*, and need not engage in constitutional analysis. In the event that this Court determines that disclosure under the Act is required, the following analysis demonstrates the unconstitutionality of RCW 42.56.050 as applied in this case.

1) *Washington Should Follow Ninth Circuit Test of Constitutionality.* Washington state courts have paralleled the Ninth Circuit rule regarding the constitutional right of informational privacy in the past. But in the intervening years, the Ninth Circuit has refined its rule

¹Appellants do not advance a facial challenge to RCW 42.56.050 because the statute has been constitutionally applied in the past (*see Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993)) and therefore, Appellants cannot show that no set of circumstances exists in which the statute can be constitutionally applied. *See State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005).

and Washington State has not yet had the opportunity to do the same. This case presents that opportunity.

For more than 100 years, the United States Supreme Court has recognized an individual's right of personal privacy. *Eastwood v. Dep't. of Corrections*, 846 F.2d 627, 630 (10th Cir. 1988), *citing* *Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). This right actually involves two different interests: 1) an individual's interest in independence in making certain kinds of important decisions, and 2) an individual's interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). (footnotes omitted).

Because the U. S. Supreme Court has not defined the scope of the informational right of privacy, each of the Circuits has fashioned its own framework within which constitutional privacy interests are considered. *See, Ferm v. United States Trustee (In re Crawford)*, 194 F.3d 954, 958 (9th Cir. 1999) (*citing* *Doe v. City of New York*, 15 F.3d at 267; *Fadjo v. Coon*, 633 F.2d 1172, 1175-76 (5th Cir. 1981); *United States v. Westinghouse*, 638 F.2d 570, 577 (3d Cir. 1980)). The Circuits have uniformly concluded that the Constitutional right of informational privacy requires a court to balance the invasion of privacy at stake against the

competing public interest in its disclosure. See e.g. *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir 1995) (If an individual has a legitimate expectation of confidentiality, then 'disclosure of such information must advance a compelling state interest which, in addition, must be accomplished in the least intrusive manner.');

Flaskamp v. Dearborn Pub. Schs, 385 F.3d 935, 945 (6th Cir. 2004). (The interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private.)

In Washington State, the scope of an individual's federal right to informational privacy was first addressed in *Peninsula Counseling Ctr. v. Rahm*, 105 Wn.2d 929, 719 P.2d 926 (1986) in which this Court was asked to consider the constitutionality of a statute which required the reporting of mental health patient names and diagnostic codes to DSHS. This Court reviewed the rules of other jurisdictions and adopted an analytical framework that was consistent with the Ninth Circuit. This Court held that:

While disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, the

disclosure cannot be greater than is reasonably necessary.

Rham, 105 Wn.2d at 935, see *Thorne v. El Segundo*, 726 F.2d 459 (9th Cir. 1983) (Patients' privacy rights not violated because centralized records were kept strictly confidential and included no more than the patient's name and diagnostic code).

This Court revisited and affirmed the privacy analysis in *O'Hartigan v. State Dep't of Pers.*, 118 Wn.2d 111, 821 P.2d 44 (1991) (Polygraph test of law enforcement employment applicant did not violate right of privacy).

But since *O'Hartigan* was decided, the Ninth Circuit has refined the test for informational privacy. In *Planned Parenthood of S. Arizona v. Lawall*, 307 F.3d 783 (9th Cir 2002), the court adopted the multi-factored test of the Third Circuit. In balancing the competing privacy interests of an individual against the State's interest in the information, a court must consider the following factors:

- (1) The type of information requested,
- (2) The potential for harm in any subsequent non-consensual disclosure,
- (3) The adequacy of safeguards to prevent unauthorized disclosure,
- (4) The degree of need for access, and

- (5) Whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Lawall II, 307 F.3d at 790. The court reiterated that the State bears the burden of showing that the disclosure is narrowly tailored to meet a legitimate state interest. *Lawall II*, 307 F.3d at 790. In *Lawall II*, the Ninth Circuit rejected a *facial* challenge to a statute that allowed judges and court administrators to view closed court records relating to a young woman's petition for judicial bypass proceedings under the parental consent statute for abortions. *Lawall II*, 307 F.3d at 787, 789.

The Ninth Circuit reaffirmed the rule in *Tuscon Women's Clinic v. Eden*, 379 F.3d 531, 551 (2004) when it held that an Arizona statute authorizing the collection of unredacted medical records of patients obtaining abortions violated the patients' informational right of privacy, in part because there was no system of safeguards to prevent disclosure of the records to the public.

On the question of the applicability of the Ninth Circuit rule in Washington State, this Court has long held that it "always" gives careful consideration to Ninth Circuit decisions. *Lundborg v. Keystone Shipping Co.*, 138 Wn.2d 658, *dissent at 677*, 981 P.2d 854 (1999), *quoting In re Pers. Restraint of Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993).

Generally, it will follow federal interpretation of federal statutes unless this Court determines that the federal construction is not logical or sound. *Home Ins. Co., v. N.P.R. Co.*, 18 Wn.2d 798, 808, 140 P.2d 798 (1943).

In the context of the federal constitutional right of informational privacy, this Court has paralleled the Ninth Circuit in the past. And the practical prudence of following the Ninth Circuit rule in this case was well articulated by Justice Gerry Alexander in his dissent in *Lundborg*, 138 Wn.2d at 677. That is, a decision by this Court to construe the constitutional right of privacy more narrowly than the Ninth Circuit would encourage forum shoppers objecting to disclosure of records under the WPDA to sue for constitutional protection in federal court rather than state court. This Court should adopt the balancing test enunciated by the Ninth Circuit in *Lawall*.

b) *Definition of Privacy in RCW 42.56.050 Erodes Constitutional Right.*

As stated *infra*, every Circuit court in the United States provides for some balancing of interests when determining the scope of an individual's right of privacy. RCW 42.56.050 abandons those basic constitutional principles by expressly rejecting any balancing of privacy interests. The statute defines privacy as follows:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

RCW 42.56.050. [emphasis added]. The Legislature's use of the word "and" in the statute essentially renders an individual's right of privacy moot; for once a requester demonstrates that the public has a legitimate concern in the records at issue, a court is not permitted to consider the privacy interests of the subject individual at all.

This leaves RCW 42.56.050 uniquely susceptible to constitutional attack. Because RCW 42.56.050 expressly rejects the constitutional safeguards of informational privacy, a court considering the disclosure of records under the Act must engage in a two prong inquiry. First, it must consider the request under the standard set forth in RCW 42.56.050. If a court determines that the records are not subject to disclosure (*see e.g. Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1997)), then no privacy rights have been compromised and the analysis ceases. But if a court determines that a legitimate public concern justifies disclosure of records under the Act, then it must next evaluate the request under the constitutional right of privacy as articulated in *Lawall II*, 307 F.3d at 790.

In this case, both the trial court and the Court of Appeals erroneously determined under RCW 42.56.060 that individual identities should be disclosed in conjunction with unsubstantiated allegations of misconduct. Once they reached that conclusion, both courts were required to test the constitutionality of their decisions to disclose personal identities.

But in compliance with the mandate of RCW 42.56.050, these courts summarily rejected any consideration of the privacy claims of the individuals at issue here. In so doing, they failed utterly to consider the constitutional implications of their decisions.

c) RCW 42.56.050 is Unconstitutional As Applied to Individuals Accused of Unsubstantiated Allegations of Misconduct.

Under *Tuscon Women's Clinic and Lawall, II*, the following factors are considered:

i) *The Type of Information Requested.* At stake in this case is the disclosure of individual identities in conjunction with unsubstantiated allegations of misconduct. While normally, names of employees would not implicate privacy interests, it is not so when those names are disclosed in conjunction with private facts about the employees. *See Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998) (disclosure of employee names not offensive "only if" not coupled

with employee identification numbers, which could then allow public access to private facts about the employees.

Courts across the country agree that unsubstantiated allegations of sexual misconduct are among the most private, embarrassing, and offensive facts that can be known about a person. In *Booth Newspapers, Inc. v. Kalamazoo School District*, 181 Mich. App. 752, 450 N.W.2d 286 (1989), the Michigan Court of Appeals affirmed the redaction of a teacher name in conjunction with misconduct allegations. It stated, "It is hard to imagine anything more embarrassing than allegations pertaining to personal sexuality Of particularly persuasive import is that the requested information pertains only to bare allegations 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 named. *Booth Newspapers*, 181 Mich. App. at 756-57.

The Ninth Circuit, too, has said that sexual harassment carries a unique stigma in our society. *Ortega v. O'Connor*, 146 F.3d 1149, 1165 (9th Cir 1998) (allegations of sexual misconduct properly excluded as evidence at trial where prejudicial nature of claims outweighed probative value of vague stale allegations).

And in *Brandt v. Board of Cooperative Educational Services*, 845 F.2d 416 (2nd Cir. 1988), the court stated that if the stigmatizing allegations against the teacher were made *public*, such disclosure would implicate the teacher's constitutional right to a name clearing hearing. Only because the stigmatizing allegations in the file were removed, did the court dismiss the teacher's request for a name clearing hearing. *Brandt*, 845 F.2d at 418.

A reasonable person could hardly dispute that the nature of the information sought is exceptionally private and sensitive, capable of unjustly perpetrating irreparable harm.

ii) Potential for Harm In Any Subsequent Non-Consensual Disclosure. This factor, too, demonstrates an unparalleled invasion of these individuals' privacy. In *Tuscon Women's Clinic v. Eden*, 379 F.3d 531, 552 (9th Cir. 2004), the court held that an Arizona statute that collected unredacted medical records of patients obtaining abortions violated the patients' informational right of privacy, in part because there was no system of safeguards to prevent disclosure of the records to the public. By contrast, the U.S. Supreme Court upheld disclosure of former President Nixon's papers to Government archivists, with "an unblemished record for discretion" because they would separate the private papers from

the public ones and return the private records to Mr. Nixon. *Nixon v. Gen'l Adm'r of Genl Svcs*, 433 U.S. 425, 53 L.Ed. 2d 867, 903 (1977). In that case, there was no danger of disclosure of personal, private facts to the public.

In this case, there is no limit to the breadth of disclosure proposed by The Seattle Times. The Court is not asked to determine whether private facts can be maintained in a state database for state use. To the contrary, it is the Times' intent to publish these individuals' identities in a newspaper of state-wide circulation, for all the public to see. The extent of the public disclosure in this case could not be greater and the harm of lasting stigma attached to these individuals could not be more assured.

iii) The adequacy of safeguards to prevent unauthorized disclosure. In *Tuscon Women*, the statute was unclear as to whether it provided for civil or criminal penalties if the State made the identities of patients public. *Tuscon Women at 552*. On that basis, the Court held that the statute was unconstitutional. In this case, safeguards regarding the use of the information do not exist.

iv) The degree of need for access. In *Tuscon Women's Clinic*, the Ninth Circuit concluded that the redacted records

could ensure reporting compliance. The identities of the patients did not further the stated purpose of the State. *Tuscon Women at 552-53.*

In this case, the Times seeks records of sexual misconduct allegations from the school districts for the purpose of:

- a) assessing misconduct allegations and investigations;
- b) determining how schools respond to the complaints;
and
- c) exposing sexual abuse of students in schools

The school districts have disclosed to The Times all of the files and records related to allegations of misconduct. The Times has before it all the information it needs to learn of the extent of the issue in the schools, to assess the allegations made, and to review how the school districts' responded to the complaints. The identities of the individuals who are the subject of the complaints will not appreciably further the stated purposes of the Times.

v) Express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. The purpose of Washington's Public Disclosure Act is to monitor the operation of government in a manner that does not impede the efficient administration of government or invade the privacy of individuals. *RCW 42.17.010(11)*. To that end, this Court has recognized the public's

legitimate interest in learning of instances of known sexual misconduct in schools. *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 791 P.2d 526 (1990).

These purposes are served by the disclosure of all of the records requested by The Times, with only the limited redacting necessary to protect the privacy of individual identities contained in those records. On balance, the extraordinary scope of the disclosure requested in this case does not withstand constitutional muster when the invasive nature of the information requested is balanced with the incremental usefulness of individual identities in assessing how school districts respond to allegations of sexual misconduct.

vi) Disclosure must be narrowly tailored. Finally, even information that is otherwise disclosable must only be made available in the narrowest manner possible to achieve the purposes of the Act. The request in this case is not that the disclosure be made to the parents of children in the subject schools. It is not that the records be made available to other governmental entities. It is not limited to currently working teachers. A single requester is not asking for the information on behalf of him/herself. Instead, the contemplated disclosure

is the broadest, most comprehensive disclosure possible of current and retired teacher identities in publication of a state-wide public newspaper.

The scope of the potential disclosure in this case cannot be justified when a narrower disclosure, if any disclosure is required, would surely serve the purposes of the Act (i.e. notices to the parents of children attending the schools at issue, *in camera* review of records to confirm no danger of school hopping, etc.).

Disclosure of the identities of individuals who are the subject of unsubstantiated allegations of misconduct would violate their constitutional right of informational privacy. To the extent that RCW 42.56.050 mandates disclosure, it is unconstitutional.

V. CONCLUSION

Governmental conduct is accorded a presumption of legitimacy. Identities of individuals are not subject to disclosure in conjunction with unsubstantiated allegations of misconduct. The burden rests with the requester to produce evidence that the allegations of misconduct are verified before disclosure is justified.

The disclosure requested in this case could not be broader or more invasive. The incremental usefulness of individuals' identities does not outweigh the invasion of privacy under the federal constitution and the

breadth of disclosure requested is not the most narrow disclosure possible to achieve the purposes of the Act. Disclosure of identities in conjunction with unsubstantiated allegations of misconduct is unconstitutional. The Court of Appeals and the trial court should be reversed and the cause remanded for further proceedings consistent with these rules and the United States Constitution.

RESPECTFULLY SUBMITTED THIS 9th day of February, 2007.



Leslie J. Olson, WSBA #30870
Attorney for Appellants,
Bellevue John Doe #11
Seattle John Doe #6

FILED AS ATTACHMENT
TO E-MAIL