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NO. 78603-8

IN THE SUPREME COURT
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BELLEVUE JOHN DOE 1-11, FEDERAL WAY JOHN DOES 2-5,
JANE DOES 1-2, SEATTLE JOHN DOES 2-6, 8-12 AND JOHN DOE,

Petitioners,

v.

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

Respondents; AND

THE SEATTLE TIMES COMPANY,

Respondent.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE
WASHINGTON EDUCATION ASSOCIATION
IN SUPPORT OF
PETITIONERS BELLEVUE JOHN DOES 1, 2, 3, 4, 6, 7 and 9,
FEDERAL WAY JOHN DOES 2 and 3 and
SEATTLE JOHN DOES 3, 5 and 10

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ORIGINAL

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I. INTRODUCTION

The Washington Education Association (WEA) files this brief as *amicus curiae* in support of Bellevue John Does 1, 2, 3, 4, 6, 7, and 9, Federal Way John Does 2 and 3 and Seattle John Does 3, 5 and 10 in their appeal of *Bellevue John Does 1-11 v. Bellevue School District*, 129 Wn. App. 832, 120 P.3d 616 (2005), hereinafter referred to as *Does*.

This case concerns to what extent the identities of those accused of sexual misconduct must be disclosed pursuant to a request for public records. At all times throughout this litigation, the allegations and all investigative documentation were fully disclosed except that the identities of the persons accused and other personal identities were redacted.

The Court of Appeals protected from disclosure, pursuant to the State's Public Disclosure Law, only the identities of those against whom patently false allegations of misconduct were made. This standard is vague and unworkable, fails to protect the privacy rights of an employee accused of unsubstantiated allegations and promotes gossip and rumor.

This case presents this court with the opportunity to interpret the Public Records Act in a manner that protects the public as well as the privacy rights of those who have been accused of unfounded and unsubstantiated allegations.

II. STATEMENT OF THE CASE

For its statement of the case, Amicus WEA relies upon the facts as presented in: (1) the Prevailing John Doe's Response to the Court of Appeals, pp. 1-16; (2) the Petition for Review filed by Bellevue John Does 1, 2, 3, 4, 6, 7, and 9, Federal Way John Does 2 and 3 and Seattle John Does 3, 5 and 10, pp. 1-3; and (3) the Brief of *Amicus Curiae* Washington Education Association to the Court of Appeals, pp. 2-6.

III. ISSUES FOR REVIEW

The Supreme Court issued a letter limiting review to three issues:

1. Whether allegations of sexual misconduct that remain unsubstantiated are exempt from disclosure under the Public Records Act;
2. Whether letters of direction and associated documents are exempt from disclosure; and,
3. Whether former RCW 42.17.255 (recodified as RCW 42.56.060) is unconstitutional because it defines privacy more restrictively than the constitutional right to privacy.

The statement of the first two issues should be restated so that it is clear that this court is reviewing whether, under the Public Records Act, it is appropriate to order redaction of identities of those accused of allegations and those who received letters of direction. The facts reveal that no documents were withheld from disclosure.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

In this case, the Seattle Times engaged in a fishing expedition to locate all cases in the respondent school districts, whether sustained or dismissed, where allegations of sexual misconduct were made. In response to this extremely broad request for records, the school districts provided all responsive documents with identities deleted. Thereafter, the trial court properly engaged in a careful and detailed review of records *in camera*, took live testimony and issued Findings of Fact and Conclusions of Law ordering that certain identities be disclosed and others remain redacted. CP 100-115. The trial court determined that there was no legitimate public concern in identifying those against whom allegations remained unsubstantiated or false after adequate investigation.

On appeal, the Court of Appeals reversed in part, ordering the disclosure of the identities of teachers who were the subject of unsubstantiated allegations and those who received a letter of direction. The Court of Appeals protected from disclosure only the identities of those against whom “patently false” allegations were made.

The Court of Appeals’ standard is vague and not workable. While Division Two created a workable standard in *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094, *rev. den’d*, 119 Wash.2d

1020, 838 P.2d 692 (1992), Division One applied that standard only to patently false allegations.

This case, involving a fishing expedition for records and identities, is factually distinct from *Tacoma News* which only involved a request for records concerning one known party. However, the trial court here correctly determined that there simply is no legitimate public concern in the name of the accused unless there is a finding of wrongdoing. The alternative is too damaging to a person's career and to the efficient functioning of the schools without a corresponding public benefit. Additionally, the Court of Appeals erred in distinguishing letters of direction from personnel evaluations. These documents are functionally similar, and to preserve their utility, it is imperative to permit redaction of identities in letters of direction.

B. THE TRIAL COURT PROPERLY ALLOWED REDACTION OF IDENTITIES IN CASES WITH UNSUBSTANTIATED ALLEGATIONS.

1. There Is No Legitimate Public Concern In Linking The Teacher's Identity To Unsubstantiated Allegations.

The Legislature expressly permits agencies to redact identities in appropriate cases. RCW 42.56.070¹ authorizes redaction if necessary to prevent an unreasonable invasion of privacy. Division One noted that this

provision anticipates that agencies will exercise judgment that may result in the withholding of names. *Does, supra*, at 854.

RCW 42.56.070(1) provides as follows:

To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record.

The Court of Appeals acknowledged that there are sufficient privacy concerns with regard to “patently false” allegations to require redaction of the names of the falsely accused teachers from the records that concern those teachers. The Court therein properly opined that the public has no legitimate interest in finding out the names of people who have been falsely accused, stating:

Neither the existence of a school district file documenting the investigation, nor the circulation of rumors about who was involved, justifies forcing Seattle John Doe 1 to be publicly linked, without his consent, with these highly offensive allegations that are patently false. ***Public disclosure of his name would serve no interest other than gossip and sensation.***

Does, supra at 853. (Emphasis added).

These same public policy concerns exist with regard to those against whom there has been no finding of having engaged in any sexual misconduct. The circulation of rumors regarding unsubstantiated

¹ This statute was formerly codified as RCW 42.17.260(1).

allegations can have a damaging effect not only on the reputation of the teacher but also on the administration of the schools. While repeating an unsubstantiated allegation does not make it true, this repetition promotes gossip and sensation and has the potential effect of causing others to believe that the allegation is true. Consequently, parents, hearing this gossip, unsupported by any findings, are likely to suddenly feel uneasy about a teacher based on nothing but rumor. This uneasiness can be disruptive in the public school setting and is unnecessary when there has been no finding that anything untoward occurred.

The Court of Appeals justifies its different treatment of those against whom unsubstantiated allegations of misconduct have been made by focusing on what it references as a potentially “troubling pattern:”

If a teacher’s record includes a number of complaints found to be “unsubstantiated,” the pattern is more troubling than each individual complaint. Yet, if the teacher’s name in each individual complaint is withheld from public disclosure, the public will not be able to see any troubling pattern that might emerge concerning that teacher.

Does, supra at 856.

The Court identifies this pattern as a problem without any support in scientific or legal research. Neither has the Seattle Times presented any evidence that a pattern of multiple unsubstantiated allegations caused public harm nor was evidence presented of a teacher accused multiple

times of misconduct where the allegations remained unsubstantiated.² To avoid what could potentially be a “troubling pattern,” with no evidence of any such pattern in actuality, the Court of Appeals has sacrificed the privacy of numerous teachers against whom a single unsubstantiated allegation was made.

Moreover, the Legislature has adopted a specific statute to prevent the occurrence of a pattern that would be of legitimate public concern – a statute aimed at preventing a subsequent employer from hiring a person with a history of known sexual misconduct. RCW 28A.400.301 adopted in 2004 as well as the implementing administrative regulations (Chapter 188-88-010 through 188-88-060 WAC) protect the public from a real troubling pattern, as opposed to a pattern based on rumor and innuendo.

RCW 28A.400.301(2) states:

Before hiring an applicant, a school district shall request the applicant to sign a statement:

(a) Authorizing the applicant’s current and past employers, including employers outside of Washington state, to disclose to the hiring school district sexual misconduct, if any, by the applicant and making available to the hiring school district copies of all documents in the previous employer's personnel, investigative, or other files relating to sexual misconduct by the applicant.

² At the time of an *in camera* review, a trial court could fashion a remedy for this potential problem by requiring the use of the same numerical identifier for a John Doe who may be accused of multiple unsubstantiated allegations.

If the Legislature had wanted to require that school districts report unsubstantiated allegations of sexual misconduct to subsequent potential employers, it could have so stated. Yet, the Legislature, presumably aware of the harmful effects of rumor and gossip, decided that mandatory reporting of known sexual misconduct satisfied the public interest.

It is not in dispute that teachers occupy positions of public trust. A teaching position is a difficult job, requiring long hours at relatively low pay by dedicated public servants. This Court, in *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990), identifying important policy considerations, limited its holding of requiring disclosure of documents to those cases where there is a finding of sexual misconduct:

Sexual abuse of students is a proper matter of public concern because the public must decide what can be done about it. The public requires information about the extent of **known** sexual misconduct in the schools, its nature, and the way the school system responds in order to address the problem. Because the information sought is of legitimate public interest, we conclude that no privacy right has been violated.

(Emphasis added).

Division One errs in finding that *Brouillet* is precedent justifying the disclosure of the identity of a teacher against whom an unsubstantiated allegation is made. *Does supra* at 856-7. In doing so, Division One misinterprets Petitioners' argument. The *Brouillet* court ordered the

disclosure of the identity of teachers whose certificates were revoked for reasons related to sexual misconduct when there was no formal process establishing that the allegations of misconduct were true. However, in *Brouillet*, there was a finding against the teacher: The Office of the Superintendent of Public Instruction (hereinafter "OSPI") found that the certificate of the accused teacher should be revoked for reasons related to sexual misconduct. While in some of the cases in *Brouillet*, the teacher did not challenge that finding, those facts significantly differ from the facts before the Court in the case at bar. In the cases of the John Does faced with unsubstantiated allegations here, there absolutely is no finding by the school district that the teacher engaged in misconduct. The policy concerns addressed in *Brouillet* must be limited to cases where there were findings of misconduct, sufficient for the OSPI to revoke the teaching certificates of those accused or for an employer to sanction the teacher.

Brouillet has not been applied to teachers to require linking their identities to false or unsubstantiated allegations. In *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), this Court noted that release of complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanction. In its Supplemental Brief, the Times relies on *Svaldi v. Anaconda-Deer Lodge*

County, 106 P.3d 548 (Mont. 2005) in support of its position that this Court should order disclosure of the identities of certain teachers because they hold positions of public trust. (Times' Supp. Br., p. 12). Yet, *Svaldi* stands for no such proposition. Unlike the facts of any of the cases before this Court, the Supreme Court of Montana found that the teacher's privacy rights were not violated because the allegations had been made public prior to the disclosure in dispute.

The Seattle Times also relies on *Linzmeier v. Forcey*, 646 N.W. 2d 811 (Wis. 2002). (Times' Supp. Br., p. 13). Yet, *Linzmeier* notably pertained only to the disclosure of a Report and did not involve a fishing expedition for records and identities. In the case at bar, all records were released at the onset. The only issue here is whether there is a legitimate public concern in linking the identity of the teacher to false or unsubstantiated allegations. And, there simply is no legitimate public concern in promoting gossip and rumor when there is no finding that misconduct occurred.

Thus, the agency must be allowed to redact the name in cases, such as those presented here, where there is no legitimate public concern in disclosure because the allegations have not been substantiated and the allegations are of the type that are highly offensive to a reasonable person.

2. The Test Adopted By The Court Of Appeals Is Vague and Unworkable.

The Court of Appeals has created a test to protect the privacy rights of only a very few individuals, by adopting a vague and ambiguous standard that, as a practical matter, is impossible to administer. Division One's test requires that allegations be "patently false" before any protection from disclosure applies. But, can an allegation be almost "patently false?" How does false differ from "patently false?"

The test is problematic because it makes a school district vulnerable for attorney's fees if it fails to disclose the identity pursuant to RCW 42.56.070(1) because it has determined that the allegation is "patently false" and yet, a court reviewing the record determines that the allegation is merely false. Since the agency is subject to a fine if it fails to produce requested documents, it will always be more fiscally prudent for the agency to disclose the name of the teacher against whom an unsubstantiated allegation has been made rather than risk a fine by protecting the privacy of its employee.

Based on case precedent, the use of the word "patently" implies that an agency should be able to review an allegation and determine, on its face, that it is patently false. Courts have applied that standard in contract interpretation cases: See *International Ass'n of Firefighters, Local 1789*

v. Spokane Airports, 146 Wn.2d 207, 234-5, 45 P.3d 186 (2002); *am'd on den'l of recon.*, 50 P.3d 618 (2002) (a court's inquiry is at an end if the complaint on its face calls for an interpretation of the agreement; where the need for contract interpretation cannot be characterized as "patently baseless"). Courts have applied the same standard in other types of cases as well. (In making a determination as to whether a complaint is "patently frivolous," this Court held that "the role of the chief judge, in passing upon a petition, is to determine whether it is frivolous upon its face, and not to delve beyond the face of the petition.") *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975).

Yet, Division One did not apply this definition of "patently false" to the examples before it. Rather, the Court of Appeals reviewed the entire investigative file and made its own determination as to whether an allegation was patently false. For example, in the case of Seattle John Doe 1, the Court of Appeals found that allegation to be "patently false" despite the fact that the school district's investigation found the allegation to be unsubstantiated. *Does, supra* at 851.³

Consequently, the test, adopted out of whole cloth by Division One, is not workable. That test requires that the school district find that the allegation is "patently false." Yet, the Court adopts no definition for

that term. And, its application by the Court is not consistent with the application of a similar term by other courts.

3. The Redactions Allowed By The Trial Court Accomplish The Purpose of the Public Records Act And Are Consistent With The Common Law Definitions of Privacy.

As one of the purposes of the Public Records Act, RCW 42.17.010

(11) provides:

[M]indful of the right of individuals to privacy and of the desirability of the efficient administration of government, 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.

Stated in another way, the purpose of the Act is to “ensure the sovereignty of the people and the accountability of the governmental agencies that serve them.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 603, 963 P.2d 869 (1998). Requiring disclosure of the records while protecting the identity of the teacher, unless there is a finding of misconduct, holds government accountable while preserving the right of individuals to privacy.

Applying *Tacoma News, supra*, the trial court ordered disclosure of the teacher’s identity when the school district had not engaged in an adequate investigation. CP 100. Yet whether or not there was an

³ See also Petitioner’s Response Brief to the Court of Appeals, pp. 10-12.

adequate investigation should not, as a policy matter, determine the accused's right to privacy because the accused has no control over the adequacy of the investigation. However, by allowing public scrutiny of the investigation, the conduct of government is subject to full examination, consistent with the statutory purpose.

After a requester receives redacted records from the agency, the Court of Appeals recognized that the requester can challenge the redactions in court if the requester is not satisfied with the redactions. *Does, supra* at 854. This same logic applies to unsubstantiated allegations. Similarly, after receiving redacted records, the requester can challenge the adequacy of the investigation by requesting that the school district do more – or by exposing what they have determined to be an inadequate investigation. These remedies protect the public from inadequate investigations while protecting the privacy of those against whom there has been no finding of misconduct.

The Seattle Times has also suggested that this court should apply Restatement (Second) of Torts §652D, the common law definition of privacy. (Times' Supp. Br., pp. 8-10). In a case very similar to some at issue here, another court found that redaction of the names of the accused teacher is consistent with this Restatement. In *Booth Newspapers v. Kalamazoo School District*, 450 N.W.2d 286 (Mich.App.1989), the court

applied this definition and held that disclosure of records containing allegations of sexual misconduct by a teacher does not amount to an intrusion of privacy, if redacted of personal identities. Furthermore, that court recognized: “disclosure of the teacher’s identity would be intrusive or his or her privacy.”

Of particularly persuasive import is that the requested information pertains only to bare allegations that have not and will not be adjudicated one way or the other... 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. ... There is ... great merit in disclosing the action taken by a public body in addressing problems of this nature, but we see no justification for taking from those concerned their prerogative to keep their involvement in this matter secret.

Id. at 288.

C. DIVISION ONE’S DISTINCTION BETWEEN RECORDS PROMPTED BY COMPLAINTS AND THOSE ARISING IN THE COURSE OF EVALUATIONS IS ERRONEOUS.

All letters of direction were provided to the Seattle Times with the names redacted pursuant to RCW 42.56.070(1). The issue before this Court is whether an agency must delete a teacher’s name from a letter of direction as required by RCW 42.56.070(1) in order to preserve the teacher’s personal privacy interest when there has been no disciplinary sanction on the employee.

The Court of Appeals held that the identities of the teachers referenced in letters of direction must be disclosed because these letters were prompted by complaints and were not routine performance evaluations. The Court of Appeals erroneously attempted to distinguish *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) and *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993) from the facts in the case at bar by stating that the facts in those cases did not arise from complaints. *Id.* at 848. Yet, that distinction is misplaced and not supported by the record therein. Simply put, the manner that a concern came to the attention of the District was not addressed by the *Brown* court. In fact, the *Brown* court specifically and affirmatively stated that its ruling pertained to documents “other than yearly performance evaluations and self-evaluations.” *Id.*, at 615.

Undisputed evidence in the record as well as case law from other states must compel this court to hold that a letter of direction provides a function similar to a performance evaluation. CP 63-9; 860; 873-4. Where a complaint has been investigated and found to be unsubstantiated, a letter of direction gives the employer the opportunity to give direction or clarification, similar to the type of direction that might be given in a performance evaluation. This tool is useful primarily because it allows the employer to provide guidance and to have documentation of the guidance

similar to a performance evaluation. A school district administrator testified:⁴

It is important for the Court to understand that a counseling letter is an important tool for the effective supervision of employees in the District.

Other courts have considered this issue and held that investigative records prompted by complaints are subject to nondisclosure for the same reasons as personnel evaluations. See *Manns v. City of Charleston Police Dept.*, 550 S.E.2d 598, at 603 (W.Va. 2001) citing *Connecticut Alcohol and Drug Abuse Commission v. Freedom of Information Commission*, 657 A.2d 630 at 638 (Conn. 1995) as follows:

While reports of incidents occurring in the workplace are not “personnel files” *per se*, they may be similar to personnel files in that they may contain information that would ordinarily be considered in making personnel decisions regarding the individuals involved. Such reports would be functionally similar to information contained in the individuals “personnel files.”

The *Manns* court also cited *Gannett Co., Inc. v. James*, 86 A.D.2d 744 at 745, 447 N.Y.S.2d 781 at 783 (1982) in finding that reports prompted by complaints are similar to performance evaluations:

Clearly, complaints made ... while handled ... in a slightly different fashion, fall within the statutory exemption ... as personnel records used to evaluate performance. The fact that some complaints are unfounded and the officers are

⁴ CP 873-74.

cleared of any wrongdoing is of no moment. The complaint subjects the officer to possible disciplinary sanctions and is thus an evaluative tool.

This Court should not base its ruling on how the allegation came to the attention of the employer. When a public employer investigates an allegation of misconduct, how it came to the attention of that employer is of no relevance. If the identity of a teacher to whom such a letter is directed becomes public, as the Court of Appeals ruled, the letter will be seen as disciplinary and will cease to exist. Instead, an administrator will take the teacher aside and provide the guidance orally. Then, if the administrator leaves, the institutional memory will be gone as well. There will be no institutional benefit either for the students or for the public.

This Court has recognized that the Public Records Act permits some balancing of the public interest in disclosure against the public interest in the "efficient administration of government." *Dawson, supra* at 798. As this Court noted, efficient administration of government depends upon candid communication between public employees and public employers and minimizing acts that undermine employee morale and discord in the workplace. *Id.* at 799. Giving employers the option of using, as a supplemental evaluative tool, letters of direction, which do not sanction the employee, is extremely valuable to the efficient operation of

schools and should be so recognized by this Court as the trial court properly did.

The Court of Appeals discussed the concerns raised by the school district administrators who testified at trial and erroneously held that the public interest articulated in *Brouillet* outweighed these concerns. *Does, supra* at 848. Yet, as stated *infra* at p. 9, the public interest articulated in *Brouillet, supra* at 798, is the public's legitimate concern in having information about the extent of known sexual misconduct in the schools, its nature, and the way the school system responds in order to address the problem. Providing the public with the investigative file, the complaint and the letter of direction with the name of the accused teacher redacted accomplishes this public interest without harming the efficient operation of the schools.

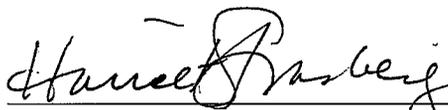
The identity of the accused teacher should be deleted, as permitted by statute. It is neither in the public's interest nor is it good public policy to require disclosure of the teacher's name when there is no disciplinary sanction but the District issues a letter intended to be helpful and provide guidance to the teacher.

V. CONCLUSION

For all the reasons stated herein, Amicus respectfully requests that this Court reverse the Court of Appeals decision with regard to Bellevue

John Does 1, 2, 3, 4, 6, 7, and 9, Federal Way John Does 2 and 3 and Seattle John Does 3, 5 and 10. Amicus WEA further requests that this Court either affirm the trial court decision or, in the alternative, remand the case to the trial court for a decision with regard to the above-named Petitioners that is consistent with its decision.

Dated this 20th day of February, 2006.



HARRIET STRASBERG, WBSA #15890
Attorney for Amicus Curiae
Washington Education Association

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.

1. I am over 18 years of age and an attorney of record for the amicus curiae Washington Education Association herein.

2. On February 20, 2006, I caused to be served a true and correct copy of the Washington Education Association's Motion To File Amicus Curiae Brief and the Brief Of Amicus Curiae Washington Education Association on the following via electronic mail and the the United States Postal Service ("USPS"):

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