

No. 90129-5

SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY PREDISIK and CHRISTOPHER KATRE,

Appellants,

v.

SPOKANE SCHOOL DISTRICT NO. 81,

Respondent.

**BRIEF OF *AMICUS CURIAE*
WASHINGTON
EDUCATION ASSOCIATION**

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I. INTRODUCTION

Today's public school teacher is expected to perform countless critical tasks in caring for our children. They are overworked and underpaid. Unfortunately, these teachers are often subjected to false accusations including an entire ambit of alleged improper conduct. Yet RCW 4.24.510 confers broad immunity to any person who might make a false allegation to a school district, such that the teacher has no civil remedy.

Teachers remain just as helpless if those false accusations become known to the public. The media has a conditional privilege to repeat the false allegations in its coverage of the matter. *Mark v. Seattle Times*, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981)(publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged). If teachers attempt to file suit against either their accusers or the media, they could find themselves subject to an anti-SLAPP¹ motion, which, if they lose, would subject them to the harsh mandatory penalty of \$10,000 per defendant. *See* RCW 4.24.525(6)(a)(ii); *Akrie v. Grant*, 178 Wn. App. 506, 513, 315 P.3d 567 (2013), *rev. granted*, 180 Wn.2d 1008 (2014).

¹ "SLAPP" is an acronym that stands for "Strategic Lawsuits Against Public Participation." Laws of 2010, ch. 118.

In summary, teachers who are falsely accused of misconduct have few options when it comes to protecting their reputations. The only safeguard these teachers have is their right to privacy. If the Court of Appeal's decision is allowed to stand, even that safeguard will be whittled down to almost nothing. Therefore, this Court should reverse the decision below and remand the case for trial.

II. IDENTITY AND INTEREST OF *AMICUS*

The Washington Education Association (WEA) is a union organization representing educators throughout the state of Washington. The WEA's stated mission is to advance the professional interests of its members in order to make public education the best it can be for students, staff, and communities. The WEA has an interest in protecting the privacy interests of educators and ensuring that educators are provided with their guaranteed due process rights.

III. STATEMENT OF THE CASE

The WEA incorporates by reference the statement of the case presented by Petitioners.

IV. ARGUMENT

A. MR. PREDISIK'S ADMINISTRATIVE LEAVE LETTER IS EXEMPT FROM PUBLIC DISCLOSURE.

As a preliminary matter, Mr. Predisik's administrative leave letter is not subject to public disclosure regardless of the reasons he was placed on leave. Placing an employee on administrative leave is not discipline. *Stearns-Groseclose v. Chelan Cnty. Sheriff's Dep't*, 2006 WL 195788 at *18 (E.D. Wash. 2006). Accordingly, the letter is properly regarded as part of Mr. Predisik's personnel file. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), *overruled on other grounds by Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994), and *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993), thus control the disposition of this case with respect to the administrative leave letter. In *Dawson*, this Court held that disclosure of a prosecutor's performance evaluations would be highly offensive to a reasonable person and that the public did not have a legitimate concern in the records. *Id* at 797, 799. In *Brown*, the Court of Appeals applied *Dawson* to a request for the personnel records of a school principal. 71 Wn. App. at 615. The Court held that, as in *Dawson*, "disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive. *Brown*, 71 Wn. App. at

618 (quoting *Dawson*, 120 Wn.2d at 797). The Court further held that the public had no legitimate concern in personnel records, because “quality of public employee performance will suffer” if personnel records were freely disclosable. *Id.* at 619. The Court thus held that the principal’s personnel file- in its entirety- was exempt from public disclosure. *Id.* at 620. This Court should adhere to *Dawson* and *Brown*, and hold that Mr. Predisik’s administrative leave letter is not subject to public disclosure.

B. RECORDS OF AN ONGOING DISCIPLINARY INVESTIGATION INTO ALLEGED MISCONDUCT ARE PERSONAL INFORMATION EXEMPT FROM DISCLOSURE UNDER THE PRA.

Even if Mr. Predisik’s administrative leave letter is not a personnel file, as in *Dawson* and *Brown*, this Court should still hold that it, along with the other requested records in this case, are exempt from public disclosure. The Public Records Act (PRA) provides for a strong presumption in favor of disclosure. *Sargent v. Seattle Police Dep’t*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013). However, “[t]he PRA’s mandate for broad disclosure is not absolute.” *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600, 605 (2013), *as amended on denial of reh’g* (2014). In order to “protect relevant privacy rights or vital governmental interests,” *id.*, the PRA exempts certain public records from disclosure. One type of record exempt from disclosure is “[p]ersonal

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 42.56.230(3). An individual’s right to privacy is invaded when disclosure “(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. *Amicus* maintains that the records sought by the news agencies in this case are exempt from disclosure pursuant to these statutory provisions.

What the Court must address today is whether disclosure of the information contained in Mr. Predisik’s and Mr. Katke’s disciplinary investigation files would violate their respective rights to privacy. In other words, the Court must determine whether disclosure of the records at issue would be highly offensive to a reasonable person, and whether the public has a legitimate concern in obtaining those files. For the reasons that follow, the Court should answer those questions “yes” and “no,” respectively.

1. Both Parties Agree that Petitioners are Entitled to a Right of Privacy in the Records Because they Contain Personal Information.

The files at issue are, without a doubt, “personal information,” as that term is used in RCW 42.56.230(3). Generally speaking, information is “private” or “personal” when an individual “would not normally share

[that information] with strangers.” *Dawson*, 120 Wn.2d at 796. This Court has previously held that unsubstantiated allegations of misconduct are “personal information,” such that the accused persons have a general right to privacy in their identities in connection with the allegations. *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 215, 189 P.3d 139 (2008). In fact, both parties concede that the records at issue contain “personal information.”

2. Disclosure of Unsubstantiated Allegations of Misconduct is Highly Offensive to a Reasonable Person.

The first prong of the two part test to determine whether an individual’s right to privacy will be invaded by public disclosure is whether disclosure “would be highly offensive to a reasonable person.” RCW 42.56.050(1). Whether something is “highly offensive” is not subject to any specific criteria, but rather must be determined on a case by case basis. *West v. Port of Olympia*, Slip Op. No. 44964–1–II (Div. II, Aug. 26, 2014).

In this case, the question of whether disclosure would be highly offensive to a reasonable person is controlled by this Court’s opinion in *Bellevue John Does*. In *Bellevue John Does*, the Seattle Times submitted a public records request to area school districts for “all records relating to allegations of teacher sexual misconduct in the last 10 years.” 164 Wn.2d

at 206. This Court stated that “[i]t is *undisputed* that disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person.”² *Id.* at 216 (emphasis added). This determination did not depend on whether the allegations were substantiated or unsubstantiated, as the offensiveness “is implicit in the nature of an allegation of sexual misconduct.”³ *Id.* at 216 n. 18.

There is no reason to assume that disclosure would be any less offensive if the alleged misconduct was not of a sexual nature. Contrary to Respondent’s assertion, *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), does not limit “highly offensive” allegations solely to those concerning sexual misconduct. Rather, this Court simply held that the allegations of misconduct in *that* case were not highly offensive. *Id.* at 756. There are many behaviors, in addition to sexual misconduct, that society considers reprehensible, such as physical and psychological abuse. These behaviors are often considered to be even more reprehensible when the victim or victims are children.⁴ It is not unthinkable that a reasonable person would consider it highly offensive to be accused of reprehensible

² That holding was later reaffirmed in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 415, 259 P.3d 190 (2011).

³ Moreover, disclosure of information that bears on the competence of an employee has also been considered to be highly offensive. *Dawson*, 120 Wn.2d at 797 (quoting *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979)).

⁴ While there is no evidence in this case that the alleged misconduct occurred against children, given the nature of Mr. Predisik’s and Mr. Katke’s employment, the involvement of children is a likely inference.

behavior toward children. This is especially so when the allegations are unsubstantiated or false. As the Court of Appeals articulated, “disclosure of unsubstantiated allegations of other types of misconduct can be offensive because it also subjects the teacher to gossip and ridicule without a finding of wrongdoing.” *Predisik v. Spokane Sch. Dist. No. 81*, 179 Wn. App. 513, 520, 319 P.3d 801, *review granted*, 180 Wn.2d 1021, 328 P.3d 903 (2014). Therefore, the disclosure of a teacher’s identity in connection with an ongoing disciplinary investigation is highly offensive.

In this case, the trial court found that the release of the records with identifying information would be highly offensive to a reasonable person, and ordered that Mr. Predisik’s and Mr. Katke’s names be redacted before release. The Court of Appeals correctly agreed. *Predisik*, 179 Wn. App. at 520 (“The teachers have a right to privacy in their identities because the misconduct alleged in the record has not yet been substantiated. The disclosure of their identities in connection to the unsubstantiated allegations could be highly offensive and is not of public concern.”).

However, where both the trial court and appellate court erred was by concluding that redaction of Mr. Predisik’s and Mr. Katke’s names would transform the records into something less offensive. It does not.

In *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 142, 827 P.2d 1094 (1992), the Morning News Tribune requested records of a

particular incident from the city's police department. The Tribune's request referenced the alleged perpetrator's name. The Tribune argued that these records could be disclosed if the names of the victim and informant were redacted. *Id.* at 153. The Court of Appeals rejected the Tribune's argument, stating that redaction would be pointless. The court articulated two explanations for why this was the case: "First, whatever information was not redacted would continue to be unsubstantiated and not of legitimate concern to the public. Second, identification of the [perpetrator] would inevitably lead to the identification of others allegedly involved." *Id.* at 152-53.

Likewise, in *Mueller v. U.S. Dep't of Air Force*, 63 F.Supp.2d 738, 740 (E.D. Va. 1999),⁵ the plaintiff requested the disclosure of records pertaining to the Air Force's investigation of Major Martha Buxton. The Court stated that it "would be pointless" to delete "Major Buxton's name from the disclosed documents, when it is known [to the public] that she was the subject of the investigation." *Id.* at 744. Thus, the court held that "[e]ven with redactions, any disclosure could reasonably be expected to

⁵ This Court has previously stated that "[c]ases interpreting FOIA are relevant when we are interpreting our state act." *Dawson*, 120 Wn.2d at 791. Additionally, "although FOIA case law cannot apply directly to [the PRA], ... certain helpful privacy principles do emerge from FOIA cases." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137, 580 P.2d 246 (1978).

constitute an unwarranted invasion of Major Buxton's personal privacy." *Id.* at 744.

Similarly, redaction of names from Mr. Predisik's and Mr. Katke's disciplinary investigation files would be pointless. The Spokesman-Review requested the records using the teachers' names specifically. If the Spokesman-Review receives the requested records, it will know *exactly* to whom the records pertain, redacted or not.⁶ As in *Mueller* and *Tacoma News*, disclosure of a redacted record would fail to protect Mr. Predisik's and Mr. Katke's privacy interests in their identities. Essentially, disclosure of the disciplinary investigation records *is* a disclosure of Mr. Predisik's and Mr. Katke's identities. Thus, in this case, disclosure of the records in their entirety is highly offensive.

Amicus is cognizant of this Court's holding in *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416-18, 259 P.3d 190 (2011), that release of records is still permissible even when redaction would not protect the privacy interest of the persons involved. However, this Court addressed that issue in connection with the second prong, i.e. whether the public has a legitimate interest in the records. In *Bainbridge Island Police Guild*, disclosure was not a violation of the officer's privacy

⁶ That Mr. Predisik's and Mr. Katke's names have been divulged throughout the course of this litigation is of no moment. A person maintains her or her right to privacy despite some information having previously been revealed. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 414, 259 P.3d 190 (2011).

interests “[b]ecause the nature of the investigations is a matter of legitimate public concern.” *Id.* at 417. Here, the public does not have a legitimate interest in the records at issue in this case (discussed below in subsection b). As *Bainbridge Island Police Guild* addressed a different question, it is not applicable to the issue of offensiveness.

This Court should hold that the release of the entire records at issue in this case would be highly offensive to a reasonable person and thus rule that the records are not disclosable.

3. The Public does not have a Legitimate Interest in the Records of an Ongoing Disciplinary Investigation.

In order to constitute an invasion of privacy, disclosure of records must not only be highly offensive to a reasonable person, but it must also not be of legitimate concern to the public. RCW 42.56.050. The records at issue here are not of legitimate public concern and thus Mr. Predisik and Mr. Katke have satisfied the second prong of the privacy interest test.

“As a matter of common sense, one factor bearing on whether information is of legitimate concern to the public is whether the information is true or false.” *Tacoma News*, 65 Wn. App. at 148. In *Bellevue John Does*, this Court held that “[w]hen an allegation is unsubstantiated, the teacher’s identity is not a matter of legitimate public concern.” 164 Wn.2d at 221. This Court reasoned that “because the

teachers' identities do not aid in effective government oversight by the public and the teachers' right to privacy does not depend on the quality of the school districts' investigations," they were not of legitimate public concern. *Id.* Rather, "disclosure of the identities of teachers who are the subject of unsubstantiated allegations 'serve[s] no interest other than gossip and sensation.'" *Id.* (quoting *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 129 Wn. App. 832, 854, 120 P.3d 616 (2005)).

Under a school district's disciplinary system, discipline may not be imposed until after an investigation is completed.⁷ Thus, any and all allegations remain unsubstantiated while an investigation is still pending. The public has no legitimate concern in the disclosure of Mr. Predisik's and Mr. Katke's identities at this time.⁸

Furthermore, the public has no legitimate concern in interfering with an ongoing disciplinary investigation. As this Court has previously recognized, "[r]elease of files dealing with pending investigations ... would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations." *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 725, 748 P.2d 597 (1988) (plurality

⁷ See Br. of Petitioner, 41 ("The CBA states that the District has an obligation to investigate alleged employee misconduct.")

⁸ Sometime, in the future, if the allegations are substantiated, then the identities of Mr. Predisik and Mr. Katke will be subject to disclosure. *Cowles Publ'g Co.*, 109 Wn.2d at 726.

opinion). Educators, as public employees, are afforded certain due process protections in connection with their employment. Certificated educators may only be terminated for “sufficient cause”. RCW 28A.405.300; .310. Teachers are entitled to a hearing on what constitutes “sufficient cause,” even when their conduct is “so egregious that the sufficient cause determination could be made as a matter of law.” *Hoagland v. Mount Vernon Sch. Dist. No. 320, Skagit Cnty.*, 95 Wn.2d 424, 428, 623 P.2d 1156 (1981). Although “[n]aming the teachers who have been the subject of student complaints is not tantamount to revoking their professional license,” *Bellevue John Does*, 129 Wn. App. at 860, certain allegations could lead to termination. As such, ongoing investigations implicate a teacher’s due process rights in a way that completed investigations do not.⁹

Other jurisdictions recognize that although the public may have a legitimate interest in the results of disciplinary actions, the same does not ring true for ongoing investigations where no conclusions have been reached. In *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 623 (W.Va.

⁹ In *Sargent*, this Court overturned a Court of Appeals decision holding that records pertaining to an ongoing internal disciplinary investigation of a police officer were categorically exempt from disclosure. 179 Wn.2d at 394. However, in that case, the police department claimed that the records were exempt from disclosure pursuant to the effective law enforcement provision of the PRA. *Id.* at 383-84. That provision is not at issue here; therefore, *Sargent* is inapplicable.

2013),¹⁰ the West Virginia Supreme Court of Appeals stated that “the premature disclosure of information about any investigation into allegations of misconduct by state police officers before any internal investigation or inquiry takes place, could cause an unwarranted invasion of privacy.”¹¹ The court contrasted ongoing investigations to those that were completed, noting that for the latter category, “there is a compelling reason to disclose [those] records.” *Id.* at 623-24. Accordingly, the court held that the records were “subject to release to the public only after *completion* of the investigation or inquiry and a determination made as to whether disciplinary action is authorized.” *Id.* at 624 (emphasis added).

Similarly, the Arizona Supreme Court held that “an investigatory file concerning mere allegations of misconduct” is exempt from disclosure due to the necessity of protecting privacy interests, confidential information, and certain governmental interests.¹² *London v. Broderick*, 80 P.3d 769, 774 (Ariz. 2003).¹³ The court noted that there is a privacy interest “in preventing disclosure of investigations that have not been

¹⁰ The information requested in *Smithers* pertained to allegations of improper use of force. 752 S.E.2d at 458.

¹¹ This concern was not limited to allegations against police officers; the Court also discussed the same concerns in connection with attorney and physician malpractice allegations. *Smithers*, 752 S.E. at 623.

¹² *London* was decided under Arizona’s Supreme Court Rule 123, the judicial branch’s corollary to Arizona’s Public Records Act. 80 P.3d at 771. Rule 123 does not contain specific exemptions, but is subject to the “common-law limitations” to “protect privacy interests [and] confidential information.” *Id.* at 772. The Court utilized cases interpreting both the Arizona and federal public records statutes in its analysis.

¹³ The Court in *London* did not reveal the nature of the alleged misconduct.

completed, in part to protect the reputation of Department employees if allegations turn out to be frivolous or never result in disciplinary charges.” *Id.* at 773. The court further stated that there was no public interest that “would be frustrated by ‘deferring disclosure until after’” the investigation concluded. *Id.* at 774 (quoting *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)). Accordingly, the court held that the requested records, part of an ongoing disciplinary investigation, were not subject to public disclosure.¹⁴ *Id.*

The Court should find the reasoning in these cases persuasive. There are significant differences between ongoing and completed investigations such that the public does not have an interest in both. As previously noted, allegations remain unsubstantiated while an investigation is ongoing. Any ongoing investigation has the potential to trigger a teacher’s due process rights, which are guarded not only by statute, but by the state and federal constitutions. And, as the Arizona

¹⁴ The Utah Supreme Court reached the opposite conclusion in *Deseret News Pub. Co. v. Salt Lake Cnty.*, 182 P.3d 372 (Utah 2008). In that case, the court held that “[a]s public officials, Mr. Floros and Ms. Swensen cannot reasonably argue that release of the investigative report would generally constitute a significant invasion of their personal privacy. The accusations of misconduct contained in the investigative report primarily pertain to the performance of their official duties.” *Id.* at 382. However, this holding presumes that the public has a legitimate interest in both substantiated and unsubstantiated allegations of misconduct of public officials. As previously discussed, this Court has held that the public does *not* have a legitimate interest in unsubstantiated allegations of misconduct. *Bellevue John Does*, 164 Wn.2d at 221. Thus, this Court should reject the approach used by the Utah Supreme Court.

Supreme Court noted, the public can still gain oversight of an agency's investigatory process by accessing the records after the investigation is complete. *See e.g. Bainbridge Island Police Guild*, 172 Wn.2d at 417 (release of disciplinary records provided public with information on nature of investigations).

Therefore, the second prong having been satisfied, this Court should hold that Mr. Predisik and Mr. Katke should be protected at this time and that the records are not subject to disclosure.

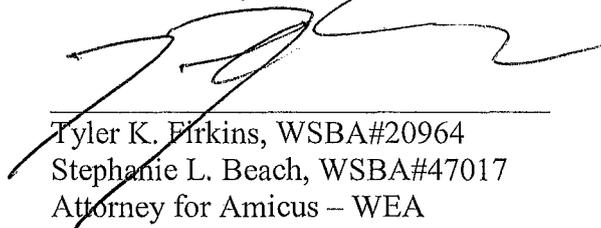
V. CONCLUSION

Without protection of a teacher's right to privacy, teachers will be irreparably harmed without recourse. That result was not what the legislature intended when enacting the PRA. The purpose of the PRA is "to ensure 'full access to information concerning the conduct of government on every level.'" *Bellevue John Does*, 164 Wn.2d at 209. It is *not* to enable the public to go on witch hunts. Mr. Predisik, Mr. Katke, and teachers across the state of Washington have a privacy interest in their identities and would find it highly offensive to be accused to misconduct toward children. Furthermore, the public has no interest in learning of unsubstantiated allegations and interfering with ongoing investigations.

This Court should reverse the decision of the Court of Appeals and hold that the records in this case are not subject to disclosure under the PRA.

DATED this 12 day of September, 2014.

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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 employed by the law offices of Van Siclén, Stocks & Firkins.

2. On September 12, 2014, I caused to be served a true and correct copy of the foregoing Brief of *Amicus Curiae* Washington Education Association via Federal Express and Email to the following:

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