No. 78603-8

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,
Petitioners,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Statutes

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU recognizes the competing civil liberties interests—privacy and public oversight of government—involved in access to public records. It has participated in numerous cases involving the Public Records Act as *amicus curiae*, as counsel to parties, and as a party itself. In addition to litigation, the ACLU has participated in legislative and rule-making procedures surrounding access to a wide variety of public records.

STATEMENT OF THE CASE

The parties have presented the case, but a few facts relevant to the argument below bear repeating.

The Seattle Times filed Public Records Act requests with several school districts, asking for all records of allegations of sexual misconduct by any teachers within the last ten years. The school districts notified the teachers, some of whom filed suit to block disclosure of their identities. In all cases, records of the allegations, investigations, and results were provided to the Seattle Times. However, names and identifying details were redacted for students, parents, and the accused teachers; the teachers'

names were replaced with pseudonyms.

Both the trial court and the Court of Appeals ultimately divided these teachers into several different groups, based on the nature of the allegations and the results of investigation: patently false allegations, unsubstantiated allegations, instances where there was not an adequate investigation, instances in which teachers received letters of direction, and instances in which the investigation substantiated misconduct and led to some form of discipline (not a letter of direction).

The trial court received evidence, including witness testimony, about the effect of public disclosure of the identities of recipients of "letters of direction." Based on this evidence, the court found that disclosure would interfere with the schools' "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." CP 103 (Finding of Fact 10).

The trial court found that identities should remain redacted in cases where an adequate investigation failed to substantiate allegations, including instances where letters of direction were issued; identities should be disclosed only when the investigation was inadequate or

allegations were substantiated. The Court of Appeals reversed the trial court in part, holding that identities should be redacted only in cases where the allegations were "patently false." *Bellevue John Does 1-11 v. Bellevue School District #405*, 129 Wn. App. 832, 857, 120 P.3d 616 (2005).

ARGUMENT

This case involves the competing civil liberties interests of privacy and public oversight of government operations. The ACLU believes that proper application of the privacy exceptions to the Public Records Act, former RCW 42.17.250-.348, requires case-by-case consideration. In this instance, we believe that the statute allowed the schools to redact the identities of most or all of the petitioner teachers from documents discussing allegations of misconduct by those teachers. To the extent the record consists of documentary evidence, this Court reviews a Public Records Act challenge *de novo. Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). But when some findings are based on witness testimony and the trial court's assessment of witness credibility, those factual findings must be reviewed for support in the record, and are accepted as verities if not challenged on appeal. *Cowles Pub. Co. v. State Patrol*, 44 Wn. App. 882, 888,724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712 (1988).

A. Legitimate Public Concern Balances Oversight Against Effective Government Operation

Former RCW 42.17.310(1)(b) exempts from public disclosure information in teachers' personnel files "to the extent that disclosure would violate their right to privacy." The right to privacy is "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." Former RCW 42.17.255. This does not involve balancing the degree of offensiveness against the degree of legitimate concern. *See Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990).

Here, there is no serious disagreement that disclosure of the identity of a teacher accused of sexual misconduct would be highly offensive, especially since this Court has already held that disclosure of even favorable performance evaluations are highly offensive. *See Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993). The present dispute, therefore, is whether disclosure of an accused teacher's identity is of legitimate public concern.

This Court has interpreted "legitimate" to mean "reasonable" and recognized that some weighing of competing interests is inherent in the inquiry. *Id.* at 798. One of the particular interests that must be balanced is "the public interest in the 'efficient administration of government.'" *Id.*

And, of course, the other primary interest to be considered is the underlying purpose of the Public Records Act: oversight of government operations. This Court has used that balance to hold that routine performance evaluations of a deputy prosecutor are not of legitimate public concern. *Id*. at 800. But beyond *Dawson* there has been relatively little examination in Washington courts of the contours of either interest.

1. Disclosure Is Necessary to Enable Public Oversight

The Public Records Act was initially enacted by an initiative of the people in 1972, as part of a comprehensive package of provisions designed to bring greater accountability to government operations, including lobbyist registration and campaign finance reform. *See Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). Disclosure of public records was intended to further this purpose of government accountability; "full access to information concerning the *conduct of government* on every level must be assured." RCW 42.17.010(11) (emphasis added). The Act is to be interpreted to provide "full access to public records so as to assure continuing public confidence of fairness of … governmental processes." RCW 42.17.010 (last paragraph).

When governmental misconduct is alleged, as in the present case, the public needs sufficient information to determine whether the agency

has acted properly. Most importantly, the public needs sufficient information to determine whether the allegations were adequately investigated. And, if misconduct actually occurred, the public needs to know both the details of the misconduct, and the steps taken by the agency to rectify that misconduct.

The facts of the allegation, and the details of the investigatory procedure, are necessary for the public to determine whether the agency properly investigated. The identity of the accused, however, is unnecessary, and plays little role in the public's oversight of the *investigation*. The name is most relevant to public oversight *if* the misconduct occurred—if the misconduct didn't occur, the only actual governmental action is the investigation.

On the other hand, if there was misconduct, it is important for the public to know the identity of the malfeasant. The public is entitled to know when improper actions are taken under color of law, with apparent state imprimatur. The public must be able to verify that the employee was properly disciplined, and the problem rectified. Disclosure of identity also allows the public to recognize a pattern of misconduct by the same individual, even if the individual changes positions or moves between agencies. *See Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990).

Multiple Washington cases have recognized the importance for public oversight of disclosing the identity of government employees involved in misconduct. *See, e.g., Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990); *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989). The one anomalous decision is this Court's holding in *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). *Cowles* concerned sustained complaints of misconduct by police officers, and this Court held that those officers' identities were exempt from public disclosure under the exemption for law enforcement records.

Amicus respectfully suggests that *Cowles* was wrongly decided, and believes the contrast with this case demonstrates that. It is simply implausible that the Legislature intended that a teacher be identified when falsely, or even accurately, accused of minor misconduct, such as use of sarcastic language, *see Bellevue John Does*, 129 Wn. App. at 843 (Bellevue John Doe #6), but a police officer found to have falsely arrested and incarcerated an individual, *see Cowles*, 109 Wn.2d at 714 n. 1 (third incident), should be protected from public identification. *Cowles* should be overruled so that it is clear the Public Records Act requires disclosure of the identity of any public employee when the employee's misconduct has been substantiated by the agency.

2. Disclosure Can Impede Effective Government Operation

The public also has a legitimate interest in ensuring that government agencies operate effectively. This interest is worthy of consideration when determining if the public concern for disclosure is "legitimate" or "reasonable." *Dawson*, 120 Wn.2d at 798. In this case, there are important factors that weigh against revealing some of the teachers' identities.

Government operations, including public schools, require a frank and candid flow of information internally. People must be able to express concerns about employees, managers must be able to suggest changes in employee behavior, and employees must be able to continue about their daily jobs without fear of being portrayed inaccurately or out of context in a newspaper article. When misconduct is alleged, there must be an appropriate investigation, and corrective action taken when necessary. All of these necessities of effective government operation are undermined by public disclosure of the identities of people involved. It should be noted that student and parent identities were redacted from documents in the present case with no complaint; apparently all parties agree that is an appropriate privacy-protective move, even though it is unclear whether those identities are exempt under any of the provisions of the Public

Records Act. Disclosure of the identities of employees falsely accused of misconduct should likewise be prevented.

Disclosure of identities in unsubstantiated complaints will create a variety of undesirable incentives for participants in the educational system. Qualified teachers may well choose to avoid the profession entirely, or work in private schools, rather than risk public scorn if falsely accused. Those teachers who do remain in the system will become more distant, so as not to have any personal contact with students misinterpreted, even for a moment. Teachers will be particularly reluctant to work with "difficult" children, fearing accusations with no opportunity to clear their name. Or perhaps teachers will bend over backwards to curry favor with students, attempting to prevent an upset student from making a false accusation. And students who do dislike a teacher, for whatever reason, will have an outlet to "get even" and besmirch the teacher's public reputation with no risk of repercussion.[1] The primary factor preventing these actions today is the knowledge that unsubstantiated complaints will be kept internal, and have no effect on a teacher's future.

Similarly, administrators will avoid letters of direction, and will even avoid findings of "unsubstantiated;" they will instead tend to make

[1] This state provides absolute immunity to complainants, RCW 4.24.510.

findings of "patently false" in questionable cases, so as to protect teachers. Any other result will lead teachers to file grievances, resulting in time-consuming disciplinary hearings. Students will be less likely to complain about true problems, knowing that administrators are biased against them from the start. In the process, valuable opportunities to correct small issues will be lost.

This Court has previously recognized the importance of many of these concerns, holding that routine performance evaluations are not of legitimate public concern. *See Dawson v. Daly*, 120 Wn.2d 782, 799-800 845 P.2d 995 (993). Unfounded allegations of misconduct, or even substantiated instances of trivial misconduct, are not inherently of more concern to the public than performance evaluations. In fact, it seems likely that the public is more concerned with knowing about a teacher who is incompetent or fails to educate students adequately than with knowing about a teacher who is falsely accused of sexual misconduct, or occasionally makes sarcastic comments that are blown out of proportion. The specific harms to efficient government discussed in *Dawson* regarding evaluations—decreased employee morale and decreased candor in supervisor communications—are even more apparent here, when dealing with unsubstantiated complaints.

Investigations into alleged misconduct often reveal behaviors that cannot fairly be described as "misconduct," but nonetheless fail to meet desired professional standards. There is value in allowing a supervisor or investigator to suggest changes in behavior, or remind employees of desired standards. But if these suggestions are opened to public view, it is likely that many supervisors will instead choose to remain silent, or at least not use written direction, so as not to tarnish a generally good employee's reputation. The trial court made an uncontested factual finding that disclosures of letters of direction would "substantially and irreparably damage vital government functions." CP 103 (Finding of Fact 10). This comports with a previous decision of the Court of Appeals, which found "the quality of public employee performance will suffer because employees will not receive the guidance and constructive criticism required for them to improve their performance and increase their efficiency." *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 619-20, 860 P.2d 1059 (1993).

It should be noted that the *Dawson* and *Brown* courts found these concerns so important that they resulted in total nondisclosure of evaluations, completely denying the public the opportunity to learn anything about government operations discussed in the evaluations, including the evaluation process itself. In contrast, nobody here is arguing

for complete exemption; instead, the records describing the allegations and investigations were released, with only identities redacted. This provides a more appropriate balance between public oversight and efficient government than complete nondisclosure.

B. Consideration Must Be Case-By-Case

Amicus believes that the balancing described above must be done on a case-by-case basis. Although bright-line rules would simplify both the agency's and court's jobs, they do not suffice to adequately balance the public's competing policy concerns. This is demonstrated by the decisions of both the trial court and Court of Appeals in this case—both purported to follow clear rules, but an examination of the individual teacher's facts shows a more nuanced approach.

The trial court ordered redaction of identity when allegations remain unsubstantiated after an adequate investigation, and no serious discipline was issued. CP 111 (Conclusion of Law 12). But the court also ordered disclosure of the identity of Bellevue John Doe #11, even though an investigation by the Bellevue Police Department led to no charges or other discipline, because the "court saw 'a pattern of inappropriate behavior which was arguably sexually motivated.'" *Bellevue John Does*, 129 Wn. App. at 858.

The Court of Appeals, in turn, ordered disclosure of identity in all cases except those where the allegations were "patently false." *Id*. at 857. This category, however, was created and applied by the court *sua sponte.* No school had labeled the results of its investigation "patently false." Instead, the court drew its own conclusions, drawing fine lines. It found the accusation of Federal Way John Doe #1 was patently false because other eyewitnesses disputed it, but decided the complaint against Seattle John Doe #5 was merely unsubstantiated even though an "extensive investigation ... determined the allegations to be unfounded", CP 107 (Finding of Fact 34), and decided the same for Seattle John Doe #10, even though the teacher didn't even teach at the school at the time he allegedly acted improperly, CP 108 (Finding of Fact 39). *See Bellevue John Does*, 129 Wn. App. at 850-57.

Although puzzled by some of the distinctions drawn, *amicus* does not take a position as to whether the final determinations of either court were correct. *Amicus* does, however, believe both courts were correct to consider a variety of factors, as discussed below, in order to draw those distinctions.

Of course, the agency is first to evaluate the records and balance the competing interests to determine whether redaction is warranted, since it is the agency that receives the request for the records. This could

potentially lead to biased decisions, since it is typically the agency itself that originally decided whether or not to take action as the result of an investigation. There are two powerful factors, however, that make it unlikely that agencies will routinely make self-serving determinations that there is no legitimate public concern in disclosure of identities.

First, the Public Records Act provides for significant penalties for refusing records requests, along with attorney fees, RCW 42.56.550, and provides immunity for good faith disclosures that violate a person's right of privacy, RCW 42.56.060. Second, the agency's decision is always subject to review by a court. "Requesters who wish to challenge in court a school district's decision to withhold a name may use the [redacted] files, just as the Times has done here, to dispute the deletions." *Bellevue John Does*, 129 Wn. App. at 854. The court's review is *de novo*, with no deference to the agency's determination of exemption. RCW 42.56.550(3).

C. Multiple Factors Must Be Considered

The balance between public oversight and efficiency of government operations depends on a variety of factors. Some factors will increase or decrease the need for public oversight, and others will have varying effects on efficiency. Some of the most important factors that must be considered in each case are:

1. Credibility of Allegation

"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 v. Tacoma News*, 65 Wn. App. 140, 148, 827 P.2d 1094 (1992). In fact, this is probably the single most important factor to consider. If an allegation of serious misconduct is true, the need for public oversight is high, in order to verify that the agency has properly dealt with the misconduct. In addition, the harm to efficiency is low because employees should expect misconduct to be made public—and innocent employees will probably prefer to have miscreants identified. On the other hand, if the allegation is false, there is no misconduct (or government conduct of any kind); there is no need for public oversight, and the harm of disclosure is most likely to hurt government operations.

Both the trial court and Court of Appeals recognized this central truth as well, agreeing "that the public as a rule has no legitimate interest in finding out the names of people who have been falsely accused." *Bellevue John Does*, 129 Wn. App. at 853. The difficulty is determining whether an accusation is false or not, and that is where the courts split ways. Both correctly determined that one cannot simply defer to the result of an agency investigation. While investigations that lead to discipline may be fairly assumed to be based on true allegations, the converse is not

true. It is rare for an investigation to definitively label an allegation as false; instead, the allegation is usually labeled "unsubstantiated." Whether or not a letter of direction is issued appears to be largely a matter of happenstance; these letters do not indicate an allegation is true, but merely provide reminders of professional standards.

The trial court generally treated unsubstantiated allegations as false, agreeing with Division Two that "[i]f information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative though not always dispositive of falsity." *Tacoma News*, 65 Wn. App. at 149. Division One, by contrast, held that "unsubstantiated" and "false" are different, and only "patently false" allegations are not of legitimate public concern. *See Bellevue John Does*, 129 Wn. App. at 856.

Division One's approach is not nuanced enough. It is impossible to determine with certainty that almost any allegation is either true or false. Instead, one must look at the overall probability of its truth, and consider the relative harm and gain due to release of identity, keeping in mind both possibilities of truth and falsity.

In a slightly different context, the Legislature has previously decided that the harm of releasing information about unsubstantiated allegations outweighs the public gain in access to information. The Criminal Records Privacy Act generally prohibits the release of

nonconviction data—i.e., unsubstantiated allegations of wrongdoing. RCW 10.97.050. Although there is more need for public oversight of government misconduct than of private misconduct, it would be illogical to give more protection to a criminal suspect where the charges were supported by probable cause (even if not proven beyond a reasonable doubt) than to a dedicated teacher when allegations of misconduct are most likely false (but not "patently" false).

Amicus therefore suggests that the approach taken by the trial court is closer to correct. Disclosure of identity in cases of unsubstantiated allegations is more likely to harm the efficient operation of government than it is to enable meaningful public oversight—unless consideration of the remaining factors tilts significantly towards disclosure.

2. Adequacy of Investigation

The more thorough an investigation is, the more weight should be given to its conclusion—and conversely, little weight should be given to a quick or superficial investigation, where a finding of "unsubstantiated" is not indicative of the truth or falsity of the allegation. *Amicus* believes that good public policy requires the disclosure of the accused's identity in cases of inadequate investigation. Simply put, the risk that the allegation is

true is simply too high to overlook in such cases, especially in cases where the accused chooses to quickly resign in order to avoid an investigation.

In other cases, it could be argued that it is unfair to punish a possibly innocent teacher due to the negligence of the school in failing to properly investigate a complaint. While there is some truth to this, requiring disclosure will provide incentive to both the school and the teacher to ensure that all complaints receive the thorough examination they are due, and to ensure the investigation is properly documented. On balance, this incentive, coupled with uncertainty about the truth or falsity of the allegation, is sufficient to tilt the balance towards disclosure. The trial court properly used this criterion to order the disclosure of the identities of several teachers (who did not appeal).

3. Seriousness of Allegation

One must also consider the seriousness of the allegation. The public has more need to know about serious misconduct (e.g., molestation or improper use of force) than about minor misconduct (e.g., improper use of sarcastic language). Of course, even the most serious allegation is not of legitimate public concern if it is false, and the Court of Appeals properly ordered redaction of identity for the clearly false, but very serious,

allegations of rape against Seattle John Does #1 and #7. *See Bellevue John Does*, 129 Wn. App. at 853-55.

It is to be hoped that there will be few instances where investigations of such serious charges are inconclusive. Typically more physical evidence, or other corroborating or exculpatory evidence, will be present in serious cases than may exist in less serious cases where the only evidence may be somewhat unreliable memories and interpretations of those involved. In some cases, however, where truth or falsity or a serious allegation remains uncertain, public oversight may demand disclosure of the identity of a potential malfeasant, if for no other reason than to force a more thorough investigation.

4. Pattern of Conduct

A real concern with redacting identity in all unsubstantiated cases is the possibility that it will allow an employee with a history of misconduct to escape detection. An adequate investigation leading to a finding of unsubstantiated is "indicative though not always dispositive of falsity." *Tacoma News*, 65 Wn. App. at 149. But a pattern of allegations, even if each is unsubstantiated, is indicative though not dispositive of truth, and "the pattern is more troubling than each individual complaint." *Bellevue John Does*, 129 Wn. App. at 856. The trial court properly

considered the "pattern of inappropriate behavior which was arguably sexually motivated" when deciding to disclose the identity of Bellevue John Doe #11. CP 105 (Finding of Fact 29).[2]

If an agency (or court) decides that identity of an employee should be redacted, it is essential that the method used properly effectuates the public's need to recognize a pattern. The method used in this case, replacing identity with a separate pseudonym for each teacher (rather than each instance), is one such method, and should be required in similar future cases. It enables a requester who receives redacted records to analyze them. The requester may then choose to make another records request for more details about a suspect teacher's history, or simply argue to the agency (or court) that the pattern revealed should be weighted more heavily and required disclosure of the teacher's identity.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to evaluate each of the petitioner's records under the above framework, and find that disclosure of most or all of the petitioners' names is not required under the Public Records Act.

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[2] Bellevue John Doe #11 assigned error to this finding of fact in his appeal. *Amicus* takes no position as to whether the finding is correct, but believes the court properly considered the finding after having made it.

Respectfully submitted this 20th day of February 2007.

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