No. 82374-0

Consolidated with No. 82803-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF PUYALLUP,

Respondent, and

THE CITY OF MERCER ISLAND,

Respondent below, and

KIM KOENIG, LAWRENCE KOSS, and ALTHEA PAULSON,

Appellants.

BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. It supports the right of any member of the public to promote government transparency and accountability through public records requests. The ACLU is also a leading proponent of informational privacy. Where both interests are implicated, the ACLU believes that the two competing civil liberties are most prudently evaluated on a case-by-case basis to achieve the purpose of the Public Records Act ("PRA") with minimal harm to legitimate privacy interests.

Amicus has reviewed the documents and pleadings in this case and is familiar with the issues and arguments of the parties.

II. INTRODUCTION

A straightforward reading of two previous decisions of this Court provides a simple conclusion: The agencies must disclose investigative records of alleged police officer misconduct even when the allegations are unsubstantiated, but the identity of the officer must be redacted to protect the officer's privacy. *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) ("*Bellevue John Does*"). Even in instances where redaction will not ultimately serve to protect the

subject's identity—because the subject is identified in the PRA request—the result remains the same. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006).

Neither party cites to *Koenig v. City of Des Moines.* Instead both parties argue for exceptional results because Officer Steven Cain's identity will necessarily be known by disclosure of records specifically seeking his investigative records or is already known. The Respondents request that no disclosure, even of redacted documents, be allowed because such disclosure would violate Officer Cain's right to privacy. Appellants argue that full disclosure of unredacted documents is warranted because Officer Cain's right to privacy has been waived or extinguished by the public nature of the incident.

Amicus respectfully requests that this Court apply *Bellevue John Does* faithfully and order disclosure of the investigative records with Officer Cain's identity redacted. Where redaction does not fully protect the subject's identity, as the case is here, *Amicus* urges this Court to consider a variety of factors in determining whether the public has a legitimate concern in the disclosure of the records. *Amicus* respectfully submits that this approach is more prudent than the bright-line rule followed in *Koenig v. City of Des Moines*. In any event, under either

Amicus' proposed approach or *Koenig*, disclosure of redacted records is required here.

Amicus also requests this Court to reject Appellants' position that privacy rights may be waived.

III. ISSUES PRESENTED

1. Under *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2008), does Officer Steven Cain have a right to privacy only in his identity in investigative records of unsubstantiated misconduct?

2. Where redaction of the subject's identity does not result in the protection of the subject's privacy, should an agency consider additional factors in determining whether there is a legitimate public concern in disclosure under the Public Records Act?

3. Is a subject's failure to file an injunction action against disclosure of documents under the Public Records Act a voluntary waiver of that subject's right to privacy for all future disclosures?

IV. STATEMENT OF THE CASE

This case arises out of a traffic stop on Bainbridge Island in September 2007. Kim Koenig, the passenger in the stopped car, formally complained that Bainbridge Island police officer Steven Cain committed sexual misconduct during the traffic stop. The Bainbridge Island Police

Department requested two outside police departments to investigate Ms. Koenig's allegations; the Mercer Island Police Department was asked to conduct an internal investigation and the Puyallup Police Department was asked to investigate potential criminal misconduct. After both investigations, the outside police departments recommended that Officer Cain be exonerated. The Bainbridge Island Police Chief subsequently closed the investigation of Ms. Koenig's complaint with the finding that the allegations were "unsubstantiated."

Ms. Koenig's allegations of misconduct against Officer Cain and the Bainbridge Island Police Department attracted attention from journalists who had mixed results in trying to obtain investigative records through the Public Records Act. In April 2008, one individual successfully obtained Officer Cain's criminal investigation records from the Puyallup Police Department. Before releasing the records, the Puyallup Police Department notified Officer Cain of its intention to release the criminal investigative files but Officer Cain did not respond. A variety of news articles and blog posts regarding the incident ensued.

In June and July 2008, Ms. Koenig and a local activist, Lawrence Koss, requested the internal and criminal investigative records from the Mercer Island Police Department and the Puyallup Police Department. Officer Cain and the Bainbridge Island Police Guild filed injunction

actions in both King County and Pierce County Superior Courts to prevent disclosure of the requested documents. In both actions, the trial courts issued injunctions against disclosure, finding that disclosure of the requested materials would violate Officer Cain's right to privacy, even if Officer Cain's name was redacted.

Ms. Koenig and Mr. Koss, Appellants here, argue for full disclosure of the requested records because Officer Cain has no right of privacy to already public information. Amended Appellants' Brief, pp. 9-10. In the alternative, Appellants argue for disclosure of redacted records under *Bellevue John Does 1-11 v. Bellevue School District #405*, the Washington Supreme Court decision in 2008. *Id.* at 13-15. On the other hand, Officer Cain and the Bainbridge Island Police Guild argue against disclosure of the documents because even the disclosure of redacted records would violate Officer Cain's right to privacy. Bainbridge Island Respondents' Brief, p. 28.

V. ARGUMENT

A. *Bellevue John Does* Requires Disclosure of Redacted Investigative Records of Unsubstantiated Allegations.

Two exemptions from public disclosure are at issue here: RCW 42.56.240(1), the investigative records exemption, and RCW

42.56.230(2), the employee records exemption.[1] *See* Bainbridge Island Respondents' Brief, fn. 3. Both exemptions apply only to the extent that disclosure would violate a person's right to privacy. *Id.* A person's right to privacy is violated, for purposes of the PRA, only if disclosure of information about a person 1) would be highly offensive to a reasonable person and 2) is not of legitimate concern to the public. RCW 42.56.050. This Court has held that both prongs of the test are met by the disclosure of unredacted records regarding unsubstantiated allegations of sexual misconduct, and that such unredacted records are therefore exempt from disclosure. *Bellevue John Does 1-11 v. Bellevue School District #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) ("*Bellevue John Does*").

In *Bellevue John Does*, public school teachers filed a PRA injunction action to prevent disclosure of records relating to allegations of teacher sexual misconduct. *Id.* at 206. The trial court allowed disclosure of records, including the identity, for teachers whose alleged misconduct was substantiated, disciplined or the subject of an inadequate investigation. *Id.* The Court of Appeals tipped the scales in favor of even more disclosure, allowing non-disclosure only where the allegations were "patently false." *Id.* at 207. This Court favored privacy over disclosure

[1] The Criminal Records Privacy Act (CRPA) does not apply here because the investigative records do not fall within the definition of "criminal history record information." RCW 10.97.030(2). Thus, *Amicus* does not address the CRPA in this brief.

and held that public school teachers who were the subject of *unsubstantiated* sexual misconduct allegations, which would also include patently false allegations, had a right to privacy in their identities.

The *Bellevue John Does* Court also affirmed the legitimate public interest in *redacted* investigative records of unsubstantiated misconduct. *Id.* at 221. The Court reasoned, "The public can continue to access documents concerning the nature of the allegations and reports related to the investigation and its outcome, all of which will allow concerned citizens to oversee the effectiveness of the school districts' responses. The identities of the accused [employees] will simply be redacted to protect their privacy interests." *Id.*

Under a straightforward application of *Bellevue John Does*, the *identity* of Officer Cain is not disclosable because there is no legitimate public concern in the identity of a subject of unsubstantiated allegations. Yet there is a legitimate public concern in the redacted documents insofar as they allow concern citizens to oversee the effectiveness of the external investigations and the Bainbridge Island Police Department's response to the allegations. Accordingly, *Bellevue John Does* requires disclosure of redacted records here.

B. Where Redaction Does Not Effectively Protect Privacy, Public Agencies and Courts Should Consider Various Factors in Determining the Legitimate Public Concern in Disclosure of the Documents.

1. *Koenig's* Bright-Line-Rule Is Ineffective to Protect Privacy.

Respondents correctly argue that a straightforward application of *Bellevue John Does* would not actually protect Officer Cain's privacy rights. They point out the essential difference between the present case and *Bellevue John Does*: there, multiple records were at issue, so the identity of teachers would remain protected when their names were redacted from the records; here, redaction is pointless since the request itself names the subject officer. *See* Bainbridge Island Respondents' Brief, p. 18. Puyallup agrees that this result "would create a fill-in the blank exercise for a requestor," and claims the issue of whether redaction in such circumstances provides meaningful privacy is ripe for review. Puyallup Respondent's Brief, p. 5.

None of the parties appear to be aware that this Court has already considered the question of the efficacy of redaction to protect privacy when the information is already known by the requester, in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) ("*Koenig*").[2] In

[2] There is no apparent relation between Kim Koenig, the requestor in this case, and David Koenig, the requestor in the Des Moines case.

Koenig, a person had requested, by name of the victim, the records for the investigation of a sexual assault against a minor. Disclosure of documents, even if redacted, would still be associated with the victim, since the requester already knew her identity, and the records request specifically named the victim. This Court affirmed the legitimate concern of the public in the city's response to the crime, and ordered the disclosure of redacted records even though such disclosure would be practically ineffective at protecting privacy. *Id.* at 182.

The majority in *Koenig* expressly rejected Officer Cain's rationale—that the public agency necessarily discloses the identity of the subject when the requestor asks for records of a specific individual—as a basis to deny disclosure. *Id.* The Court allowed disclosure of redacted documents, reasoning that, "[t]he fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable. To hold otherwise would eviscerate the act's policy of favoring openness and disclosure." *Id.* at 187.

A straightforward application of the bright line rule of *Koenig* to the present case would similarly ignore the fact that the requesters know Officer Cain's identity and result in the disclosure of redacted documents.

Amicus respectfully asks this Court to instead adopt a multi-factor test for situations in which redaction is ineffective to protect privacy. The result in this case will be the same, but a multi-factor test will be better suited to handle future scenarios.

2. Where Privacy Interests Are Not Sufficiently Protected by Disclosure of Redacted Documents, a Case-By-Case Evaluation of Many Factors Is Prudent When Assessing the "Legitimate Public Concern."

Amicus understands the tension between privacy and public disclosure implicit in Respondents' "fill-in-the-blank" argument. This tension is normally resolved by the release of redacted documents, satisfying both the need for public oversight of government operations and the privacy rights of named individuals. In cases such as the present, however, redaction does not serve any real purpose—the agency's only real choice is between failing to disclose the document entirely and disclosing the practically unredacted document.

As such, the agency must determine whether disclosure of the *unredacted* document violates the subject's right to privacy, *i.e.*, whether disclosure is both highly offensive and not of legitimate public concern. RCW 42.56.050. There is no real dispute in this case that disclosure is highly offensive; the question therefore is whether the disclosure of unredacted documents is of a "legitimate" public concern. Some weighing

of competing interests is inherent in this inquiry, and therefore cases like these should be evaluated on a case-by-case basis.

In cases such as the present, where redaction does not effectively protect privacy interests, *Amicus* urges this Court to adopt multi-factor test to evaluate the legitimate public concern in light of the subject's right to privacy. As this Court has noted, "While the legitimacy of the public's concern cannot take into account the identity of the requesting party or the purpose of the request, the legitimacy of the public's concern should be viewed in the context of the PDA." *Bellevue John Does*, at 224 (citations omitted) (listing factors such as privacy rights, efficient administration of government, evaluations of prosecutors, chilling effect on public employee evaluations). While the purpose of the PRA is to promote openness of government and disclosure of public records to enable oversight of government operations, such multi-factor analysis is prudent where disclosure is sought over the subject's "fill-in-the-blank" privacy objections.

Amicus proposes the following non-exclusive factors to consider: the scope and wording of the request, the persons implicated by the records, the public context of the request, and the impact upon efficient administration of government. This list is not exhaustive; the agency must consider the totality of the situation.

(a) Scope and Wording of the PRA Request

The scope and wording of the PRA request will assist courts in evaluating legitimate public concern. A request that encompasses multiple investigations of sexual assault by public employees would allow a requester to discover a pattern of investigative methods or other misconduct by public officials. Such a request would have special value for government oversight if the requester were to seek all records involving a particular public official or group of public officials, *e.g.*, records involving all investigations conducted by a particular law enforcement officer or all records involving allegations of misconduct against a particular officer.

(b) Person(s) Implicated by the Records

Another factor to consider is the person(s) implicated by the record disclosure. The public may have a legitimate interest in knowing details of assaults if the alleged perpetrator is a public official. *See, e.g., Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (ordering disclosure of investigative records involving sexual abuse of students by teachers). A similar interest may exist if the perpetrator is not a public official, but nonetheless somebody that occupies a special position of public trust (*e.g.*, a clergy person or community center volunteer).

(c) Public Context of the Request

An agency should also take into account the public context of the request. The presence of news coverage – or even multiple public inquiries – about a matter may indicate it is of legitimate public concern, particularly where questions about the government's conduct have been raised.

(d) Efficient Administration of Government

As already identified by this Court, another factor to consider in determining the public's legitimate concern is the impact of disclosure upon "the efficient administration of government." *Dawson v. Daly*, 120 Wn.2d 782, 798, 845 P.2d 995 (1993). *Amicus* believes this is a valid factor to consider, but it is only one of many, and certainly does not deserve the primacy that the lower courts have assigned it. *See Brown v. Seattle Public Schools*, 71 Wn. App. 613, 619, 860 P.2d 1059 (1993); *Tiberino v. Spokane County*, 103 Wn. App. 680, 690, 13 P.3d 1104 (2000); *Koenig v. City of Des Moines*, 123 Wn. App. 285, 299-300, 95 P.3d 777 (2004). Too great a concern for efficiency opens the door to allow government to decide based on its own convenience what is good for the public to know.

3. Applying the Factors Here, Disclosure of Redacted Documents is Warranted.

Applying the above factors to the present case should reach the same result as would be reached by a straightforward application of *Bellevue John Does* and *Koenig*—disclosure of redacted documents.

The scope and wording of the requests sought investigative records regarding alleged misconduct of a particular police officer during the conduct of his official duties. Even where those allegations are found to be unsubstantiated, the request furthers the public's oversight of government functions—the alleged conduct of a public employee and the government's response to such allegations. In addition, the person implicated by the PRA request here is a police officer, an employee to whom the public has entrusted great powers, and is therefore in most need of public oversight. Again, the details of the allegations and the government's response to such allegations are of legitimate public interest.

Here, there is also evidence of news coverage in the record. *See* Amended Appellants' Brief, pp. 4-6 (citing news articles in the record). The request involved an incident involving government conduct that garnered the attention of multiple journalists. Finally, the investigations here are complete—in fact, closed for a finding of "unsubstantiated." There is no interruption of the government's investigation of the

allegations or any conceivable impact on the efficient administration of government.

Accordingly, disclosure of redacted records over Officer Cain's privacy objection is warranted considering the totality of the circumstances and in light of the PRA's purpose of effective oversight of government functions.

C. This Court Should Dispel Any Misconception that Privacy Rights Can Be Waived by Failing to File a Public Records Act Injunction Action.

Appellants argue that Officer Cain waived his privacy rights when he did not file an action to prevent Puyallup's initial disclosure of records to the first PRA requestor. *Amicus* respectfully requests this Court to deny Appellants' argument that privacy interests may be waived by inaction.

Privacy is a fundamental right—independent and reinforced by the Public Records Act. Article 1, Section 7 of the Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." At common law, an invasion of privacy may result in tort liability. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978). The PRA has numerous provisions that recognize and protect an individual's right to privacy when disclosure of public records is required. *See, e.g.,* RCW 42.50.050 (defining when a privacy invasion occurs); RCW 42.56.070 (requiring redaction of

identifying details to prevent an "unreasonable invasion of privacy); RCW 42.56.210 (exemptions to disclosure are inapplicable to the extent information, the disclosure of which would violate personal privacy, can be redacted).

Waiver is the voluntary and intentional relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). "It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage." *Id.* Generally, silence alone does not constitute a waiver, unless there is an obligation to speak. *See Voelker v. Joseph*, 62 Wn.2d 429, 462, 383 P.2d 301 (1963). Under tort, contract, and constitutional law, the doctrine of waiver is strictly applied. *See, e.g., Jones v. Best*, 134 Wn.2d 232, 241-242, 950 P.2d 1 (1998) (waiver of a contractual right must be express or implied from unequivocal acts or conduct evidencing an intent to waive the right); *Jeffers v. City of Seattle*, 23 Wn.App. 301, 313, 597 P.2d 899 (1979) (waiver of privacy right against investigation into medical condition exists where a plaintiff sues for personal injuries); *City of Seattle v. Klein*, 161 Wn.2d 554, 561, 166 P.3d 1149 (2007) (waiver of constitutional right must be knowing, voluntary and intelligent).

Where waiver of privacy rights in relation to the PRA was at issue, only explicit and intentional acts such as holding a press conference was

held sufficient to waive privacy rights. *See Bellevue John Does*, 164 Wn.2d. at 214, fn.14 (citing *Columbian Publishing Co. v. City of Vancouver*, 36 Wn.App. 25, 27, 671 P.2d 280 (1983)). In *Columbian Publishing Co. v. City of Vancouver*, the local police union issued a press release expressing concerns about the police chief's job performance. *Columbian Publishing Co. v. City of Vancouver*, 36 Wn.App. at 27. At the city manager's request, the police union provided the city with statements of 13 police officers detailing specific complaints. *Id.* A newspaper requested the 13 statements pursuant to the PRA, and the police union claimed that the statements were exempt under the privacy exemption. *Id.* at 29. The appellate court found that the privacy exemption did not apply to documents relating to the job performance of a public official and, in dicta, noted that the police union had waived the privacy rights of its individual members in the specific statements by bringing vague complaints to the press's attention. *Id.* at 30.

Here, Officer's Cain inaction to file a PRA injunction act should not be interpreted as a voluntary waiver of that right. First, Officer Cain did not expressly waive his right to privacy. In fact, both before and after the alleged waiver, Officer Cain *did* assert his privacy rights in multiple instances. Second, Officer Cain's inaction alone is not sufficient to imply waiver. The subject of a PRA request has the option, but is not required,

to file an injunction action. *See* RCW 42.56.540. Third, Officer Cain did not initiate the investigation into his alleged misconduct nor did he attempt to benefit by putting the investigation at issue. Finally, as a matter of public policy, Appellants' argument places an unfair obligation on people to affirmatively defend their privacy interests, similar to the requirement of trademark holders to vigorously protect their trademarks. Privacy is a fundamental right that should not be conditioned on such a standard.

VI. CONCLUSION

For the foregoing reasons, *Amicus* requests the Court to reverse the trial courts' refusal to allow disclosure of the requested documents. Disclosure of redacted documents related to unsubstantiated allegations of government misconduct is vital to the public's oversight of government functions. Here, because redaction does not serve to protect the subject's privacy, *Amicus* urges this Court to adopt a multi-factor test to determine whether the public interest in the documents is "legitimate;" the totality of circumstances of the present request indicate that the concern is, in fact, legitimate. Finally, *Amicus* requests this Court to dispel any misconception that privacy rights may be waived by inaction, such as failing to file a PRA injunction action to enjoin the disclosure of records.

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Respectfully submitted this 15th day of October, 2010.

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