No. 82374-0

MADSEN, C.J. (concurring/dissenting)—While I agree with the lead opinion that the Puyallup criminal investigation report and the Mercer Island internal investigation report must be produced, I do not agree that redaction of Bainbridge Island Police Officer Steven Cain's identity is proper under the Public Records Act (PRA or Act), chapter 42.56 RCW. The trial court's grant of an injunction should be reversed and the reports should be produced in their entirety because the Bainbridge Island Police Guild and Officer Cain have failed to establish that either the personal information exemption or the investigative records exemption of the PRA applies to prevent production of the reports in full.

The lead opinion misconstrues the privacy exemption to apply to the identity of a police officer who is alleged to have engaged in sexual misconduct occurring during the course of performing public duties. Such allegations in no way involve the details of one's personal and private life and do not implicate Officer Cain's privacy interests.

Accordingly, I disagree with the lead opinion's refusal to direct full disclosure of the criminal and internal investigation reports.

Analysis

The PRA is an expression of intent that public records must be available so that the people are informed and, consequently, are able to maintain control over the instruments of the government they have created. RCW 42.56.030. Chapter 42.56 RCW "shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." *Id.*; *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). There must be a very good reason to disregard the public mandate of openness in government—a mandate that unquestionably includes public servants' performance of their official public duties.

In fact, public records relating to alleged misconduct of public servants and how government agents investigate such allegations are quintessential examples of the kind of information that the PRA opens to public scrutiny. The public has the right to know about allegations of such misconduct, investigation into alleged misconduct, and corrective measures that may have been taken. Only by access to this kind of information can the people assure integrity of government action. "The basic purpose of the public disclosure act is to provide a mechanism by which the public can be assured that its public officials are honest and impartial in the conduct of their public offices." *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 719, 748 P.2d 597 (1988).

The lead opinion correctly concludes that the investigative records must be disclosed in this case. However, the lead opinion then undercuts its holding by erroneously limiting disclosure through its holding that the public servant's name must be redacted from the records. This limitation does not comport with the letter or the spirit of the PRA.

The exemptions from disclosure claimed in this case do not justify nondisclosure. The personal information exemption under former RCW 42.56.230(2) (2010)[1] applies to "[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." The investigative records exemption under RCW 42.56.240(1) applies, in relevant part, to "specific investigative records compiled by investigative [and] law enforcement . . . agencies . . . vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential . . . for the protection of any person's right to privacy." In the circumstances here, both of these exemptions turn on whether Cain's right to privacy is implicated by the disclosure requests. If it is not, then neither exemption applies.

The meaning of the term "right to privacy" (or "privacy right") in the PRA was written into the Act in 1987 when the legislature expressly agreed that this court's adoption in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978), of the

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[1] A 2011 amendment recodified this subsection as RCW 42.56.230(3). Laws of 2011, ch. 173, § 1.

common law right to privacy standard of the *Restatement (Second) of Torts* § 652D, at 383 (1977) correctly sets forth the appropriate standard for the right to privacy. Laws of 1987, ch. 403, § 1. The legislature stated: "[T]o avoid unnecessary confusion, 'privacy' as used in [RCW 42.56.050[2]] is intended to have the same meaning as the definition given that word by the Supreme Court in 'Hearst.'" The legislature thus wrote RCW 42.56.050 to state that "A person's 'right to privacy,' 'right of privacy,' 'privacy,' or 'personal privacy,' as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." Laws of 1987, ch. 403, § 2. There is no general right to privacy under the PRA.

As the court in *Hearst* explained, under *Restatement (Second) of Torts* § 652D, the information that is protected from disclosure concerns private facts as described in comment b to § 652D:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

[2] Formerly codified as RCW 42.17.255. RCW 42.56.050 is used in this opinion in place of the former codification.

The lead opinion ignores this definition, saying that the PRA only tells when the right is violated and not when it exists, citing *Bellevue John Does*, 164 Wn.2d at 212. The problem with the conclusion here, as in *Bellevue John Does*, is that the legislature did not believe that it identified only when the right is violated. Rather, as stated, the legislature expressly said that it intended the term to have the same meaning as set out in *Hearst*, which is the common law meaning. This court reached the same conclusion following *Hearst*. *E.g.*, *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989) ("[t]he right of privacy is commonly understood to pertain only to the intimate details of one's personal and private life").

In fact, in *Bellevue John Does* itself, 164 Wn.2d at 212, the court actually affirmed that "[i]n *Hearst*, we *defined* 'right to privacy' . . . by looking to the common law tort of invasion of privacy by *public disclosure of private facts*" and "[w]e adopted the *definition* of 'invasion of privacy' as provided in" § 652D. (Emphasis added.) The court stated that "[a] person has a right to privacy in '"matters[s] concerning the private life."'" *Bellevue John Does*, 164 Wn.2d at 212 (second alteration in original) (quoting *Hearst*, 90 Wn.2d at 135 (quoting Restatement (Second) of Torts § 652D)). The court explicitly stated that comment b to § 652D "illustrates the nature of facts that could be considered matters concerning the private life." *Id*.

Without regard to the legislature's express reference to the definition in *Hearst* and without regard to *Hearst*, *Spokane Police Guild*, and *Bellevue John Does* itself, the lead opinion says that the legislature has not identified what constitutes matters within the

right to privacy.

Applying the complete and correct definition from *Hearst*, nothing about the situation or circumstances under which the misconduct allegedly occurred in this case involves any matters that would come within the common law's understanding of privacy rights embodied in § 652D. The investigative reports concern allegations about misconduct occurring on a public highway while Officer Cain was on duty and engaged in his public duty of law enforcement.[3]

Nor does it matter that the allegations were not confirmed. They have to do only with his official capacity and on-the-job conduct.

The lead opinion is able to reach a different conclusion as a result of its determination that this case is no different from *Bellevue John Does*, which involved public records relating to allegations that teachers committed acts of sexual misconduct against students. In that case, the court held that investigative reports into the allegations must be disclosed but the teachers' names redacted. The court in *Bellevue John Does* stressed the significance of possible negative reaction when deciding whether disclosure of the teachers' names was required. *Bellevue John Does*, 164 Wn.2d at 215. The court said in *Bellevue John Does* that "[t]he fact of the allegation, not the underlying conduct, does not bear on the teacher's performance or activities as a public servant"; "the allegation of sexual misconduct toward a minor may hold the teacher up to hatred and

[3] The fact that the allegation concerns *sexual* misconduct surely does not mean that personal privacy is at stake. If that were so then sexual offenses would involve the offenders' personal privacy interests.

ridicule in the community"; and an unsubstantiated allegation is a "'matter concerning the private life' within the *Hearst* definition." *Id*. (quoting *Hearst*, 90 Wn.2d at 135).

Unfortunately, this analysis never explains why there was a personal privacy right at issue. Public reaction to unsubstantiated allegations does not establish whether a privacy right exists. Significant adverse reaction would exist in the case of allegations of a teacher's sexual abuse of a student whether the allegation is substantiated or not, and therefore whether an allegation is substantiated cannot be a legitimate distinguishing factor. And if the intended point is that an individual should not be subject to unsubstantiated allegations, that reasoning fails to come to grips with the first question that has to be answered—whether a privacy right exists in the subject matter of the allegations.

The lead opinion should not rely on the analysis in *Bellevue John Does*, because although that case in fact contains the correct definition of what personal matters come within privacy rights, the definition is ignored in the analysis.

For this reason and for other reasons I explained in my dissent in *Bellevue John Does*, the court's analysis and result in that case is difficult to harmonize with the PRA and our other cases. *Id*. at 228-41 (Madsen, J., dissenting). Further, as explained above, the court's holding in *Bellevue John Does* does not conform to the court's own recognition that the definition of privacy rights involves one's *personal, private affairs* that would not ordinarily be shared. Whether substantiated or not, allegations of public misconduct while performing public duties do not concern an individual's personal

privacy interests.

Here, nothing about Officer Cain's conduct, whether substantiated or not, or about the investigation itself, concerns his personal privacy rights. The embarrassment or negative attention that might be focused on him by disclosure of his identity would not arise because of disclosure of anything relating to his personal life or characteristics, but would be wholly concerned with the performance of public duties and allegations arising wholly in connection with those public duties. The lead opinion confuses negative publicity and adverse reaction upon public disclosure with privacy rights. They are not the same, as this court and the legislature have both previously recognized.

The lead opinion fails to follow the express language of the PRA, the legislature's express statements about what is meant by privacy rights in the PRA, and the common law definition of the term that is the meaning intended. The court should conclude that Officer Cain's privacy rights are not implicated by the requested disclosure.

The lead opinion's resolution of this case also fails to follow the spirit of the law. The legislature commanded that the PRA is to be construed as "'a strongly worded mandate for broad disclosure of public records'" that must be liberally construed to effectuate this intent. *Id*. at 209 (quoting *Hearst*, 90 Wn.2d at 127); *see* RCW 42.56.030. The lead opinion has not followed this command. It has failed to heed the principle of construction embodied in the Act that exemptions are to be narrowly construed. RCW 42.56.030. The lead opinion has expansively construed the privacy exemptions at issue by weighing the strength of possible embarrassment and adverse reaction and ignoring the

real meaning of privacy interest.

Because Officer Cain's personal, private interests are not implicated under the circumstances, there is no reason to ask whether disclosure of the reports "[w]ould be highly offensive to a reasonable person" and "not of legitimate concern to the public." RCW 42.56.050. Under the PRA, these issues do not arise in the absence of a cognizable privacy interest at stake.

Conclusion

I agree that the investigative reports at issue must be disclosed under the PRA, but I cannot agree that Officer Cain's identity must be redacted. The lead opinion's analysis does not follow the PRA and the legislature's intent as to what is meant by "privacy interest." Instead, the lead opinion gives undue weight to the potential for negative reaction upon disclosure. That is not the proper focus in a case under the PRA.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Richard B. Sanders, Justice Pro Tem.