No. 82374-0

J.M. JOHNSON, J. (dissenting)—The Puyallup criminal investigation report (PCIR) and the Mercer Island internal investigation report (MIIIR) fit squarely within the Public Records Act[1] (PRA) exemption for investigative records and should not be disclosed at all. In this case, where some investigative records have already been disclosed, and information connecting the individual officer to unsubstantiated allegations has already been made public, further disclosure of the investigative records in any form invades and violates the individual officer's right to privacy.

The lead opinion's holding is inconsistent with our most relevant recent decision, *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 215, 189 P.3d 139 (2008). Although the public has a legitimate interest in how a police department responds to and investigates a false or unsubstantiated allegation,

[1] Ch. 42.56 RCW.

there is no reason to treat the privacy rights of officers differently from the privacy rights of teachers, who are also public servants. I dissent.

Facts

The Puyallup Police Department and the Mercer Island Police Department conducted separate investigations in response to a complaint by a cited defendant who alleged sexual assault by an officer during her arrest. Both investigations found the claim to be unsubstantiated, and the Mercer Island Police Department recommended that the officer be "EXONERATED."[2] The PCIR, however, was briefly released and articles were published in print and on-line connecting the officer with the incident.

The Bainbridge Island Police Guild (Guild) and the arresting officer moved for injunctive relief to prevent further disclosure of the PCIR and the MIIIR. The court reviewed the PCIR and the MIIIR in camera, and then concluded that the "investigations were both very thorough" and "reasonable." Clerk's Papers (CP) at 33. The court also found the claims against the officer to be unsubstantiated.

The trial court granted the Guild's motion for injunctive relief, applying the standard articulated in *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140,

[2] This statement is found in the record at Clerk's Papers (CP) at 66.

827 P.2d 1094 (1992) (holding that police investigative records containing unsubstantiated claims of child abuse are exempt from disclosure under the PRA).[3] The order was appealed and we granted direct review. Order Granting Review at 1.

Analysis

The PCIR and the MIIIR are public records and the cities of Mercer Island and Puyallup are public agencies. RCW 42.56.010. Unless an exemption or prohibition applies, the PCIR and the MIIIR must be made available for public inspection and copying. RCW 42.56.070.

RCW 42.56.240(1) provides an exemption from disclosure for certain investigative records. Under RCW 42.56.240(1), investigative records compiled by law enforcement (and state agencies vested with the responsibility to discipline members of its profession) are exempt from disclosure if nondisclosure is either (1) essential to effective law enforcement or (2) essential for the protection of any person's right to privacy.

The PCIR and the MIIIR fit squarely within this exemption. Nondisclosure of the PCIR and the MIIIR is essential for the protection of the officer's right to

[3] The trial court issued its ruling before this court decided *Bellevue John Does 1-11*, 164 Wn.2d 199; CP at 35-37. The holding of *Bellevue John Does* is not inconsistent with *Tacoma News*. *See Bellevue John Does*, 164 Wn.2d at 210, 216-21.

privacy because disclosure of false and unsubstantiated charges would invade and violate the officer's privacy.[4] In this case, redacted disclosure of the PCIR and the MIIIR is insufficient to protect the officer's right to privacy, as several articles connecting the officer with the incident have already been published.

A. The Right to Privacy under the PRA

RCW 42.56.050 supplies the standard for determining whether a person's privacy is invaded or violated under the PRA. That provision states:

> 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. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

(Emphasis added.) Both the lead opinion and the concurrence/dissent misapply this definition. I begin by addressing the concurrence/dissent.

[4] The Guild does not argue that nondisclosure of the PCIR and the MIIIR is essential to effective law enforcement. In *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 713, 733, 748 P.2d 597 (1988), however, we held that nondisclosure of the identities of law enforcement officers was essential to effective law enforcement where complaints had been made against the officers and internal investigations had been conducted by their respective law enforcement agencies. We reasoned that "[i]nternal investigations depend upon the trust and cooperation of the law enforcement officers within the agency" and stated that "the cooperation of the officers is available because they know the incident will be kept confidential." *Id.* at 733.

The legislature has stated that "privacy" as used in RCW 42.56.050 "is intended to have the same meaning as the definition given that word by the Supreme Court in 'Hearst v. Hoppe,' 90 Wn.2d 123, 135 (1978)." Laws of 1987 ch. 403, § 1. At that precise location, one finds the relevant discussion:

> "Right to privacy" is not defined by [the PRA] . . . . Inasmuch as the statute contains no definition of the term, there is a presumption that the legislature intended the right of privacy to mean what it meant at common law. The most applicable privacy right would appear to be that expressed in tort law. Tort liability for invasions of privacy by public disclosure . . . is set forth in Restatement (Second) of Torts § 652D, at 383 (1977): "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person . . . ."

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 135, 580 P.2d 246 (1978) (citation omitted).

In *Bellevue John Does*, 164 Wn.2d at 215, a case involving a school teacher, we held that a false or unsubstantiated accusation of sexual misconduct "is not an action taken by an employee in the course of performing public duties." Instead, we held that a false or unsubstantiated accusation of sexual misconduct "is a 'matter concerning the private life' within the *Hearst* definition of the scope of the right to privacy." *Id.* (quoting *Hearst,* 90 Wn.2d at 135); *see also Cowles*, 109 Wn.2d 712. Accordingly, we held that disclosure of false or unsubstantiated allegations of sexual misconduct violates a teacher's right to privacy under the PRA – such disclosure

would be highly offensive to a reasonable person. *Bellevue John Does*, 164 Wn.2d at 216 (citing *Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993); *Tacoma News*, 65 Wn. App. at 145). We also held that the public does not have a legitimate interest in the identities of teachers who are subjects of false or unsubstantiated allegations of sexual misconduct. *Id.* at 216-21.

We should apply the same standard to law enforcement officers. The allegations against the officer in this case are false and unsubstantiated and, therefore, are matters concerning the private life of the officer under *Bellevue John Does*. Disclosure of the officer's identity in connection with false and unsubstantiated accusations would be highly offensive to a reasonable person and are not of legitimate public concern. *Id.*

This should end our analysis: the PRA's investigative records exemption applies in this case because disclosure of the officer's identity would invade or violate the officer's right to privacy. In this case, where information connecting the officer to unsubstantiated allegations has already been made public, any further disclosure of the details of accusations in the PCIR and MIIIR will perpetuate this identification and violate the officer's right to privacy. Nondisclosure of the PCIR and the MIIIR is essential to protect the officer's right to privacy from further

invasion. RCW 42.56.240(1).

B. The Lead Opinion Misapplies RCW 42.56.050

The lead opinion does not reach this result because it misapplies the "legitimate public concern" prong of RCW 42.56.050. As the lead opinion puts it, "[a]lthough lacking a legitimate interest in the name of a police officer who is the subject of an unsubstantiated allegation of sexual misconduct, the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer." Lead opinion at 17. It then remands to the trial court for production of the PCIR and the MIIIR after redaction of the officer's identity. *Id.* at 23.

The lead opinion recognizes that we have previously permitted redacted disclosure in one case "even though redaction of only the person's name was insufficient to protect their identity." *Id.* at 17 (citing *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). *Koenig*, however, does not support the lead opinion's compromise. The claims of sexual misconduct were not unsubstantiated or proven false in *Koenig*. *Koenig*, 158 Wn.2d at 177-78. In other words, the public had some legitimate interest in disclosure of "information about the person" in *Koenig*. *See id.* at 186-87. Here, as in *Bellevue John Does*, the public *does not*

have a legitimate interest in the identity of an officer who was the subject of false and unsubstantiated allegations of sexual misconduct.

C. Attorney Fees

Finally, neither the lead opinion nor the concurrence/dissent addresses whether the appellants are entitled to statutory penalties and reasonable attorney fees under RCW 42.56.550. The appellants are not entitled to statutory penalties or attorney fees. They have not prevailed against an agency in this case but rather opposed the motion of the Guild and the officer to enjoin disclosure. The Puyallup Police Department and the Mercer Island Police Department have not wrongfully denied disclosure. Therefore, RCW 42.56.550(4) does not apply.

Conclusion

The PCIR and the MIIIR here fit squarely within the PRA's investigative records exemption. Disclosure of the officer's identity in connection with false and unsubstantiated accusations would be highly offensive to a reasonable person and is not of legitimate public concern. In this case, where some investigative records have already been disclosed and information connecting the individual officer to unsubstantiated allegations has already been made public, further disclosure of the investigative records in any form will repeat the identification of the officer and

violate the officer's right to privacy.[5] Nondisclosure of the PCIR and the MIIIR is therefore essential for the protection of the officer's right to privacy. RCW 42.56.240(1). I dissent.

[5] In this age of rapid information dissemination via the internet, I predict that the individual officer's right to privacy will be further invaded and violated soon after these records are released.

AUTHOR:

Justice James M. Johnson

WE CONCUR: