IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN, Respondents, v. THE CITY OF PUYALLUP, a municipal corporation, Defendant, and KIM KOENIG, an individual; and LAWRENCE KOSS, an individual, Appellants.	)	No. 82374-0 EN BANC Filed August 18, 2011
BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN, Respondents, v. THE CITY OF MERCER ISLAND, a municipal corporation, Defendant, and KIM KOENIG, an individual; and	)	No. 82803-2

LAWRENCE KOSS, an individual; and ALTHEA PAULSON, an individual; and TRISTAN BAURICK, an individual,

Appellants.

FAIRHURST, J. - Appellants, Kim Koenig, Lawrence Koss, and Althea Paulson, seek direct review of two separate superior court orders enjoining disclosure of investigative records compiled by the cities of Puyallup and Mercer Island. Appellants argue that the records were wrongfully withheld. We remand these cases to the trial courts and direct them to order the production of the Puyallup criminal investigation report (PCIR) and the Mercer Island internal investigation report (MIIIR) with Bainbridge Island Police Officer Steven Cain's identity redacted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Koenig filed a complaint against Officer Cain alleging sexual assault and strangulation during the course of a traffic stop on September 30, 2007. Koenig alleged that Officer Cain sexually assaulted her by pinning her against a car and rubbing his crotch against hers. Koenig also claimed that Officer Cain choked her until she defecated out of fear. Bainbridge Island Police Chief Matt Haney asked

the Puyallup Police Department to conduct a criminal investigation and the Mercer Island Police Department to conduct an internal investigation into Officer Cain's conduct.

The Puyallup Police Department forwarded the results of its criminal investigation to the Kitsap County Prosecuting Attorney for review. Relying on the PCIR, the prosecutor declined to initiate any charges against Officer Cain, because there was "not sufficient evidence to establish that there was any inappropriate behavior by this police officer." Clerk's Papers (CP) (Puyallup) at 72. The MIIIR yielded similar results, recommending that Officer Cain be "EXONERATED."[1] CP (Mercer Island) at 66. After receiving the MIIIR and the PCIR, Chief Haney closed the case and informed Officer Cain that each investigation found the allegations "unsubstantiated." CP (Puyallup) at 70.

In February 2008, Bainbridge Island received multiple public records requests for the MIIIR and the PCIR, including requests from Tristan Baurick, a reporter from the *Kitsap Sun*, and Paulson, author of the *Bainbridge Notebook* blog. Paulson was permitted to view the PCIR as "non-conviction data," and Bainbridge Island informed her that the MIIIR would be produced absent an injunction. CP (Puyallup) at 131-32.

[1]The MIIIR is not contained in the appellate record before this court.

On March 31, 2008, Puyallup notified Officer Cain that Baurick had also submitted a public records request to Puyallup for the PCIR. Puyallup disagreed that the PCIR was nonconviction data, and informed Officer Cain that it intended to produce the PCIR absent an order enjoining release. No injunction was obtained and the PCIR was produced for Baurick.

The Bainbridge Island Police Guild (BIPG) and Officer Cain filed a complaint in the Kitsap County Superior Court to prevent Bainbridge Island from providing the MIIIR and the PCIR to Paulson and Baurick. Neither Mercer Island nor Puyallup was joined as a party. Judge Russell W. Hartman reviewed the documents *in camera* and ruled that production of any portion of the reports would violate Officer Cain's right to privacy. Therefore, both the PCIR and the MIIIR were withheld under the investigative report exemption of the Public Records Act (PRA), RCW 42.56.240(1). However, the court refused to enjoin the *Kitsap Sun* from publishing an article based on the PCIR produced by Puyallup for Baurick because Puyallup was not a party to the case.

On May 11, 2008, the *Kitsap Sun* published an article describing the allegations and identifying Officer Cain in connection to them. Additional articles were also published in the *Bainbridge Islander* newspaper, the *Bainbridge Review* newspaper, and many Internet sources.

In June and July 2008, Koss and Koenig separately submitted public records requests to Puyallup for the PCIR. On July 18, 2008, Officer Cain and BIPG moved in the Pierce County Superior Court to enjoin Puyallup from producing the PCIR. The court denied a temporary injunction and Puyallup released the report to Koss and Koenig. However, the court later ruled that the entire report was exempt from production under the personal information exemption, former RCW 42.56.230(2) (2010). The entire report was exempted, not just Officer Cain's name, because the request was specific to information regarding the investigation of Koenig's allegation against Officer Cain, and thus any production would reveal his identity in connection with the incident. Koss and Koenig were ordered to return the report to Puyallup.

Koss and Koenig appealed the Pierce County Superior Court order directly to this court. Meanwhile, Koss, Koenig, Baurick, and Paulson all submitted public records requests to Mercer Island for the MIIIR. Officer Cain and BIPG moved in the King County Superior Court to enjoin production, and the injunction was again granted for the entirety of both reports. Koenig, Koss, and Paulson appealed the King County Superior Court order directly to this court. Because both appeals involve a public records request for the same reports held by different agencies, involving the same underlying facts, the cases were consolidated for review.

II. ISSUES

A. Under the PRA, did the trial court properly grant injunctive relief preventing production of the entire PCIR and MIIIR?

B. Under the Washington State Criminal Records Privacy Act (CRPA), chapter 10.97 RCW, did the trial court properly grant injunctive relief preventing production of the entire PCIR and MIIIR?

III. ANALYSIS

A. *PRA*

Under the PRA, appellants argue that the trial court erroneously granted Officer Cain and the BIPG's motion for injunctive relief to prevent production of the entire PCIR and MIIIR. If an agency intends to produce public records for a requester, an interested third party may seek to enjoin production under RCW 42.56.540.[2] Judicial review under the PRA and this injunction statute is de novo. RCW 42.56.550(3); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 34-35, 769 P.2d 283 (1989). Where the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or

[2]Appellants cite the substantive requirements for an injunction under RCW 7.40.020 as authority to deny the injunction claim. RCW 7.40.020 codifies the court's general powers to grant an injunction. RCW 42.56.540 specifically governs the court's power to enjoin the production of a record under the PRA. We have long recognized that where two statutes apply, the specific statute supersedes the more general statute. *Gen. Tel. Co. of the Nw., Inc. v. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). Because RCW 42.56.540 is specific to injunctions against production under the PRA, it is the governing injunction statute in this case.

competency, we are not bound by the trial court's factual findings and stand in the same position as the trial court. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994) (PAWS).

The PRA requires state and local agencies to produce all public records upon request, unless the record falls within a PRA exemption or other statutory exemption. RCW 42.56.070(1); *PAWS*, 125 Wn.2d at 250. To the extent necessary to prevent an unreasonable invasion of personal privacy interests protected by the PRA, the agency shall redact identifying details and produce the remainder of the record. RCW 42.56.070(1). The party seeking to enjoin production bears the burden of proving an exemption or statute prohibits production in whole or in part. *Spokane Police Guild*, 112 Wn.2d at 35.

The PRA is "a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. Therefore, the PRA is to 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.*

The parties to this case do not dispute that the PCIR and the MIIIR are public records falling within the PRA.[3] Therefore, we must decide whether any exemptions apply to prevent production of either report. If an exemption does apply, we then decide whether the trial court properly enjoined production of the PCIR and the MIIIR under the injunction requirements of RCW 42.56.540. Both trial courts in these consolidated cases granted the motions for injunction under the personal information exemption, former RCW 42.56.230(2).[4] Additionally, the BIPG and Officer Cain argue that the investigative records exemption, RCW 42.56.240(1),[5] also exempts the PCIR and the MIIIR from production. Before analyzing both of these exemptions, and whether an injunction order was proper under RCW 42.56.540, we must decide if Officer Cain has waived his right to argue that either exemption applies.

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[3]The PRA defines a "'[p]ublic record'" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(2).

[4]Former RCW 42.56.230 provides in pertinent part: "The following personal information is exempt from public inspection and copying under this chapter: . . . (2) Personal 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."

[5]RCW 42.56.240 provides:

> The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

1. *Waiver*

Appellants argue that Officer Cain waived his right to privacy by failing to object to Baurick's initial public records request for the PCIR, having received notice of that request. The PRA itself does not provide for waiver of a claimed exemption. Instead, the PRA mandates that state and local agencies produce all public records upon request, unless the record falls within a specific PRA exemption or other statutory exemption. RCW 42.56.070(1). Neither the personal information exemption nor the investigative records exemption expressly requires a person to object to every single public records request that might occur in order to preserve the exemption for future requests. *See* former RCW 42.56.230(2), RCW 42.56.240(1).

Finding no statutory authority for appellants' waiver argument, we turn to the common law doctrine of waiver.

> The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).[6] Officer Cain's actions are inconsistent with an intent to waive his right to privacy. The first PRA request for the PCIR and the MIIIR occurred in February 2008. Officer Cain and the BIPG objected to that production, and the Kitsap County Superior Court ruled that both the PCIR and the MIIIR were exempt from production. In hindsight, Officer Cain should have either joined Puyallup in the Kitsap County action to prevent Bainbridge Island's production, or Officer Cain should have filed a separate action to enjoin production by Puyallup, but Officer Cain did neither. What Officer Cain did do was continue a legal battle to prevent the production of both the PCIR and the MIIIR by Bainbridge Island. Officer Cain and the BIPG's lawsuit against Bainbridge Island to prevent production is consistent with an intention to *protect* Officer Cain's right to privacy, not to forever waive it.

The failure to object to a single public records request is only a relinquishment of the right to prevent that specific production. It is not an intentional and voluntary relinquishment of a person's right to privacy regarding all future requests for that document. The fact that Officer Cain failed to prevent the

[6]The BIPG and Officer Cain, and the American Civil Liberties Union of Washington (ACLU) in its amicus brief, incorrectly cite to *City of Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1149 (2007) for the applicable waiver rule. *Klein*, applied the waiver rule for relinquishment of a constitutional right. *Id*. at 560 n.4. The right to privacy here stems from the PRA, and has been interpreted according to the common law as enumerated in the *Restatement (Second) of Torts* § 652D (1977). *Hearst*, 90 Wn.2d at 135.

production of the PCIR and the MIIIR for Baurick and the *Kitsap Sun* newspaper should not mean he is forever prohibited from protecting his right to privacy. We hold that Officer Cain has not waived his right to privacy and proceed with an analysis of whether a PRA exemption bars release of the PCIR and the MIIIR.[7]

2. *Former RCW 42.56.230(2) – the personal information exemption*

The trial court erroneously ruled that the personal information exemption prohibited production of the entire PCIR and MIIIR. The PRA exempts from production "[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." Former RCW 42.56.230(2). To determine whether the PCIR and the MIIIR fall within this exemption, we must first decide (a) whether the reports constitute personal information, (b) whether Officer Cain has a right to privacy in his identity, and (c) whether the production of Officer Cain's identity in connection with the alleged and unsubstantiated sexual misconduct would violate

[7]Two Court of Appeals cases appellants cite for their waiver argument are not helpful. In *Columbian Publishing Co. v. City of Vancouver*, 36 Wn. App. 25, 27, 30, 671 P.2d 280 (1983), the court held that police officers' affirmative act of disclosure by choosing to "go to the press" with their complaints waived their right to privacy in complaints they filed against the police chief. By failing to object to the Puyallup production, Officer Cain engaged in no affirmative act of waiver. Instead Officer Cain pursued a separate lawsuit to *prevent* Bainbridge Island's production of the same documents.

In *Ames v. City of Fircrest*, 71 Wn. App. 284, 296, 857 P.2d 1083 (1993), the court held that keeping a police chief's identity anonymous was not "essential to effective law enforcement" because the chief had been placed on administrative leave and had agreed to a press release accepting responsibility for his mismanagement. Not only had the chief agreed to the press release, the court did not even consider waiver of the right to privacy.

that right to privacy. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 210, 189 P.3d 139 (2008).

(a) *Personal information*

The PCIR and the MIIIR constitute personal information under former RCW 42.56.230(2). Although not defined in the PRA, we have defined "personal information" as "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." *Bellevue John Does*, 164 Wn.2d at 211.[8] In *Bellevue John Does*, we held that a teacher's identity in connection with an unsubstantiated allegation of sexual misconduct is "personal information" under former RCW 42.56.230(2). 164 Wn.2d at 211-12.

Similar to *Bellevue John Does*, a police officer's identity in connection with an allegation of sexual misconduct is also personal information under former RCW 42.56.230(2). Neither party asserts a reasonable basis to distinguish our case from *Bellevue John Does* on this issue. We hold that the PCIR and MIIIR contain personal information.

[8]In *Bellevue John Does*, we defined "personal information" in former RCW 42.56.310(1)(b) (2002). 164 Wn.2d at 211. That provision was amended and recodified as former RCW 42.56.230(2) and provides identical language for the personal information exemption. Former RCW 42.17.310(1)(b) (2002). For consistency, we refer to former RCW 42.56.230(2).

(b) *Right to privacy*

Appellants argue that Officer Cain has no right to privacy in his identity under the PRA because his identity in connection with the unsubstantiated allegations was already released to the media without Officer Cain's objection. We are not persuaded that a person's right to privacy, as interpreted under the PRA, should be forever lost because of media coverage.

Personal information is exempt from production only when that production violates an employee's right to privacy. Former RCW 42.56.230(2). RCW 42.56.050 sets forth the test for determining when the right to privacy is *violated*,[9] but does not explicitly identify when the right to privacy *exists*. *Bellevue John Does*, 164 Wn.2d at 212. In *Bellevue John Does*, we held that teachers have a right to privacy in their identities in connection with an unsubstantiated allegation of sexual misconduct, because the unsubstantiated allegations are matters concerning the teachers' private lives. *Id.* at 215-16. In our case, the PCIR resulted in the allegations being found "unsubstantiated," and the MIIIR "EXONERATED" Officer Cain. CP (Puyallup) at 70; CP (Mercer Island) at 66. Under the precedent established in *Bellevue John Does*, Officer Cain has a right to privacy in his identity

[9]"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." RCW 42.56.050.

in connection with Koenig's unsubstantiated allegation of sexual misconduct.[1] Therefore, we must turn to the question of whether that right to privacy was eliminated by media coverage of the incident stemming from the initial disclosure of the PCIR by Puyallup.

Under the PRA, Officer Cain maintains his right to privacy in his identity, regardless of the media coverage of this unsubstantiated allegation. An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity. Even

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[1]The concurrence/dissent argues that unsubstantiated allegations of sexual misconduct against a police officer "in no way involve the details of one's personal and private life." Concurrence/dissent at 1. The dissent would hold that a person's right to privacy does not include their identity in connection with an unsubstantiated allegation of sexual misconduct during performance of public duties. *Id.* at 8. While accusing us of ignoring the definition of "private facts" in comment b to § 652D of the *Restatement (Second) of Torts*, concurrence/dissent at 5, the concurrence/dissent ignores the precedent of this court that expressly defined the scope of the right to privacy in the context of unsubstantiated allegations of sexual misconduct. *Bellevue John Does*, 164 Wn.2d at 215. We reiterate:

> An unsubstantiated or false accusation of sexual misconduct is not an action taken by an employee in the course of performing public duties . . . . The fact of the allegation, not the underlying conduct, does not bear on the [officer's] performance or activities as a public servant. The mere fact of the allegation of sexual misconduct . . . may hold the [officer] up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred. The fact that [an officer] is accused of sexual misconduct is a "matter concerning the private life" within the *Hearst* definition of the scope of the right to privacy. *Hearst*, 90 Wn.2d at 135. Thus, we hold the [officer has] a right to privacy in [his] identit[y] because the unsubstantiated . . . allegations are matters concerning the [officer's] private [life] and are not specific incidents of misconduct during the course of employment.

Id. at 215-16 (footnote omitted). No party in this case argued that *Bellevue John Does* should be overruled, nor would we support such an argument.

though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

We also must note the practical effect on the agency if we were to hold that Officer Cain has no right to privacy in his identity. Under such a holding, agencies will be required to engage in an analysis of not just the contents of the report but the degree and scope of media coverage regarding the incident. Exactly how much media coverage is required before we will rule that an individual's right to privacy is lost? Agencies will be placed in the position of making a fact-specific inquiry with uncertain guidelines. If the agency incorrectly finds that there has been little media coverage and exempts from disclosure the identity of the subject of the report, the agency could face significant statutory penalties. *See* former RCW 42.56.550(4) (2005). Puyallup filed a separate brief in this action requesting a bright line rule enabling government agencies to fulfill their duty under the PRA while protecting an individual's right to privacy. Denying the existence of a right to privacy on the basis of the extent of media coverage is likely to result in incorrect assessments and potentially significant costs to the agency. We hold that Officer Cain has a right to

privacy in his identity, regardless of the media coverage stemming from the production of the PCIR.

(c) *Violation of the right to privacy*

Appellants argue that even if we hold that Officer Cain has a right to privacy in his identity in connection to the unsubstantiated allegation of sexual misconduct, that right to privacy is not violated by production of the PCIR or the MIIIR with Officer Cain's name redacted. "A person's 'right to privacy' . . . 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." RCW 42.56.050.

(1) *Highly offensive*

Appellants argue that production of Officer Cain's identity in connection with the unsubstantiated accusation of sexual misconduct is not highly offensive to a reasonable person. "[T]he offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated," but "is implicit in the nature of an allegation of sexual misconduct." *Bellevue John Does*, 164 Wn.2d at 216 n.18. In *Bellevue John Does*, we held that it was highly offensive to reveal a teacher's identity in connection with an accusation of sexual misconduct. *Id.* at 216. For the purposes of determining whether the production is highly offensive, there is no reason to distinguish an allegation of sexual misconduct against a police officer from an allegation of sexual misconduct against a teacher. We hold that revealing

Officer Cain's identity in connection with Koenig's unsubstantiated allegation of sexual misconduct is highly offensive to a reasonable person.

(2) *Legitimate public concern*

Appellants argue that the trial court's withholding of the *entire* PCIR and MIIIR unlawfully denied access to a matter of legitimate public concern: an agency's response to an allegation of sexual misconduct. In *Bellevue John Does*, we held that the public has no legitimate interest in finding out the identity of someone accused of an unsubstantiated allegation of sexual misconduct. *Id.* at 221. Because the public records request in this case was specific to the PCIR and the MIIIR involving Officer Cain and Koenig, the trial courts found that any production of the PCIR or the MIIIR in connection with this specific request would necessarily reveal Officer Cain's identity in connection with the unsubstantiated allegation. However, we have recognized "when allegations of sexual misconduct are unsubstantiated, the public may have a legitimate concern in the nature of the allegation and response of the school system to the allegation." *Id.* at 217 n.19.[11]

Although 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

[11]Although recognizing the possibility of a legitimate public interest, in *Bellevue John Does*, we did not need to determine whether such a legitimate interest in fact existed, because the general nature of the public records request in that case allowed the court to protect the teachers' identities by producing the records with only the teachers' names redacted. *Id.* at 227.

have a legitimate interest in how a police department responds to and investigates such an allegation against an officer. The reports in this case not only identify Officer Cain, they reveal the nature of the Mercer Island and Puyallup Police Departments' investigations of this allegation. Under RCW 42.56.050, the trial court erred by exempting the entire PCIR and MIIIR, rather than producing the report with only Officer Cain's identity redacted.

We have previously permitted production of a similarly redacted report even though redaction of only the person's name was insufficient to protect the person's identity. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). In *Koenig* the public records exemption at issue, former RCW 42.17.31901 (1992), specifically exempted "'[i]nformation revealing the identity of child victims of sexual assault.'" 158 Wn.2d at 181. However, unlike former RCW 42.56.230(2), former RCW 42.17.31901 went on to define "[i]dentifying information" as "the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator." In *Koenig*, the requestor had submitted a public records request specific to Jane Doe, a child victim of sexual assault. 158 Wn.2d at 178. Just like our current case, any production of the records of the assault whatsoever would identify Jane Doe as a child victim of

sexual assault, even if her name were redacted. Relying on the express language of the statute, the court held that the provision exempted only the enumerated pieces of identifying information and not the entire report. *Id.* at 182. The majority noted the dissent's concern that the result would encourage "'fishing expedition[s]'" and speculation about victims' identities in filing public records requests. *Id.* at 184. However, the majority held that it was bound by the unambiguous text of former RCW 42.17.31901, and ordered the records production with only the enumerated identifying information redacted.

Although former RCW 42.56.230(2) does not enumerate specific types of identifying information that must be redacted, we are placed in the same position of being unable to completely protect the identity of an individual in a public record. Under RCW 42.56.050, a person's "'right to privacy' . . . 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 [a matter] of legitimate concern." (Emphasis added.) The PCIR and MIIIR include matters of legitimate public concern because they include information regarding police departments' investigations of an allegation of sexual misconduct. Because the nature of the investigations is a matter of legitimate public concern, disclosure of that information is not a violation of a person's right to privacy.[12] Because it is not a violation of a person's right to

privacy, it does not fall into the category of "personal information" exempt under former RCW 42.56.230(2). We recognize that appellants' request under these circumstances may result in others figuring out Officer Cain's identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while Officer Cain's identity is exempt from production under former RCW 42.56.230(2), the remainder of the PCIR and the MIIIR is nonexempt.[13]

The dissent asserts our holding today is "inconsistent" with this court's decision in *Bellevue John Does*, or that we are somehow treating "the privacy rights of [police] officers differently from the privacy rights of teachers." Dissent at 1-2. This is simply inaccurate. Here, we exempt from production Officer's Cain name

[12]The dissent argues that we should exempt *the entire* PCIR and MIIIR from disclosure because the documents identify Officer Cain in connection with an unsubstantiated allegation of sexual misconduct. Dissent at 6-7. The dissent's position depends on an incredibly narrow reading of what information is included in these reports. The PCIR and the MIIIR contain a great deal of information beyond Officer Cain's identity. Importantly, they reveal the nature of the police departments' investigations into the allegation of misconduct. Even assuming that disclosure of any portion of these reports would reveal Officer Cain's identity, we still must inquire into whether any portion of that information is a matter of legitimate public concern. RCW 42.56.050. If disclosure of the *entire report* reveals information about a person, then the *entire report* must be "highly offensive" and "not [a matter] of legitimate concern" in order for any disclosure to violate a person's right to privacy. *Id.* That is not the case here. We cannot follow the dissent's reasoning without ignoring the public's legitimate interest in the nature of the investigations, the details of which are included in the PCIR and the MIIIR in addition to the identity of Officer Cain.

[13]The multifactor test advocated in the amicus brief of the ACLU is unnecessary to decide this case, and we express no opinion about it.

and identifying information while disclosing the remainder of the report dealing with the departments' investigations into the allegation. In *Bellevue John Does*, we exempted the name and identifying information of the teachers from production, while permitting disclosure of portions of the "documents related to the allegations and investigations (subject to redactions), thus maintaining the citizens' ability to inform themselves about school district operations." 164 Wn.2d at 222. Our analysis here is consistent with the analysis in *Bellevue John Does*.

3. *RCW 42.56.240(1) – the investigative records exemption*

Although conceding that both exemptions turn on the issue of Officer Cain's right to privacy, BIPG and Officer Cain argue that the investigative records exemption under RCW 42.56.240(1), exempts the entire PCIR and MIIIR from production. RCW 42.56.240 provides:

> The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

The PCIR and MIIIR are clearly investigative records compiled by law enforcement. *See Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 729, 748

P.2d 597 (1988) (holding that law enforcement internal investigation records meet the first criterion of investigative records exemption); *Cowles Publ'g Co.* v. *Spokane Police Dep't*, 139 Wn.2d 472, 477-78, 987 P.2d 620 (1999) (investigative records exemption applies to criminal investigative records so long as the other criteria of the exemption are met). The PCIR was part of a criminal investigation of Officer Cain, and the MIIIR was compiled by Mercer Island Police after the Bainbridge Island police chief vested Mercer Island with the responsibility of deciding whether Officer Cain should be disciplined.

The BIPG and Officer Cain do not argue that the PCIR and the MIIIR are essential to effective law enforcement, but only that withholding the reports is essential for the protection of Officer Cain's right to privacy. The analysis here is identical to the right to privacy analysis in the personal information exemption. *See Spokane Police Guild*, 112 Wn.2d at 37-38. Therefore, only Officer Cain's identity is exempt under the PRA and should be redacted. Subject to those redactions, the remainder of the PCIR and the MIIIR, including the nature of the agencies' response to the allegation, are nonexempt.

4. *RCW 42.56.540*

Regardless of the applicability of the exemptions, appellants argue that *procedurally* the trial courts' injunctions preventing production of the PCIR and the

MIIIR are invalid under RCW 42.56.540. RCW 42.56.540 authorizes a court order enjoining production of a public record falling under a PRA exemption if the superior court finds that such production "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." Therefore, "[t]he court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person." *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) (citing *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007)).

For the same reasons that continued production of the portions of the PCIR and MIIIR containing Officer Cain's identity would be highly offensive, we hold the continued production of the PCIR and the MIIIR in unredacted form would substantially and irreparably damage Office Cain. Moreover, although the public clearly has an interest in the nature of a police department's response to an allegation of sexual misconduct, production of the PCIR and the MIIIR with only Officer Cain's identity redacted would not infringe upon that interest. Under RCW 42.56.540, and the PRA exemptions enumerated in former RCW 42.56.230(2) and RCW 52.56.240(1), we remand to the trial courts for production of the PCIR and the MIIIR after redaction of Officer Cain's identity.[14]

B. *CRPA*

As an alternative basis to the PRA, the BIPG and Officer Cain argue that the CRPA, chapter 10.97 RCW, exempts the PCIR from production, and to the extent it contains the PCIR, the MIIIR as well. The court's objective when construing a statute is to determine the legislature's intent. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 427, 237 P.3d 274 (2010). The plain meaning is to be discerned from the ordinary meaning of the language, as well as the context of the statute where that provision is found, related provisions, and the statutory scheme as a whole. *Id.* CRPA generally provides for the "completeness, accuracy, confidentiality, and security of criminal history record information." RCW 10.97.010. RCW 10.97.080 states in pertinent part:

> No person shall be allowed to retain or mechanically reproduce any *nonconviction data* except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete. The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.

[14]Appellants have not argued for an award of costs, attorney fees, or penalties under former RCW 42.56.550(4). Even if such a request were made, appellants would not be entitled to an award of attorney fees, costs, or penalties because former RCW 42.56.550(4) does not authorize such an award in an action brought by a private party to prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998). Appellants have prevailed against Officer Cain and the BIPG, not the cities of Puyallup and Mercer Island, and are thus not entitled to an award under Former RCW 42.56.550(4).

(Emphasis added.) RCW 10.97.080 bars only the *retention and copying* of nonconviction data, therefore it would not prevent appellants from viewing or inspecting the nonconviction data. *Hudgens v. City of Renton*, 49 Wn. App. 842, 844-45, 746 P.2d 320 (1987). As for their right to retain or copy, "'[n]onconviction data'" is defined as

> *all criminal history record information* relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending. There shall be a rebuttable presumption that proceedings are no longer actively pending if more than one year has elapsed since arrest, citation, charge, or service of warrant and no disposition has been entered.

RCW 10.97.030(2) (emphasis added). Nonconviction data only includes "'[c]riminal history record information,'" which is defined as

> information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.
>
> The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender.

RCW 10.97.030(1). The PCIR did not arise from an arrest, detention, indictment, or other formal criminal charge, and would not include any "descriptions and notations" of those events. Therefore, the PCIR does not contain any criminal

history record information beyond the individual identification of Officer Cain as the alleged offender.

The BIPG and Officer Cain cite to *Hudgens* as authority for the proposition that RCW 10.97.080 exempts an entire record such as the PCIR from production if it contains any criminal history record information. In *Hudgens*, the Court of Appeals declared, without analysis, that police investigative records relating to an arrest were exempt from retention and copying under RCW 10.97.080. 49 Wn. App. at 844-45. We reject that interpretation, and hold that RCW 10.97.080 requires redaction of only criminal history record information. In other words, the statute does not exempt information relating to the conduct of the *police* during the investigation. *See* Lynette Meachum, *Private Rap Sheet or Public Record? Reconciling the Disclosure of Nonconviction Information Under Washington's Public Disclosure and Criminal Records Privacy Acts*, 79 Wash. L. Rev. 693 (2004).

Interpreting criminal history record information as not including all the contents of an investigative record is also consistent with the surrounding statutory context. "Statutes in pari materia should be harmonized so as to give force and effect to each and this rule applies with peculiar force to statutes passed at the same session of the Legislature." *Int'l Commercial Collectors, Inc. v. Carver*, 99 Wn.2d

302, 307, 661 P.2d 976 (1983) (citing *State ex rel. Oregon R.R. & Nav. Co. v. Clausen*, 63 Wash. 535, 540, 116 P. 7 (1911)). The first paragraph of RCW 10.97.080 explicitly draws a distinction between criminal history record information and "data contained in . . . investigative . . . files." Moreover, companion legislation enacted during the same legislative session as RCW 10.97.080 draws the same distinction:

> "Criminal history record information" includes, and shall be restricted to identifying data and information recorded as the result of an arrest or other initiation of criminal proceedings and the consequent proceedings related thereto. "Criminal history record information" shall not include intelligence, analytical, *or investigative reports* and files.

RCW 43.43.705 (emphasis added); Laws of 1977, 1st Ex. Sess., ch. 314, § 14. RCW 43.43.705 establishes the Washington State Patrol as the central clearinghouse for criminal history record information in Washington. We interpret "criminal history record information" in a manner consistent with RCW 43.43.705, holding that it does not include the entire investigative report. In the context of the PCIR, RCW 10.97.080 requires nothing more than redaction of Officer Cain's identity in connection with the allegation, but the PCIR's description of the police department's investigation is not criminal history record information and must be produced.

IV. CONCLUSION

We reverse the trial courts. On remand, the trial courts should redact Officer Cain's identity and produce the remainder of the PCIR and MIIIR consistent with this opinion.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens