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GREAT NEWS!

Soon, the Firehouse Laywer will have a new website (the site address will remain the same: www.firehouselawyer.com)!!!

Inside this Issue: Employment Investigations and Privacy

Open Investigations and the Privacy of Public Employees

Recently, the Supreme Court of Washington decided *Predisik v. Spokane Sch. Dist. No. 81*, No. 90129-5 (2015), an important case under the Public Records Act, RCW 42.56. The Court held that public records that only reveal that an investigation is occurring, and not the allegations contained in the investigation, do not implicate a public employee's expectation of privacy. Consequently, such records are not exempt from disclosure under RCW 42.56.230 (3), which protects "[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." (emphasis added).

Predisik involved two public school employees suing to enjoin disclosure by their employer-school district of records pertaining to them being put on administrative leave. In late 2011, there were two separate and unrelated allegations made against the employees. The substance of the allegations was not in the record before the court. Both employees were placed on paid administrative leave pending the investigations, which are still ongoing. In 2012, the media made a public records request for (1) the administrative leave letter of one of the employees, Mr. Predisik, and (2) "information on all district employees currently on paid/non-paid administrative leave." After this request, the school district returned three sets of records.

The school district returned the administrative leave letter, indicating that Mr. Predisik had been placed on administrative leave "pending completion of the District's investigation into allegations of inappropriate interactions with a former student." The letter further indicated that Predisik was banned from district property and forbidden from talking with students about the investigation. The letter did not name his accuser or discuss any further details of the complaints.

The two other records were payroll spreadsheets for Mr. Predisik and Ms. Katke, the other employee being investigated. These spreadsheets contained the employee's name, the date of pay, the hours paid, the rate of pay, and a position code. One final column indicated the reason for them being placed on admin leave. Both columns stated the same thing: "allegations currently under investigation." The spreadsheets provided no further information.

The two employees separately sued to prevent the school district from disclosing the leave letter and spreadsheets; the school district argued that the records should be disclosed. The trial court found that the two employees' names were exempt from disclosure under RCW 42.56.230 (3), and ordered all three of the records disclosed with their names redacted. The court of appeals affirmed. Our Supreme Court granted review to discuss one issue: whether "the PRA will recognize a right to privacy in the identity of a public employee who is the subject of an open investigation by his or her public employer."

The Court first stated that RCW 42.56.230 (3) prevents the disclosure of records when (1) those records contain personal information, such as names, (2) the public employee has a privacy interest in that personal information, and (3) the disclosure of the records would violate that right to privacy. Citing Washington case law, the Court noted that the PRA expressly provides a remedy when the right to privacy is violated, but does define when this right exists. Consequently, the "highly offensive" test, espoused under RCW 42.56.050, is only triggered when discerning whether a right to privacy is violated in the context of an exemption (remember, there is no stand-alone "privacy exemption" to the PRA). First, the Court found that the names of these employees were "personal information" because "they relate to particular people."

The Court next turned to whether the employees had a privacy interest in their names. Noting that an investigation into allegations of misconduct "relates to a part of the employee's life—his or her profession—that is freely exposed to the public," the Court did not find such a privacy interest. It further reasoned that such an investigation is "an act of the government, not a closely held private matter that gives rise to a privacy right under the PRA." The records at issue disclosed that an investigation was ongoing, not the actual allegations. These records only revealed the employees' "status as public employees and nothing about their personal lives."

The employees argued the Court should adhere to its holding in *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, (2008), where the Court held that RCW 42.56.230 (3) protects records of investigations into unsubstantiated allegations because the mere fact of the allegation itself does not reflect on the public employee's performance. But the *Predisik* Court held that the protections afforded under RCW 42.56.230 (3) depend on the facts, and are not subject to a "bright-line rule." The Court noted that the leave letter and spreadsheets did not disclose any "salacious facts", and in fact contained "no specific allegations of misconduct at all." To read *Bellevue John Does* as preventing disclosure of employee names each time their name may have some tangential relationship to

allegations of misconduct, the Court opined, would amount to the exception swallowing the rule. The Court added that if it accepted the employees' argument, "the public would never learn about an investigation unless and until the underlying allegations are substantiated at some point in the future."

The Court briefly addressed the employees' argument that the leave letters and spreadsheets were protected from disclosure under RCW 42.56.240 (1), the "law enforcement" exemption, which exempts "specific investigative records compiled by investigative, law enforcement, and penology agencies" (such as the Department of Health and the police) to the extent that such investigative information is "essential to effective law enforcement." The Court swiftly dismissed this argument. The school district has less investigative and disciplinary authority than say, the superintendent of public instruction, said the Court.[1]

Accordingly, the Court partially reversed the court of appeals, in that the records at issue had to be disclosed in their entirety, with the names of the employees included, not redacted. *Predisik* means that a public employer may—and perhaps must—disclose records, in their entirety, that demonstrate that an ongoing investigation is occurring, but do not reveal the substance of the allegations underlying that investigation. Of course, records containing allegations of misconduct that are substantiated are subject to disclosure; this is less subject to the case-by-case analysis that the *Predisik* Court called for when allegations are unsubstantiated and an investigation is ongoing. Under *Predisik*, the employee has no expectation of privacy if the records disclosed do not contain allegations of specific instances of misconduct. But what if the employee has an expectation of privacy?

Under RCW 42.56.230 (3), this matters very little. In order for an employee's expectation of privacy to be violated, the disclosure must be highly offensive to a reasonable person and of no legitimate concern to the public. Washington case law interpreting RCW 42.56.230 (1) is clear on this point: *See Cowles*, 109 Wn.2d 712 (finding that the disclosure of names of police officers investigated by internal affairs for misconduct not highly offensive to a reasonable person and of legitimate concern to the public, while at the same time finding that RCW 42.56.240 (1) provided exemption because investigation was conducted by internal affairs); *See Also Spokane Police Guild*, 112 Wn.2d 30, 38 (1989) (finding that disclosure of information in a report of police misconduct at a bachelor party/strip show was not highly offensive because the conduct occurred in front of approximately 40 people); *Columbian Publishing*, 36 Wn.App. 25 (1983) (finding that complaints about the management style of police chief, such as saying he was a "task master, not a people master", may embarrass the chief, but entirely concerned his professional performance and were thus subject to disclosure).

[1] *But See City of Fife v. Hicks*, No. 45450-5-II (2015) (finding that investigator hired by outside attorney retained by city was a "law enforcement agency" because it acted as the agent of the city manager, who was the supervisor of the city police and initiated the investigation into a whistleblower complaint).