No. 42774-5-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DEREK E. GRONQUIST,

Appellant/Plaintiff,

V.

DEPARTMENT OF CORRECTIONS,

Respondent/Defendant.

SECOND AMENDED OPENING BRIEF

On appeal from the Clallam County Superior Court
The Honorable S. Brooke Taylor

Derek E. Gronquist
#943857 C-404-L
Monroe Correctional Complex
P.O. Box 888/TRU
Monroe, WA 98272

pm 8/3/12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT DECISIONS

WASHINGTON STATE SUPREME COURT DECISIONS

WASHINGTON STATE COURT OF APPEALS OPINIONS

STATUTES, RULES & CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Appellant Derek E. Gronquist files this Second Amended Opening Brief. This brief supersedes the previous briefs filed in this appeal, and embraces all claims at issue in this case.

I. ASSIGNMENTS OF ERROR.

1. The trial court erred in refusing to impose statutory penalties for each day the Department of Corrections withheld a nonexempt public record.

2. The trial court erred in holding that Mr. Gronquist failed to request identifiable records in his July 30, 2007, Public Records Act request.

3. The trial court erred in finding as fact that "records in the form requested did not exist", pertaining to Mr. Gronquist's July 30, 2007, Public Records Act request.

4. The trial court erred in holding that requested prison video surveillance recordings were exempt in their entirety.

5. The trial court erred in dismissing Mr. Gronquist's facial Free Speech challenge to the Department of Corrections censorship of requested public records for failure to state a claim.

6. The trial court erred in denying Mr. Gronquist's motion to vacate a portion of its December 18, 2009, order based upon the Department of Corrections misrepresentations and misconduct.

7. The trial court erred in denying Mr. Gronquist's motion for leave to file a Second Amended Complaint.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Does a trial court possess authority to reduce the amount of days penalized for violation of the Public Records Act? (Assignment of Error 1)

2. Whether Mr. Gronquist's July 30, 2007, Public Records Act request for documents demonstrating the Department of Corrections use and payment of undocumented alien labor in its Class II Correctional Industries program was sufficiently specific to enable the agency to locate the records? (Assignment of Error 2 & 3).

3. Did the Department of Corrections conduct an objectively reasonable search for records responsive to Mr. Gronquist's July 30, 2007, Public Records Act request by having a newly appointed and untrained employee make only a single telephone call to a potentially criminally

liable official before denying the existence of all records requested? (Assignment of Error 2 & 3).

4. Whether the trial court incorrectly concluded that records responsive to the July 30, 2007, Public Records Act request did not exist, when Mr. Gronquist presented undisputed evidence of the Department of Corrections use of undocumented alien labor in its Class II Correctional Industries program and the existence of responsive identification badges, payroll, and inmate banking records for those individuals? (Assignment of Error 3).

5. Whether generalized claims regarding the capabilities of the Department of Corrections video surveillance system as a whole can constitute "specific intelligence information" exempt under RCW 42.56.240(1) in the specific, stale, and narrowly tailored video recordings Mr. Gronquist requested? (Assignment of Error 4).

6. Can video surveillance recordings capturing the complicity of Department of Corrections officials in an assault on Mr. Gronquist be withheld as "essential to effective law enforcement" under RCW 42.56.240(1)?

(Assignment of Error 4).

7. Does a complaint alleging a content based prior restraint censorship of public records by an administrative agency in the absence of any judicial process state a claim upon which relief can be granted under Article I, Section 5, of the Washington State Constitution? (Assignment of Error 5).

8. Is RCW 72.09.530's directive to inspect inmate mail for "contraband" unconstitutionally vague or overbroad when the Department of Corrections uses that provision to impose content based prior restraint censorships upon lawfully obtained and true public records it sends to prisoners through the mail? (Assignment of Error 5).

9. Should the trial court have granted Mr. Gronquist leave to amend his complaint to include a claim that the Department of Corrections failed to search for, identify, and disclose an Internal Investigations Report requested under the Public Records Act, when the facts germane to that claim were withheld by the Defendant throughout this litigation? (Assignment of Error 7).

10. Does a trial court abuse its discretion by denying a motion to vacate without weighing the factors required by Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968), instead deferring to the presumptive correctness of an order that rests entirely upon intentional deception and false statements of fact? (Assignment of Error 6).

11. Did the trial court abuse its discretion by concluding that the Public Records Act authorized the Department of Corrections to "categorically" refuse to search for and disclose requested public records? (Assignment of Error 6).

12. Did the Department of Corrections have standing to claim, or the trial court to find, that one of the Public Records Act's exemptions applied to information contained in a public record that neither of them ever reviewed? (Assignment of Error 4 & 6).

13. Whether substantial justice requires this case to be decided upon its real merits regarding the Department of Corrections failure to search for, disclose, and subsequent destruction of, a requested public record; when the Department

of Corrections withheld those facts from Mr. Gronquist and obtained a judgment based upon a fictitious statutory exemption defense? (Assignment of Error 6).

III. STATEMENT OF THE CASE.

This case concerns two Public Records Act requests submitted by Mr. Gronquist to the Department of Corrections.

A. The July 30, 2007, Public Records Request.

Mr. Gronquist has been incarcerated in the Washington State Department of Corrections (DOC or Department) since 1995. CP 354. Throughout his incarceration in various institutions operated by the Department, Mr. Gronquist noticed a significant increase in the use of undocumented alien labor by DOC's Class II Correctional Industries.[1] CP 354-355. To determine if DOC's use of undocumented alien labor violated the Immigration Reform and Control Act,[2] Mr. Gronquist submitted a public records request to the Department requesting disclosure of:

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[1] "Class II Industries" are state owned businesses operated for the benefit of governmental agencies and nonprofit organizations. RCW 72.09.100(2).

1. All Department of Corrections (DOC) inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries from January 1, 2004, to today's date.

2. All records demonstrating the payment of any wages, gratuities, or other form of payment, to undocumented alien workers employed by the DOC's Class II industries from January 1, 2004, to today's date.

3. All records revealing internal DOC [c]ommunications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program, regardless of class.[3] This third request seeks all records in existence on this subject.

The term "undocumented alien worker" means any person who is not a United States Citizen and who does not possess a current and valid work permit or similar document authorizing such person to be employed in the United States.

CP 196-197.

This request was received on July 30, 2007, by Mr. Michael Holthe; an individual who had just been temporarily assigned to the position of

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[2] The Immigration Reform and Control Act (IRCA) is codified in scattered sections of 8 U.S.C.. IRCA prohibits employment of illegal aliens, 8 U.S.C. § 1324a, and requires employers to verify the identity, citizenship and eligibility for employment of all new hires by examining specified documents. 8 U.S.C. § 1324a(b). Employers who violate IRCA are subject to civil fines and criminal prosecution. 8 U.S.C. §§ 1324a(e)(4)(A) & (5), and 1324a(f)(1).

[3] DOC's Correctional Industries has five classes of work programs. RCW 72.09.100.

Public Disclosure Coordinator for the Clallam Bay Corrections Center (CBCC). CP 199 & 247. On July 31, 2007, Mr. Holthe responded to the request, stating: "Per the Correctional Industries Manager at Clallam Bay Corrections Center, Offenders are not identified by their citizenship, nor is it a part of the employment process." CP 199 & 360. On October 17, 2007, Mr. Gronquist wrote to Mr. Holthe complaining of the lack of response to his public records request. CP 201 & 362. On October 22, 2007, Mr. Holthe responded to Mr. Gronquist's letter, stating: "If you not agree with the decision made by this office that there are no documents responsive to your request, you may appeal the decision to: Kay Wilson-Kirby, Appeals Officer, P.O. Box 41114, Olympia, WA 98504." CP 203 & 364.

B. **The August 9, 2007, Public Records Request.**

In the early morning hours of June 17, 2007, a CBCC Correctional Officer unlocked Mr. Gronquist's Pod and then Cell door for inmate Dennis Florer, who viciously assaulted Mr. Gronquist in his sleep as part of an extortion attempt. CP 357. In an effort to identify the staff members involved and gather information

concerning this incident, Mr. Gronquist submitted a Public Records Act request to the Department, requesting:

> 1. All documents created in response to, or because of, this incident;
> 2. All infraction reports, witness statements, inmate statements, disciplinary hearing findings and recommendations, confidential information summaries, and Administrative Segregation placement, referrals and/or recommendations;
> 3. All photographs;
> 4. The surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007;
> 5. The surveillance video of the chow hall used for C-unit inmates on and for the Breakfast meal on June 17, 2007;
> 6. All records of staff interviews;
> 7. All inmate statements;
> 8. Any summaries or reports;
> 9. The complete Internal Investigations file;
> 10. All communications, letters and e-mails;
> 11. Any recommendations;
> 12. All disciplinary actions taken against staff;
> 13. Any information or documentation gathered, made, or obtained because of events occurring since June 17, 2007, which may relate to this event; and
> 14. All documents and communications from outside law enforcement officials.

CP 205-206 & 366-367.

On August 9, 2007, Mr. Holthe responded to the request by acknowledging its receipt, and informing Mr. Gronquist that:

> It is anticipated that it may take up to twenty (20) business days to **review and assemble** the documentation requested . . . . You will be notified of the copying charges once the documentation is assembled.

CP 369-370 (emphasis added).

Twenty days later, Denise Larson, another CBCC Public Disclosure Coordinator, informed Mr. Gronquist that it may take an additional 20 business days "to **review and assemble**" the records requested, and that he "will be notified . . . once the documentation is assembled." CP 376 (emphasis added). On September 24, 2007, Mr. Holthe notified Mr. Gronquist that responsive records had been assembled, and demanded $23.80 for copying and mailing charges. CP 378. Mr. Gronquist tendered payment in full. CP 380.

On October 26, 2007, Mr. Holthe contacted the Mail Room Sergeant of the Stafford Creek Corrections Center (SCCC), where Mr. Gronquist was then housed, and directed her to intercept the records he was mailing to Mr. Gronquist on that day, and withhold specific records from Mr. Gronquist. CP 323 & 382. Included with the mailing was a "Denial of Disclosure of Public Records" form stating that the requested video surveillance recordings had been determined to contain information exempt under RCW 42.56.420(2). CP 383. On November 2, 2007, SCCC's Mail Room

Sergeant intercepted the records and refused to permit Mr. Gronquist to receive 39 pages of documentation and 11 photographs. CP 324. Mr. Gronquist appealed that decision to SCCC's Superintendent, who failed to even consider the appeal. Id.

Upon receipt of the remaining, un-censored, records, Mr. Gronquist discovered that a portion of the Internal Investigation Report sought under request 9 had been withheld without any claim of exemption. CP 358. After this lawsuit was filed, served, and responded to by the Department, Mr. Holthe disclosed the withheld portion of the Internal Investigation report on August 11, 2008. CP 227 & 358.

C. Procedural Facts.

On August 1, 2008, Mr. Gronquist filed a complaint in the Clallam County Superior Court alleging that the Department's conduct violated the Public Records Act. CP 435-439. The Department filed an Answer on August 8, 2008. CP 430-433. The Answer, for the first time, "further alleged" that the video surveillance recordings were determined to be exempt under RCW 42.56.240(1). CP 432. As an affirmative defense,

DOC claimed that it "acted in good faith **in responding to** Plaintiff's public disclosure requests . . . [and] any documents not produced were withheld under **lawfully cited** exemptions." CP 432-433 (emphasis added).

Mr. Gronquist filed a Motion to Show Cause on June 19, 2009. CP 337-429. On July 17, 2009, the superior court entered an Order to Show Cause requiring DOC to establish why:

> 1. A full and complete search for records responsive to Plaintiff's July 30, 2007, public records request should not be compelled;
>
> 2. Disclosure of all records requested by Plaintiff's July 30, 2007, public records request should not be compelled;
>
> 3. Disclosure of video surveillance recordings requested by Plaintiff's August 9, 2007, public records request should not be compelled; and
>
> 4. Why the court should not award penalties and costs to the Plaintiff . . . .

CP 326-327.

On September 4, 2009, the Department filed a response to the Order to Show Cause, alleging: (1) Mr. Gronquist's July 30, 2007, request "did not request identifiable public records" because DOC does not consider its Class II Industries workforce to be "employees"; (2) the surveillance

video recordings were exempt in their entirety under RCW 42.56.240(1); and (3) its "accidental" withholding of a non-exempt public record did not violate the Public Records Act, and if it did, the amount of days penalized should be reduced from 223 days to "the span of time from Mr. Gronquist's constructive notification to the Department through service of summons and complaint on July 18, 2008 and the ultimate disclosure . . . on August 11, 2008 (24 days)." CP 295-311. A reply, sur-reply, and two supplemental declarations were filed in support of the show cause hearing. CP 137-176 & 328-336.

On December 18, 2009, the superior court entered an order holding that: (1) DOC violated the Public Records Act by withholding one page of an internal investigation report requested under the August 9, 2007, request, and awarding Mr. Gronquist $15 per-day in statutory penalties for 24 days; (2) that records in the specific form requested by the July 30, 2007, request did not exist; and (3) "that the Defendant **properly claimed** 42.56.240(1) as an exemption . . . [and] **properly withheld** surveillance video tapes from disclosure pursuant to RCW 42.56.240(1) . . . ."

CP 125-126. Reconsideration of the limitation on the amount of days penalized was denied. CP 134-136.

On July 27, 2009, Mr. Gronquist filed a First Amended Complaint which included an injunctive relief claim that the Department's censorship of public records it sent through the mail violated Article I, Section 5 of the Washington State Constitution. CP 319-325. An answer was filed August 12, 2009. CP 313-317. On October 8, 2010, the Department filed a motion to dismiss the Article I, Section 5 claim, asserting that courts lack authority to enforce violations of the Constitution and it possesses unchallengable authority to censor inmate mail under RCW 72.09.530 and Livingston v. Cedeno, 164 Wn.2d 46, 186 P.3d 1055 (2008). CP 118-123. Gronquist opposed the motion, and cross-moved for Rule 11 sanctions. CP 109-127. On January 3, 2011, the superior court entered an Order Granting in Part and Denying in Part Defendant's Motion to Dismiss; dismissing Mr. Gronquist's facial Article I, Section 5, challenge to the Department's censorship of requested public records. CP 98-99.

As explained in the following sections, this case proceeded to the entry of a final Judgment on April 25, 2012. CP 446-448 & 459-460. Notice of Appeal was filed on May 24, 2012. CP 444.

D. **The Motion to Vacate.**

The June 17, 2007, assault of Mr. Gronquist resulted in the filing of a separate action alleging that DOC and CBCC officials failed to protect Mr. Gronquist from foreseeable or known harms. Derek E. Gronquist v. Faye Nicholas, et al., United States District Court, Western District of Washington at Tacoma, No. C10-5374 RBL/KLS. Because the video surveillance recordings at issue in this case were also relevant to the failure-to-protect case, Mr. Gronquist requested the Department to produce them through discovery in that case. CP 37 & 41. Like this case, DOC refused to produce the tapes without stating its reasons therefore. Ids. DOC then moved for summary judgment. The federal court found that the requested video surveillance recordings were relevant to the action, and entered an order staying summary judgment through the discovery process. CP 44-51. Thereafter, the Department revealed -- **for the first time ever** --

that the surveillance recordings "were not preserved" and had been "recorded over in the normal course of business . . . ." CP 54 & 58-59.

The revelation that the surveillance recordings had been destroyed prompted the taking of depositions. Denise Larson testified that CBCC officials and representatives from the Attorney General's Office had several conversations regarding the surveillance videos; some of which occurred around the time of the show cause hearing in this case. CP 67-71. They discussed whether the surveillance recordings had been searched for, located, and secured in response to Mr. Gronquist's August 9, 2007, public records request. Id. No determination could be made of whether Mr. Holthe made any attempt to locate, review, or secure the video recordings. CP 62-67. Officials were unable to locate any records indicating that a search had been done for the recordings, and no copy of the recordings was ever placed in the agency's public records file as required by Department policy. Id. The only determination that was conclusively made was that the requested surveillance recordings had been

destroyed. CP 69-70.

Two CBCC officials reviewed the surveillance recordings pursuant to the internal investigation of the June 17, 2007, assault of Mr. Gronquist. CP 77-79, 81 & 87-89. Both officials testified that the surveillance video came from a single static overhead camera that did not contain **any** of the special capabilities asserted by DOC's Prison Division Director in response to the superior court's order to show cause. Compare CP 81-83 & 89-90 with 289-292.

On August 5, 2011, Mr. Gronquist filed a motion to vacate the trial court's December 18, 2009, order; arguing that the Department's misrepresentations regarding the content of the surveillance recordings and its failure to search for, locate, review, identify, and preserve the requested recordings required vacation of the order. CP 19-96. The Department opposed Mr. Gronquist's motion to vacate, asserting that the order was not based upon any misrepresentation, and that the Department is under no legal duty to search for, identify, review, or preserve prison surveillance recordings based upon the agency's belief that the records are categorically exempt under RCW 42.56.240(1). CP 14-17. On September

28, 2011, the trial court entered an order denying Mr. Gronquist's motion to vacate, holding that its previous "[o]rder was correct, in that video recordings are categorically exempt from disclosure." CP 11. A timely notice of appeal was filed on October 28, 2011. CP 8.

E. **The Motion for Leave to Amend Complaint.**

During the discovery process in the Nicholas case discussed in Section D above, the Department produced the previously censored records at issue in this case. CP. 476. In addition, an employee of the Department gave deposition testimony averring that a previously undisclosed investigation into employee involvement in the assault of Mr. Gronquist was conducted by CBCC Internal Investigator Lester Schneider. CP 80-81. Mr. Gronquist's August 9, 2007, public records request sought records of such an investigation, but the Department never produced nor identified such records. CP 32-34.

Based upon these newly discovered facts, Mr. Gronquist filed a Motion for Leave to Amend Complaint to omit his "as applied" Article I, Section 5, challenge as moot; and add a new Public Records Act claim alleging that DOC failed to

conduct a sufficient search for responsive investigative records. CP 468-474 & 479-482.

The Department opposed the motion as untimely. CP 461-465. On February 27, 2012, the superior court entered an order denying the motion and dismissing this case with prejudice. CP 459-460. A motion for reconsideration was filed on March 9, 2012. CP 455-458. The Department opposed that motion. CP 449-453. On April 25, 2012, the superior court issued a Memorandum & Order Re Motion for Reconsideration reversing its basis for denying leave to amend, but once again, denying the Motion for Leave to Amend Complaint. CP 446-448. A timely Notice of Appeal was filed on May 24, 2012. CP 444-445. This appeal follows.

IV. ARGUMENT.

The Public Records Act (PRA or Act) 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); RCW 42.56 et seq. The PRA requires state agencies to disclose any public record upon request. RCW 42.56.070. When an agency fails to properly respond to a public records request, or refuses to permit

inspection of a public record, the requester may maintain an action to compel disclosure and penalize the agency. RCW 42.56.550; Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 727, 261 P.3d 119 (2011).

The court is required to conduct **de novo** review of the agency's actions "tak[ing] into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to the public official or others." RCW 42.56.550(3). The Act mandates that its provisions "be liberally construed to promote this public policy." RCW 42.56.030. The burden of proof rests upon the agency to establish that its conduct complies with the Act. RCW 42.56.550(1). When the trial court record consists of only affidavits, memoranda, and documentary evidence, as it does here, appellate review is de novo. Progressive Animal Welfare Society (PAWS) v. University of Washington, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

I. THE SUPERIOR COURT LACKED AUTHORITY TO REDUCE THE PENALTY PERIOD FOR A VIOLATION OF THE PUBLIC RECORDS ACT

The superior court reduced the amount of days penalties were imposed against the Department for withholding a non-exempt public record from 223 days to 24. CP 125-126 & 134-136. This was error.

RCW 42.56.550(4) requires penalties to be awarded "for **each day** [the Plaintiff] was denied the right to inspect or copy said public record." (Emphasis added). In Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004), a superior court subtracted 527 days from the number of days penalties were imposed against an agency for withholding non-exempt public records. Upon appeal, Yousoufian argued that the PRA does not authorize courts to reduce the amount of days comprising the penalty period. The Supreme Court agreed, and reversed the trial court:

> the [PRA] unambiguously requires a penalty 'for each day.' The [PRA] does not contain a provision granting the trial court discretion to reduce the penalty period if it finds the plaintiff could have achieved the disclosure of the records in a more timely fashion. . . . Because the [PRA] does not include a limitation on the penalty period beyond the statute of limitations, we are of the view that the [PRA] does not allow a reduction of the penalty period . . . .

Yousoufian, 98 P.3d at 471.

Contrary to the express requirements of RCW 42.56.550(4) and the binding opinion of the Supreme Court in Yousoufian, the superior court reduced the penalty period from the 223 days a non-exempt public record was actually withheld, to 23 days -- representing the span of time between service of the complaint in this action upon the Department and disclosure of the record. Such an error requires this Court to reverse the superior court and remand this case for imposition of penalties upon each of the 223 days the non-exempt public record was withheld.

II. MR. GRONQUIST'S JULY 30, 2007, PUBLIC RECORDS REQUEST SOUGHT IDENTIFIABLE PUBLIC RECORDS

At its core, this case involves a PRA request that sought to uncover suspected illegal use of undocumented alien labor in DOC's Class II Correctional Industries. CP 196-197 & 354-355. The superior court refused to order the Department to even **attempt** to locate such records; accepting without question the unsupported argument of Counsel that "[b]ecause inmates are not employees of or employed by the Department, Mr. Gronquist's request, by its language and defined terms seeks records that do not exist." CP 134-136 & 304.

RCW 42.56.080 commands:

> Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person.

A request seeks "identifiable public records" when there is "a reasonable description enabling the government employee to locate the requested records." Bonamy v. City of Seattle, 92 Wn.App. 403, 960 P.2d 447, 451 (1998), review denied, 137 Wn.2d 1012 (1999) (citation omitted). Mr. Gronquist's request met this standard.

It must be emphasized that the Department has never disputed Mr. Gronquist's evidence that it uses undocumented alien labor in Class II Industries. Compare CP 354-356 with CP 295-311 & 137-143. It is therefore an established fact that DOC uses undocumented alien labor in its Class II Industries. Energy Northwest v. Hartje, 148 Wn.2d 454, 199 P.3d 1043 (2009) (unchallenged facts are verities on appeal). The only question is whether Mr. Gronquist's public records request sought "identifiable" records related to this practice.

Mr. Gronquist's first request sought:

> All Department of Corrections (DOC) inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries from January 1, 2004, to [July 24, 2007].

CP 196 ¶ 1.

Inmate identification cards are created under DOC Policy 400.025, titled: "Identification Cards." CP 148-154. The policy states: "Offenders housed in Department facilities will be issued an ID card," who "will wear them so that they are visible at all times." CP 151 §§ II(C) & VI(A). In Correctional Industries, inmate identification cards are used to "[c]lock offenders in and out of CI to track offender movement for pay and security purposes." CP 153. The request even narrowed its scope to identification cards from undocumented aliens working in Class II Industries between January 1, 2004, and July 24, 2007. This request clearly sought identifiable public records.

Mr. Gronquist's second request sought:

> All records demonstrating the payment of any wages, gratuities, or other forms of payment, to undocumented alien workers employed by the DOC's Class II Industries from January 1, 2004, to [July 24, 2007].

CP 197 ¶ 2.

Inmates working in Class II Correctional Industries receive monetary pay for their labor. RCW 72.09.100(2); RCW 72.09.111(4); and CP 392 § I(c)(1). This compensation is **documented** by Correctional Industries "in accordance with generally accepted accounting principles." CP 393 § III(A)(1); RCW 72.09.111(7) (requiring DOC to "develop the necessary administrative structure to **recover inmates' wages** and **keep records** of the amounts inmates pay for the costs of incarceration and amenities.") (emphasis added). DOC issues this pay by depositing it into an inmate's DOC Trust Account. CP 398 § I(E). Once deposited, DOC Policy 200.000 commands that the deposit "will be . . . **recorded** in the Trust Accounting System." CP § III(A) (emphasis added); see also CP 166-167 (showing what a "Trust Account" statement is). This request sought identifiable records that DOC, by law, is required to create and maintain.

Mr. Gronquist's third request sought:

> All records revealing internal DOC communications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program, regardless of class. This request seeks all records in existence on this subject.

CP 197 ¶ 3.

This request specifically sought "records" -- not information -- containing DOC discussions regarding the use of undocumented alien labor. This was more than specific enough to enable the agency to locate them if it chose to do so. Unlike the other records at issue, it is unknown if records responsive to this request exist. It is unknown because, as discussed in section III infra, the Department never attempted to locate them.

The Department summarily denied Mr. Gronquist's public records request with the assertion: "Per the Correctional Industries Manager of Clallam Bay Corrections Center, Offenders are not identified by their citizenship, nor is it a part of the employment process." CP 359 & 363. But Mr. Gronquist did not request records showing that DOC identified inmates by citizenship. Rather, he sought records demonstrating the payment of wages to undocumented aliens for their labor and the identities of those individuals.

The Department's assertion is also false. DOC Policy 330.700 unambiguously states: The Department **will identify offenders who are**

citizens of other nations . . ." CP 415 Policy § I (emphasis added). Identification of citizenship occurs upon DOC's reception of an inmate. Id., at Directive § I(A). It was only when DOC's statement was shown to be false that its attorney manufactured a new basis to claim that Mr. Gronquist's public records request was inadequate; i.e., "[b]ecause inmates are not employees of or employed by the Department, Mr. Gronquist's request, by its language and defined terms seeks records that do not exist." CP 304.

Despite the irrelevance of such a statement to the specific records Mr. Gronquist requested, this statement is just as false as DOC's. In National Electrical Contractors Association v. Riveland, 138 Wn.2d 9, 978 P.2d 481 (1991), DOC admitted that inmates working in Class II Industries are its employees:

> DOC maintains that [Washington Industrial Safety and Health Act] protection should only extend to inmates who are "employees," i.e., **Class II inmates who are deemed employees** because of their coverage under industrial insurance.

National Electrical Contractors Association, 138 Wn.2d at 27 (citing RCW 72.60.102 and RCW 49.17.020) (emphasis added).

The Department's own policies even use the word "employment" to define its relationship with inmates working in Class II Industries. See CP 382-390 (DOC Policy 710.400 titled "Correctional Industries Class II Employment" and stating "Employment in Correctional Industries Class II is voluntary for offenders."). However, when Mr. Gronquist used the word "employed" in the periphery to describe inmates working in Class II Industries, his public records request -- **as a whole** -- was deemed inadequate.

Permitting an agency to withhold non-exempt public records behind the smoke-and-mirrors of its lawyer's manufactured and false grammatical gamesmanship renders the vigorous and fundamental requirements of the PRA utterly meaningless. The trial court not only effectuated such an absurd result, but turned this work of lawyerly fiction into judicial fact through its December 18, 2007 order. CP 134-136. That order is absolutely erroneous and must be reversed.

Likewise, the superior court's finding that "records in the form requested did not exist" is clearly erroneous and contrary to the evidence. Inmate identification cards and payroll records

from undocumented aliens working in Class II Industries clearly do exist. DOC should have been required to search for them.

III. THE DEPARTMENT FAILED TO CONDUCT AN OBJECTIVELY REASONABLE SEARCH FOR UNDOCUMENTED ALIEN LABOR RECORDS

The Department's only response to Mr. Gronquist's July 30, 2007, public records request was to make a single telephone call to the Correctional Industries Manager at CBCC who responded that "[o]ffenders are not identified by their citizenship, nor is it a part of the employment process." CP 359. Based upon this single conclusory and incorrect statement, the Department suspended its search and denied the existence of all records. CP 363. This conduct violates the PRA.

"[A]gencies are required to make more than a perfunctory search . . :

> The search should not be limited to one or more places if there are additional sources for the information requested."

Neighborhood Alliance, 172 Wn.2d at 720.

"The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Id. The agency bears the

burden of proving beyond material doubt that its search was adequate. Id., at 721. To do so, the agency must submit a detailed nonconclusory affidavit showing the search terms, the type of search performed, and establishing that "all places likely to contain responsive materials were searched." Id. An inadequate search constitutes a denial of public records. Id.

The Department has not filed such evidence in this case. Even if we overlook this evidentiary insufficiency, Mr. Holthe's conduct was grossly inadequate. It was not reasonable (because of its falsity and limited scope), objective (because it relied upon the allegation of a single interested individual squarely contrary to well known DOC policies and procedures), nor adequate (because it failed to actually search for responsive records).

A reasonable search could have easily obtained identification cards responsive to Request 1 from the undocumented aliens working in Class II Industries. Payroll records responsive to Request 2 could have been obtained from DOC's Trust Accounting System computer database. Records responsive to Request 3 could have been

located in Correctional Industries meeting minutes. A reasonably competent official would have **at least began** his search in these obvious areas. But Mr. Holthe did not; he did nothing. Therefore, this Court must discharge its mandatory duty and compel DOC to perform a full and complete search for responsive records.

IV. THE SPECIFIC SURVEILLANCE VIDEO RECORDINGS MR. GRONQUIST REQUESTED ARE NOT EXEMPT FROM DISCLOSURE UNDER RCW 42.56.240(1)

After this lawsuit was filed, DOC's attorney asserted that the surveillance video recordings Mr. Gronquist sought under his August 9, 2007, public records request were exempt in their entirety under RCW 42.56.240(1). CP 305-308. In support of that argument, Counsel submitted the declaration of Richard Morgan, DOC's Director of Division of Prisons. CP 289-292. Mr. Morgan asserted -- **in very general terms** -- that the capabilities of DOC's entire, state-wide, video surveillance system constituted "intelligence information" the non-disclosure of which was "essential to effective law enforcement":

> Prison surveillance cameras provide staff and officials a steady and valuable stream of intelligence information which is used in prison investigations and is often used

> to support prison infractions and/or criminal prosecutions. DOC is authorized by statute to create and enforce a comprehensive system of prison discipline which is reflected in chapter 137-25 and chapter 137-28 WAC. Inmates who violate prison rules are subject to a broad array of sanctions, including the loss of good conduct time which increases the amount of time an offender must stay in prison. If an inmate or any other person were allowed to get any of DOC's recorded surveillance video tapes through public disclosure, they would get not only the specific intelligence information that was recorded, but also the specific intelligence information of the surveillance and recording capabilities of the surveillance cameras in DOC institutions. For the reasons described above, nondisclosure of prison surveillance videotapes in essential to effective law enforcement by DOC, including the effective enforcement of DOC disciplinary regulations.

CP 291-292.

No evidence was submitted regarding the specific video recordings Mr. Gronquist requested. Without reviewing the recordings **in camera**, the superior court held that DOC "properly withheld surveillance video tapes from disclosure pursuant to RCW 42.56.240(1)." CP 126. This was error.

The PRA does not exempt general information or the systems which create public records. Rather, the Act only authorizes withholding of "specific" information contained in a "record":

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless **the record** falls within the specific

> exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of **specific** information or records.

RCW 42.56.070(1); see also PAWS, 125 Wn.2d at 258 -259 (holding the PRA "contains no general exemptions.").

In Prison Legal News v. Department of Corrections, DOC asserted that it may withhold "all" patient information contained in medical misconduct investigation reports without determining if the **specific information** in **each record** fell within one of the PRA's exemptions. Prison Legal News, 115 P.3d at 318 & 324. The Court rejected this position, holding:

> The DOC's blanket approach in redacting all health care information conflicts with the requirement to construe exemptions narrowly. Further, the broad mandate favoring disclosure under the [PRA] **requires the agency to demonstrate that each patient's health care information** is "readily associated" with the patient in order to withhold health care information under RCW 70.02.010(6).

Prison Legal News, 115 P.3d at 325 (emphasis added).

Despite this holding, DOC is once again claiming authority to withhold "all" records created by its video surveillance system in the absence of any determination that information

contained in the specific recordings requested falls within the Act's narrow exemptions. This argument is foreclosed by Prison Legal News. DOC is required to prove that information contained in the specific records Mr. Gronquist requested is exempt. It has failed to do so.

RCW 42.56.240(1) exempts:

> 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.

There is absolutely no evidence establishing that the specific video recordings Mr. Gronquist sought contained any "intelligence information". The recordings were from a single fixed overhead camera that did not possess any special capabilities. CP 81-83 & 89-90. It merely captured the conduct of staff and inmates in a living unit's common area and chow hall on a specific day and time; now five years in the past. If such conduct and capabilities could constitute "intelligence information" sensitive enough to be exempt under RCW 42.56.240(1), anything could be.

DOC was also required to prove that nondisclosure of the specific recordings Mr. Gronquist requested was "essential to effective law enforcement." In this vain, Mr. Morgan claims DOC is "enforcing law" by "maintaining order and security within the [prison] facilities." Id. The Supreme Court has rejected this contention. In Prison Legal News, the Court held that DOC's efforts to maintain "the legal, safe, secure and orderly operation of its prisons" does not constitute "law enforcement" under RCW 42.56.240(1):

> DOC's proposed definition ignores the command of our prior case law that exemptions to the [PRA] be construed narrowly. Were we to accept DOC's definition, investigations of all aspects of DOC operations would be off limits from public disclosure and only by accepting DOC's invitation to define every activity it undertakes as "law enforcement" can we uphold the lower court.
>
> . . .
>
> Had the legislature determined that all investigations potentially affecting operations of a penology agency would be exempt from disclosure the legislature could have simply eliminated the requirement that records of such investigations be "essential to effective law enforcement . . ."
>
> We reject DOC's proffered definition of "law enforcement" and hold nondisclosure is not "essential to effective law enforcement." DOC must release the unredacted investigative records.

Prison Legal News, 115 P.3d at 323-324 (citations omitted).

DOC is clearly not "enforcing law" by utilizing video surveillance to monitor its facilities. If the Legislature had wanted to keep all activities occurring within Washington's prisons secret, it would have created a specific exemption for prison surveillance video. It did not, and this Court should decline DOC's invitation to create such an exemption under the guise of construing RCW 42.56.240(1).

Finally, DOC's withholding is incongruent with the statutory mandate to be "'essential to **effective**' law enforcement." The video recordings requested captured the involvement of DOC employees in the assault and attempted extortion of Mr. Gronquist. How concealment of that conduct could be "essential" to **effective** law enfrocement is a concept so ridiculous that only DOC would dare assert it. See e.g., Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (arguing that it was legally permissible for a DOC employee to sexually assault a prisoner). If the PRA does not possess the force to compel disclosure of the criminal wrongdoing of public officials, it is

not worth the paper it is printed on. The records should have been disclosed.

DOC may assert that Fischer v. DOC, 160 Wn.App 722, 254 P.3d 824 (2011) compels a different result. While that case did hold that video surveillance recordings could be exempt from disclosure, its facts and circumstances are distinguishable, and its holding unpersuasive. First, Fischer's trial court made specific findings of fact regarding the capabilities of DOC's surveillance system as captured by the actual recordings requested. That is not the case here. Second, Fischer did not dispute that the recordings he sought contained specific intelligence information, or that DOC was engaging in law enforcement. Mr. Gronquist does. Third, DOC's use, and the court's endorsement of, the phrase "law enforcement" is directly contrary to the Supreme Court's holding in Prison Legal News. Fourth, and most importantly, the records withheld in Fischer did not attempt to conceal the criminal wrongdoing of DOC officials. DOC's withholding here does.

V. THE DEPARTMENT'S CENSORSHIP OF PUBLIC RECORDS VIOLATES ARTICLE I, SECTION 5, OF THE WASHINGTON STATE CONSTITUTION

The Department filed a CR 12(b) motion to dismiss Mr. Gronquist's facial Article I, Section 5, challenge to its censorship of public records upon the ground that it possesses unchallengable authority to censor inmate mail under RCW 72.09.530 and Livingston v. Cedeno, 164 Wn.2d 46, 186 P.3d 1055 (2008). CP 121-122. The superior court granted the motion. CP 98-99. This was error.

A CR 12(b) motion requires the Court to accept all factual allegations in the complaint as true. Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). The motion can only be granted if it appears beyond doubt that the plaintiff could prove no set of facts that would entitle him to relief. Id. The motion should be denied if any hypothetical situation conceivably exists to support further prosecution of the case. Bravo v. Dolsen Co., 125 Wn.2d 745, 750, 888 P.2d 147 (1995). CR 12(b) dismissals are particularly inappropriate when the area of law involved is developing. Bravo, 125 Wn.2d at 751. Appellate review is de novo. Id.

Mr. Gronquist's First Amended Complaint alleges that DOC officials seized the public

records mailed in response to the August 9, 2007, public records request, and refused to permit him to receive or inspect 39 pages of records and 11 photographs. This seizure was done in the absence of any judicial process, and did not advance any penological interest. CP 323-324. Gronquist sought to enjoin DOC "from obstructing [his] receipt and/or inspection of any public record in the absence of a judicial order prohibiting [his] receipt and/or inspection of a specific record or records." CP 324-325. This relief, and the facts upon which it stands, states a claim.

Freedom of speech is "the Constitutions most majestic guarantee." Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 535-536, 936 P.2d 1123 (1999). This right "includes the 'fundamental counterpart' of the right to receive information" -- **including public records.** Fritz v. Gorton, 82 Wn.2d 275, 296-297, 517 P.2d 911 (1974):

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the conduct of public business.

Time v. Firestone, 424 U.S. 448, ___, 47 L.Ed.2d 154, 96 S.Ct. 958 (1976).

The State bears the burden of justifying restrictions on speech. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114, 937 P.2d 154 (1997). "[A]ny system of prior restraints of expression comes into court bearing a heavy presumption against its constitutional validity." Fine Arts Guild, Inc. v. Seattle, 74 Wn.2d 503, 506, 454 P.2d 602 (1968).

When determining whether Article I, Section 5, grants independent or greater protection than the First Amendment, Washington courts consider the six nonexclusive Gunwall factors: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

Article I, Section 5, commands:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

The First Amendment declares:

> Congress shall make no law . . . abridging the freedom of speech.

The language of Article I, Section 5, and its differences with the First Amendment support independent and hightened protection. Collier v. Tacoma, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993). The First Amendment merely places a restraint on Congress against passing laws abridging freedom of speech. Article I, Section 5, is an affirmative grant of an absolute right to "every person" to freely speak:

> The free speech and press clause in its final form is thus not a mere guide to the formulation of state policy, but a command, the breach of which cannot be tolerated.

State v. Rinaldo, 36 Wn.App. 86, 93, 673 P.2d 614, aff'd of other grounds 102 Wn.2d 749 (1984).

Read **in pari materia** with Article I, Section 29, there can be no doubt that Article I, Section 5, grants absolute free speech rights to "every person":

> The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

Const. Art. I, Sec. 29.

Article I, Section 5's use of the phrase "every person" is significant. In the First Amendment context, the United States Supreme Court has held that prisoners possess only **limited**

speech rights; their mail may be censored for any legitimate penological interest. Thornburgh v. Abbott, 490 U.S. 401, 414-415, 104 L.Ed.2d 459, 109 S.Ct. 1874 (1989). Article I, Section 5, however, grants "every person" the **absolute** right to freely speak on all subjects. Consistent with Article I, Section 29, the phrase "every person" cannot be re-interpreted to mean "every person except prisoners." Westerman v. Cary, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994) (canon for constitutional construction requires words to be given their ordinary meaning); DeLong v. Parmelee, 157 Wn.App. 119, 236 P.3d 936, 948-949 (Div. II 2010) (holding that phrase "any person" guaranteed prisoners equal rights under the PRA).

This is particularly true when considering the history of our state's Constitution and preexisting state law. In other sections of the Washington Constution the constitutional convention expressly excluded prisoners from exercising certain rights. Const. Art. VI, Sec. 3 (voting); Const. Art. V, Sec. 2 (public office); Const. Art. II, Sec. 29 (prohibition against slavery). Article I, Section 5, however, does not contain **any** exclusionary or limiting language:

> [F]rom a historical standpoint, it can readily be seen that the free speech and press clause of our constitution became progressively more liberal during the course of convention consideration. The first version . . . was a prohibition against the enactment of laws that would abridge freedom of speech and press. The second version . . . was the declaration of a general constitutional policy. The third and final version . . . went all the way, and was **an affirmative grant of a guaranteed right to every person**. The free speech and press clause in its final form is thus not a mere guide to the formation of state policy, but is a command, the breach of which cannot be tolerated.
>
> Those hardy frontier lawyers, newspaper people and their colleagues at the 1889 constitutional convention said it as clearly as they possibly could - **the right to free speech and press in the State of Washington is a privilege guaranteed to all, and** so long as it is not abused **is absolute**.

Rinaldo, 36 Wn.App. at 93-94 (emphasis added).

While the application of Article I, Section 5, in the prison context is an issue of first impression, Washington court's have a long history of invalidating the form of censorship at issue: the abhorrent **prior restraint.** A "prior restraint" is:

> [A]ny form of government action which tends to suppress or interfere with speech activity before it is ultimately punished through civil or criminal sanctions in a court of law.

State v. J-R Distributers, Inc., 111 Wn.2d 764, 776, 765 P.2d 281 (1988) (police seizure of

magazines and videotapes constitutes a prior restraint).

Prior restraints are not unconstitutional **per se** under the First Amendment, **but they are under Article I, Section 5.** JJR, Inc. v. Seattle, 126 Wn.2d 1, 6, 891 P.2d 720 (1995). Article I, Section 5, "**absolutely forbids prior restraints** against the publication or broadcast of constitutionally protected speech" where "the information sought to be restrained was **lawfully obtained, true, and a matter of public record**." State v. Coe, 101 Wn.2d 364, 375, 679 P.2d 353 (1984) (emphasis added). This strict standard for evaluating prior restraints lies in the plain language of Art. I, Sec. 5, which "seems to rule out prior restraints under any circumstances." Coe, 101 Wn.2d at 374.

Prior restraints upon speech are so offensive to Article I, Section 5, that our Supreme Court permits **only** the judiciary to impose them. Adams v. Hinkle, 51 Wn.2d 763, 322 P.2d 844 (1958) (enjoining "Comic Book Act" because it vested power to enter final censorship determinations to a state administrative agency); Fine Arts Guild, 74 Wn.2d 503 (1968) (enjoining ordinance authorizing administrative agency to censor

sexually explicit films for same reason). The absence of judicial process is dispositive:

> We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.

Fine Arts Guild, 74 Wn.2d at 509; see also RCW 7.42.010 (vesting jurisdiction to censor obscenity to the judiciary).

Despite the clarity of Washington State law prohibiting administrative agencies from imposing prior restraint censorships, the Department is operating such a system here.

The statute DOC claims vests it with such authority is RCW 72.09.530, titled "Prohibition on Receipt or Possession of Contraband":

> The secretary shall, in consultation with the attorney general, adopt by rule a uniform policy that prohibits receipt of possession of anything that is deemed to be contraband. The rule shall provide consistent maximum protection of legitimate penological interests, including prison security and order and deterrence of criminal activity. The rule shall protect the legitimate interests of the public and inmates in the exchange of ideas. The secretary shall establish a method of reviewing all incoming and outgoing material, consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband. The secretary shall consult regularly with the committee created under RCW 72.09.570 on the development of the policy and implementation of the rule.

To the extent RCW 72.09.530 can be interpreted to authorize DOC to impose prior restraint censorships upon lawfully obtained and true public records, it is unconstitutional on its face under Article I, Section 5, Adams and Fine Arts Guild.

RCW 72.09.530 is also overbroad, and its use of the word "contraband" vague. Article I, Section 5, "is less tolerant than the First Amendment of overly broad restrictions on speech." O'Day v. King County, 109 Wn.2d 796, 804, 749 P.2d 142 (1988). A statute is overbroad if it "sweeps within its proscriptions" forms of protected speech. State v. Reyes, 104 Wn.2d 35, 700 P.2d 1155 1160 (1985). A statute is unconstitutionally vague "if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." O'Day, 109 Wn.2d at 810.

RCW 72.09.530 is overbroad. The statute was intended to prohibit the introduction of real contraband items like weapons and drugs into our state's prisons. That is a legitimate governmental interest. But DOC is sweeping within the statute's ambit one of the most fundamental

mediums of political expression: true public records revealing the misconduct of government employees. That sweep is far too broad.

RCW 72.09.530's use of the word "contraband" to define its reach is also far too vague. The dictionary defines "contraband" as: "goods legally prohibited in trade." Merriam Webster Dictionary (1994) at 174. RCW 72.09.015 defines the word as:

> any object or communication the secretary determines shall not be allowed to be: (a) brought into; (b) possessed while on the grounds of; or (c) sent from any institution under the control of the secretary.

WAC 137-48-020 defines the word to include:

> illegal items, explosives, deadly weapons, alcoholic beverages, drugs, tobacco products, controlled substances and any item that is controlled, limited, or prohibited on the grounds or within the secure perimeter of a correctional facility as defined by department policy.

See also WAC 137-48-040 (further defining the term to include almost everything).

As illustrated by these vastly different definitions, people of common intelligence differ as to the meaning of "contraband" and must guess at what it actually means. Any rational, reasonable person, would have to guess -- and would likely be surprised -- if the word

"contraband" could include public records revealing the misconduct of governmental employees. The statute is simply too vague.

Regarding the fifth Gunwall factor, the Supreme Court has recognized that this criteria

> notes that the federal constitution is a grant of enumerated power, while the state constitution acts as a limitation on the otherwise plenary power of state government. The distinction simply reinforces the responsibility the Washington court has to engage in independent state analysis and afford broader protection when necessary.

State v. Reece, 110 Wn.2d 766, 780, 757 P.2d 947 (1988).

Finally, the issue is a matter of state concern. A state agency is using a vague state statute in an overly broad manner to impose prior restraint censorships against lawfully obtained and true public records in clear violation of Article I, Section 5, of the Washington State Constitution. This is exactly the type of issue that requires independent and heightened state constitutional scrutiny.

In addition, much of the reason prisoners only possess limited speech rights under the First Amendment is because of the principle of Federalism; the federal government's deference to

state sovereignty, particularly in matters involving the internal operation of a prison. See Procunier v. Martinez, 416 U.S. 396, 404-406, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974). This Court is not constrained by federalist principles. It is a state court applying the state constitution against a state statute and state agency. That exercise can serve not only as a valuable guide to the agency, inmates, courts, and others, but will also discharge this Court's most fundamental duty: To protect the Constitution and ensure that "every person" may freely speak, as Article I, Section 5, commands.

VI. THE TRIAL COURT ERRED IN DENYING LEAVE TO AMEND THE COMPLAINT

The superior court denied Mr. Gronquist leave to amend the complaint to include a newly discovered claim that the Department failed to search for, identify, and disclose CBCC internal investigation records on the ground that Gronquist needed to seek "revision" of the previous orders entered in this case upon unrelated PRA issues. CP 468-482 & 446-448. This was error.

CR 15(a) requires that leave to amend "shall be freely given when justice so requires." The

rule serves to facilitate decisions on the merits, to provide parties with adequate notice of the basis for claims, and to allow amendment except where it would result in prejudice to the opposing party. Caruso v. Local Union No. 690, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

Mr. Gronquist should have been granted leave to amend. The **only** reason the claim was not asserted earlier was because DOC withheld and misrepresented the facts of its insufficient search and withholding from Mr. Gronquist. This newly discovered claim had absolutely nothing to do with the previously decided issues in the case, and the trial court erred in holding that Gronquist must seek revision of the previous orders prior to requesting leave to amend.

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO VACATE A PRIOR ORDER BASED ENTIRELY UPON THE MIS-REPRESENTATIONS OF THE DEPARTMENT REGARDING THE FACTS OF THIS CASE

CR 60(b) authorized the trial court to vacate any order obtained by "misrepresentation, or other misconduct of an adverse party." CR 60(b)(4). Appellate review is for abuse of discretion. Mitchell v. Wash. Inst. of Pub. Policy, 153 Wn.App. 803, 821, 225 P.3d 280 (2009). A trial

court abuses its discretion when its decision is "manifestly unreasonable, based on untenable grounds, or based on untenable reasons." Id. (Citation omitted). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id.

The trial court's refusal to vacate its December 18, 2009, order constitutes an abuse of discretion. The decision was based upon the untenable conclusion that the previous "[o]rder was correct, in that video recordings are categorically exempt from disclosure." CP 11.

By focusing only upon the presumptive correctness of its previous ruling, rather than the nature and degree of the Department's misconduct, the trial court applied the wrong legal standard. Washington law requires that any "determination [of a motion to vacate] **must be based upon** "weighing of factors and values such as the complexity of the issues, the length of the trial, the degree and nature of the prejudicial incidents, the nature and amount of the verdict, the cost of retrial, the probable results, the

desirability of concluding litigation, and such other circumstances as may be appropos to the particular situation."" Roberson v. Perez, 123 Wn.App. 320, 342, 96 P.3d 420 (2004), aff'd on other grounds, 156 Wn.2d 33 (2005) (quoting Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968)) (emphasis added).

Rather than apply the Olpinski factors to the facts of this case, the trial court simply deferred to the presumptive correctness of an order that rests upon these deceptive and false statements of fact:

> 1. The Department searched for the requested video recordings;
>
> 2. The Department reviewed the video recordings and determined they contained potentially exempt information;
>
> 3. The surveillance recordings existed at the time of the Department's claim of exemption or the show cause hearing; and
>
> 4. That disclosure of the specific video recordings requested would reveal a plethora of highly sensitive intelligence information regarding the location, capabilities and weaknesses of the Department's video surveillance system.

When a party withholds facts relevant to an action, or obtains a judgment based upon deception and false statements of fact, vacation of that order is warranted. Mitchell, 153 Wn.App. at 825

(court properly granted motion to vacate on party's deceptive and false statements of fact "without considering the probable effect of the misconduct on the trial's outcome."); Roberson, 123 Wn.App. at 342 (nondisclosure of facts relevant to action warrants vacation of judgment).

The trial court also applied the wrong legal standard to conclude that public records can ever be "categorically exempt from **disclosure**." CP 11. The Supreme Court has clearly held that public records are **never** exempt from disclosure:

> Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.
>
> . . .
>
> **A document is never exempt from disclosure**; it can be exempt only from production.

Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010) (citations omitted, emphasis added).

To properly disclose a public record, the agency must search for the record and identify it "with particularity" to the requester. Neighborhood Alliance, 172 Wn.2d at 721; Sanders, 169 Wn.2d at 854-856. Failure to disclose a requested public record constitutes a "silent withholding" "clearly and emphatically prohibited

by the PRA." PAWS, 125 Wn.2d at 270. The trial court applied the wrong legal standard and, not surprisingly, reached the erroneous conclusion that public records can be "categorically exempt from disclosure." CP 11.

The decision also improperly assumed that DOC could assert, or the court could find, a statutory exemption for a record neither of them ever reviewed. In DeLong, 157 Wn.App. at 160-162 & 167, this Court held it is impossible to determine if an exemption applies without a review of the record. Here, neither the superior court nor the Department ever reviewed the surveillance tapes requested. The trial court, therefore, could not have found that an exemption applied to a record it never reviewed.

For similar reasons, DOC lacked any basis to claim an exemption applied to a record it never reviewed, and had destroyed prior to asserting that exemption. Rental Association v. Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009) (failure to provide indication "whether there is a **valid basis** for a claimed exemption **for an individual record**" would "defeat[] the very purpose of the PRA.") (Emphasis added); CR 11 (requiring defenses

to be "well grounded in fact"); RCW 4.32.170 (authorizing courts to strike "sham, frivolous and irrelevant answers and defenses"). The trial court applied an incorrect and unprecedented standard to conclude it was "correct" in finding that a statutory exemption applied to information in a public record that neither it, nor the Department, ever reviewed, and which had -- **prior to that decision** -- been destroyed.

Application of the correct legal standards to the facts of this case demonstrates that substantial justice has not been served. First and foremost, the nature and degree of the Department's misconduct is extreme:

* The Department lied when it informed Mr. Gronquist that it was "assembling and reviewing" the surveillance recordings;

* The Department lied when it claimed that, based upon its review of the surveillance recordings, it had determined they contained exempt information;

* The Department failed to properly identify the requested recordings;

* The Department failed to provide a proper explanation of how an exemption applied to the records;

* The Department destroyed the surveillance recordings after receiving Mr. Gronquist's public records request;

* The Department withheld the fact that it had destroyed the surveillance recordings; and

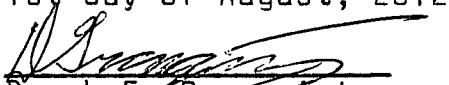
* The Department and Attorney's employed by the Washington State Attorney General's Office manufactured a false statutory exemption defense in a -- **successful** -- attempt to escape liability for its conduct.

The above referenced facts -- **the real facts of this case** -- entitle Mr. Gronquist to judgment as a matter of law. Neighborhood Alliance, 172 Wn.2d 702 (2011) (inadequate search for and destruction of public records requires award of costs and penalties); PAWS, 125 Wn.2d at 270-271 (failure to identify withheld records violates the PRA); Sanders, 169 Wn.2d at 860 (failure to explain claim of exemption requires award of costs, fees, and increased penalty); O'Neill v. City of Shoreline, 145 Wn.App. 913, 936 n.64, 187 P.3d 822 (2008) (destruction of requested public records requires award of penalties); Yacobellis v. Bellingham, 55 Wn.App. 706, 710, 715-716, 780 P.2d 272 (1989) (same). Gronquist's probability of success is high.

Deciding the real merits of this case will have only a slight impact on judicial resources. The previous order was decided through a brief show cause hearing; there was no trial, witnesses,

or jurors. Any new hearing will be brief. Basic notions of fairness and justice should allow this case to be decided on its real merits, and require vacation of a judgment that is based entirely upon deception and lies.

Submitted this 1st day of August, 2012.



Derek E. Gronquist
#943887 C-404-L
Monroe Correctional Complex
P.O. Box 888/TRU
Monroe, WA 98272

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed envelope in the internal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Second Amended Opening Brief. Said envelope(s) was addressed to:

Brian J. Considine
Assistant Attorney General
P.O. Box 40116
Olympia, WA 98504; and

David C. Ponzoha, Clerk
Washington State Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Dated this 2 day of ~~July~~ August, 2012.

Derek E. Gronquist
#943857 C-404-L
Monroe Correctional Complex
P.O. Box 888/TRU
Monroe, WA 98272