95293-1

Review of Division I Cause #34519-0-III
No.

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE,

v.

BENTON COUNTY.

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

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I. IDENTITY OF PETITIONER

Petitioner is Donna Zink, a pro se appellant in this cause of action. Zink respectfully asks this court to accept review of the Court of Appeals published opinion, terminating review as designated in section II of this petition.

II. COURT OF APPEALS DECISION

Zink seeks review of *John Doe v. Benton County*, 200 Wn. App. 781, 403 P.3d 861 (Div. III, 2017), a published decision of Division III of the Court of Appeals filed on October 10, 2017. A timely filed motion for reconsideration was denied on November 7, 2017 (RAP 13.4(a)). A copy of the published opinion, printed from the *Washington State Judicial Opinions Website*[1] is attached to this request for review at Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Does CR 13(g) limit a requestor's right to judicial review of an agencies actions under RCW 42.56.550?
2. Do the facts show that John Doe requested declaratory and injunctive relief to enjoin all of Zink's requests for sex offender information made to Benton County?
3. Are all of Zink's requests for sex offender information transactions occurring from the same event under CR 13(g) and therefore at issue in Zink's appeal?

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[1] https://www.lexisnexis.com/clients/wareports/.

4. Do the facts show that the trial court acted on all of Zink's claims for judicial review when it dismissed all of Zink's claims with prejudice prohibiting Zink from filing any further action?
5. Is a requester precluded from seeking judicial review of an agency's actions under RCW 42.56.550 if the agency notifies third parties under RCW 42.56.520?
6. Are requestors required to wait until the last and final installment of a request has been made in order to seek judicial review of an agency's response to a public record request under RCW 42.56.550?
7. Did Zink fail to state a claim upon which relief can be granted under CR 12(b)(6)?

IV. STATEMENT OF THE CASE

On July 15, 2013, Zink made a request to Benton County requesting records relating to convicted sex offender (CP 2:11-14). On July 31, 2013, Benton County responded, denying release of the requested records and informing Zink that they would be notifying third parties to prevent the release of the records (CP 2:19-26; 16:16). Benton County did not provide a reasonable time estimate, an applicable exemption log identifying a claimed exemption or identify any of the records being withheld.

On September 18, 2013, Zink made a second public record request to Benton County for correspondence associated with other denials of the requested sex offender records (CP 3:1-4; 16:17; 22:11).

On April 17, 2014, Zink made a third request for all e-mail associated with her request for sex offender records from July 15, 2013, through and including, April 17, 2014 (CP 3:11-15; 16:20; 22:16-17). All of these requests stemmed from Zink's request to access sex offender information held by Benton County.

On July 16, 2015, John Doe filed for Declaratory and Injunctive Relief against release of the requested records (CP 1-5). In his request for relief, John Doe asked the trial court for an injunction to enjoin Benton County from responding to Zink's requests dating back to July 15, 2013; claiming the requested sex offender information affected him (*Id.* Facts 2.4-2.12 at CP 2:8-3:19).

On July 17, 2015, the trial court issued a Temporary Restraining Order (TRO) preventing the release of the requested records (CP 11-12). The order of the trial court clarified that all of Zink's requests for sex offender records were enjoined in this cause of action and not just Zink's April 17, 2014 request.

> IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED that Benton County is and shall be enjoined, until further order of the Court, from releasing the identity, names, documents or any material related to the public records request of Donna Zink and Jeff Zink, **to include, but not be limited to, Ms. Zink's public records request dated April 17, 2014.**

CP 12:1-6 (emphasis added). In other words, the trial court enjoined the records associated with Zink's requests dating back to July 15, 2013.

On August 6, 2015, Zink filed a cross-claim against Benton County under RCW 42.56.550(1)(2)(4) for unreasonable delay and denial in production of public records (CP 20-33). Zink's cross claims against Benton County alleged violations of the PRA and requested judicial review of the reasonableness of Benton County's responses to all of Zink's requests for access to sex offender information dating back to July 15, 2013 (CP 26:24-25) as set forth in John Does action.

On August 26, 2015, Benton County motioned the trial court to dismiss Zink's cross-claim under CR 12(b)(6)) (CP 46-59). Oral arguments were heard on

September 25, 2015. (RP (September 25, 2015)). Benton County argued that Zink failed to state a claim upon which relief can be granted based on the fact that:

1. Zink is prohibited from filing a crossclaim on any of their responses except their response to Zink's April 17, 2014 request (CP 50:16-25; RP (September 25, 2015) 3:4-4:7);
2. A requestor has no right to request review of an agency's actions until after the last and final installment has been made by the agency if that agency provides records in installments (*Id.* 4:17-5:6); and
3. Zink is prohibited from filing any further actions on her other requests because a requestor cannot seek review of an agencies actions under RCW 42.56.550 if the agency notifies third parties (*Id.* 5:7-8:15).

Zink argued that:

1. Benton County's actions in denying release of the requested records was an unreasonable denial and she has right to request judicial review of Benton County's actions under RCW 42.56.550; and
2. All requests stemmed from her initial request on July 15, 2013 and were rightfully at issue in this cause of action (RP (September 25, 2016) 14:12-15:14).

The trial court found that while Zink has a right to review under RCW 42.56.550, no action is permissible under RCW 42.56.540 when an agency notifies a third party; stating:

> I think action is sufficient in these cases to trigger a right to bring a lawsuit, but it's just this particular action, which is exercising the option under RCW 42.56.540, to notify affected parties does not give rise to a claim. So, to the extent you've alleged that, and only to that extent, I will dismiss with prejudice such a claim.

RP (September 25, 2015) 21:18-24). Zink filed a timely appeal to Division III (CP 126-132).

On October 10, 2017, Division III filed their published opinion concerning Zink's request for judicial review of Benton County's actions *John Doe v. Benton County*, 200 Wn. App. 781, 403 P.3d 861 (Div. III, 2017). Division III opined that:

1. A requestor cannot initiate or seek review of an agency's actions under RCW 42.56.550 until after the last and final installment has been made if an agency produces records in installments (¶25);
2. An agency's actions in notifying third parties under RCW 42.56.520 cannot be reviewed by a court under RCW 42.56.550 (¶21-22);
3. CR 13(g) precludes Zink from filing a cross-claim against Benton County for any requests for sex offender information other than her April 17, 2014 request (¶24, *fn.* 5); and
4. Zink did not prevail against and agency and is not entitled to penalties or an award of costs and fees (¶30-32).

Zink seeks review of Division III's published decision.

V. ARGUMENT WHY REVIEW SHOULD BE EXCEPTED

1. Grounds for Review

Rules of Appellate Procedure (RAP) 13.3 allow a party to petition the Supreme Court for discretionary review of a Court of Appeals decision terminating review pursuant to RAP 13.4(a).

> A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must ... file a petition for review or an answer to the petition that raises new issues.

Under RAP 13.4(b) a petition for review will be accepted if:

1) the decision is in conflict with a decision of the Supreme Court; or
2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
3) If a significant question of law under the Constitution of the State of Washington is involved; or
4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(*Id.* 1-4)). In this case, the decision of Division III fundamentally alters the statutory requirements under RCW 42.56.550 for initiating an action against a public agency for violations of the PRA under RCW 42.56.520. The issue of whether a requestor must wait until the last and final installment has been made by the agency is a decision of first impression and a significant issue of substantial public interest. The decision of Division III that Zink's request for review is limited to only the one request is in conflict with the actual facts of the case as well as established case law concerning CR 13(g). Finally, Division III's decision robs Zink, as well as other requestors, of their right to seek judicial review and oversight of an agency's response to requests for public records (RCW 42.56.550(1)(2)(4); including judicial review of an agency's response under RCW 42.56.520 (see RCW 42.56.550(3) judicial review of agency action under RCW 42.56.520 are de novo). For these reasons Zink respectfully requests this Court to accept review of the decisions of Division III in this cause of action.

2. The Trial Court Acted Upon All of Zink's Requests and Civil Rule 13(g) Is Permissive and Does Not Preclude Zinks' Cross Claim

In its Decision, Division III stated that Zink was limited to judicial review of her April 17, 2014 request since John Doe brought this suit to enjoin the County from releasing records responsive to the April 17, 2014 request.

> The Zinks also argue that the County violated the PRA in responding to Ms. Zink's other various PRA requests, including her July 2013 request. However, a party may assert a cross claim against a coparty only if the claim "aris[es] out of the transaction or occurrence that is the subject matter ... of the original action." CR 13(g). **John Doe brought this suit to enjoin the County from releasing records responsive to Ms. Zink's April 17, 2014 request. As such, the Zinks' cross claim may be only for alleged PRA violations with respect to this request.**

John Doe v. Benton County, 200 Wn. App. 781, ¶24, *fn.* 5, 403 P.3d 861 (Div. III, 2017). Division III's opinion that CR 13(g) bars Zink from filing a cross claim against Benton County for violations relating to her requests for access to sex offender records has no basis in law and is not supported by the actual facts of this case.

a) The Facts of the Case Clearly Show that John Doe Sought Injunctive Relief of All of Zink's Requests and That the Trial Court Made Judicial Rulings Concerning All of Zink's Requests

John Doe's *Amended Complaint for Declaratory and Injunctive Relief* initiating this action in the Benton County Superior Court (Cause #15-2-01587-4) on July 16, 2015, included allegations against Zink, claiming she had made requests for sex offender information starting in July 2013 affecting him (*Id.* Facts 2.4-2.12 at CP 2:8-3:19). John Doe alleged that:

> Defendant Zink has requested the notification letter to each Level I offender as an alternative method of learning their identity and address.

Id. Facts 2.17)(CP 4:8-10).[2]

> Based on the receipt of notice from Defendant Benton County, Plaintiff believes his identity, address, or other personal information will be released as a result of the **public records requests** made by Defendant Zink.

Id. Facts 2.20 (CP 4:16-19).

In responding to John Does complaint, Defendant, Benton County, admitted Zink had made the requests on the dates specified by John Doe in their *Answer to Plaintiff's Amended Complaint for Declaratory and Injunctive Relief,* Facts 2.4-2.12 (CP 16:11-22). Defendant, Zink, also admitted to making requests for information concerning sex offenders on the dates specified by John Doe as affecting this case in her *Answer to Complaint for Declaratory and Injunctive Relief and Cross-Claim for Violations of the Washington Public Records Act (PRA)* (Facts 2.4-2.12), filed August 6, 2015, (CP 21:16-22:19).

Based on the pleadings, on July 17, 2015, the trial court granted a Temporary Restraining Order (TRO)(CP 11-12) mandating that:

> IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED that Benton County is and shall be enjoined, until further notice of the Court, from releasing the identity, names, documents or any materials related to the public records request of Donna Zink and Jeff Zink, **to include, but not be limited to,** Ms. Zink's public record request dated April 17, 2014...

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[2] Zink requested copies of all notification letters prior to her request of April 17, 2014.

(CP 12:1-6)(emphasis added). By including the language "*to include but not be limited to,*" in the TRO, the trial court specified that all of Zink's requests for sex offender information to Benton County were at issue in this cause of action and not just the April 17, 2014 request.

On September 25, 2015, oral argument concerning the dismissal of Zink's claims was heard before the trial court. Zink argued that all of her requests were for the same type of records from the same agency and the requests were intertwined and could not be separated as suggested by Benton County (RP (September 25, 2015) 14:12-16:8).

Benton County argued that only Zink's request for sex offender records submitted on April 17, 2014 was legally at issue in this cause of action. (RP (September 25, 2015) 4:1-5:25). When asked about the request for the Court to dismiss of all of Zink's claims with prejudice, Benton County stated that Zink must be precluded from filing additional actions concerning her other requests because she had no legal right to review in the first place.

> MR. LUKSON: So, that would be my first point is that under Hobbs you can't file suit against an agency until they've finished with your request, and we haven't finished with her request.
>
> THE COURT: But your proposed order suggests that the dismissal should be with prejudice.
>
> MR. LUKSON: And that's as to my second point, your Honor. I can move on to that right now, if you'd like?
>
> THE COURT: Well, do you understand my question?
>
> MR. LUKSON: Yes.

> THE COURT: You're saying that this -- it should be dismissed because it's premature but you proposed that order should be dismissed without prejudice but cannot be filed once that final action is taken.
>
> MR. LUKSON: Yes. The reason I'm asking final action is even if they were timely filed she still would have no basis as a matter of law for the cross-claim. So, that's the basis of my second point, which is -- first point is more just essentially for lack of a better term the cherry on top. That's kind of a side issue. The main issue is that the Supreme Court has made clear, and I think the Confederated Tribes case as well as the Belo Management and the Robbins Geller case that there is no cause of action against an agency for providing third party notice.

(*Id.* 5:3-6:3). Based on these arguments, the trial court ruled that:

> THE COURT: So, understanding that your claim is limited to what I would call a wrongful notification of -- the wrongful exercise of the option of notification to third parties under RCW 42.56.540, I find that no such claim exists and I must dismiss it, ...
>
> Okay. I reject your final action argument. **I think action is sufficient in these cases to trigger a right to bring a lawsuit, but it's just this particular action, which is exercising the option under RCW 42.56.540, to notify affected parties does not give rise to a claim.** So, to the extent you've alleged that, and only to that extent, I will dismiss with prejudice such a claim.

(RP (September 25, 2015) 21:3-25)(emphasis added). Benton County did not request clarification. The trial court subsequently issued orders dismissing all of Zink's cross-claims with prejudice.

Based on the trial court's TRO and subsequent order dismissing Zink's claims with prejudice, Zink was precluded from filing any further action to enforce the PRA pending an appeal. Had Zink attempted to file a new claim against Benton County for violations of the PRA in responding to her requests, she would have

violated a court order and/or, at the least, found to be initiating a frivolous lawsuit. Both of which are frowned upon in our judicial system and carry consequences in the form of sanctions (see CR 11; RCW 4.84.185).

Division III's decision that only Zink's April 17, 2014 request is at issue in this appeal is erroneous and deprives Zink of her lawful right to judicial review and oversight of Benton County's actions in responding to her requests for sex offender information under RCW 42.56.550.

b) The Purpose of CR 13(g) is to Allow Parties to Resolve as Many Related Claims as Possible in a Single Lawsuit. Division III's Decision That Zink's Cross-Claims Are Barred Under CR 13(g) Is A Narrow Interpretation and Is In Conflict With This Court's Decisions That CR 13(g) is to Be Applied Broadly

Division III's determination that under CR 13(g), Zink's claims are limited to only the April 17, 2014, request is a narrow construction of the court rules concerning cross-claims; in opposition to well-established case law.

CR 13(g) clarifies that:

> A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action **or** of a counterclaim therein **or** relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.[3]

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[3] Division III omitted the following underline language in CR 13(g) in reaching their decision:

> Cross Claim Against Co-party. A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter **either of the original action or of a counterclaim therein or relating to any property that is the subject matter** of the original action. **Such cross claim may**

CR 13(g). This Courts has opined that CR 13(g) is to be broadly construed in order for justice to be served. This Court has mandated that CR 13(g) allows claims to be filed by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action.

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 866, 726 P.2d 1 (1986). Zink's requests for sex offender information arose from the same transaction in a series of occurrences all of which were related to obtaining access to sex offender records maintained by Benton County.

Not only did John Doe included all of Zink's request for access to sex offender information in his claim for declaratory and injunctive relief in this cause of action (CP 1-5), all of Zink's requests were combined in four other lawsuits initiated by John Doe sex offenders.[4] Clearly the trial court correctly recognized that all of Zink's requests for sex offender information to Benton County are logically related.

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include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant. CR 13(g).

[4] Four separate and individual lawsuits were filed by different and individual Plaintiff's, each of the Plaintiffs requested the court enjoin the records requested by Zink on July 15, 2013, September 18, 2013 as well as April 17, 2014 (Cause #13-2-02037-5, 13-2-02039-1, 13-2-020146-1 and 13-2-02786-3). Furthermore, in cause #13-2-02037-5, the trial court enjoined records requested from the WSP and WASPC; two completely different agencies, because the requests were for information concerning sex offenders.

> [C]ourts should give the phrase `transaction or occurrence that is the subject matter' of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions, [not instantly relevant] any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated or are related, but within the exceptions, need not be pleaded.

Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 865, 726 P.2d 1 (1986). In 2004, Division I, relying on the Supreme Court decision in *Schoeman v. N.Y. Life Ins. Co.*, opined that CR 13(g) "is liberally construed in order to resolve as many related claims as possible in a single action." *Rieger v. Bennet*, 120 Wn. App. 74, 78-79, 84 P.3d 265 (2004)(emphasis added). Similarly, in 1986, Division II, opined that the assertion of a cross claim is permissive.[5] *Krikava v. Webber*, 43 Wn. App. 217, 221, 716 P.2d 916 (1986).

Further, in the history of the PRA, no requestor has been required to file separate and individual lawsuits for each individual request made to a single agency in order to obtain judicial review of an agencies actions under RCW 42.56.550(1)(2)(4). (See *Zink v. Mesa*, 140 Wn. App. 328, ¶3, ¶47, 166 P.3d 738 (2007)). Forcing requestors to file individual actions, flies in the face of judicial economy, fairness and convenience as well as this Court's decision in *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 865, 726 P.2d 1 (1986).

The trial court acted upon all of Zink's request in this cause of action, correctly recognizing that all of Zink's requests were logically related, stemmed

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[5] The Division II opinion cites: *Nautilus, Inc. v. Transamerica Title Ins. Co.*, 13 Wn.App. 345, 353, 534 P.2d 1388 (1975), *Kuhn v. Kuhn*, 301 N.W.2d 148 (N.D. 1981). *Chandler v. Cashway Bldg. Materials, Inc.*, 584 S.W.2d 950 (Tex. Civ. App. 1979) and 3A L. Orland, *Wash. Prac., Rules Practice* § 5166, at 227 (3d ed. 1980)

from the same transactions and did not require separate actions be filed individually by any party. Division III's opinion that Zink may only assert a cross claim against Benton County for the April 17, 2014 request (A10, *fn.* 5) is restrictive and limiting, in opposition to other well-established case law. Zink respectfully requests this Court to review and reverse the decision of Division III concerning the application of CR 13(g).

3. The Decision of Division III is in Conflict With State Statutes and Case Law Concerning Dismissal of an Action Pursuant to CR 12(b)(6)

This Court has established that a dismissal of a cause of action under CR 12(b)(6) is a question of law and review is de novo. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, ¶5, 233 P.3d 861 (2010). This Court has established that a plaintiff does not fail to state a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

Further, this Court has repeatedly opined that under a CR 12(b)(6) motion, a Plaintiff's factual allegations are assumed to be true, and can only be dismissed if the defendant can prove "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to the requested relief." *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (quoting *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)); see also *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978); *Stangland v. Brock*, 109 Wn.2d 675, 677, 747 P.2d 464 (1987). Benton County

did not prove beyond doubt that any of the facts set out by Zink are not true or that they do not give rise to a claim for judicial review under RCW 42.56.550.

Under the strict mandates of the PRA, within five days an agency must respond to a request for access to public records by either:

1. providing the requested records;
2. providing a link for the requested records;
3. acknowledging the request and giving a reasonable estimate of time need to provide the records; or
4. denying the request (RCW 42.56.520 (2010))

Hikel v. City of Lynnwood, 197 Wn. App. 366, ¶14, 389 P.3d 677 (2016)

In response to Zink's requests in this cause of action Benton County:

1. did not provide the requested records;
2. did not provide a link to the requested records;
3. did not provide a reasonable estimate of time need to provide the records: and
4. refused to provide the requested records with no claim of exemption.[6]

John Doe v. Benton County, 200 Wn. App. 781, ¶25, 403 P.3d 861 (Div. III, 2017). Despite the facts of this case, Division III opined that Zink failed to state a claim upon which relief can be granted because Benton County did not deny Zink access to the records because they never claimed an exemption (*Id.*). This is an issue of first impression and/or a fundamental change to well-established case law which must be reviewed by this Court.

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[6] Agencies having public records are required to rely only upon statutory exemptions or prohibitions for refusal to provide public records (RCW 42.56.050). See also RCW 42.56.070(1), .210(3) and .520.

4. Division III's Decision That Requestor's Have No Right to Judicial Review of an Agencies Actions Until After the Last and Final Installment is Error and Must Be Reviewed by this Court

Pursuant to Division III's decision, a requestor has no right to seek judicial review of an agencies actions until after the last and final installment has been made.

> An agency's decision to deny a request becomes final for purposes of judicial review two business days after it initially denies the request. Former RCW 42.56.520; WAC 44-14-08004(1). A requestor is not permitted to initiate a lawsuit prior to an agency's denial of a public record. Hobbs v. Wash. State Auditor's Office, 183 Wn. App. 925, 935, 335 P.3d 1004 (2014). In other words, there is no cause of action under the PRA until after the agency has engaged in some final action denying access to a record. Id. at 935-36. **When an agency produces records in installments, the agency does not "deny" access to the records until it finishes producing all responsive documents.** Id. at 936-37.

John Doe v. Benton County, 200 Wn. App. 781, ¶21, 403 P.3d 861 (Div. III, 2017)(emphasis added).

> However, the County never denied Ms. Zink the right to inspect any record. **Because the County had not yet finished producing all responsive documents, the request was still open.** The County never claimed an exemption, refused to produce the records, or otherwise engaged in final action denying access to the records.

John Doe v. Benton County, 200 Wn. App. 781, ¶25, 403 P.3d 861 (Div. III, 2017). Division III opined that Zink failed to state a claim for which relief can be granted under CR 12(b)(6) because an agency does not deny access to records until after the last and final installment of records has been made. Because the

County had not completed its last and final installment, it did not deny access to the requested records.

No court has ever before determined that requestors are precluded from filing an action for judicial review and oversight of an agency's actions under RCW 42.56.550 until after the last and final installment is made. In light of the penalty provision under RCW 42.56.550(4)(up to $100 per day), the ramifications of requiring requestors to wait years for a court to decide whether a PRA violation has occurred are huge. Division III's mandate is a case of first impression, is of great public importance and must be ultimately decided by this Court.

5. Division III's Decision That Requestor's Have No Right to Judicial Review of an Agencies Actions If the Agency Notifies Third Parties Without An Exemption Has No Basis in Law

Having no case law to cite, Division III relied heavily on model rules set out by our State Attorney General to determine that an agency cannot be held accountable for its actions in notifying third parties even if they know the records are not exempt. *John Doe v. Benton County*, 200 Wn. App. 781, ¶22, 403 P.3d 861 (Div. III, 2017). The Court ignored the mandate of our Washington State Attorney General that agencies should only notify third parties if an applicable exemption applies.

> Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

WAC 44-14-04003(11). Without reference to a statute or case law, Division III opined that third parties have a "right" to a chance to claim an exemption in those

times when the agency believes no exemption applies," citing to WAC 44-14-04003(11). *John Doe v. Benton County*, 200 Wn. App. 781, ¶26, 403 P.3d 861 (Div. III, 2017).There is no language in the PRA or WAC 44-14-04003(11) providing third parties with a "right" to claim an exemption when an agency has no exemption to claim. Nor did Division III identify any language, mandating that third parties have any right to notification under the PRA absent an agency's identified exemption. While Benton County argued that this renders RCW 42.56.520 superfluous, that is a false argument. Under the PRA an agency can **choose to release exempt records**.

> Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.

RCW 42.56.210(2). This harmonizes RCW 42.56.520 and 42.56.540. Especially in light of the fact that, RCW 42.56.540 is the sole means for obtaining a third party injunction (*Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, ¶12, *fn.* 2, 423, 259 P.3d 190 (2011). Furthermore, having an exemption is not good enough to enjoin public records. An injunction can only be had at the request of a third party if the court finds 1) an exemption exists, **and** 2) that the examination of the records would clearly not be in the public interest, **and** 3) would substantially and irreparably damage any person (RCW 42.56.540)(*Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, ¶64, 174 P.3d 60 (2007); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, ¶78, 246 P.3d 768 (2011); *Bainbridge*

Island Police Guild v. City of Puyallup, 172 Wn.2d 398, ¶36, 259 P.3d 190 (2011); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, ¶18, 243 P.3d 919 (2010).

A third party has no "absolute right" to notification of disclosure of non-exempt records and must not only prove an exemption exists, they must also prove the records are not of public interest and that release will cause some type of harm. In this cause of action Benton County knew that the records were not exempt at the time they denied release of the records and notified third parties. Failure to have a reasonable belief that the records are exempt when notifying third parties is an unreasonable denial or delay and a violation of the PRA. Again, Division III's opinion otherwise is one of first impression and must be reviewed by this Court for final determination.

6. Division III's Opinion Robs Requestors of Their Statutory Right to Request Review of An Agencies Action in Responding to Requests for Public Records

Division III was required to assume Zink's factual allegations to be true, and can only dismiss Zink's claims if the defendant can prove "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to the requested relief." *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985). Despite the clear mandates of this Court concerning dismissal of action under CR 12(b)(6), Division III opined that requestors have no right to judicial review of an agency's actions if that agency notifies third parties under RCW 42.56.520.

RCW 42.56.550(3) clearly states that requestor have a right to judicial review of agency action under RCW 42.56.520 when it clarifies that such review will be

de novo (Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo). If requestors have no right to judicial review and oversite under RCW 42.56.550 of an agencies actions in notifying third parties under RCW 42.56.520 they would also have no right to judicial review and oversight when an agency denies the request and claims an exemption under RCW 42.56.520. Rendering the language in RCW 42.56.550(3) superfluous.

This Court has repeatedly opined that our Legislature did not intend to allow agencies or judges to wield broad and protean exemptions *(John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, ¶10, 374 P.3d 63 (2016)). If Benton County believed the records were not exempt, they were required to release the records.

> 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 (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1)(emphasis added). As in cases where an agency denies a request and provides and exemption under RCW 42.56.520, Zink has a right to judicial review of Benton County refusal to release the requested records and notify of third parties with knowledge that the records were not exempt.

Pursuant to our State Attorney General WAC 44-14-04003(11), and the PRA (RCW 42.56.520(2) agencies must have a reasonable belief that an exemption applies to the requested records prior to notification of third parties or the denial/delay is unreasonable.

> Additional time required to respond to a request may be based upon the need ... to notify third persons or agencies affected by the request.

RCW 42.56.520(2)(emphasis added).. Under RCW 42.56.550(1),[7] Zink has a statutory right to request review of Benton County's actions in denying release of these records. Under RCW 42.56.550(2),[8] Zink has a statutory right to judicial review of Benton County's unreasonable delay in the release of the requested records. Under RCW 42.56.550(3), Courts are specifically directed to review an agency's actions under RCW 42.56.520. Therefore, Zink's cross claim cannot be found to have failed to state a claim for which relief can be granted under CR 12(b)(6) since the relief sought is that Benton County is found to have violated the PRA by unreasonably denying and/or delaying release of the requested records.

7. Zink is Entitled to Per Diem Penalties for Violations of the PRA Should She Prevail Against Benton County

Pursuant to RCW 42.56.550(4), Zink is entitled to penalties, costs and fees if the trial court finds Benton County violated the PRA.

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[7] Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records. RCW 42.56.550(1).

[8] Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable. RCW 42.56.550(2).

8. Providing Contact Information is in Violation of RCW 42.56.240(8)

Division III opined that an agency is allowed to violate a state statute (RCW 42.56.240(8)) concerning Zink's name and contact information if an agency decides it wants to notify third parties even if no need exists. If a state law prohibits the release of the information, an agency cannot release that information simply because they want to notify third parties to prevent release of non-exempt records. Especially in light of the fact that Benton County knew the records were not exempt at the time of the notification and had no reasonable reason or need to notify any convicted sex offenders of Zink's request or provide them with prohibited information; Zink's name and contact information.

VI. CONCLUSION

Division III's published opinion re-interprets and fundamentally alters well-established case law concerning the rights of parties under the PRA (RCW 42.56.550) as well as Court Rules CR 12(b)(6) and 13(g). For all of the reasons as specified within, Zink respectfully requests this Court to review the opinion of Division III set out in this cause of action.

RESPECTFULLY SUBMITTED this 7th day of December 2017.

By Donna M Zink

Donna Zink
Pro se

VII. CERTIFICATE OF MAILING

I, Donna Zink, declare that on December 7, 2017, I did send a true and correct copy of Appellant Zink's request for "*Petition for Discretionary Review to Supreme Court*" to the following parties via e-mail to the following e-mail Service Addresses:

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Dated this 7th day of December 2017.

By _____
Donna Zink
Pro Se

Appendix A

JOHN DOE, *Plaintiff*, v. **BENTON COUNTY**, *Respondent*, DONNA ZINK ET AL., *Appellants*.

No. 34519-0-III

COURT OF APPEALS OF WASHINGTON, DIVISION THREE

200 Wn. App. 781; 403 P.3d 861; 2017 Wash. App. LEXIS 2364

October 10, **2017**, Filed

SUBSEQUENT HISTORY: Reconsideration denied by Doe v. **Benton County, 2017** Wash. App. LEXIS 2534 (Wash. Ct. App., Nov. 7, **2017**)

PRIOR-HISTORY: Appeal from **Benton** Superior Court. Docket No: 15-2-01587-4. Judge signing: Honorable Bruce A. Spanner. Judgment or order under review. Date filed: 09/25/2015. Doe A v. Wash. State Patrol, 2015 Wash. LEXIS 244 (Wash., Mar. 4, 2015)

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A citizen who had requested a **county** to produce public records concerning prior requests she had made for records concerning level I registered sex offenders claimed that the **county** improperly delayed production of responsive records while it notified affected level I registered sex offenders of the request. One of the level I registered sex offenders who received the notice sought to enjoin the production of any records that identified him. The citizen's claim against the **county** was raised as a cross claim in the level I registered sex offender's action.

Superior Court: After enjoining the **county** from producing any records that were not first redacted of information that would identify the level I registered sex offender, the Superior Court for **Benton County,** No. 15-2-01587-4, Bruce A. Spanner, J., on September 25, 2015, dismissed the citizen's cross claim with prejudice. In later proceedings, on the basis of a recent precedent by the Supreme Court that level I sex offender registration information was subject to disclosure, the trial court dissolved the injunction, dismissed the complaint, unsealed the records identifying the level I registered sex offender, and ordered that unredacted copies of the requested records be provided to the **county** and to the citizen.

Court of Appeals: Holding that the **county** was statutorily authorized to take additional time to provide notification to the level I registered sex offenders who were affected by the citizen's request and that the citizen was not entitled to a penalty award against the **county** or an award of attorney fees, the court *affirms* the order dismissing the cross claim.

COUNSEL: *Donna Zink* and *Jeff Zink*, pro se.

Andrew K. Miller, *Prosecuting Attorney*, and Ryan J. Lukson, *Deputy*, and Richard D. Whaley, *Special Deputy*, for respondent.

JUDGES: Authored by Robert Lawrence-Berrey. Concurring: Laurel Siddoway, Kevin Korsmo.

OPINION BY: Robert Lawrence-Berrey

OPINION

¶1 LAWRENCE-BERREY, A.C.J. — In 2013 and 2014, Donna Zink made a series of requests under the Public Records Act (PRA), chapter 42.56 RCW, seeking documents pertaining to level I registered sex offenders. She made one of these requests to **Benton County (County)**, which possessed records identifying the plaintiff in this case, John Doe, as a level I sex offender. Before the **County** produced its final installment of records, which contained John Doe's information, it notified John Doe about Ms. Zink's request.

¶2 John Doe filed suit against the **County,** Ms. Zink, and Ms. Zink's husband to enjoin production of the records identifying him. In their answer, the Zinks asserted a cross claim against the **County,** claiming it violated the PRA by withholding the requested records to notify John Doe about the request. The trial court dismissed the Zinks' cross claim under CR 12(b)(6), and the Zinks appealed. We affirm.

FACTS

¶3 On July 21, 2013, Ms. Zink submitted a public records request to the **County.** In it, she sought "the level one [sex] offender registrations filed in **Benton County** as well as a list of all level one [sex] offenders registered in **Benton County.**"[1] Clerk's Papers (CP) at 352. The **County** responded to Ms. Zink and informed her the sheriff's office would begin processing her request.

FOOTNOTES

1 This particular request is not at issue in this case. It is discussed for context.

¶4 One week later, the **County** contacted Ms. Zink and indicated the documents she requested were potentially exempt from disclosure under both the "investigative records" and "other statute" exemptions.[2] The **County** told Ms. Zink it was going to notify the affected individuals that she had requested their records. It stated the notice would include a copy of her request and her name so that the affected individuals could seek an injunction if they believed the records were exempt. The **County** stated that absent an injunction, it would release the records.

FOOTNOTES

2 *See* RCW 42.56.240(1) (exempting investigative records), .070(1) (exempting information that is protected by an "other statute"); RCW 4.24.550(3) (authorizing and providing guidelines to law enforcement agencies for proactively disseminating information about sex offenders to the public). The **County** indicated RCW 4.24.550(3) was an "other statute" under the PRA, which potentially exempted release of the records.

¶5 In response to the **County's** notices, 14 individuals filed a complaint to enjoin the **County** from releasing their information to Ms. Zink. Multiple lawsuits were filed, and the trial court entered four permanent injunctions prohibiting the **County** from releasing the records.

¶6 On April 17, 2014, Ms. Zink made another PRA request. She sought "all e-mails sent to or received from anyone or any person in **Benton County** staff, officials, council members, [and] other agencies ... concerning [her] requests for sex offender information starting on July 15, 2013 through and including April 17, 2014." CP at 363 (formatting omitted). This is the request at issue in this case.

¶7 Following Ms. Zink's April 17 request, the **County** began responding in installments. During this process, the **County** came across names of new individuals whose names were not identified in the initial set of records responsive to Ms. Zink's July 2013 request. By June 2015, the **County** had e-mailed Ms. Zink 12 installments of responsive records and was close to completing her April 17, 2014 request.

¶8 On July 1, 2015, the **County** sent a written notice to 72 new individuals whose identities would be released in its response to Ms. Zink's April 17, 2014 request. The letter notified these individuals that the **County** had received a request for records that identified them as level I sex offenders. The letter also stated that the **County** did not believe the records were exempt from release but that it nonetheless was providing notice as permitted by RCW 42.56.540 because the records identified the individuals. The letter stated the **County** would release the records in their entirety on July 17, 2015, unless it was enjoined from doing so. The **County** never claimed an exemption for the records associated with these 72 individuals.

¶9 John Doe, the plaintiff in this case, received one of these notices. The **County** possessed roughly five documents that contained his information. On July 16, 2015, he filed suit against both the **County** and the Zinks, seeking to enjoin the production of any records that identified him. The next day, the trial court issued a temporary restraining order enjoining the **County** from producing any records whatsoever associated with Ms. Zink's April 17, 2014 request.

¶10 The **County** filed an answer to John Doe's complaint. It stated that it intended to produce the records Ms. Zink requested and that it believed the records were nonexempt.

¶11 The Zinks also filed an answer to John Doe's complaint. In it, they asserted a cross claim against the **County** for alleged violations of the PRA. They claimed the **County** was withholding the records without an applicable exemption and without providing an exemption log. They further claimed that the **County** did not "need" to notify the John Does and that it did so to delay or deny release of the requested records. CP at 30 (emphasis omitted). They also claimed the **County** wrongfully disclosed their contact information to John Doe.

¶12 John Doe moved for a preliminary injunction. The **County** opposed his motion, arguing that the records did not fall under any PRA exemption. The trial court entered an injunction and enjoined the **County** from releasing any documents responsive to Ms. Zink's April 17, 2014 records request without first redacting John Doe's information. Following the court's injunction, the **County** produced the responsive records to Ms. Zink with John Doe's information redacted.

¶13 On August 26, 2015, the **County** moved to dismiss the Zinks' cross claim against it under CR 12(b)(6). The trial court concluded that the PRA gives the **County** the option of notifying third parties of records requests and that the **County** did not violate the PRA by exercising that option. The trial court further reasoned that the PRA's penalty and attorney fee provision does not apply when a third party brings an action to prevent disclosure. Accordingly, the trial court dismissed the Zinks' cross claim with prejudice.

¶14 In April 2016, our Supreme Court issued its opinion in *John Doe A v. Washington State Patrol*, 185 Wn.2d 363, 374 **P.3d** 63 (2016). That case involved identical requests for level I sex offender information that Ms. Zink made to the Washington State Patrol and the

Washington Association of Sheriffs and Police Chiefs. *Id.* at 367-68. The court held that RCW 4.24.550 is not an "other statute" under RCW 42.56.070(1). *Id.* at 368. Thus, the court concluded that "level I sex offender registration information is subject to disclosure." *Id.* at 385.

¶15 Following the issuance of the mandate from the Supreme Court, the **County** moved to dissolve John Doe's preliminary injunction and dismiss his complaint. The trial court granted the **County's** motion. The trial court also unsealed the records identifying John Doe and ordered unredacted copies to be provided to the **County** and the Zinks.

¶16 The Zinks appeal from the trial court's September 2015 order dismissing their cross claim.

ANALYSIS

STANDARD OF REVIEW

¶17 CR 12(b)(6) allows a defendant to move to dismiss a complaint based on the plaintiff's failure to state a claim on which relief can be granted. When considering a defendant's motion to dismiss under this rule, the court presumes all facts alleged in the plaintiff's complaint are true. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 **P.3d** 487, *review denied*, 184 Wn.2d 1011, 360 **P.3d** 817 (2015). The court may also consider hypothetical facts conceivably raised by the complaint. *Id.* However, the court is not required to accept the complaint's legal conclusions. *Id.* If the facts in the complaint or hypothetical facts consistent with the complaint are legally insufficient to support the plaintiff's claims, dismissal under this rule is appropriate. *Id.* at 843-44. Because the trial court's ruling on a CR 12(b)(6) motion to dismiss is a question of law, this court reviews the trial court's order de novo. *Id.* at 843.

ALLEGED WRONGFUL DENIAL OF ACCESS TO RECORDS

¶18 The Zinks argue that the **County** violated the PRA by denying them access to the records while it notified John Doe about the request. They also argue the **County** withheld the records without an applicable exemption and without providing an exemption log. This court reviews an agency's compliance with the PRA de novo. RCW 42.56.550(3).

¶19 Within five business days of receiving a records request, an agency must either (1) provide the records, (2) provide an Internet link for the records, (3) acknowledge the request and give a reasonable estimate of the time it will need to provide the records, or (4) deny the request. Former RCW 42.56.520 (2010).[3] An agency may produce records on a "partial or installment basis" as it assembles a larger set of requested records. Former RCW 42.56.080 (2005).

FOOTNOTES

3 In **2017,** the legislature amended RCW 42.56.520 to address an agency's obligations in responding to unclear records requests. *See* ENGROSSED SUBSTITUTE H.B. 1594, 65th Leg., Reg. Sess. (Wash. **2017).**

¶20 A "denial" of a request can occur, for example, when an agency (1) does not have the record, (2) fails to respond to a request, (3) claims an exemption of the entire record or a portion of it, or (4) fails to provide the record after the reasonable estimate expires. WAC 44-14-04004(4).[4] An agency violates the PRA when it wrongfully denies an opportunity to inspect or copy a public record. RCW 42.56.550(1). When an agency withholds a record or part of a record based on an exemption, the agency must explain and justify this withholding in writing, i.e., provide an exemption log. RCW 42.56.070(1), .210(3); former RCW 42.56.520.

FOOTNOTES

4 Although the model rules in chapter 44-14 WAC are advisory, the legislature has instructed agencies to consult the model rules when establishing local ordinances for PRA compliance. RCW 42.56.570(4).

¶21 An agency's decision to deny a request becomes final for purposes of judicial review two business days after it initially denies the request. Former RCW 42.56.520; WAC 44-14-08004 (1). A requestor is not permitted to initiate a lawsuit prior to an agency's denial of a public record. *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 935, 335 **P.3d** 1004 (2014). In other words, there is no cause of action under the PRA until *after* the agency has engaged in some final action denying access to a record. *Id.* at 935-36. When an agency produces records in installments, the agency does not "deny" access to the records until it finishes producing all responsive documents. *Id.* at 936-37.

¶22 "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." RCW 42.56.540; *see also* WAC 44-14-040(4), -04003(11). "An agency has wide discretion to decide whom to notify or not notify." WAC 44-14-04003(11). The agency provides this notice before it produces the record, which allows the affected third parties to seek an injunction to prevent disclosure. WAC 44-14-040(4), -04003(11); *see also* RCW 42.56.540. Before notifying third parties, the agency should have a reasonable belief that the record is arguably exempt from disclosure. WAC 44-14-040(4), -04003(11).

¶23 A full response to a public records request may include notifying third parties named in the records who might seek an injunction against disclosure. WAC 44-14-04003(6). Accordingly, an agency may take additional time to respond to a request based on a need to notify third persons or agencies affected by the request. Former RCW 42.56.520.

¶24 Here, there are no facts to support a claim that the **County** denied the Zinks the right to inspect any public record or otherwise violated the PRA in responding to the April 17, 2014 request.[5] After producing the majority of the responsive records in installments, the **County** opted to notify John Doe that Ms. Zink had requested records that identified him. Although the **County** maintained the records were *not* exempt, the records were at least arguably exempt given that the trial court had already ruled in various other lawsuits that identical sex offender records were exempt and had enjoined the **County** from producing them. The **County** intended to release these records identifying John Doe in its final installment on July 17, 2015, but John Doe filed suit and obtained an order restraining the **County** from producing this final installment.

FOOTNOTES

5 The Zinks also argue that the **County** violated the PRA in responding to Ms. Zink's other various PRA requests, including her July 2013 request. However, a party may assert a cross claim against a coparty only if the claim "aris[es] out of the transaction or occurrence that is the subject matter ... of the original action." CR 13(g). John Doe brought this suit to enjoin the **County** from releasing records responsive to Ms. Zink's April 17, 2014 request. As such, the Zinks' cross claim may be only for alleged PRA violations with respect to this request.

¶25 The Zinks argue that the **County** withheld and denied them access to the records while it notified John Doe and the other affected individuals. However, the **County** never denied Ms. Zink the right to inspect any record. Because the **County** had not yet finished producing all responsive documents, the request was still open. The **County** never claimed an exemption, refused to produce the records, or otherwise engaged in final action denying access to the records. Rather, it simply took additional time to notify John Doe about the request, which RCW

42.56.520(2) expressly authorizes.

¶26 The Zinks also argue the **County** violated the PRA because it did not claim an exemption or provide an exemption log before notifying John Doe about Ms. Zink's request. But neither the statute nor the model rules require or advise this. Moreover, such a requirement would be inconsistent with the policy underlying third party notice, which is to give the third party a chance to assert an exemption when the agency does not believe the records are exempt and will not claim a potential exemption on the third party's behalf. *See* WAC 44-14-04003(11).

¶27 In sum, the PRA recognizes that an agency may not be able to respond fully to a request if it needs to notify third parties who are affected by the request. Here, in light of the other lawsuits and injunctions concerning identical level I sex offender information, a full response to Ms. Zink's April 17, 2014 request necessitated a notification to John Doe, who had not yet received notice. The **County** was statutorily authorized to take additional time to do this. Accordingly, the facts alleged in the Zinks' cross claim do not state a claim for a PRA violation, and the trial court did not err in dismissing it under CR 12(b)(6).

PENALTIES AND ATTORNEY FEES

¶28 The Zinks argue that they are entitled to per diem penalties and attorney fees.

¶29 To the extent the Zinks argue they are entitled to penalties because the **County** notified John Doe, our Supreme Court expressly rejected this argument in *John Doe A*, 185 Wn.2d at 387.

¶30 To the extent the Zinks argue they are entitled to penalties because the **County** wrongfully withheld the records identifying John Doe, we hold a requestor is not entitled to penalties under the PRA "unless some 'final agency action' denies inspection or copying of a public record." *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 379, 389 **P.3d** 677 (2016) (internal quotation marks omitted) (quoting *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 715, 354 **P.3d** 249 (2015)). Here, the **County** never withheld or denied the Zinks the right to inspect any records. As discussed above, Ms. Zink's request was still open and pending when the trial court enjoined the **County** from completing the request. It was the court—not the **County**—that prevented production of the remaining records. Because the **County** never took "final agency action" with respect to the records, the Zinks are not entitled to PRA penalties on this basis. *See id.*

¶31 The Zinks also argue they are entitled to penalties because they prevailed against the **County.** RCW 42.56.550(4) provides that

> [a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

¶32 Here, the Zinks never prevailed against the **County**—they prevailed against John Doe. RCW 42.56.550(4) does not authorize penalties or attorney fees in this situation. *See, e.g., John Doe A*, 185 Wn.2d at 386-87. Accordingly, the Zinks are not entitled to per diem penalties or attorney fees.

COUNTY'S DISCLOSURE OF THE ZINKS' CONTACT INFORMATION

¶33 The Zinks argue that the **County** wrongfully disclosed their personal information to the John Does, including their names, address, and e-mail addresses.

¶34 When an agency notifies third parties about a records request, the notice should make it possible for those parties either to contact the requestor and ask the requestor to revise the request, or to seek a court order to prevent the disclosure. WAC 44-14-040(4). The notice to the affected individuals will include a copy of the request. *Id.* Because the requestor has an interest in any legal action to prevent the disclosure of the records, the agency's notice should also instruct the third parties to name the requestor as a party to any action. WAC 44-14-04003(11).

¶35 Without the Zinks' contact information, the John Does would not have been able to contact Ms. Zink and ask her to revise her request or name her as a party to an action. The **County** was entitled to provide this information.

APPELLATE COSTS

¶36 The Zinks request an award of fees and costs under Title 14 RAP "[a]s the substantially prevailing party in this cause of action."[6] Opening Br. of Appellant at 38. This rule gives appellate courts discretion to consider the issue of appellate costs when the parties raise the issue in their briefs. *State v. Sullivan*, 196 Wn. App. 277, 297, 383 **P.3d** 574 (2016), *review denied*, 187 Wn.2d 1023, 390 **P.3d** 332 (**2017**). Generally, "the party that substantially prevails on review" will be awarded appellate costs, unless the court directs otherwise in its decision. RAP 14.2; *see Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 726-27, 81 **P.3d** 111 (2003). Here, the Zinks are not the substantially prevailing party, nor do they identify any other factor that would entitle them to costs under Title 14 RAP. We, therefore, decline to award them appellate costs.

FOOTNOTES

6 The **County** does not request appellate costs in its brief.

¶37 Affirmed.

KORSMO and SIDDOWAY, JJ., concur.

Reconsideration denied November 7, **2017.**

Washington Administrative Law Practice Manual

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

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