Supreme Court No. 96965-5
Court of Appeals No. 49186-9-II

Supreme Court
of the State of Washington

Jane Doe,

Petitioner,

v.

Washington State Department of Fish and Wildlife, et al.,

Respondents

Petition for Review

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Cases

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1. Identity of Petitioner

Jane Doe, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

Jane Doe v. Dept. of Fish and Wildlife, No. 49186-9-II (Oct. 16, 2018) (unpublished). The court denied WDFW's timely motion to publish by order filed Feb. 14, 2019. A copy of the decision is included in the Appendix at pages 1-9.

3. Issues Presented for Review

1. RCW 42.56.540 authorizes courts to enjoin disclosure of any specific public record. Such an injunction is based on the record, not on any particular request for the record. Does an injunction under this statute bar all future requests for the records to which it applies?

2. A person's right to privacy under the Public Records Act is violated if disclosure of information about the person would be highly offensive and is not of legitimate concern to the public. This Court's prior decision in *Predisik* requires courts to analyze the privacy exemption on a per-record basis. Did the trial court err in not ordering redaction of Jane Doe's identity everywhere it appeared in the records that implicated the privacy exemption?

4. Statement of the Case

4.1 Jane Doe sought an injunction to require redaction of her identity from public records under the privacy exemption of the Public Records Act.

The unpublished opinion of the Court of Appeals summarizes the basic facts of the case as follows:

> In early 2015, the Department [of Fish and Wildlife] conducted an investigation into cross-allegations of sexual harassment between two employees at the Department.
>
> The Department later received a PRA request [from Dakota Loomis] for all "e-mails, memos, personnel files, notes, reports, or other disclosable documents pertaining to human resources investigations filed against, or filed by, or prominently including" the two investigated employees. CP at 65. The Department identified records responsive to the request, including the interviews, notes, report, letters, and other documents related to the investigation. These documents contained, in addition to other information, allegations regarding Doe's sexual conduct.
>
> The Department informed Doe of the PRA request and that she was identified in the responsive records. The Department provided her with a copy of the records with redactions identified by the Department. Doe objected to the release of the records without redacting all information that identified her by name, relationship, or association. Doe provided the Department with proposed redactions, but the Department declined to make Doe's proposed redactions.

> Doe filed suit for a preliminary and permanent injunction enjoining the Department from disclosing the responsive records without her proposed redactions. The Department opposed the injunction arguing that no privacy interest would be violated if the records were released with the redactions that it had already made. The superior court granted a preliminary injunction.
>
> The superior court ordered an in camera review of the responsive records. Doe submitted her proposed redactions for the superior court's in camera review. Doe requested that the superior court enter a permanent injunction that prohibited the Department from disclosing any responsive records without first redacting every reference to Doe by name, relationship, or association. Doe argued that "[h]er name and relationship, in the context of these records, connect[ed] [her] to the conduct of those subjects and to unsubstantiated allegations of private sexual conduct with no connection to her public employment." CP at 289.
>
> After conducting an in camera review, the superior court entered a permanent injunction. The superior court accepted some of Doe's proposed redactions and rejected others. The superior court found that the unredacted references to Doe did not connect her to alleged sexual conduct, and, therefore, did not implicate her right to privacy.

Jane Doe v. Dept. of Fish and Wildlife, No. 49186-9-II, slip op. at 1-3 (Oct. 16, 2018). Additional details may be found in Brief of Appellant, at 3-11. Jane Doe was not a subject of the Department's investigation, was not interviewed, and the allegations of her conduct were never substantiated. CP 322.

4.2 Jane Doe requested that the injunction apply permanently to the records, including all future requests, but the trial court declined.

As part of her request for an injunction to redact the records, Jane Doe requested that the trial court specifically order that the injunction would apply permanently to the records, regardless of who might request them in the future. She argued that the plain language of RCW 42.56.540 authorizes the superior court to enjoin the release of "any specific public record." *E.g.,* CP 111. By conducting the analysis required in the statute, the court protects the interests of the public, including future requesters who would be unable to examine the records due to the injunction. *Id.*

Jane Doe argued that this remedy would enable the person requesting an injunction to come to the courthouse only once and obtain permanent protection against any future disclosure of the records, rather than having to watch vigilantly and run to the courthouse to litigate anew every time the record is requested. CP 111; RP, Mar. 4, 2016, at 6. She argued, "When a future requestor comes along, the analysis is not going to be any different. The records will be the same. Jane Doe's privacy interests will be the same. The lack of any public interest in identifying Jane Doe will be the same. So I don't think there is

anything lost by making a permanent decision in this case." RP, Mar. 4, 2016, at 9.

The trial court denied Jane Doe's request but left the question open:

> My injunction will be silent on the scope of the injunction in that it is not going to expressly say that it applies to future requests, but it's not going to expressly say that it doesn't apply to future requests. I think it's an injunction to Fish and Wildlife to not release these records. It was brought in the context of this case, and I'll leave it for the parties to determine what that means in a future case.

RP, Apr. 29, 2016, at 33. The trial court's written order stated, "WDFW is hereby permanently enjoined from disclosing any records corresponding to the 141 pages identified herein without first making the redactions described herein." CP 330. The injunction does not expressly state that if applies to future cases.

4.3 The Court of Appeals affirmed the trial court's redactions and declined to address whether the injunction applies to future requests.

On appeal, Jane Doe argued that the trial court should have conducted the privacy analysis on a record-by-record basis. Br. of App. at 14 (citing *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015)). If any record contains

factual allegations of a private nature, the record implicates the right to privacy, and the person's private information should be redacted everywhere it appears in that record. Br. of App. at 14. Jane Doe argued that an injunction under RCW 42.56.540 attaches to the specific records, not to the request or to the person making the request. Br. of App. at 16-18.

The Court of Appeals affirmed the trial court's redactions, analyzing each instance of private information separately to determine whether that instance implicated Jane Doe's privacy interest. *Jane Doe*, slip op. at 5-7.

The Court of Appeals declined to address the question of whether the injunction applies to future requests for the same records. *Jane Doe*, slip op. at 7. The court held that there was no actual dispute on this issue and answering the question would be "step[ping] into the prohibited area of advisory opinions." *Id.*

5. Argument

A petition for review should be accepted when the case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion

on a common issue. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

An issue that merits review under the mootness doctrine should also merit review by this Court under RAP 13.4(b)(4). "A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials." *Cathcart v. Snohomish County*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981). Procedural questions regarding PRA injunctions have been addressed by this Court under this standard. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 749-50, 174 P.3d 60 (2007) (reviewing the question of whether an agency may seek a judicial determination of whether specific documents are subject to disclosure).

5.1 The scope of privacy protection available under the Public Records Act is an issue of substantial public interest that should be determined by this Court.

> The public disclosure act, formerly chapter 42.17 RCW, was enacted in 1972 by initiative. The portion dealing with public records has since been recodified at chapter 42.56 RCW and renamed the Public Records Act. It requires that "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 … this chapter, or other

> statute which exempts or prohibits disclosure of specific information or records." We have recognized that the Public Records Act "is a strongly worded mandate for broad disclosure of public records." The act should be liberally construed, and its exemptions should be narrowly construed in favor of disclosure. But where a listed exemption squarely applies, disclosure is not appropriate.

Soter, 162 Wn.2d at 730-31 (internal citations omitted).

The PRA exempts disclosure of personal information contained in employment records to the extent that disclosure would violate a public employee's right to privacy. RCW 42.56.230(3). For purposes of the PRA, a person's right to privacy is violated if disclosure of information about the person would be highly offensive and is not of legitimate concern to the public. RCW 42.56.050. A public record that contains private matters of a sexual nature may only be disclosed when it relates to misconduct in the course of performing public duties and the allegations are substantiated or result in discipline. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 215, 189 P.3d 139 (2008). "Agencies and courts must review each responsive record and discern from its four corners whether the record discloses factual allegations that are truly of a private nature." *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015).

When a PRA exemption applies, a court may enjoin disclosure of any specific public record, under RCW 42.56.540, if the court finds that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest. *Soter*, 162 Wn.2d at 757.

This Court has frequently reviewed cases relating to the privacy exemption and injunctions under the PRA, providing significant, authoritative guidance for public officials, demonstrating that this Court views the PRA as a matter of substantial public interest. *E.g., Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 418 P.3d 102 (2018) (holding that PRA injunction standards are different from CR 65); *Predisik*, 182 Wn.2d 896 (2015) (reversing an injunction where the records did not implicate the privacy exemption); *Franklin Cnty. Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 285 P.3d 67 (2012) (reversing a decision that permitted a court to consider the identity of the requester when determining whether to issue an injunction); *Bellevue John Does*, 164 Wn.2d 199 (2008) (clarifying the privacy exemption in relation to sexual misconduct by public employees); *Soter*, 162 Wn.2d 716 (2007) (holding that either a person or an agency may seek injunctive relief under the PRA); *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) (holding the injunction statute did not create a stand-alone exemption to the PRA).

However, this Court has yet to address the question of whether an injunction under RCW 42.56.540 applies to future requests for the same record. A definitive answer to this question would impact every PRA injunction request and avoid unnecessary litigation and confusion on this common issue.

It also appears that further guidance is required on the issue of whether redactions under the privacy exemption should be analyzed by isolating each instance of personal information or by considering each record as a whole.

5.2 An injunction under RCW 42.56.540 should apply permanently to the specific public records, even when those records are requested again in the future.

The PRA authorizes a court to enjoin the examination of any specific public record:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

RCW 42.56.540.

The language of this statute focuses on the **content** of "any specific public record," not on the identity of the requester or the context of the request. *Cf. Predisik*, 182 Wn.2d at 906 (focusing on the content of the records); *Parmelee*, 175 Wn.2d at 481-82 (reversing a court of appeals decision that would have allowed courts to consider the identity of the requester); RCW 42.56.080 (An agency may not consider the identity of the requester or the purpose of the request). An injunction under this section prohibits the public agency from disclosing **the specific public records** to which the injunction applies. The inquiry is not whether a particular **request** would cause harm; rather, it is whether the **content of the record** would cause harm if disclosed.

The injunction described by the statutory language does more than merely prohibit production of the record to a particular requester. The injunction is against "examination of any specific public record," by anyone. The injunction attaches to the record, not to the request or to the person making the request. An injunction against examination of a specific record must naturally apply permanently to the record itself and remain in effect against any future requests for that record.

Such an interpretation is consistent with common sense and with judicial economy. It enables the person whose privacy would be violated to come to the courthouse only once and obtain permanent protection against any future disclosure of the

offensive records. Without a permanent injunction attaching to the records, Jane Doe would be forced to return to court, at great personal expense, every time there is a new request, to re-litigate the issue of her right to privacy. Surely that is not the result the legislature or the people intended when they enacted the PRA.

The Court of Appeals reasoned, "what is highly offensive may change over time and what is of legitimate interest to the public may change depending on the circumstances." *Jane Doe*, slip op. at 7. But even assuming that the privacy exemption could "expire" in this manner at some future time due to changes in public mores or interests, the burden should not be on Jane Doe to prove with every future request that nothing has changed. Rather, the injunction should be permanent, as envisioned by the plain language of the statute. If a future requester believes that the exemption no longer applies, the burden should fall on the new requester to seek termination of the injunction and prove that there has been a substantial change and the exemption no longer applies. *Cf. Petters v. Williamson Assocs*, 151 Wn. App. 154, 167-69, 210 P.3d 1048 (2009) (affirming the trial court's termination of an injunction after finding that the trade secrets upon which the injunction was based had ceased to exist).

The Court of Appeals was wrong to decline to address this issue. The two cases cited by the court to support its avoidance of the issue are distinguishable. In *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001), the court found that To-Ro's claims under the Uniform Declaratory Judgments Act were not justiciable because "To-Ro failed to show that its interests were direct and substantial," as required by the UDJA. *To-Ro Trade Shows*, 144 Wn.2d at 412. To-Ro had complained that it was damaged by a state licensing action against a third party but failed to prove any damages to the jury. *Id.*

In contrast, Jane Doe's interests in a permanent injunction against future disclosure of the records is direct and substantial. It is her privacy interest that justifies the injunction. It is her privacy interest that will continue to be threatened if she must re-litigate the injunction with every new request.

In *Ames v. Pierce County*, 194 Wn. App. 93, 374 P.3d 228 (2016), a Pierce County sheriff's detective sought to enjoin the county from disclosing certain documents, as potential impeachment evidence, to the defense in any future criminal case in which he might testify. *Ames*, 194 Wn. App. at 99-100. The appellate court affirmed the trial court's determination that the detective's request was not justiciable under the Declaratory Judgments Act. *Id.* at 113-14.

However, the appellate court also noted that courts have discretion to address an issue that is not justiciable under the UDJA, so long as the issue is one of public importance where the public would be benefited by a decision. *Id.* at 116-17. The court concluded that the issues in *Ames* were not of public importance, were not likely to recur, and related only to the detective seeking to repair his own credibility. *Id.* at 117. In other words, it was a purely private dispute.

This case is different. In addition to Jane Doe's direct interest in a permanent injunction, the issue will have broad public impact on all PRA injunction cases. It will resolve a question that has gone unaddressed by the appellate courts of this state. An authoritative determination that injunctions under RCW 42.56.540 apply permanently to the records, for all future requests, will resolve uncertainty and avoid needless future litigation.

The Court of Appeals in this case overlooked the mootness doctrine. "A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials." *Cathcart v. Snohomish County*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981). The mootness doctrine applies

here. This Court should accept review and provide an authoritative determination on this issue.

5.3 Redactions under the privacy exemption should be determined by analyzing each record as a whole and redacting all personal information in any record that implicates the right to privacy.

Further guidance appears to be necessary to clarify the analysis that trial courts should undertake in determining when to redact personal information from records that implicate the privacy exemption.

In her opening brief, Jane Doe argued that the privacy exemption required redaction of her identity everywhere it appeared in the records. Br. of App. at 12-16. She argued that the trial court should have analyzed the redactions on a record-by-record basis and redacted her identity everywhere it appeared in any record that connected her to the sexual allegations. Br. of App. at 14 (citing *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015)). Because each of the records contained sexual allegations, each record should have been redacted to remove Jane Doe's identity everywhere it appeared. Br. of App. at 14-15. Leaving her identity intact anywhere in the records would enable the reader to, as the trial court acknowledged, "connect the dots" between Jane Doe and the sexual allegations. RP, Apr. 29, 2016, at 31.

In *Predisik*, this Court specifically identified the unit of analysis as **each record,** not each mention of the employee's identity within a record: "Agencies and courts must review **each responsive record** and discern **from its four corners** whether the record discloses factual allegations that are truly of a private nature." *Predisik*, 182 Wn.2d at 906. The court emphasized, "a record-specific inquiry is the only way to adhere to the PRA's mandate that exemptions be construed narrowly." *Id.*

The court then applied this unit of analysis to the records at issue in that case. The court found that the three records at issue did not implicate the right to privacy because the records "do not disclose the factual allegations." *Id.* at 906. "the leave letter and spreadsheets do not disclose any salacious facts that one might consider a private matter. Indeed, the records contain no specific allegations of misconduct at all." *Id.* at 907. There was no right to privacy because the **records** were only tangentially related to the alleged misconduct.

Thus, the issue and analysis in *Predisik* was whether the **record** was tangentially related to misconduct allegations, not, as the Court of Appeals did here, whether a specific mention of the employee's identity was only tangentially related.

Consistent with *Predisik*, any record that sets forth the allegations that trigger the right to privacy is subject to the exemption. Here, all of the records contain the offensive

allegations. Because any mention of Jane Doe's identity anywhere in those records could enable a reader to connect her with the allegations, disclosure of the records violates her right of privacy unless her identity is redacted everywhere it appears.

Nevertheless, the Court of Appeals affirmed the trial court's separate, isolated analysis of each mention of Jane Doe within the records. This analysis conflicts with the analysis clearly set forth by this Court in *Predisik*. This Court should accept review under RAP 13.4(b)(1) (conflict with a prior decision of this Court) and clarify that the required analysis is on a per-record basis. If the content of a record triggers the privacy exemption, the personal information should be redacted wherever it appears in that record.

6. Conclusion

The scope of privacy protection provided by the PRA through the privacy exemption and permanent injunctions against disclosing specific public records is a matter of substantial public importance that should be reviewed by this Court. Per the plain language of the statute, an injunction under RCW 42.56.540 should apply permanently to the specific public records, even when those records are requested again in the future. Even if this issue is moot, it is a matter of continuing and substantial interest, it presents a question of a public nature

which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials. This Court should accept review.

Redactions under the privacy exemption should be determined by analyzing each record as a whole and redacting all personal information in any record that implicates the right to privacy. The per-instance analysis of the trial court and Court of Appeals in this case conflicts with the analysis mandated by this Court in *Predisik*. This Court should accept review.

Respectfully submitted this 18th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 18, 2019, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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Filed
Washington State
Court of Appeals
Division Two

February 14, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

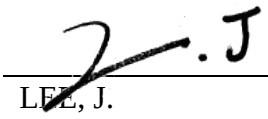
DIVISION II

JANE DOE, Appellant, v. WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, and DAKOTA LOOMIS, Respondent.	No. 49186-9-II ORDER DENYING MOTION TO PUBLISH

Respondent, Washington State Department of Fish and Wildlife, filed a motion to publish this court's unpublished opinion filed on December 16, 2018. After consideration, it is hereby

ORDERED that the motion for publication is denied.

FOR THE COURT: Jj. Maxa, Lee, Melnick



LEE, J.

Filed
Washington State
Court of Appeals
Division Two

October 16, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JANE DOE Appellant, v. WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, and DAKOTA LOOMIS, Respondents.	No. 49186-9-II UNPUBLISHED OPINION

LEE, J. — Jane Doe appeals the superior court's permanent injunction order entered as a part of her suit to enjoin the Washington State Department of Fish and Wildlife (the Department) from disclosing investigative records in response to a Public Records Act (PRA) request without first redacting all references to her identity. Doe argues that the superior court erred when it (1) failed to order the redaction of all references to her identity in the investigative records, (2) failed to apply the permanent injunction to all future PRA requests, and (3) denied her request for attorney fees. We affirm.

FACTS

In early 2015, the Department conducted an investigation into cross-allegations of sexual harassment between two employees at the Department.

The Department later received a PRA request for all "e-mails, memos, personnel files, notes, reports, or other disclosable documents pertaining to human resources investigations filed against, or filed by, or prominently including" the two investigated employees. Clerk's Papers (CP) at 65. The Department identified records responsive to the request, including the interviews,

notes, report, letters, and other documents related to the investigation. These documents contained, in addition to other information, allegations regarding Doe's sexual conduct.

The Department informed Doe of the PRA request and that she was identified in the responsive records. The Department provided her with a copy of the records with redactions identified by the Department. Doe objected to the release of the records without redacting all information that identified her by name, relationship, or association. Doe provided the Department with proposed redactions, but the Department declined to make Doe's proposed redactions.

Doe filed suit for a preliminary and permanent injunction enjoining the Department from disclosing the responsive records without her proposed redactions. The Department opposed the injunction arguing that no privacy interest would be violated if the records were released with the redactions that it had already made. The superior court granted a preliminary injunction.

The superior court ordered an in camera review of the responsive records. Doe submitted her proposed redactions for the superior court's in camera review. Doe requested that the superior court enter a permanent injunction that prohibited the Department from disclosing any responsive records without first redacting every reference to Doe by name, relationship, or association. Doe argued that "[h]er name and relationship, in the context of these records, connect[ed] [her] to the conduct of those subjects and to unsubstantiated allegations of private sexual conduct with no connection to her public employment." CP at 289.

After conducting an in camera review, the superior court entered a permanent injunction. The superior court accepted some of Doe's proposed redactions and rejected others. The superior court found that the unredacted references to Doe did not connect her to alleged sexual conduct, and, therefore, did not implicate her right to privacy.

The superior court's written order stated that the Department was "permanently enjoined from disclosing any records corresponding to the 141 pages identified herein without first making the redactions described herein . . . ." CP at 330. However, the superior court refused to expressly apply the permanent injunction to future cases, instead leaving it to the parties to determine the effect of the permanent injunction in future cases.

Doe also requested attorney fees, arguing that the Department's defense was frivolous. The superior court found that the Department's defense was not frivolous because there were legal and factual bases for the defenses advanced. The superior court denied Doe's request for attorney fees.

Doe appeals the superior court's permanent injunction order.

ANALYSIS

A. REDACTION OF RECORDS

Doe argues that the superior court erred when it failed to order the redaction of all references to Doe's identity in the investigative records. We disagree.

1. Legal Principles

Although the Department argues that we should review the superior court's permanent injunction for an abuse of discretion, we review a decision to grant or deny an injunction under the PRA de novo. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 791, 418 P.3d 102 (2018). Whether to grant injunctive relief requires a two-step inquiry:

> First, the court must determine whether the records are exempt under the PRA or an "other statute" that provides an exemption in the individual case. Second, it must determine whether the PRA injunction standard is met.

Lyft, 190 Wn.2d at 790. " 'If one of the PRA's exemptions applies, a court can enjoin the release of a public record only if disclosure would clearly not be in the public interest and would

substantially and irreparably damage any person, or . . . vital governmental functions.' " *Lyft*, 190 Wn.2d at 791(alteration in original) (internal quotation marks omitted) (quoting *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009)).

The PRA requires agencies to "make available for public inspection and copying all public records," unless the record falls within a specific exemption of the PRA or other statute. RCW 42.56.070(1); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). The exemptions are narrowly construed. *Resident Action Council*, 177 Wn.2d at 431. "If a portion of a public record is exempt, that portion should be redacted and the remainder disclosed." *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). The party seeking to prevent disclosure has the burden to prove an exemption applies. *Robbins, Geller, Rudman & Dowd, LLP v. Att'y Gen.*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

The PRA includes an exemption for "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy[.]" RCW 42.56.230(3). In order to qualify for this exemption, the information must (1) contain personal information, (2) the person must have a privacy interest in that information, and (3) disclosure of that personal information must violate their right to privacy. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903-904, 346 P.3d 737 (2015).

A person's identity is considered personal information because it relates to a particular person. *Predisik*, 182 Wn.2d at 904. And a person has a privacy interest when information that reveals unique facts about those named is linked to an identifiable person. *Tiberino v. Spokane County*, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000). A person also has a privacy interest in

intimate matters concerning his or her private life, such as sexual relations and details of the person's life in the home. *Bellevue John Does*, 164 Wn.2d at 212-14.

A person's right to privacy is violated if "disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050. "[W]hether disclosure of particular information would be highly offensive to a reasonable person must be determined on a case by case basis." *West v. Port of Olympia*, 183 Wn. App. 306, 315, 333 P.3d 488 (2014). Disclosure of information containing intimate details of a person's personal and private life would be highly offensive to a reasonable person. *See Tiberino*, 103 Wn. App. 689-90. The public has no legitimate concern in such information when the information is unrelated to governmental operation. *See Tiberino*, 103 Wn. App. 689-90.[1]

2. Privacy Interest

The parties do not dispute that the responsive records' references to Doe by name, relationship, or association are personal information within public records. However, they dispute whether every reference implicates Doe's privacy interest and is subject to redaction.

Here, not every reference in the responsive records to Doe's identity—by name, relationship, or association—concerns intimate matters of Doe's private life, such as sexual

[1] Doe argues that the superior court erred by failing to review each redaction in the context of the record. However, contrary to Doe's argument, the superior court stated, "ultimately my conclusions are where Miss Doe's name and/or relationship is found on records where it is connected to those sorts of activities, *given the context of the records* and all of the background I've already provided, I'm finding that her right of privacy is properly invoked to protect those records." Verbatim Report of Proceedings (Apr. 29, 2016) at 31 (emphasis added). Therefore, the record does not support Doe's claim.

relations or details of her life in the home. Our review of the proposed redactions the superior court rejected shows that many of the references to Doe's identity do not concern her private life and merely disclose details about everyday life. These references do not connect Doe to alleged sexual conduct, concern intimate matters of her private life, or reveal unique facts about Doe. Therefore, these references do not implicate Doe's right to privacy and the superior court did not err in refusing to include them in the injunction.

Other references do not reveal information about Doe's private life but about others' lives. Such references also do not connect Doe to alleged sexual conduct or reveal unique facts about Doe. As a result, these references also do not implicate Doe's privacy interest.

Doe claims that a person reviewing the records could connect her to the sexual conduct through references to her identity that are not directly connected to the sexual conduct. This argument is unpersuasive.

Although a requester may potentially figure out the identity of a person, that does not negate the public's interest in a document. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006) ("The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable."); *see also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 414, 259 P.3d 190 (2011) ("An agency should look to the contents of the document and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity."); *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servcs.*, 193 Wn. App. 377, 410-11, 377 P.3d 214 (2016) (holding that information is not exempt because its disclosure could lead

to the discovery of exempt information). The emphasis is on the content of the records. Although a person may be able to figure out Doe's identity from references to her in the records that do not implicate her privacy interest, that does not mean that such references must be redacted as the contents of those records do not implicate Doe's privacy interest. Thus, the superior court did not err when it did not require these references be redacted.

B. PERMANENT INJUNCTION

Doe asks us to hold that the superior court erred when it failed to apply the permanent injunction to all future public records requests. We decline to do so.

Courts must ensure they are "rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). If the court is not doing so, we step " 'into the prohibited area of advisory opinions.' " *To-Ro Trade Shows*, 144 Wn.2d at 416 (quoting *Diversified Indus. Devereaux. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

Here, determining whether the permanent injunction applies to every conceivable future request for the identified records would render final judgment on a dispute, which does not yet exist, between parties who have not been identified. *Ames v. Pierce County*, 194 Wn. App. 93, 114-15, 374 P.3d 228 (2016). Moreover, what is highly offensive may change over time and what is of legitimate interest to the public may change depending on the circumstances. *See* RCW 42.56.050. Accordingly, we decline Doe's request to deliver a prohibited advisory opinion in this case.

C. ATTORNEY FEES

Doe argues that the superior court abused its discretion when it denied Doe's request for attorney fees. Doe also requests attorney fees on appeal arguing that the Department's defense was frivolous. We disagree, and we decline to award Doe attorney fees on appeal.

We review a superior court's decision on attorney fees for an abuse of discretion. *In re Recall of Piper*, 184 Wn.2d 780, 786, 364 P.3d 113 (2015). Under RCW 4.84.185, the superior court may award reasonable expenses, including attorney fees, to the prevailing party in any civil action if the action or defense to such action was frivolous. "An appeal is frivolous if 'no debatable issues are presented upon which reasonable minds might differ, *i.e.*, it is devoid of merit that no reasonable possibility of reversal exists.' " *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn. App. 765, 780, 189 P.3d 195 (2008) (internal quotation marks omitted) (quoting *Olson v. City of Bellevue*, 93 Wn. App. 154, 165, 968 P. 2d 894, *review denied*, 137 Wn.2d 1034 (1998)). The action or defense, in its entirety, must be frivolous and advanced without reasonable cause before an award of attorney fees may be made. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992).

Here, the superior court had no basis to award attorney fees to Doe under RCW 4.84.185 because the Department's defense was not entirely frivolous and advanced without reasonable cause. Doe had requested that every reference to her by name, relationship, or association should be redacted before the responsive records were disclosed. But the Department argued, and the superior court properly agreed, that not every reference connected her to alleged sexual conduct. Thus, the Department's defense was not entirely frivolous. Therefore, the superior court did not abuse its discretion by denying Doe's request for attorney fees under RCW 4.84.185.

And, under RAP 18.1, we will only award a party attorney fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses . . . ." But because the Department's defense was not frivolous, either at the superior court or on appeal, Doe is not entitled to attorney fees under the applicable law, RCW 4.84.185. Accordingly, we deny Doe's request for attorney fees on appeal.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.

OLYMPIC APPEALS PLLC

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