

No. 35561-2-II

consolidated to
35469-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THOMAS DeLONG, et al.,

Respondents,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent,

v.

ALLAN PARMELEE,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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INTRODUCTION

The Appellant, Allan Parmalee, asks this Court to overturn a decision of the Clallam County Superior Court, permanently enjoining the disclosure of various public records pertaining to Washington Department of Corrections (DOC) staff members.

The case was filed by 73 DOC employees seeking to prevent Mr. Parmelee from obtaining public records pertaining to them. The court denied Mr. Parmelee's multiple requests to intervene in the case and allowed DOC and its employees to litigate the case with no opposition, ultimately approving a stipulated order permanently preventing Mr. Parmelee from obtaining a broad array of public records.

The trial court entered a permanent injunction based solely on evidence submitted by DOC in a different proceeding, evidence that was never made part of the record in this case. Further, it entered the injunction without requiring the petitioners to prove (1) that they had ever been the subject of public records requests made by Mr. Parmelee, and (2) that the records at issue in the case were exempt

from disclosure, both of which are required to justify injunctive relief under the Washington Public Records Act (PRA).

Finally, the court issued the injunction based on purported facts that are not supported by any evidence in the record.

For these reasons, Mr. Parmelee asks this Court to reverse the trial court's decision granting the permanent injunction, to order the lower court to dismiss the action, and to order DOC to pay Mr. Parmelee's attorney fees and costs for this appeal, as well as statutory penalties for each day he was wrongfully denied access to the public records he requested.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in denying Mr. Parmelee's motions to intervene in this case and in allowing the Respondents to litigate this case with no opposition, without requiring them to join Mr. Parmelee as a necessary party under CR 19(a).
2. The trial court erred in entering its Stipulated Order on Permanent Injunction.

B. Issues Pertaining to Assignments of Error

1. In a third-party injunction action under the Public Records Act, is the records requestor a necessary party, subject to compulsory joinder under CR 19(a), when the interests of the other parties are aligned and nobody is opposing the injunction? (Assignment of Error No. 1)
2. Does a trial court err when it deprives a public records requester an opportunity to intervene in a case where a third party is seeing to block disclosure of public records to that requester? (Assignment of Error No. 1)
3. Is it error for a trial court to grant injunctive relief to a party seeking to prevent disclosure of public records when that party has not established that the records at issue pertain to him or her? (Assignment of Error No. 2)
4. May a trial court enjoin the disclosure of public records when the parties seeking the injunction fail to prove that the records are covered by a specific statutory exemption to mandatory disclosure? (Assignment of Error No. 2)
5. Is it error for a trial court to enjoin disclosure of public records when the request for the injunction is not supported by an affidavit or declaration? (Assignment of Error No. 2)
6. Does a trial court err in entering a permanent injunction when its findings of fact are not supported by any evidence in the record? (Assignment of Error No. 2)

STATEMENT OF THE CASE

Appellant Allan Parmelee is a Washington prisoner who regularly speaks out and writes about prison conditions and prisoner rights. CP 48. He has written several articles for national

publications such as Prison Legal News, Prison Living Magazine, and Justice Works. Id. Mr. Parmelee frequently requests public records to gather information for his writing projects and political activities. Id.

On September 29, 2006, 73 employees of the Washington Department of Corrections (DOC) filed a Petition for Temporary and Permanent Restraining Order in Clallam County Superior Court, seeking to enjoin DOC from producing “any and all employment records” that may have been responsive to public records requests by Mr. Parmelee. Clerk’s Papers (“CP”) 204-211. The DOC employees (Respondents in this appeal) did not provide the court with a copy of Mr. Parmelee’s alleged public records requests, nor did they submit any affidavits or declarations in support of their petition.

One of the petitioners, Gerald Banner, appeared *pro se* in the trial court’s ex parte department to present the Petition for Temporary Restraining Order. CP 125; Verbatim Report of Proceedings (“RP”), 9/29/06, at 3. An assistant attorney general appeared at the hearing telephonically. Id. at 4.

The trial court commissioner initially rejected the petition, noting that it did not provide sufficient information to justify the entry of an order. CP 125; RP, 9/29/06, at 9. The petition Mr. Banner had presented was just one page and did not state specifically what relief was sought. CP 204; RP, 9/29/06, at 6:12-14, 7:10-22. The commissioner then instructed Mr. Banner to add more pages to the petition so that it would make sense and that if he did so, the court would add all the signatures to the petition. RP, 9/29/06, at 8:4-22.

Mr. Banner apparently followed the commissioner's instruction and added more pages to the petition. See CP 205-07. The commissioner then entered an Order to Show Cause/Temporary Restraining Order, prohibiting DOC from releasing documents to Mr. Parmelee and ordering DOC to appear for a show cause hearing at a later date. CP 124.

On October 10, 2006, Mr. Parmelee, acting *pro se*, filed a Limited Notice of Appearance, a Notice of Issue, and a motion asking the court, among other things, to (1) allow him to intervene in the case or join him as a party, (2) re-note the show cause hearing to

a later date to give him a chance to respond to the petition, and (3) conduct an *in camera* review of the public records at issue in the case. CP 116-21. Mr. Parmelee noted in his motion that not all of the petitioners had standing to seek relief because he had not requested public records pertaining to all of them. CP 118. The court denied Mr. Parmelee's request for intervention or joinder and did not allow him to participate in the subsequent show cause hearing. CP 63-65; RP, 10/13/06, at 5:24 – 6:10.

DOC filed a Response to Petitioners' Motion for Temporary Restraining Order and Permanent Injunction on October 12, 2006. CP 105-13. DOC claimed in its brief that it had received multiple public disclosure requests from Mr. Parmelee pertaining to the petitioners. CP 106:9-10. However, it did not submit any affidavits or declarations to support this claim. In fact, the record contains no evidence whatsoever that Mr. Parmelee had actually requested public records pertaining to all 73 petitioners. Instead of submitting evidence regarding the alleged public records requests at issue, DOC chose to present the court with a lengthy description of Mr. Parmelee's criminal convictions and prior correspondence to DOC

officials and others, none of which was supported by any evidence in the record.¹

The trial court conducted the show cause hearing on October 13, 2006. CP 103; RP, 10/13/06. An assistant attorney general (AAG) appeared on behalf of DOC. RP, 10/13/06, at 3. The AAG noted that Mr. Parmelee had made a request to participate in the hearing and stated that she objected to that request. Id. at 5:24 – 6:5. Even though Mr. Parmelee was the person who requested the records that were the subject of the hearing, the court decided that he was not a necessary party to the action and refused to allow him to participate in the hearing. Id. at 6:7-10.

Although the court did not take any testimony during the show cause hearing, it did hear argument from two of the petitioners, Gerald Banner and David Weaver, and from DOC, through its counsel, Sara Olson. Id. at 4. Even though Mr. Banner is not an

¹ DOC purported to rely on evidence submitted in a separate case. See CP 107 n.1. However, for reasons discussed later in this brief, that evidence was not properly before the court and was never made part of the record. See sec. D(2) of the argument below. The record also contains a number of documents, none of which are attached to a declaration, that reference Mr. Parmelee. CP 146-203. However, the record does not reflect that these documents were ever offered as evidence in the case. Further, the trial court did not consider these documents in issuing its final order for injunctive relief. CP 13:2-7.

attorney, the court allowed him to argue on behalf of the other petitioners. Id. at 9-19. The court also allowed him to make a motion on behalf of two other employees seeking to have their names added to the petition – a motion which the court granted. Id. at 8:5-15. Mr. Banner’s argument consisted almost exclusively of allegations about Mr. Parmelee that were not supported by any evidence appearing in the record in this case. Id. at 9-19.

DOC argued that Mr. Parmelee’s records requests posed “a direct threat to not only the public interest but to these individual Petitioners” and stated it did not object to the court entering an injunction against the Department. Id. at 20-21.

At the end of the hearing, the court asked DOC’s attorney to draft a permanent injunction against her client. Id. at 25.

On October 24, 2006, the court entered two Stipulated Orders on Permanent Injunction. CP 70-73, 75-78. These orders were identical except for the court’s handwritten amendments to paragraph 7 of each order. CP 71, 76. Mr. Banner purported to represent all the other petitioners in agreeing to the orders. CP 73, 78.

Mr. Parmelee filed two motions challenging the court's rulings. He filed the first motion on October 23, 2006, seeking to revise what he believed to be a commissioner's order from the October 13 show cause hearing. CP 80-87. He again asked to be allowed to intervene and again asked the court to review *in camera* the records at issue in the case. CP 82-83, 85. Mr. Parmelee's second motion, filed October 30, 2006, sought revision of the Stipulated Order on Permanent Injunction and also asked the court to reconsider its failure to join Mr. Parmelee as a party in the case. CP 66-68.

The court denied Mr. Parmelee's requests in a memorandum opinion dated November 2, 2006, noting that the stipulated injunction had been based on the court's ruling in a different case, Mathieu, et al. v. Parmelee v. Brunson, et al., "in which identical issues were presented to the Court and ruled upon." CP 64:6-10.²

The court wrote:

² In Mathieu, et al. v. Parmelee v. Brunson, et al., the Clallam County Superior Court entered a permanent injunction against DOC, prohibiting the agency from disclosing to Mr. Parmelee public records pertaining to DOC employee Laura Mathieu. The court's ruling in that case is the subject of a separate appeal currently before this Court. See Court of Appeals Cause No. 35469-1-II.

The only distinction between the earlier case and this case is that in the earlier case not all of the corrections officers whose personal information was requested were parties. Mr. Parmelee participated fully in the previous case. The issues are the same and the Court's ruling would be the same. Mr. Parmelee's Motion to Intervene was filed after the Court signed a stipulation between the parties resolving the litigation.³ Mr. Parmelee, having previously represented himself on identical issues in what is, in all respects a companion case, has had full opportunity to provide the same information and argument to the Court which he no doubt would provide in this case. The Court would make the same ruling and enter the same order which was entered by stipulation of the existing parties. Accordingly, allowing the Motion to Intervene would be a fruitless act.

CP 64:21 – 65:8.

After the October 13, 2006 show cause hearing, and before the entry of the October 24 Stipulated Order on Permanent Injunction, 55 additional DOC employees, not parties to the original action, filed a Petition for Temporary Restraining Order and Permanent Injunction under the same superior court cause number. CP 91-102. (Although the caption listed 55 purported petitioners, only 54 individuals signed the petition.) This new petition recited

³ Contrary to the court's statement, Mr. Parmelee first sought leave to intervene in a motion filed October 10, 2006, well before the court entered the Stipulated Order on Permanent Injunction. CP 118-21.

the same allegations about Mr. Parmelee that had been read by Mr. Banner at the October 13 show cause hearing. CP 92-95. Once again, these allegations were not supported by any testimony or declarations to be found in the record.

Petitioner Seth Schwenker appeared by himself in the ex parte department to present the petition on behalf of all the new petitioners. RP, 10/18/06, at 3. DOC did not appear. Id. Just as he did when he entered the first temporary restraining order, the commissioner instructed the petitioner to amend the petition and resubmit it without requiring the remaining petitioners to sign the amended petition. Id. at 6-7.

The commissioner entered an Order Restraining Disclosure Pending Hearing on October 18, 2006. CP 90.

The commissioner conducted a hearing on November 3, 2006. CP 60. Once again, the assistant attorney general appeared telephonically and noted that Mr. Parmelee had requested to be included. Id. And once again the court denied his request. Id. DOC, through its counsel, requested that the additional 54

petitioners be added to the Stipulated Order on Permanent Injunction dated October 24, 2006. Id. The court granted this request. CP 61.

On November 6, 2006,⁴ Mr. Parmelee filed a Second Motion to Intervene and Motion for In Camera Review Pursuant to RCW 42.56.550(3). CP 53-59. The court never ruled on this motion.

On November 7, 2006, despite the fact that the record contained no declaration from the second group of petitioners and no other evidence pertaining to them, the commissioner issued a memorandum opinion, granting a permanent injunction in favor of the second group. CP 43-44. The commissioner directed DOC's attorney to prepare an order containing a complete list of all the petitioners. CP 44. DOC's counsel prepared the order, which the court entered on November 15, 2006. CP 34-38. Once again, Petitioner Gerald Banner, acting pro se as the "Petitioner's [sic] representative," agreed to the order on behalf of all the other petitioners. CP 38. Mr. Parmelee filed a motion to revise this order, which the court denied. CP 29-33, 27-28.

⁴ This motion was dated October 25, 2006. It is unclear why it was not filed by the trial court until November 6.

On December 13, 2006, the petitioners joined with DOC in a Stipulated Motion for Clarification, asking the court to define the term “personal information,” as used in the Stipulated Order on Permanent Injunction, as “information pertaining to a staff person’s home, property, livelihood, physical body, character and/or family.” CP 18-21. The court granted this request and entered an amended permanent injunction, incorporating the parties’ proposed definition. CP 11-15.

Mr. Parmelee filed timely notices of appeal. CP 7, 40, 217.

By order dated February 22, 2007, this Court determined that Mr. Parmelee was an aggrieved party and authorized him to bring this appeal.

ARGUMENT

This Court should overturn the trial court’s permanent injunction because (1) it was entered without allowing Mr. Parmelee an opportunity to intervene and oppose the petition, (2) it does not satisfy the requirements of the PRA injunction statute, and (3) it is not supported by any evidence in the record.

A. Standard of Review

Where, as here, the trial court decides a case based on a documentary record, without live testimony, the appellate court “stands in the same position as the trial court in looking at the facts of the case and should review the record *de novo*.” Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); RCW 42.56.550. The Washington Supreme Court has declared the Public Records Act to be a “strongly worded mandate for broad disclosure of public records,” and thus “it is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed.” Amren v. Kalama; 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Indeed, the PRA itself – in three separate places – explicitly mandates liberal construction of the disclosure provisions and narrow construction of the exemptions. See RCW 42.17.010; RCW 42.56.030; RCW 42.17.920; King County v. Sheehan, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (acknowledging the “‘thrice-repeated’ legislative mandate that exemptions under the public records act are to be narrowly construed”). The PRA further instructs that its policy is that “free

and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

B. The Case Should Be Dismissed Based on the Respondents’ Refusal to Join Mr. Parmelee as a Necessary Party.

CR 19(a) provides that a person *shall* be joined as a party to an action if “he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest.” CR 19(a)(2). When a litigant fails to join a necessary party as a result of inexcusable neglect, the court should dismiss the case. See Nat’l Homeowners Ass’n v. City of Seattle, 82 Wn. App. 640, 643-46, 919 P.2d 615 (1996) (affirming dismissal with prejudice against plaintiff who failed to join a necessary party in a timely manner when plaintiff knew of the other party’s interest in the case).

Here, it is indisputable that Mr. Parmelee had an interest relating to the subject of the action: the petitioners were seeking a permanent order to prevent Mr. Parmelee from obtaining records under the Washington Public Records Act. It is also indisputable

that disposition of the action in Mr. Parmelee's absence could (and did) impair his ability to protect his interests. Thus, Mr. Parmelee was a necessary party under CR 19(a). Moreover, both the court and the other parties had notice of Mr. Parmelee's interest very early in the case, yet resisted joining him as a party. See, e.g., CP 118-21 (Parmelee's first motion to intervene or join the case under CR 19 or CR 24, filed October 10, 2006); RP, 10/13/06, at 5:24 – 6:5 (DOC counsel notifying the court that Mr. Parmelee requested to participate in the show cause hearing and objecting to that request); CP 63-65 (memorandum opinion denying Mr. Parmelee's motion to intervene, stating that intervention would be a "fruitless act," because even if Mr. Parmelee were allowed to participate in the case, the court would enter the same order as the one to which the petitioners and DOC had already stipulated). The petitioners and DOC had a duty to explain in their pleadings why Mr. Parmelee had not been joined. CR 19(c). However, none of the parties complied with this requirement. CP 91-102; CP 105-13; CP 204-11.

Given Mr. Parmelee's obvious interest in the action, and the parties' early and frequent notice of his desire to participate in the

case, the Respondents' refusal to join Mr. Parmelee as a necessary party constituted inexcusable neglect, warranting dismissal of the action.

C. The Trial Court Erred in Denying Mr. Parmelee's Request to Intervene.

Not only did the court below err in allowing the petitioners and DOC to litigate this action hand-in-hand, without joining Mr. Parmelee as a necessary party under CR 19(a), it also erred in denying Mr. Parmelee's requests to intervene under CR 24.

CR 24(a) requires the court to allow a party to intervene, upon timely application, "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the actions may as a practical matter impair or impede his ability protect that interest, unless the applicant's interest is adequately represented by existing parties." As described above, Mr. Parmelee claimed an interest in this litigation, and his absence from the case impeded his ability to protect that interest, as all the other parties were aligned in their support for an injunction, leaving nobody to speak in support of Mr. Parmelee's interests. He mailed his first motion to intervene one day

after he learned of the litigation. CP 81. Under these circumstances, it was error for the court to deny Mr. Parmelee's requests to intervene.

D. The Trial Court Erred in Granting Injunctive Relief as the Petitioners Did not Satisfy the Requirements to Justify Such Relief Under the PRA.

The trial court granted petitioners injunctive relief pursuant to RCW 42.56.540. CP 14. This provision of the Public Records Act states:

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 party or parties seeking to prevent disclosure under this statute bear the burden of proving that the records at issue should not be disclosed. Dragonslayer, Inc. v. Washington Gambling Comm'n, 139 Wn. App. 433, 441, 161 P.3d 428 (2007). Neither DOC nor the

petitioners established the elements required by the PRA injunction statute.

1. The Parties Did Not Prove that the Records at Issue Pertained to the Petitioners.

The only parties who are entitled to seek injunctive relief under RCW 42.56.540 are public agencies and persons who are “named in the record or to whom the record specifically pertains.” RCW 42.56.540. The record in this case is devoid of evidence that any of the individual petitioners were the subject of any public records requests by Mr. Parmelee. To the contrary, Mr. Parmelee submitted a declaration asserting that he had not requested records pertaining to many of the petitioners. CP 45.

The first group of petitioners and DOC alleged in their pleadings that Mr. Parmelee had made public disclosure requests for documents pertaining to the original petitioners. CP 106:9-13; CP 205:10-14. However, the record contains no testimony or documentary evidence to support this allegation. Indeed, the record does not even include the alleged public records requests from which the petitioners were seeking relief. The second group of petitioners

did not even allege that Mr. Parmelee had made any public records requests pertaining to them specifically. CP 91-102.

Without any evidence to establish that each petitioner was the subject of a PRA request by Mr. Parmelee, it was error for the court grant each petitioner relief under RCW 42.56.540. Since the petitioners failed to establish a required element for relief under that statute, this Court should reverse the lower court's ruling and order the trial court to dismiss the petitioners' claims.

2. The Trial Court's Injunction Was Not Supported by Affidavit.

As noted above, the PRA injunction statute authorizes injunctive relief only "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." RCW 42.56.540 (emphasis added).

In its brief supporting injunctive relief, DOC purported to rely on evidence submitted in a different case, Mathieu, et al. v. Parmelee v. Brunson (see footnote 1 above), and asked the court to take judicial notice of that evidence. CP 3:23-25. In fact, that was the only evidence cited by the court in support of its final order. CP 13:4-6. A trial court may take judicial notice of the record in

proceedings “engrafted, ancillary, or supplementary” to the cause presently before it. Swak v. Dep’t of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952) (citing examples of cases where a trial court properly took judicial notice of a record from a different proceeding). However, a court “cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties. The record, though public, must be proved.” Id. at 54 (citations omitted); accord Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (rejecting party’s claim that the current action was “engrafted, ancillary or supplemental to” a separate proceeding, even though the parties were the same, the issues were the same, and documents at issue were the same). Even though there was some overlap between the issues in the Mathieu case and the issues in the current case, the two actions were separate, filed by different parties under different cause numbers. Thus, the trial court erred in taking judicial notice of evidence from the Mathieu case.

Since the record does not contain any affidavits or declarations by DOC or by any petitioner, as required by RCW 42.56.540, there can be no support for the trial court's findings of fact (CP 13-14). Further, since the Respondents failed to produce the evidence mandated by RCW 42.56.540 for injunctive relief, the trial court erred in granting such relief and this Court should reverse.

3. The Parties Failed to Prove that the Records at Issue Were Exempt from Disclosure Under the Public Records Act.

The sole legal authority cited by the trial court in its final Stipulated Order on Permanent Injunction was RCW 42.56.540, the statute authorizing superior courts to enter injunctions preventing disclosure of records. CP 4. However, the Washington Supreme Court has held that that statute, by itself, is not sufficient to justify a court order prohibiting disclosure of public records. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d at 257-58. As the court explained:

[RCW 42.56.540]⁵ is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they

⁵ The statute cited by the Supreme Court, RCW 42.17.330, was recodified at RCW 42.56.540 in 2006.

fall within specific exemptions found elsewhere in the Act. Stated another way, section [.540] governs access to a remedy, not the substantive basis for that remedy.

Id. (emphasis in original).

The parties seeking to prevent disclosure of public records bear the burden of proving that a specific exemption applies to the records requested. Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 744, 958 P.2d 260 (1998). In this case, however, neither DOC nor any of the petitioners even cited such an exemption, much less proved that one applied to the records Mr. Parmelee allegedly requested. See CP 105-13 (DOC's Response to Petitioners' Motion for a Temporary Restraining Order and Permanent Injunction); CP 91-102 (Petition for Temporary Restraining Order and Permanent Injunction); CP 204-11 (Petition for Temporary and Permanent Restraining Order). Rather, DOC relied solely on RCW 42.56.540 as the basis for relief, arguing erroneously that that statute creates an independent basis for a court to enjoin disclosure. CP 111.

Since neither DOC nor any of the petitioners proved that a statutory exemption applied to the records at issue in the case, the

trial court should have dismissed the petition.⁶ Instead, the court adopted DOC's erroneously cited legal standard and granted injunctive relief in violation of the requirements set forth by the Supreme Court in the Progressive Animal Welfare Soc'y case.

E. The Trial Court's Findings of Fact Are Not Supported by the Record.

As noted above, since the trial court decided this case without testimony, this Court reviews the lower court's decision de novo. This Court is not bound by the lower court's findings on disputed factual issues. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d at 252-53. Here, the trial court entered factual findings that were based solely on evidence filed in a different proceeding, Mathieu, et al. v. Parmelee v. Brunson, et al. CP 3:4-6. As argued above, it was error for the trial court to take judicial notice of this outside evidence, none of which is part of the record in this case.

⁶ Even if DOC or Ms. Mathieu had cited a specific statutory exemption and proved that it applied to the records at issue, it still would have been an error for the trial court to issue a blanket injunction prohibiting disclosure of all the records in their entirety. See RCW 42.56.210(1) ("the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought"); WAC 44-14-04004(4)(b)(i) (attorney general's explanation of the duty to provide redacted records in appropriate circumstances).

In addition, the court rejected Mr. Parmelee's multiple requests to conduct an *in camera* review of the records that were the subject of this litigation. See, e.g., CP 53-58, 85, 118-21. Without reviewing the records, and without the benefit of any evidence establishing the content of the records, it was impossible for the court to find, as it did, that producing the records would "substantially and irreparably damage the Petitioners" and would "substantially and irreparably" interfere with the vital governmental functions furthered by Respondent, Department of Corrections." CP 14:1-4. It also was impossible for the court to determine whether the records should have been released with redactions, as required by RCW 42.56.210(1).

Since the record contains no evidence – let alone substantial evidence – to support the trial court's findings of fact, and since the court failed to conduct an *in camera* review to determine the content of the records at issue and analyze them in light of the petitioners' and DOC's allegations, this Court should conclude that the lower court's findings of fact 5 through 9 (CP 13-14) are unsupported and should reject them.

F. The Court Should Award Mr. Parmelee Attorney Fees and Statutory Penalties Under the PRA.

If Mr. Parmelee prevails in this appeal, he asks the Court to award him attorney fees for the appeal as well as statutory penalties for each day DOC has wrongfully withheld the public records he requested.

The PRA provides:

Any 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. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550. “Strict enforcement of this provision discourages improper denial of access to public records.” Spokane Research and Defense Fund v. Spokane, 155 Wn.2d at 101. The Supreme Court has observed that the PRA “is very clear that the court ‘shall’ award attorney fees to a person who prevails against an agency in an action seeking the disclosure of public records.” Amren v. Kalama, 131 Wn.2d at 35 (citation omitted). “Attorneys’ fees on appeal are

recoverable under the [PRA].” Progressive Animal Welfare Soc’y v. Univ. of Wash., 114 Wn.2d at 690 (citations omitted).

In addition, Mr. Parmelee asks the court to order an award of statutory penalties for each day DOC wrongfully withheld the public records he had requested. See RCW 42.56.550 (4); King County v. Sheehan, 114 Wn. App. at 355 (daily penalties are mandatory where an agency erroneously withholds a public record, even when the agency has acted in good faith).

CONCLUSION

Mr. Parmelee asks this Court to overturn the lower court’s decisions precluding his participation as a party in this case and entering a permanent injunction preventing him from examining records pertaining to the public employees responsible for his custody.

Given Mr. Parmelee’s stake in this case, the trial court should have required DOC and the petitioners to join him as a necessary party under CR 19(a). Further, the court should have allowed Mr. Parmelee to intervene in the case as a matter of right.

More important, the trial court should have dismissed the petitioner's claims, as they failed to support their request for injunctive relief with an affidavit or declaration, as required by RCW 42.56.540. The record is devoid of any properly admitted evidence to establish (1) that each petitioner was the subject of a public records request by Mr. Parmelee, and (2) that the public record at issue were covered by a specific statutory exemption to mandatory disclosure, as required.

Finally, without the benefit of any evidence in the record or an in camera review, the trial court's findings of fact justifying the permanent injunction are unsupported and should be rejected.

For all of these reasons, Mr. Parmelee asks the Court to overturn the lower court's rulings and instruct the lower court to dismiss the petitioners' claims.

Respectfully submitted this 15th day of October, 2007.

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STATE OF WASHINGTON
BY _____

No. 35561-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

THOMAS DeLONG, et al.

Respondents,

v.

WASHINGTON DEPARTMENT OF
CORRECTIONS,

Respondent,

v.

ALLAN PARMELEE.

Appellant.

CERTIFICATE OF SERVICE

I certify that on this date I caused to be mailed by first class mail,
postage pre-paid, copies of (1) Brief of Appellant, and (2) this Certificate
of Service to:

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Dated this 15th day of October, 2007

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A handwritten signature in cursive script, appearing to read "Hank Balson", written over a horizontal line.

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