

No. ³⁵⁴⁶⁹⁻¹~~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.

FILED
COURT OF APPEALS
DIVISION II
08 FEB 21 PM 12:00
STATE OF WASHINGTON
BY DEPT

REPLY BRIEF OF APPELLANT

Hank Balson
WSBA #29250
Attorney for Appellant

Public Interest Law Group, PLLC
705 Second Ave., Suite 501
Seattle, WA 98104
(206) 447-0103

ORIGINAL

TABLE OF CONTENTS

Table of Authorities iii

SUMMARY OF REPLY1

ARGUMENT.....1

 A. Mr. Parmelee Is a Necessary Party Under CR 19(a).1

 B. The Trial Court Erred in Denying Mr. Parmelee’s
 Requests to Intervene.....4

 C. DOC’s Allegations About Mr. Parmelee’s Character and
 Motives are Insufficient to Support Injunctive Relief
 Under Current PRA Statutes and Case Law.8

 1. The Record Contains No Evidence to
 Support DOC’s Factual Assertions.9

 2. Even If There Were Evidence in the Record to
 Support DOC’s Factual Assertions, Those Facts
 Do Not Satisfy the Legal Requirements for an
 Injunction Under the Public Records Act.....10

 (a) There is No Evidence that the Public
 Records At Issue in this Case Pertained
 to the Petitioners.10

 (b) The Trial Court’s Injunction Was Not
 Supported by Affidavit, as Required.13

 (c) DOC’s Asserted Facts Do Not Satisfy
 the Statutory Requirements for an
 Injunction.15

 (d) DOC’s Asserted Facts Do Not Establish
 that the Enjoined Records Were Exempt
 from Disclosure Under the
 Public Records Act.16

3. The Court Should Reject DOC's Request to Establish a Judicial Exemption to the Public Records Act that is Not Provided in the Act Itself.....17

D. Mr. Parmelee is Entitled to Fees and Monetary Penalties if He Prevails Against DOC..21

CONCLUSION25

TABLE OF AUTHORITIES

CASES

<u>Amren v. Kalama</u> , 131 Wn.2d 25, 929 P.2d 389 (1997).....	18
<u>Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405</u> , 129 Wn. App. 832, 120 P.3d 616 (2005).....	23
<u>Brouillet v. Cowles Publ'g Co.</u> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	17
<u>Burt v. DOC</u> , 141 Wn. App. 573, 170 P.3d 608 (2007).....	2, 3
<u>Columbia Gorge Audobon Soc'y v. Klickitat County</u> , 98 Wn. App. 618, 989 P.2d 1260 (1999).....	5
<u>Confederated Tribes of Chehalis Reservation v. Johnson</u> , 135 Wn.2d 734, 958 P.2d 260 (1998).....	16, 22, 23, 25
<u>Doe I v. Washington State Patrol</u> , 80 Wn. App. 296, 908 P.2d 214 (1996).....	22, 24
<u>Dragonslayer, Inc. v. Washington State Gambling Comm'n</u> , 139 Wn. App. 433, 161 P.3d 428 (2007).....	12, 17
<u>Gildon v. Simon Property Group, Inc.</u> , 158 Wn.2d 483, 145 P.3d 1196 (2006).....	3
<u>Harvey v. Bd. of County Supervisors of San Juan County</u> , 90 Wn.2d 473, 584 P.2d 391 (1978).....	3
<u>In re Adoption of B.T.</u> , 150 Wn.2d 409, 78 P.3d 634 (2003).....	13
<u>King County v. Sheehan</u> , 114 Wn. App. 325, 57 P.3d 307 (2002).....	18, 19, 20
<u>Kitsap County Fire Protection Dist. No. 7 v. Kitsap County Boundary Review Bd.</u> , 87 Wn. App. 753, 943 P.2d 380 (1997).....	3

<u>Kleven v. City of Des Moines,</u> 111 Wn. App. 284, 44 P.3d 887 (2002).....	21
<u>Lindberg v. Kitsap County,</u> 133 Wn.2d 729, 948 P.2d 805 (1997))	25
<u>Loveless v. Yantis,</u> 82 Wn.2d 754, 513 P.2d 1023 (1973).....	5
<u>McClarty v. Totem Elec.,</u> 119 Wn. App. 453, 81 P.3d 901 (2003).....	2
<u>Olver v. Fowler,</u> 161 Wn.2d 655, 168 P.3d 348 (2007).....	5, 8
<u>Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS I),</u> 114 Wn.2d 677, 790 P.2d 604 (1990).....	21, 24
<u>Seattle Firefighter Union Local No. 27 v. Hollister,</u> 48 Wn. App. 129, 737 P.2d 1302 (1987).....	25
<u>Sherry v. Financial Indem. Co.,</u> 160 Wn.2d 611, 160 P.3d 31 (2007).....	6
<u>Soter v. Cowles Publ’g Co.,</u> __ Wn.2d __, 174 P.3d 60 (2007).....	15
<u>Spokane Research & Defense Fund v. City of Spokane,</u> 155 Wn.2d 89, 117 P.3d 1117 (2005).....	14
<u>State v. Grayson,</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	14
<u>State v. Hoffman,</u> 116 Wn.2d 57, 804 P.2d 577 (1991).....	14
<u>Swak v. Dep’t of Labor & Indus.</u> 40 Wn.2d 51, 240 P.2d 560 (1952).....	13
<u>Washington Optometric Ass’n v. Pierce County,</u> 73 Wn.2d 445, 438 P.2d 861 (1968).....	11

<u>Westerman v. Cary,</u> 125 Wn.2d 277, 892 P.2d 1067 (1994).....	4
---	---

STATUTES

RCW 42.56.030	18, 24
RCW 42.56.080	20
RCW 42.56.100	24
RCW 42.56.540	10, 12, 13
RCW 42.56.550(3).....	18
RCW 42.56.550(4).....	22

OTHER AUTHORITIES

CR 19(a).....	1, 2, 3, 4
CR 24(a).....	5, 6, 8
CR 52(a)(5)(B).....	12
ER 802	10
ER 1002	10

SUMMARY OF REPLY

DOC's response to Mr. Parmelee's arguments regarding mandatory joinder and intervention lacks merit, as it ignores the established legal standards governing the rights of interested parties.

DOC's arguments in support of the trial court's injunction order similarly should be rejected. The arguments are based on allegations that are not supported by evidence in the record. Moreover, even if these allegations could be proved, they do not satisfy the legal requirements to support injunctive relief under the Public Records Act (PRA).

Finally, DOC asks this Court to expand the agency's power to deny public disclosure requests submitted by disfavored requesters whose actions DOC abhors. This request would require the Court to go beyond the PRA exemptions already provided by the Legislature, and to ignore well-established statutory and case law mandating liberal application of the Public Records Act to promote disclosure of public records. For these reasons, DOC's request for expanded authority to deny PRA requests should be denied.

ARGUMENT

A. Mr. Parmelee Is a Necessary Party Under CR 19(a).

The only authority DOC offers to defend the parties' and the trial court's failure to join Mr. Parmelee as a necessary party under CR 19(a) is

Burt v. DOC, 141 Wn. App. 573, 170 P.3d 608 (2007). Br. of Resp't at 18. This Court should reject Division Three's holding in Burt, as it is neither controlling nor persuasive.¹

In Burt, like in the present case, DOC employees filed a petition to enjoin the Department from releasing public records requested by Mr. Parmelee. Burt, 141 Wn. App. at 575. On appeal, Division Three of this Court rejected Mr. Parmelee's mandatory joinder argument on the grounds that (1) joining Mr. Parmelee would not affect the petitioners' burden of proof, and (2) "Mr. Parmelee's disclosure request and his interest as a member of the public were easily apparent to the trial court." Id. at 579-80. Neither of these statements addresses the legal standards for mandatory joinder under CR 19(a).

"Under CR 19, a trial court undertakes a two part analysis. First, the court must determine whether a party is needed for just adjudication. Second, if an absent party is needed but it is not possible to join the party, then the court must determine whether in 'equity and good conscience' the action should proceed among the parties before it or should be dismissed,

¹ Contrary to DOC's assertion, Burt is not controlling in this case, as it was decided by a different division of this Court. See McClarty v. Totem Elec., 119 Wn. App. 453, 469 n.8, 81 P.3d 901 (2003) (overruled on other grounds). Moreover, Mr. Parmelee's petition for review of the Burt decision is still pending before the Washington Supreme Court. See Wash. Supreme Court Case No. 809984.

the absent party being thus regarded as indispensable.”² Gildon v. Simon Property Group, Inc., 158 Wn.2d 483, 494-95, 145 P.3d 1196 (2006).

“A necessary party is one who has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.” Harvey v. Bd. of County Supervisors of San Juan County, 90 Wn.2d 473, 474, 584 P.2d 391 (1978).

“CR 19(a) *requires* a person be joined as a party if: the person ‘is subject to service of process’; the ‘joinder will not deprive the court of jurisdiction over the subject matter’; and the person ‘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’” Kitsap County Fire Protection Dist. No. 7 v. Kitsap County Boundary Review Bd., 87 Wn. App. 753, 761-62, 943 P.2d 380 (1997) (emphasis added).

There is no authority for the court’s holding in Burt that a necessary party need not be joined so long as the existing parties’ burden of proof will not be altered and the interest of the unjoined party is already apparent to the court. The fact that the interest of an unjoined party may be apparent, does not mean that the party’s interest will be protected in his

² In Burt, the court conflated the two steps of this inquiry, erroneously applying the “equity and good conscience” component despite the parties’ ability to join Mr. Parmelee as a necessary party. Burt, 141 Wn. App. at 579-80.

absence. Neither the court in Burt, nor DOC in this case, applied the proper standards, set forth in the court rule and the case law cited above, to evaluate Mr. Parmelee's status as a necessary party under CR 19(a).

In this case, it is indisputable that Mr. Parmelee satisfied all requirements for mandatory joinder under CR 19(a): He was subject to service of process, his joinder would not have deprived the trial court of jurisdiction, and he claimed an interest relating to the subject of the action such that disposition of the action in his absence impeded his ability to protect his interest. See Kitsap County Fire Protection Dist. No. 7, 87 Wn. App. at 761-62. Joinder was particularly crucial in this case, as the other parties – DOC and the petitioners – were all advocating for an injunction, meaning that Mr. Parmelee was deprived of a meaningful adversarial process to protect his rights under the PRA.

B. The Trial Court Erred in Denying Mr. Parmelee's Requests to Intervene.

DOC argues that the trial court properly denied Mr. Parmelee's motions to intervene because they were untimely. Br. of Resp't at 17-18. It does not dispute that Mr. Parmelee satisfied the other requirements for intervention. Id. at 16 (citing Westerman v. Cary, 125 Wn.2d 277, 892 P.2d 1067 (1994)). Mr. Parmelee's intervention motions were timely and should have been granted.

“[T]he requirements of CR 24(a) are liberally construed to favor intervention.” Columbia Gorge Audobon Soc’y v. Klickitat County, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999) (citation omitted); accord Olver v. Fowler, 161 Wn.2d 655, 664, 168 P.3d 348 (2007) (“[W]e liberally construe our rules in favor of intervention.”).

“On the question of timeliness in particular, CR 24(a) allows intervention as a right *unless* it would work a hardship on one of the original parties.” Columbia Gorge Audobon Soc’y, 98 Wn. App. at 623 (citing Loveless v. Yantis, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973); emphasis in original). “Even after judgment has been entered, intervention remains within the discretion of the court if the particular circumstances warrant it.” Id. (citation omitted).

“Prejudice to the [opposing parties] is one of the factors the court must consider in determining whether an intervention motion is timely.” Id. at 627-28. “[P]rejudice in the context of CR 24(a) does not mean the extra bother resulting from having to deal with the intervenor’s issues. It refers only to difficulties caused by delay in bringing the motion.” Id. at 629 (citation omitted).

In light of these rules, Mr. Parmelee’s efforts to intervene were timely and the trial court erred in denying his motions.

First, it is undisputed that Mr. Parmelee, acting pro se, filed his first motion to intervene on October 10, 2006, just 11 days after the first group of petitioners initiated this action, and noted it for hearing.³ CP 116-21. Three days later, a trial court commissioner ruled that Mr. Parmelee was not a necessary party and refused to allow him to participate in the show cause hearing taking place that day. RP (10/13/06) at 5:23 – 6:10. It is undisputed that as of that date (October 13, 2006), all parties, as well as the trial court, had actual notice of Mr. Parmelee’s desire to participate in the proceedings. *Id.*; CP 116-121. Based on these facts alone, Mr. Parmelee easily satisfied the requirements for intervention as a matter of right under CR 24(a).

Assuming, for the sake of argument, that Mr. Parmelee’s initial motion to intervene was somehow defective, that would not excuse the Court’s denial of his subsequent pleas for intervention. On October 23, 2006, Mr. Parmelee filed a motion to revise the trial court commissioner’s October 13 ruling, including its decision not to allow him to intervene. CP 80-88. The next day, the trial court entered two stipulated permanent injunctions – orders that were entered upon the stipulation of all the

³ DOC attempts to discount this fact by alleging that its counsel was not served with the motion. Br. of Resp’t at 17 n.13. The Court should reject this bare allegation as it is not supported by any citation to the record. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (“We . . . decline to consider facts recited in the briefs but not supported by the record.”) (citing RAP 10.3(a)(5), 13.4(c)).

parties. CP 70, 75. On November 6, 2006, Mr. Parmelee filed a Second Motion to Intervene and Motion for In Camera Review, along with a declaration.⁴ CP 45-59. This motion was filed well in advance of the court's final injunction order, entered on December 15, 2006. CP 11-15.

On November 2, 2006, the trial court entered a memorandum opinion denying Mr. Parmelee's motion for revision and motion for intervention.⁵ CP 63-65. The trial court did not base its decision on timeliness or prejudice. Indeed, it is difficult to see how the other parties would have been prejudiced by allowing Mr. Parmelee to intervene, given that the temporary restraining order that was in place safeguarded the petitioners' interests. Rather, the court denied Mr. Parmelee the right to intervene because it predicted he would make the same arguments he had made in a previous PRA case involving different parties. CP 64-65. Based on this assumption, the court declared it would make the same ruling and enter the same order, and that "[a]ccordingly, allowing the Motion to Intervene would be a fruitless act." CP 65.

⁴ Although this motion was stamped received by the superior court clerk on November 6, Mr. Parmelee's certificate of mailing indicates that he mailed it on October 25, 2006. CP 58.

⁵ The trial court stated that Mr. Parmelee moved to intervene "[s]ubsequent to the Court's signing of the stipulation for permanent injunction." CP 64. The basis for this statement is unclear, as Mr. Parmelee's first motion to intervene was filed on October 10, his motion to revise the commissioner's ruling was filed on October 23, and the stipulated injunctions were not entered until October 24.

DOC cites no authority to support the trial court's ruling on this basis. Denying an interested party the right to intervene under CR 24(a) merely because the court thinks it can predict what arguments the party will make, and feels comfortable rejecting those arguments without hearing them, constitutes blatant prejudice and an abuse of discretion. See Olver, 161 Wn.2d at 663 (“Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”) (citations omitted).

Since Mr. Parmelee satisfied all of the requirements for intervention as a matter of right under CR 24(a), this Court should reverse the trial court's denial of his motions to intervene.

C. DOC's Allegations About Mr. Parmelee's Character and Motives are Insufficient to Support Injunctive Relief Under Current PRA Statutes and Case Law.

In his opening brief, Mr. Parmelee argued several bases for overturning the lower court's injunction, all of which were based on the explicit requirements of the PRA and case law interpreting the Act. In response, instead of demonstrating how the evidence in the record actually does satisfy the requirements for a PRA injunction, DOC asks this Court to focus on a litany of allegations pertaining to Mr. Parmelee's history and character, and to affirm the trial court's ruling based on the agency's

subjective belief that he might use the records (which are not otherwise exempt from disclosure) to annoy or harass DOC staff.

DOC's arguments are based on factual assertions that are not supported by evidence in the record. More importantly, they would require this Court to ignore several explicit PRA statutory mandates, as well as a consistent body of Supreme Court decisions requiring courts to construe the PRA liberally to promote disclosure, and to construe the Act's exemptions narrowly. DOC's request for expanded authority to reject public records requests from certain disfavored requesters is not supported by any Washington authority and should be denied.

1. The Record Contains No Evidence to Support DOC's Factual Assertions.

DOC's arguments are based largely on a set of factual assertions portraying Mr. Parmelee as an obnoxious antagonist, whose sole motive in requesting public records is to harass and intimidate DOC personnel. Br. of Resp't at 3-9. The only support DOC offers for most of its factual assertions are (1) statements from its own brief before the trial court (CP 105-13), (2) allegations contained in one of the restraining order/injunction petitions filed by some of the petitioners (CP 91-102), (3) two random documents, not attached to a declaration or otherwise authenticated (CP 154-55), and (4) unsworn oral argument by one of the

petitioners (RP (10/13/06) at 8-19). See citations provided in Br. of Resp't at 3-9. None of these sources constitute evidence. Indeed, the only evidence in the record that addresses the purposes for Mr. Parmelee's records requests is Mr. Parmelee's own declaration.⁶ CP 45-52.

2. Even If There Were Evidence in the Record to Support DOC's Factual Assertions, Those Facts Do Not Satisfy the Legal Requirements for an Injunction Under the Public Records Act.

The Legislature has established specific requirements that a petitioner must satisfy in order to obtain an injunction preventing disclosure of public records. Even if this Court were to accept the factual assertions in DOC's response brief, those facts do not satisfy the requirements necessary to affirm the trial court's injunction.

(a) There is No Evidence that the Public Records At Issue in this Case 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 [requested] record or to whom the [requested] record specifically pertains." RCW 42.56.540. In his Second Motion to Intervene and Motion for In Camera Review, Mr. Parmelee stated that he had submitted

⁶ Even if this Court were to consider the declarations submitted by DOC in the Mathieu case, as DOC urges, those declarations contain numerous statements that should be excluded on evidentiary grounds. See, e.g., Mathieu Clerk's Papers 66-67 (Decl. of Marilyn Brenneman) ¶¶ 3-6, 8 (hearsay – ER 802); Mathieu Clerk's Papers 70 (Decl. of Denise Vaughan) ¶ 4 (original writing not provided, as required by ER 1002).

public records requests pertaining to only 11 of the 131 petitioners in this case. CP 55. The record does not contain – and DOC does not point to – any evidence that Mr. Parmelee ever requested records pertaining to the remaining 120 petitioners. Thus, since those 120 petitioners lack standing to seek an injunction under the PRA, the trial court’s decision must be reversed at least with respect to those petitioners.

DOC notes that the trial court made a finding of fact that Mr. Parmelee had submitted requests for public records pertaining to the petitioners, and argues that since Mr. Parmelee failed to reference that finding specifically in his Assignments of Error, the finding is a “verit[y] on appeal.” Br. of Resp’t at 32. The Court should reject DOC’s argument for several reasons.

First, this division of the Court of Appeals has waived the requirement of RAP 10.3(g) that an appellant must separately assign error to each challenged finding of fact. General Order 1998-2 In re the Matter of Assignments of Error. Mr. Parmelee explicitly argued this issue in the body of his brief. Br. of Appellant at 19-20.

Next, and more significantly, an appellant is not required to assign error to “superfluous” findings of fact, i.e., those that the trial court was not required to make. See Washington Optometric Ass’n v. Pierce County, 73 Wn.2d 445, 448, 438 P.2d 861 (1968) (rejecting respondents’

position that trial court's findings of fact in summary judgment order were verities on appeal since appellants had failed to assign error to them). Findings of fact are not required for rulings on motions. CR 52(a)(5)(B). The Stipulated Order on Permanent Injunction at issue in this appeal was a ruling on a motion. CP 12; RCW 42.56.540 (authorizing injunctions against disclosure of public records "upon motion and affidavit"). Therefore, the trial court's findings of fact were superfluous and Mr. Parmelee was not required to assign error to them specifically.

Finally, in this case, "[w]here the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or competency, [the appellate court is] not bound by the trial court's factual findings and stand[s] in the same position as the trial court." Dragonslayer, Inc. v. Washington State Gambling Comm'n, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007) (citations omitted). Thus, regardless of whether Mr. Parmelee explicitly assigned error to the trial court's findings of fact, this Court is not bound by those findings; it conducts a de novo review to determine whether the record supports those trial court rulings challenged on appeal.

(b) The Trial Court's Injunction Was Not Supported by Affidavit, as Required.

The PRA authorizes a court to issue an injunction 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).

Although the record in this case does not contain a single affidavit by any petitioner or DOC representative, DOC contends that the affidavit requirement was satisfied by the trial court taking judicial notice of the declarations the Department had filed in a separate action, Mathieu, et al. v. Parmelee v. Brunson, et al. Br. of Resp't at 33-34. DOC cites Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952), for the proposition that a court may take judicial notice of the record in proceedings “engrafted, ancillary, or supplementary” to the cause presently before it.” Br. of Resp't at 33-34. However, DOC ignores the Supreme Court's statement in Swak that 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.” Swak, 40 Wn.2d at 54; accord In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003). DOC also ignores more recent Supreme Court authority, rejecting the notion that one action is “engrafted, ancillary or

supplemental” to another action merely because the two actions involve the same parties, the same documents, and most of the same issues. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

DOC relies primarily on State v. Hoffman, 116 Wn.2d 57, 804 P.2d 577 (1991), to support its position that it was proper for the trial court to take judicial notice of evidence submitted in a separate action. Br. of Resp’t at 33. Hoffman is not on point, as the public document at issue in that case was not evidence from a separate legal proceeding, but rather a gubernatorial proclamation, establishing the basis for the trial court’s jurisdiction. Hoffman, 116 Wn.2d at 67-68; State v. Grayson, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (“[L]egislative facts are established truths, facts or pronouncements that do not change from case to case but [are applied] universally, while adjudicative facts are those developed in a particular case.”) (internal quotation marks and citations omitted).

Given that the record in this case contains no affidavit to support the petitioners’ motion, and that the trial court improperly considered evidence from a different proceeding, the petitioners and DOC failed to meet their burden to obtain injunctive relief under RCW 42.56.540.

(c) DOC's Asserted Facts Do Not Satisfy the Statutory Requirements for an Injunction.

Before it can issue an injunction under RCW 42.56.540, a trial court must find that “a specific exemption applies *and* that disclosure would not be in the public interest *and* would substantially and irreparably damage a person or a vital government interest.” Soter v. Cowles Publ'g Co., __ Wn.2d __, 174 P.3d 60, 82 (2007) (en banc; emphasis added). Even if DOC's asserted facts were supported by evidence in the record, those facts do not demonstrate that disclosure of the records at issue (the nature and content of which are unknown) would “substantially and irreparably damage a person or a vital government interest.” At most, DOC's assertions, if proved, would establish that Mr. Parmelee has criminal convictions for arson and stalking, that he is a disgruntled prison inmate with multiple complaints and resentments against prison officials, and that he has expressed intent to attempt to vindicate his complaints through publicity and litigation. Br. of Resp't at 3-9.

Although DOC invokes such terms as “slander” and “harassment,” it fails to show with any specificity how disclosing public records to Mr. Parmelee (records which presumably contain true information), would enable him to engage in conduct amounting to slander or illegal

harassment. The record simply does not demonstrate the type of harm required by RCW 42.56.540 to warrant an injunction.

(d) DOC's Asserted Facts Do Not Establish that the Enjoined Records Were Exempt from Disclosure Under the Public Records Act.

DOC concedes that the PRA injunction statute, RCW 42.56.540, does not, by itself, constitute an exemption to the Act's public records disclosure mandate. Br. of Resp't at 24. Rather, the parties seeking to prevent disclosure of public records must prove 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).

DOC has made no attempt to argue that a specific PRA statutory exemption applies to the public records at issue in this case. In fact, it is impossible to tell precisely what records *are* at issue. The petitioners' original pleadings refer to "personal and professional (employment) information" (CP 92) and to "a broad category of documents concerning Petitioners, including photographs and other personal information" (CP 205). However, since both DOC and the petitioners failed to provide more specific information about the nature and content of the records responsive to Mr. Parmelee's requests, it was impossible for them to prove to the trial court (and it is impossible for DOC to prove to this Court) that the records

are subject to one of the PRA's statutory exemptions.⁷ DOC has failed to meet its burden of proof and thus the trial court's injunction order should be reversed. Dragonslayer, 139 Wn. App. at 441 (the parties seeking to prevent disclosure under RCW 42.56.540 bear the burden of proving that the records at issue should not be disclosed).

3. The Court Should Reject DOC's Request to Establish a Judicial Exemption to the Public Records Act that is Not Provided in the Act Itself.

Instead of arguing that the records requested by Mr. Parmelee are exempt from disclosure under one of the numerous statutory exemptions provided by the PRA, DOC asks this Court to repudiate the Supreme Court's holding in Confederated Tribes, cited above, and authorize injunctive relief under RCW 42.56.540 "whether or not an exemption or series of exemptions applies."⁸ Br. of Resp't at 25. Accepting DOC's invitation would require this Court to ignore clear and repeated statements from the Legislature and the Supreme Court, requiring broad disclosure of

⁷ If DOC truly believed that the records Mr. Parmelee requested were subject to a specific statutory exemption, and that their disclosure would subject DOC staff to substantial harm, it could have denied Mr. Parmelee's request merely by citing the applicable statutory exemption. RCW 42.56.070(1), 42.56.210(3). But it did not do so. Instead, the agency left it to its employees, unrepresented by counsel, to seek an injunction to prevent disclosure, suggesting that DOC did not actually believe it had a legitimate basis for denying Mr. Parmelee's request.

⁸ DOC also suggests the Court should "balance[] . . . the relative interests of the parties and the interests of the public." Br. of Resp't at 20. However, the Supreme Court has rejected such a balancing test in resolving cases under the PRA. See Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 798, 791 P.2d 526 (1990).

public records and narrow construction of the PRA's exemptions. See, e.g., RCW 42.56.030 (mandating liberal construction of the PRA and narrow construction of its exemptions in order to promote disclosure); RCW 42.56.550(3) ("Courts shall take into account the policy of this chapter 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."); Amren v. Kalama; 131 Wn.2d 25, 31, 929 P.2d 389 (1997) (the PRA is 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") (citation omitted).

In reviewing DOC's request for broad power to withhold public records not otherwise exempt under the PRA, this Court should follow Division One's reasoning in King County v. Sheehan, 114 Wn. App. 325, 57 P.3d 307 (2002). In that case, the court was faced with a motion by King County, seeking an injunction to prevent it from having to disclose a list of police officers' full names to two specific records requesters. The requesters in that case ran controversial Internet websites that were highly critical of police. Id., 114 Wn. App. at 333. Further, one of the requesters had previously posted identifying information regarding King County police officers, including their home addresses, on his website. Id. King

County argued that releasing officers' full names to these requesters would threaten the officers' safety and privacy, would interfere with law enforcement, and could lead to harassment and danger in the officers' personal lives. *Id.* at 333, 345. While sympathetic to the County's concerns (*id.* at 340), the Court of Appeals rejected the County's arguments, ordered full disclosure of the requested information, and ordered the trial court to assess monetary penalties against the County.

The court reasoned, in part, as follows:

We can only conclude that the requests of Sheehan and Rosenstein were denied because of who these men are – both operate controversial websites that are critical to police, and Sheehan, at least, has heretofore published home addresses of police officers on his web site. Indeed, the trial court's order reflects that the decision to require the County to release only the surnames of its police officers was based in part on “William Sheehan’s statements regarding his intended use of the information,” as well as “balanc[ing] the interests of disclosure with the interest in effective law enforcement.” But the act expressly states that “[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for their request[.]” RCW 42.17.270.⁹ Therefore, *Sheehan’s intended use of the information cannot be a basis for denying disclosure.* To conclude otherwise would be to allow agencies to deny access to public records to its most vocal critics, while supplying the same information to its friends.

⁹ RCW 42.17.270 has been recodified at RCW 42.56.080.

Id. at 341 (emphasis added). This reasoning expressly rebuts DOC’s suggestion that a court may consider the suspected purpose of a records request in certain “unique” cases. Br. of Resp’t at 27.

The court recognized that the information it was ordering the County to release could be misused in ways that might harm the police officers. Id. at 340, 348. However, the court also recognized that the PRA mandates “full disclosure in the absence of a specific exemption,” and suggested that concerns about misuse of non-exempt public information would be better addressed by the Legislature. Id. at 348.

The Washington Legislature has expressed in many ways its intent that the PRA be enforced equally, without regard to the identity, the purposes, or the circumstances of the person requesting records. See, e.g., RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request”); H.B. 2138, 59th Leg. Reg. Sess. (Wash. 2005) Sec. 1(1)(ggg) (proposal to allow agencies to withhold public records requested by prisoners; not adopted by Legislature); H.B. 3219, 60th Leg. Reg. Sess. (Wash. 2008) Sec. 1(4)(b) (seeking to deny statutory penalty awards to prisoners who are wrongfully denied access to public records; not adopted by Legislature).

Nothing in the PRA authorizes DOC to withhold public records based on its belief that the records might be misused by an individual records requester. Further, this Court cannot create an exemption that the Legislature has declined to provide. See Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS I), 114 Wn.2d 677, 688, 790 P.2d 604 (1990) (“In construing statutes, courts may not read into the statute matters which are not there.”) (citations omitted); Kleven v. City of Des Moines, 111 Wn. App. 284, 291, 44 P.3d 887 (2002) (“We will not read into a statute language that is not there.”) (citation omitted).

The PRA does not authorize agencies to reject public records requests from specific requesters merely because the agency believes that requester might use the information in ways it abhors. Since DOC has failed to demonstrate that the trial court’s injunction was supported by the actual, existing legal standards set forth in the PRA and relevant case law, this Court should reverse the trial court’s order and vacate the injunction.

D. Mr. Parmelee is Entitled to Fees and Monetary Penalties if He Prevails Against DOC.

DOC argues that Mr. Parmelee is not entitled to fees, costs, or penalties if he prevails in this appeal because this action arose under the PRA’s injunction provision (RCW 42.56.540), rather than the Act’s

judicial review section (RCW 42.56.550). Br. of Resp't at 34-35. This argument should be rejected.

The PRA guarantees fees and penalty awards to “[a]ny person who prevails against an agency in *any* action in the courts seeking the right to inspect or copy any public record.” RCW 42.56.550(4) (emphasis added). It is indisputable this appeal is a court action in which Mr. Parmelee is seeking the right to inspect and copy public records. Moreover, if Mr. Parmelee prevails in this appeal, he necessarily will have prevailed against DOC. Although this action was initiated by third parties, DOC joined the petitioners in requesting relief and is the only Respondent to have appeared in this appeal to defend the trial court’s injunction.

A public agency may be required to pay a requester’s reasonable attorney fees in an action where a third party sues to enjoin disclosure, even when the agency did not initiate the lawsuit. See Doe I v. Washington State Patrol, 80 Wn. App. 296, 908 P.2d 214 (1996). This is not true in all cases. In Confederated Tribes, cited earlier, several Indian tribes sued to enjoin disclosure of records held by the Washington State Gambling Commission. Confederated Tribes, 135 Wn.2d 734. The trial court denied the injunction and the tribes appealed. The Supreme Court upheld the trial court ruling and affirmed that the individual who had originally requested the records was entitled to receive them under the

PRA. Despite the fact that the records requester prevailed, the Court held that he was not entitled to recover attorney fees from the Gambling Commission because he had prevailed against the tribes, not the agency. Id. at 757. Similarly, in Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 129 Wn. App. 832, 120 P.3d 616 (2005), the Court of Appeals denied an award of fees to a public records requester who succeeded in large part in opposing an injunction sought by a number of teachers.

This case is distinguishable from Confederated Tribes and Bellevue John Does. In those cases, the public agencies did not actively litigate to prevent disclosure of the requested records. In Confederated Tribes, “[t]he tribes resisted disclosure; but the agency – the Gambling Commission – did not. The requester of the records was denied an award of attorney fees because he ‘prevailed against the Tribes, not against the agency.’” Bellevue John Does 1-11, 129 Wn. App. at 864 (quoting Confederated Tribes, 135 Wn.2d at 756-57). In Bellevue John Does, [t]he record confirm[ed] that the school districts [the agencies that maintained the public records at issue] did not oppose the Times’ disclosure request in court.” Id., 129 Wn. App. at 866.

In this case, however, DOC has played an active role in opposing Mr. Parmelee’s public records request. DOC filed the only substantive briefing in support of the petitioners’ injunction request (CP 105-13). It

presented oral argument in support of the petitioners. RP (10/13/06) at 20-21. It further tried to aid the petitioner by asking the trial court to take judicial notice of declarations it had prepared and filed in a different case. CP 107. It even drafted and stipulated to the trial court's final injunction order. CP 11-15. Finally, DOC has filed the only brief opposing Mr. Parmelee's appeal. DOC's role in this case has been vastly different than the more hands-off roles played by the public agencies in Confederated Tribes and Bellevue John Does.

The PRA requires agencies to provide their "fullest assistance" to individuals who request records. RCW 42.56.100. In Doe I, where the Court of Appeals ordered an agency to pay attorney fees to a requester who successfully opposed a third party's injunction request, the court criticized the agency for preferring the rights of the third-party over the rights of the records requestor. Doe I, 80 Wn. App. at 303. Here, DOC did everything it could to help the petitioners obtain an injunction and prevent Mr. Parmelee's access to the records he requested.

Like the rest of the PRA, the attorney fee provision must be construed liberally in order to promote the Act's policy of disclosure. Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d at 68; RCW 42.56.030. The purpose of the PRA attorney fee provision is "to encourage broad disclosure and to deter agencies from improperly denying

access to public records.” Confederated Tribes, 135 Wn.2d at 757 (citing Lindberg v. Kitsap County, 133 Wn.2d 729, 746, 948 P.2d 805 (1997)). If the Court allows DOC to avoid paying attorney fees in this case, the result will be that public agencies wishing to deny a public disclosure request will simply present their cases through third parties under RCW 42.56.540. The agencies will hire the lawyers, create the record and make the arguments, and then, if the court denies the injunction, walk away without having to pay fees. This result directly contradicts the PRA’s explicit intent to hold agencies accountable for their actions in wrongfully preventing public disclosure.

Additional support for Mr. Parmelee’s fee request is found in Seattle Firefighter Union Local No. 27 v. Hollister, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987) (reversing trial court’s third-party PRA injunction and awarding reasonable attorney fees to prevailing party on appeal).

CONCLUSION

For all of the reasons set forth above, this Court should grant Mr. Parmelee’s appeal, dissolve the trial court’s injunction, order that the petitioners’ action be dismissed, and order DOC to pay Mr. Parmelee’s attorney fees for this appeal.

Respectfully submitted this 19th day of February, 2008.

PUBLIC INTEREST LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Hank Falson", written over a horizontal line.

Hank Falson
WSBA #29250
Attorney for Appellant

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

FILED
COURT OF APPEALS
DIVISION II
08 FEB 21 PM 12:00
STATE OF WASHINGTON
BY *[Signature]*

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

Certificate of Service to:

Jason Howell
Assistant Attorney General
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Gerald Banner
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Dated this 19th day of February, 2008

PUBLIC INTEREST LAW GROUP, PLLC
705 Second Ave., Suite 501
Seattle, WA 98104
(206) 447-0103 (phone)
(206) 447-0115 (fax)

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

HANK BALSON
Attorney for Appellant