

Consolidated to

NO. 35561-2-II ³⁵⁴⁶⁹⁻¹

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

LT. DELONG, et al.,

Petitioners,

v.

DEPARTMENT OF CORRECTIONS, et al.,

Respondents,

v.

ALLAN PARMELEE,

Appellant.

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DEPUTY

BRIEF OF RESPONDENTS DEPARTMENT OF CORRECTIONS

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I. INTRODUCTION

This is an appeal by Washington State prisoner Allan Parmelee following entry of a superior court order enjoining disclosure of employee personal and personnel records maintained by the Department of Corrections (DOC or Department). The Petitioners, 74 individuals employed at Clallam Bay Corrections Center (CBCC) brought this injunction action against the DOC under RCW 42.56.240. CP 204-211. DOC did not initiate this injunction action in the superior court.

Following a number of hearings, the superior court entered a permanent injunction, precluding disclosure of most of the records at issue. The superior court's order should be affirmed because Mr. Parmelee was not an indispensable party and thus not entitled to intervention based upon an untimely motion, and the injunction was proper after the court considered: (1) statutory exemptions related to privacy and the need for effective law enforcement; (2) a balancing of competing interests favoring an injunction; and (3) Mr. Parmelee's abuse of the Public Records Act, chapter 42.56 RCW (PRA).

II. COUNTER STATEMENT OF THE ISSUES

1. Did the superior court properly deny Mr. Parmelee's attempt to intervene because he was not an indispensable party to resolution of the issues and his motion was untimely?

2. Mr. Parmelee is a Washington State prisoner who has actively used requests for disclosure of public records as a means to harass participants in the criminal justice system. Do these circumstances support the superior court's conclusions that failure to enjoin the disclosure of these records would invade Petitioners' privacy under RCW 42.56.050 and would interfere with effective law enforcement under RCW 42.56.240(1)?
3. Did the superior court properly take judicial notice of declaratory evidence submitted in Mathieu, et al. v. DOC v. Parmelee, a companion matter involving Mr. Parmelee and a CBCC employee whose personnel records were subject to the same PRA requests as the Petitioners' in this matter?
4. Do the unchallenged findings of fact entered by the superior court support the entering of an injunction against the Department precluding disclosure of records related to the Petitioners?
5. The superior court record does not include a motion for summary judgment or similar show cause motion by Mr. Parmelee under RCW 42.56.550 to compel disclosure or seek a determination that DOC had violated the Public Records Act. In the absence of such a motion and resulting record in the superior court, is Mr. Parmelee entitled to penalties and attorney fees in lieu of remand to the superior court?

III. COUNTER STATEMENT OF THE CASE

A. MR. PARMELEE'S BACKGROUND.

Mr. Parmelee was sentenced to DOC custody for two counts of first degree arson for the fire-bombing of two automobiles belonging to female attorneys opposing him and his co-worker in civil legal actions.¹ Each of those cars was bombed at the residences of those attorneys. Evidence at trial indicated that, in each instance, Mr. Parmelee involved others to help him commit the crimes. Prior to the fire-bombing of the first victim's car, Mr. Parmelee posted her home address on a website he created to complain about court rulings in his child custody and dissolution litigation with the victim's client, Mr. Parmelee's ex-wife. On that site he "invited" other disgruntled fathers to pay the victim "a visit." CP 92, 107, 154.²

¹ Mr. Parmelee has also been convicted on one count of felony stalking and at least two counts of misdemeanor stalking-related offenses. See State v. Parmelee, 108 Wn.App. 702, 704-707, 32 P.3d 1029 (2001); In re Personal Restraint of Parmelee, 115 Wn.App. 273, 276, 63 P.3d 800 (2003); State v. Parmelee, 121 Wn.App. 707, 709, 90 P.3d 1092 (2004).

² In DOC's Response to Petitioner's Motion for Temporary Restraining Order and Permanent Injunction (hereafter "DOC Response") counsel referred to supporting documentation provided in a companion matter, Mathieu, et al. v. Parmelee v. Brunson, et al., Clallam County Superior Court No. 06-2-00637-5 (Mathieu), which was presided over by the same judge, and asked the court to take judicial notice of those documents. CP 107 at fn.1. These exhibits consisted of two sworn declarations with attachments. In its oral rulings and written orders the court did take judicial notice of the documents and incorporated by reference its opinion and conclusions in Mathieu in entering its decision in this matter. See CP 13, 27, 36, 64, 70, 75; RP (10/13/06) at 21-23. The superior court acknowledged that the Mathieu Memorandum Opinion had been filed in this matter. RP (10/13/06) at 21; see also CP 127-139. However, courtesy copies of the exhibits referred to in DOC's Response were mistakenly filed duplicatively in the Mathieu file at docket #

Additionally, his first criminal trial on the arson charges was declared a mistrial after the Court discovered that Mr. Parmelee was in possession of materials with discrete personal information about the jurors who had been impaneled. The court found Mr. Parmelee had secreted this information in direct violation of the court's order that he not retain it. After his conviction Mr. Parmelee expressed extreme hostility toward the judge and subsequently sought the judge's photograph from the Washington State Bar Association. Id.

Mr. Parmelee has submitted numerous letters to DOC staff stating his intentions to misuse information he receives about DOC staff. He has also repeatedly stated slanderous information and indicated his intent to endanger the well-being of DOC employees and their families. CP 92, 107-08; RP (10/13/06) at 11.

On July 20, 2005, Mr. Parmelee wrote a letter to DOC Secretary Harold Clarke in which he referred to former CBCC Superintendent Sandra Carter as an "anti-male . . . lesbian," and Associate Superintendent

44 and appear in the Mathieu Clerk's Papers at 64-91 currently on appeal before this court in cause number 35469-1-II. Review of the Mathieu Clerk's Paper's demonstrates that the documents were intended to be filed in this case. See Fax Cover Sheet Comments at CP 64. Through counsel, DOC has provided written notification to the Clallam County Superior Court Clerk of this mistake and requested that the lower court correct the error in filing.

DOC moved to consolidate these two cases on appeal and in the alternative to supplement the record in this matter with the record in Mathieu because of the documentary overlap in the two cases. This court's commissioner denied the motion in

John Aldana as “an antagonist.” CP 93, 108; RP (10/13/06) at 11. He also told Secretary Clarke, “I wanted your thoughts on this so I can conclude a series of media releases I have planned about CBCC.” CP 93, 108; RP (10/13/06) at 11-12. In that same letter, he also stated: “Having a man-hater lesbian as a superintendent is like throwing gas on already smouldering [sic] fire. But before I begin my series of press release[s], I believe a comment and exchange of ideas from you is only fair.” CP 93, 108; RP (10/13/06) at 12.

On October 8, 2005, Mr. Parmelee wrote a letter to CBCC Superintendent Carter which stated,

I have initiated investigators to possibly interview your neighbors, photograph your home and conduct a detailed due diligence into actual or potential parties or witnesses to lawsuits. Some of the information will be interpreted and posted on the internet to make it easier for others to sue you people also, and to let the public know what type of people their taxes pay.

In this letter, he went on to say, “I already know some of your home addresses (for a dollar each) and now await the video and photographs. You want to conduct yourselves like official crooks, you deserve the publicity that comes with it.” Finally, he stated: “[this letter] is intended to simply put you on notice so you won’t jump to the wrong conclusion

an order dated December 20, 2007. The Department is moving to revise the commissioner’s order.

when you see a photographer or video camera around yours [sic] or your staff's homes." CP 93, 108; RP (10/13/06) at 12-13.

On March 19, 2006, CBCC staff confiscated from Mr. Parmelee's cell a letter addressed to Maxwell Tomlinson of Max Investigations, Seattle. In that letter, Mr. Parmelee refers to past and future plans to harass CBCC staff by sending people on his behalf to the homes of correctional employees or to follow them, indicating, "...I'll have to call through another as we've done before. As usual, bill me through the usual source, up to \$2,000.00 per lot that I will pre-approve." Mr. Parmelee listed in detail what he wanted from Mr. Tomlinson for that \$2,000.00 "per lot": "Several prison staff are defendants to lawsuits and I want them followed and photographed, and all the public records you can find, including SS's, DCs, and vehicle licenses, codes and pictures of them, their homes, and vehicles." Mr. Parmelee then identifies 20 DOC employees who he wants followed. He then states:

I also propose that when we get ready to move forward, that your material not only be posted on the internet for other prisoners to access, but to hire some legal talent to enforce security and to prevent these inbred bullies from causing too much more trouble. Be careful, as we're dealing with people whose thought processes are defective and base. You may need a few bullies of your own. CR-4 service will be required.

CP 93, 108-09; RP (10/13/06) at 13-14.

On July 9, 2006, Mr. Parmelee again wrote a letter to CBCC Superintendent Sandra Carter informing her that he had hired picketers to picket the homes of DOC employees. He states: "\$2,000.00 per weekend to picket peacefully some DOC staff's residences and hand out information brochures about DOC employees to the neighbors." He also states: "These pickets are planned for Olympia DOC people whom may be in the dark about what's going on here and how bad things really are. They are also planned to occur at your CBCC staff's residences, which one(s) and when will not be revealed until a day or so in advance to the media." CP 93, 109; RP (10/13/06) at 15.

On July 11, 2006, Mr. Parmelee received a serious infraction at CBCC. The infraction report states:

On 7-11-06 at approx. 1955 I was processing mail for Inmate Parmelee, Allan...Inmate Parmelee passed me a paper containing the names of several DOC staff members. Inmate Parmelee then stated, (These are the flyers that I am having printed and passed out tomorrow and if you don't stay out of it your dead bitch will be on one of them.)

CP 329. The flyer Mr. Parmelee gave to the correctional officer is entitled "SEXUAL PREDATORS [sic] IN YOUR NEIGHBORHOOD" and has the

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names of DOC employees on it listed as “sexual predators” [sic].³ Above each DOC employees’ name is a drawing of a picture of that person. Mr. Parmelee indicates: “Insert actual photos here as designated”, indicating that the photographs of those staff members are to be inserted in the flyer. The flyer states, in relevant part, “These sexual predators [sic] also work at the Clallam Bay prison where homosexual assaults are encouraged against prisoners by Sandra Carter, the gay feminist superintendent. Protect Your Families And Children. Demand The DOC Fire These People Now Before You Become Their Next Victim.” CP 94, 109-110; RP (10/13/06) at 15-16.

From July 2004 to August 2006, Mr. Parmelee submitted 95 public disclosure requests to DOC.⁴ CP 94, 110; RP (10/13/06) at 16-17. Of those requests, there are numerous pending requests in which Mr. Parmelee has requested the disclosure of employee badge photographs of over 2,525 DOC employees who are employed at five different institutions as well as DOC’s headquarters. Mr. Parmelee has also requested personnel files of numerous employees throughout the state, employed by DOC. Id. Additionally, injunction orders have been entered against Mr. Parmelee’s requests for records in two other counties, restraining DOC

³ Mr. Parmelee’s draft flyer is found at CP 155.

⁴ To date, Mr. Parmelee has submitted over 400 public records requests to DOC.

from providing Mr. Parmelee personnel files or photographs of individual employees.⁵ Id.

B. INJUNCTION PROCEEDINGS.

Mr. Parmelee admits submitting a public records request for records concerning 13 CBCC personnel, 11 of which are parties to this action.⁶ CP 55. In deciding the Mathieu matter, Judge Williams dismissed all CBCC personnel except Laura Mathieu as she was the only individual who had signed that petition. CP 127. The remaining petitioners, along with numerous⁷ other CBCC personnel filed a renewed petition seeking the relief awarded to Ms. Mathieu in that proceeding. CP 208-211.

On October 10, 2006, Mr. Parmelee filed a notice of appearance along with a motion to (1) re-note the show cause hearing, (2) permit Parmelee to intervene, (3) replace DOC Respondents as party, and (4) for

⁵ Eric Burt, et al. v. Washington State Department of Corrections, Walla Walla County Superior Court No. 05-2-00075-0. DOC v. Allan W. Parmelee, Thurston County Superior Court No. 06-2-01406-2 (superior court order restricting Parmelee from receiving DOC staff photos under his public records request); and DOC v. Allan W. Parmelee, Washington Supreme Court No. 79856-7 (pending motion for direct review of the Thurston County injunction order).

⁶ This request was for records pertaining to Gerald Banner, Danny Ahrens, John Bick, Joey Reames, Gregory Sandness, Thomas DeLong, Randy Blankenship, Jerry Matteri, Nathan Cornish, Laura Mathieu, Richard Foulkes, Gary Judd and Robert Padgett. CP 55; See also Exhibit 2, Attachment A to DOC's Response mistakenly filed in the Mathieu matter as referenced in fn. 2, supra and found in the Mathieu Clerk's Papers at 75.

⁷ The signature page of the final petition appears to contain 74 signatures. CP 208-211.

in camera review of records. CP 116-121. Mr. Parmelee did not serve this pleading on the Department and it is unknown whether he served the motion on any of the Petitioners. Furthermore, the record does not reflect whether the motions were properly noted or confirmed according to local rules⁸ and it appears that the court never ruled on the motions.

On December 12, 2006, DOC filed a Response to Petitioners' Motion for Temporary Restraining Order and Permanent Injunction. CP 105-114. DOC averred that it had received numerous public records requests seeking personal and personnel information regarding the petitioners. CP 106. DOC did not oppose Petitioners' motion. Id. Contrary to Mr. Parmelee's assertion at Br. of Appellant 6, DOC did submit declarations which had previously been filed in the Mathieu matter and asked the court to take judicial notice of those documents. See CP 107 at fn. 1. These documents were filed via facsimile and were mistakenly filed, duplicatively, in the Mathieu file. See fn. 2, supra.

On October 13, 2006 the court held a show cause hearing on Petitioners' motion. CP 103; RP (10/13/06). Counsel for DOC informed the court of Mr. Parmelee's request to appear at the hearing and stated "I would object to that as he is not a party to this action. But I certainly leave that in the Court's discretion." RP (10/13/06) at 6. The court stated "[a]s

⁸ See Clallam County Superior Court LCR 77(k)(5).

I look at the statute I don't believe that he is a necessary party to this action in its present configuration so I will not contact him." Id.

The Court then heard extensive argument from two Petitioners detailing Mr. Parmelee's harassing activities toward DOC personnel and abuse of the public records process. RP (10/13/06) at 9-20. DOC did not oppose the motion citing the court's authority to enjoin disclosure under RCW 42.56.540 and acknowledging Mr. Parmelee's well documented and clearly stated purpose to harass DOC personnel through the public disclosure process. RP (10/13/06) at 20-21. The court asked counsel for DOC whether "Mr. Parmelee had made the same or similar requests that he made in connection with [the Mathieu] litigation" to which counsel responded "[t]hat is correct." Id. at 22.

The court then entered a colloquy adopting by reference his previous opinions and conclusions in Mathieu. Id. at 21, 23. The court's oral ruling specifically referred to the privacy and law enforcement exemptions⁹ relied upon in entering the Mathieu injunction and granted Petitioners' motion. Id. at 22-25.

On October 23rd and October 24th, 2006, the Court entered two virtually identical written orders granting Petitioners' motion for a

⁹ These exemptions are codified at RCW 42.56.230(2)(privacy) and RCW 42.56240(1)(law enforcement).

permanent injunction.¹⁰ CP 70-73, 75-78. The Court's Orders specifically referred to Exhibits 1 and 2 attached to Third Party Defendants Response to Motion for Temporary Restraining Order and Permanent Injunction filed in Mathieu, et al. v. Parmelee v. Brunson, et al., Clallam County Superior Court No. 06-2-00637-5 as evidence relied on in entering its decision. CP 70, 75; See fn. 2, supra.

The court entered the following findings of fact in both orders:

1. Allan Parmelee is, and has been at all times relevant to this action, a Washington State inmate;
2. Allan Parmelee has submitted public disclosure request, pursuant to the Public Records Act (PRA) RCW 42.56, *et. seq.*, requesting personal information and personnel records of Petitioners;
3. Petitioners are employees of Respondent, Department of Corrections employed at Clallam Bay Corrections Center;
4. Respondent, Department of Corrections, is a law enforcement agency whose records are subject to exemption under the PRA.
5. Allan Parmelee has submitted these public disclosure requests to gather information to harass, slander, and endanger Petitioners and their families;
6. Allan Parmelee's requests are not being made to gather information about governmental functions in accordance with the purpose of the PRA;

¹⁰ The orders differed only slightly in the wording of handwritten notations in Finding of Fact 7 referring to the privacy and law enforcement exemptions of the PRA. CP 71, 76.

7. Producing the documents requested by Allan Parmelee is not in the public interest; and are exempt from disclosure under the PRA for privacy and law enforcement reasons;¹¹

8. Producing the documents requested by Allan Parmelee will substantially and irreparably damage the Petitioners; and

9. Producing the documents requested will substantially and irreparably interfere with the vital governmental functions furthered by Respondent, Department of Corrections.

CP 76.

The court entered the following conclusions of law:

1. The production of records requested by Allan Parmelee is not in the public interest and will substantially and irreparably damage the Petitioners and will substantially interfere with the vital governmental functions furthered by Respondent;

2. Responding to Allan Parmelee's public disclosure requests is not in the public interest;

3. Petitioner's (sic) are entitled to injunctive relief from Respondent's abusive requests pursuant to RCW 42.56.540 which states in relevant part, "The examination of any specific record may be enjoined if, upon motion and affidavit by an agency . . . the superior court for the county in which the movant resides or 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.**"

¹¹ Subsequent orders entered on October 24, 2006 and November 15, 2006 contained the following Finding of Fact 7: "Producing the documents requested by Allan Parmelee is not in the public interest; would violate privacy rights of the Petitioners and would interfere with a law enforcement duty." CP 36, 71.

CP 72, 77 (emphasis in original).

After the orders were issued, on November 6, 2006, Mr. Parmelee renewed his motion to intervene and for in camera review.¹² CP 53-59. In a memorandum opinion, the Court denied this motion as untimely and stated that Mr. Parmelee had a fair and full opportunity to litigate the issues in the companion case of Mathieu. CP 63-65.

The Court held another hearing on October 18, 2006, to add additional DOC employees whose signatures did not appear in the initial petition. RP (10/18/06). The Court entered a final order on November 15, 2006, virtually identical to the previous orders but containing 131 named petitioners in the caption. CP 34-38.

On December 15, 2006, the Court entered another virtually identical order in response to a motion for clarification from the parties defining personal information as “information pertaining to a staff person’s home, property, livelihood, physical body, character and/or family.” CP 15. All of the orders specified that Respondent DOC:

shall only release information related to Petitioner’s pay grade and pay scale. Respondent shall also release Petitioners’ training records, if requested, for the 24 months immediately preceding the request and only if the release of those records will not have an impact on Respondent’s

¹² This pleading’s signature block is dated October 25, 2006, but was not filed until November 6, 2006. CP 58.

ability to function appropriately in a law enforcement capacity.

CP 15, 37, 72, 77.

IV. STANDARD OF REVIEW

Review of an injunction issued pursuant to the Public Records Act is de novo. Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 35, 769 P.2d 283 (1989); Dragonslayer, Inc. v. Washington State Gambling Comm'n., 161 P.3d 428, 431-32 (2007). See also RCW 42.56.550(3). Where, as here, the record consists only of affidavits, memoranda of law, and other documentary evidence, “the appellate courts stands in the same position as trial court.” Progressive Animal Welfare Soc’y v. Univ. of Washington, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). In this situation, the reviewing court is not bound by the trial court’s factual findings on disputed facts. Id. at 253. However, the appellate court “need only review findings to which error has been assigned and findings to which no error is assigned are verities on appeal. Dickson v. Kates, 132 Wn. App. 724, 730, 133 P.3d 498 (2006). Mr. Parmelee has not assigned error to any specific findings of fact by the trial court, and his limited argument challenging the trial court’s findings of fact cite to nothing in the record supporting contrary findings. See Br. of App. at 2,
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24-25. The PRA requires that that statutes be “liberally construed” and exemptions “narrowly applied”. RCW 42.56.030.

V. ARGUMENT

A. **THE SUPERIOR COURT PROPERLY DENIED MR. PARMELEE’S ATTEMPT TO INTERVENE BECAUSE HE WAS NOT AN INDISPENSABLE PARTY TO RESOLUTION OF THE ISSUES AND HIS MOTION WAS UNTIMELY.**

Mr. Parmelee argues that that the Court erred in failing to permit Mr. Parmelee to intervene as an indispensable party under CR 19. Br. of Appellant at 15-17. This argument fails.

There are four requirements that must be satisfied before intervention may be allowed: (1) timely application for intervention; (2) an applicant claims an interest which is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant’s ability to protect the interest; and (4) the applicant’s interest is not adequately represented by the existing parties. Westerman v. Cary, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). All four of these requirements must be met to justify reversal. Id. at 303.

“Timeliness is a critical requirement of CR 24(a).” Kreidler v. Eikenberry, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); Martin v. Pickering, 85 Wn.2d 241, 243, 533 P.2d 380 (1975). Abuse of discretion is the proper standard of review for a trial court’s determination of

timeliness. Kreidler, 111 Wn.2d at 832. Abuse of discretion occurs when an order is manifestly unreasonable or based upon untenable grounds. Washington State Physicians Ins. Exchange v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A reviewing court will find abuse ‘only when no reasonable person would take the position adopted by the trial court.’” Id.; Board of Regents v. Seattle, 108 Wn.2d 545, 557, 741 P.2d 11 (1987).

Mr. Parmelee untimely moved to intervene after entry of the Court’s Orders on October 23, 2006 and October 24, 2006. Mr. Parmelee contends that his first motion to intervene as an indispensable party was filed on October 10, 2006. However, it is evident that this motion was never ruled on and appears to have not been acknowledged by the court. It is unknown whether this was due to a defect in noting or confirmation pursuant to Local Rule but the hearing was not docketed. See Clallam County Superior Court LCR 77(k)(5). This is not entirely surprising given Mr. Parmelee’s failure to serve the motion on the Department. See CP 121.¹³ Thus, even if the motion had been properly docketed, DOC would

¹³ Counsel for DOC did not receive this motion and the certificate of service does not contain the name or address of any parties as contemplated by CR 5(b)(2)(B). As noted in correspondence from counsel to this court dated February 27, 2007 and March 21, 2007 it is not uncommon for Mr. Parmelee to fail to serve necessary papers on counsel for DOC. See Correspondence Spindle.

not have had notice required under the civil rules rendering the motion hearing defective.

Division III of this court has recently held, in another case in which Mr. Parmelee attempted to intervene in a PRA enjoinder action under CR 19(a) and CR 24(a), that he “was not needed for a just adjudication nor was he needed in equity and good conscience to proceed.” Burt v. DOC, __ Wn. App. __, 170 P.3d 608, 611 (2007). The Court noted that, under RCW 42.56.040, the party seeking to prevent disclosure has the burden to prove that the public record should not be disclosed and that public documents are presumed viewable by the public. Id. The Court reasoned that “[j]oining Mr. Parmelee as a party would not affect the employees’ burden to overcome this presumption. And, Mr. Parmelee’s disclosure request and his interest as a member of the public were easily apparent to the trial court.” Id.

This holding is supported by the plain language of RCW 42.56.540 which only references the agency or “a person who is named in the record or to whom the record specifically pertains.” The statute is silent as to what role, if any, the records requestor, should have in the enjoinder process. The statute does not require the movant to serve notice on the requestor or to take any other steps to affirmatively bring the requestor into the action. Burt is controlling in this case and the Court should apply

the holding in Burt, decided in the exact same context as the case at bar, in affirming the superior court's denial of Mr. Parmelee's motion to join as an indispensable party.

Accordingly, this court should hold that the trial court properly denied Mr. Parmelee's intervention under both CR 19(a) and CR 24(a).

B. THE SUPERIOR COURT PROPERLY ENJOINED THE DEPARTMENT FROM RELEASING THE PERSONAL AND PERSONNEL RECORDS OF CBCC EMPLOYEES.

1. The Superior Court Retains The Authority To Grant Injunctive Relief To Protect The Rights Of Litigants.

This Court has inherent authority to issue injunctions. CR 65. "Sitting in equity, a court may fashion broad remedies to do substantial justice to the parties and put an end to litigation." Hough v. Stockbridge, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) (citations and inner quote omitted). The civil rules govern court action taken under the Public Records Act. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005). In Washington, a court may enter an injunction upon the petitioner's showing that: (1) a clear legal or equitable right exists; (2) there exists a well-grounded fear of immediate invasion of that right; (3) that the acts complained of are or will result in actual and substantial injury; and (4) that the relative equities of the parties in the public interest favor granting the injunction. Rabon v. City of Seattle, 135

Wn.2d 278, 957 P.2d 621 (1998). Because injunctions are within the equitable powers of the court, the court should examine these criteria in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate. Id. at 284.

The Public Records Act (PRA) strongly encourages release of public records. See RCW 42.56.030. However, the PRA also provides that agencies may adopt and enforce reasonable rules and regulations to protect public records from damage and disorganization, and to prevent excessive interference with other essential functions of the agency. RCW 42.56.100. With these provisions in mind, it seems reasonable that the agencies required to disclose under this chapter should be protected from requests made for harassment of agency staff.

In addition to specific exemptions, the Public Records Act contains a process whereby an agency or person named in a record can seek an injunction against disclosure. RCW 42.56.540 reads in pertinent part:

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.

The superior court properly enjoined the Department, using the above statutory standard. Based upon Mr. Parmelee's manifest efforts to utilize his requests for documents to intimidate, harass or defame individual employees, the superior court properly determined disclosure would not be in the public interest and would substantially and irreparably damage both Petitioners personally and the Department's vital governmental functions. CP 15, 37, 72, 77. The record supports this conclusion.

Mr. Parmelee has the right, under Chapter 42.56 RCW, to request public records. He also has the right to access the courts, but even that right is subject to limitations. See Lewis v. Casey, 518 U.S. 343, 355, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (concluding an inmate's ability to access the courts "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.") An inmate's right of meaningful access to the courts may be limited by the court if he abuses that right. Cello-Whitney v. Hoover, 769 F. Supp. 1155 (W.D.

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Wash. 1991).¹⁴ Numerous other federal courts have also reached the conclusion that restrictions on legal access are necessary in egregious cases. Clinton v. U.S., 297 F.2d 899 (9th Cir.1961), cert. denied, 369 U.S. 856, 82 S. Ct. 944, 8 L. Ed. 2d 14 (1962) (issuance of an injunction against further prosecution of litigation concerning an invalid patent affirmed); Matter of Hartford Textile Corp., 681 F.2d 895 (2nd Cir.1982), cert. denied, 459 U.S. 1206, 103 S. Ct. 1195, 75 L. Ed. 2d 439 (1983) (injunction issued against continuance of frivolous and vexatious litigation affirmed); Abdullah v. Gatto, 773 F.2d 487, 488 (2nd Cir.1985) (“A

¹⁴ In Cello-Whitney, the facts were egregious, but not nearly as egregious as the facts in the present case. Cello-Whitney, a prisoner and litigant, abused his right to access the courts by filing over 50 actions in federal courts in an eight year period, filing 90 motions with the court in 17 months, and stating explicitly to the court that his intention was to “force the State of Washington to deal with him on his own terms”. Id. at 1158. The court included a four-part test that a court should engage in before limiting access to the courts. Before limiting access to court, an order must:

- 1) Give the litigant adequate notice to oppose the order before entry;
- 2) Present an adequate record for review by listing the case filings which support the order;
- 3) Include substantive findings as to the frivolous or vexatious nature of the litigants filings; and
- 4) Be narrowly drawn to remedy only the plaintiff’s particular abuses.

Id. In Cello-Whitney’s case, the court concluded that the appropriate remedy was to place specific limits on his ability to access the courts in the future. Those limits consisted of limiting the number of *in forma pauperis* (IFP) applications Cello-Whitney could file to three per year, requiring Cello-Whitney to provide evidence to the court to support his claim before IFP status is granted, requiring payment of filing fee if Cello-Whitney chose to proceed without applying for IFP status, and requiring approval of the court before any claim could be filed with the court. Id. at 1160.

district court not only may but should protect its ability to carry out its constitutional functions against the threat of onerous, multiplicitous, and baseless litigation.”); Safir v. United States Lines Inc., 792 F.2d 19 (2nd Cir.1986) cert. denied, 479 U.S. 1099, 107 S. Ct. 1323, 94 L. Ed. 2d 175 (1987) (injunction limiting access to courts without leave of the court affirmed).

2. **Neither the Department Nor This Court Is Required To Assist An Inmate’s Harassment Of Department Employees.**

Harassing inmate behavior cannot be ignored simply because it arises in the context of public disclosure. After disclosure, First Amendment considerations may significantly inhibit control regarding the dissemination and use of public documents. See Sheehan v. Gregoire, 272 F. Supp. 2d 1135, 1149-50 (W.D. Wash. 2003) (Washington statute violated First Amendment principles by restricting against internet distribution of police officer’s names obtained through public disclosure).¹⁵ The court may weigh all of the facts relevant to determining whether an exemption applies, and whether to enjoin release of the records under the standard for injunctive relief set forth in RCW 42.56.540.

¹⁵ Sheehan is not a prison case. Its holding is tempered by the United States Supreme Court’s decision in Turner v. Safley, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). However, Sheehan demonstrates the additional legal challenges posed to prison officials if the same type of private staff information is obtained by an inmate through public disclosure and then disseminated within the prison population.

Allowing for consideration of the statements and conduct of an inmate in their custody is consistent with the normal role and function of the Department. See RCW 72.09.010;¹⁶ RCW 42.56.100 (“Agencies shall adopt and enforce reasonable rules and regulations, . . . consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency”). Even in the context of public disclosure, the maintenance of prison safety remains a priority. See Sappenfield v. Dep’t of Corrections, 127 Wn. App. 83, 88, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006) (recognizing that public disclosure in the prison context is not the usual case).

Washington courts have recognized that the injunction statute, RCW 42.56.540, may not operate as an exemption to public disclosure. *PAWS*, 125 Wn.2d at 260, 261 n.7. However, Washington courts have not addressed whether, and to what extent, relief may be sought under RCW 42.56.540 to preclude harassment, and whether agencies, individuals, or

¹⁶ RCW 72.09.010, describing the legislative intent of the statutory scheme establishing the Department of Corrections, states:

It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives. . . . The system should ensure the public safety. The system should be designed and

even the courts are powerless when an individual, especially a prison inmate, engages in a pattern of harassment through their public disclosure activities, whether or not an exemption or series of exemptions applies.

Under RCW 42.56.540, the court may enjoin the inspection of any specific public record if it 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”.

In King Cy. v. Sheehan, 114 Wn. App. 325, 57 P.3d 307 (2002), for example, the court directed disclosure to the requestors of a list of names of public employees, disclosure of which did not infringe upon the employees’ right to privacy, despite the County’s assertion that the information *could be used* in a way that impacted the safety of the employees. Id. at 339-40. This case is significantly different from the facts in Sheehan, 114 Wn. App. at 339-40, because the disclosure of a list of names does not equate with the release the photographic images of employees, or other personnel records, in light of a inmate’s demonstrated pattern of harassment against prison staff. More importantly, Mr. Parmelee provided in detail his intention to disseminate the photographic images in conjunction with false and highly offensive accusations. See CP

managed to provide the maximum feasible safety for the persons and

215, 233-234. The Department is not responding to a hypothetical set of events or potential use of the records. Rather, Mr. Parmelee is asking that the Court be prohibited from considering his stated purpose in acquiring and using photographs and other public records regarding Department personnel.

More recently, Division III of this Court reversed a superior court finding that the City of Mesa substantially complied with the PRA partially due, in part, to the requestor's alleged harassment of city officials. Zink v. City of Mesa, 140 Wn. App. 328, 166 P.3d 738 (2007). This court determined that the superior court erred in determining that the city substantially complied with the Public Records Act. Zink, 166 P.3d. 740. In response to the city's claim of harassment by the requestors, this Court determined that mere numbers of requests submitted to the city and threats to sue were insufficient to support a finding of unlawful harassment under RCW 10.14.020 (defining unlawful harassment is defined as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses or is detrimental to such person, and which serves no legitimate or lawful purpose"). Id. at 744-745. Zink dealt specifically with the city's failure to strictly comply with the PRA on the requestor's motion to show cause alleging that the city

property of the general public, the staff, and the inmates.

wrongfully withheld records. Id. at 740-41. However, Zink did not address the specific issue of whether an individual, about whom records pertain, can support a claim for injunctive relief against the records holder based on the manifest harassment evident in this case. Id.

3. **The Superior Court's Action In This Case Was Proper Based on Parmelee's Background and Stated intent to Harass and Defame the Petitioners.**

The record in this case goes well beyond what was occurring in Zink, based on a number of factors, including: (1) that the request is submitted by an offender convicted of stalking related violent crimes; (2) his written communications have included his plans to disseminate flyers in the neighborhoods slandering the names of prison employees, using the information he has obtained through his public disclosure efforts; (3) he has actively recruited individuals to engage in confrontations with CBCC staff members in their homes; and (4) that he has submitted such requests for no other purpose, but to harass and to vex CBCC staff.

Even though a court ordinarily would not consider the use to which specific records will be put in determining whether to enjoin their release under the Public Records Act, such a conclusion is not supported under the unique facts of this case. As the Court of Appeals observed in Sappenfield:

Matters affecting a prison's internal security are generally the province of prison administrators, not the court. Turner v. Safley, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Prison inmates do not enjoy privileges of the public community—they are imprisoned. Mithrandir v. Dep't of Corr., 164 Mich. App. 143, 147-48, 416 N.W.2d 352 (1987).

Id. at 88.

The Wisconsin Court of Appeals reached an analogous result in State ex rel. Morke v. Record Custodian, Dept. of Health & Soc. Svcs., 159 Wis.2d 722, 465 N.W.2d 235 (Ct. App. 1990). The court upheld a prison records custodian's decision to refuse an inmate's request for the names, home addresses, and published home telephone numbers of all persons employed at his assigned prison. The court's decision rested on a legal standard analogous to the language contained in RCW 42.56.540 and the language used by the superior court in its conclusions:

We conclude that the reasons stated by Gilpin for denying Morke access—concern for the safety and well-being of the prison staff and their families and for institutional morale—outweigh the general rule in favor of access to government records and would constitute an unwarranted invasion of the employees' personal privacy. Indeed, Fox Lake's superintendent was forced to remove local telephone directories from the library after institution employees complained that they were being harassed by inmates. The institution's "vital interest in ... ensuring the safety of all—both within and without the prison boundaries" would be jeopardized if Morke were given what he seeks. Additionally, persons may be discouraged from serving as institution employees if they know the public would be provided with personal information about them on request.

Morke, 465 Wis.2d at 236-37 (citation omitted). The court in Morke reached this decision even though the offender had been released from prison and he could obtain the information through other means. Id. at 237 (“Although the department cannot prevent him from gathering the information he seeks elsewhere, the department is not required to help him complete a project inimical to institutional security.”) (citation and inner quotation omitted).

Federal and state courts have consistently deferred to prison officials regarding matters affecting prison management; that deference has increased over the last thirty years. In Turner, the United States Supreme Court held that “when a prison regulation impinges on inmate’s constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Turner, 482 U.S. at 89, 107 S. Ct. at 2261. In arriving at this test, the Turner Court relied on separation of powers considerations by revising earlier tests applying a stricter level of scrutiny. The Court’s objective in Turner was to ensure that “prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.” Id. at 89, 107 S. Ct. at 2261-62 (quoting Jones v. North Carolina Prisoners’ Union, 433 U.S. 119,

128, 97 S. Ct. 2532, 2539, 53 L. Ed. 2d 629 (1977)). The Turner Court also concluded:

Subjecting the day-to-day judgments of prison officials to an inflexible analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.

Id. (quoting Procunier v. Martinez, 416 U.S. 396, 407, 94 S. Ct. 1800, 1808, 40 L. Ed. 2d 224 (1974)).

Here, the Public Records Act does not require prison officials to ignore Mr. Parmelee's stated intentions regarding his use of the records, along with his well-established patterns of practice. However, where the Act so strongly favors disclosure over exemption and penalizes agencies for violations of its terms, it does not preclude a prison employee concerned about his or her own safety and that of his or her family from seeking protection from disclosure of such records under RCW 42.56.540. Despite the deference given prisons under the Turner standard, it is unclear whether and to what extent use of the Act is impacted by one's status as a prisoner. See Sappenfield, 127 Wn. App. at 81 (because they are incarcerated, prisoner access to records may occur "by means of copies mailed upon payment of a reasonable fee."). While it is conceivable that

prison mailroom officials could intercept and prevent a prisoner from receiving requested documents received under the Act, such action should not be the only option available under the law. See Livingston v. Cedeno, 135 Wn. App. 976, 980, 146 P.3d 1220 (2006), review granted, 161 Wn.2d 1014 (2007) (dismissing inmate's Public Records Act claim where the Department properly and timely responded to inmate's public record request, but the response was rejected for receipt by the prisoner from the mailroom as contraband).¹⁷

In light of the standards discussed above, the superior court properly considered Mr. Parmelee's criminal history, his background as an inmate, and the pattern of harassment directed at all of the employees of CBCC and at other institutions. The superior court's entry of the order of injunctive relief was therefore proper.

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¹⁷ However, as the dissent in Livingston demonstrates, it remains unclear and subject to review by the Washington Supreme Court whether the PRA prevents prison officials from rejecting items obtained by inmates as non-exempt under public disclosure. Livingston, 135 Wn. App. at 982-83 (Armstrong, J. dissenting) (rejecting DOC's argument that the prison's mailroom authority extends to non-exempt public records requested by an inmate). Furthermore, an inmate could choose to avoid the prison mailroom entirely by requesting that the information be sent to a relative or friend outside the prison.

C. THE COURT PROPERLY TOOK JUDICIAL NOTICE OF DOCUMENTS FILED IN THE COMPANION MATHIEU CASE AND THIS EVIDENCE ALONG WITH UNCHALLENGED FINDINGS OF FACT SUPPORT THE COURT'S CONCLUSIONS OF LAW.

Mr. Parmelee argues that the parties did not prove that the records at issue pertained to the Petitioners and that the trial court's findings of fact are not supported by the record. Br. of Appellant at 19, 24. However, Parmelee has failed to challenge any specific findings of fact and thus the court's findings are verities on appeal. Moreover, the court properly took judicial notice of documents entered in a companion matter over which the same judge presided and incorporated by reference into the case at bar.

The appellate court "need only review findings to which error has been assigned and finding to which no error is assigned are verities on appeal." Dickson v. Kates, 132 Wn. App. 724, 730, 133 P.3d 498 (2006). Parmelee has failed to assign error to any specific findings. See Br. of Appellant at 2. At most, Mr. Parmelee refers in the argument section of his brief to findings of fact 5 through 9 in the Court's Order dated December 15, 2006. Br. of Appellant at 25. Thus, at the very least, findings of fact 1 through 4, are verities on appeal including the fact that Parmelee submitted public disclosure requests for personal information and personnel records of Petitioners. See FOF 2 at CP 13, 36, 71, 76. Not only did the parties stipulate to this fact, See CP 106; RP (10/13/06) 22:5,

but Parmelee himself acknowledges that he requested records for 13 CBCC personnel. CP 55. Thus, Parmelee should be judicially estopped from asserting otherwise for at least those petitioners acknowledged in his own motion at CP 55.

Moreover, the court appropriately took judicial notice of documents from the Mathieu case in which it presided over the same issues and most of the same parties. These documents were submitted with the DOC's Response to Petitioner's Motion although the courtesy copies supplied to the court were misfiled. See fn. 2, *supra*. These documents were not required to be filed as they were public documents and the proper subject of judicial notice. State v. Hoffman, 116 Wn.2d 57, 67, 804 P.2d 577 (1991). These documents had already been submitted to the very same judge and thus were "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). The court acknowledged that Mathieu and Delong were companion cases and that they contained identical issues and even incorporated by reference the opinion entered in Mathieu. CP 27, 64; RP (10/13/06) 21, 24. Thus, the two matters are at least "engrafted, ancillary, or supplementary" to one another and judicial notice was

appropriate. Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952).

The Court relied on facts that poignantly demonstrate Mr. Parmelee's manifest intention and stated purpose to abuse the public records process, to harass, and to commit tortious conduct against DOC personnel. Thus, the Court had sufficient evidence to support its findings and conclusions.

D. MR. PARMELEE HAS NOT PREVAILED; CONSEQUENTLY, HE IS NOT ENTITLED TO PENALTIES AND FEES FROM THE DEPARTMENT.

Mr. Parmelee requests attorney fees, costs and penalties be awarded to him pursuant to the Public Records Act. The attorney fees section of the Public Records Act provides in pertinent part:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4).

However, Mr. Parmelee has not prevailed against the Department in an action in court seeking to inspect or copy a public record, under RCW 42.56.550. This matter is purely an enjoinder action against the Department by DOC personnel pursuant to RCW 42.56.540 and there has been no attempt to compel disclosure under RCW 42.56.550. The

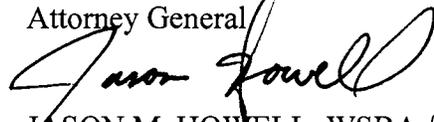
superior court properly enjoined disclosure of records to Mr. Parmelee. Therefore, he is not entitled to statutory penalties or attorney fees under the Public Records Act.¹⁸

VI. CONCLUSION

For all of the foregoing reasons, DOC Respondent respectfully requests that this court affirm the superior court's entry of the permanent injunction. If the Court concludes that the lower court committed error by not reviewing the responsive documents *in camera* to determine if exemptions apply, the appropriate remedy is remand to the lower court, not vacation of the permanent injunction.

RESPECTFULLY SUBMITTED this 16th day of January, 2008.

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¹⁸ If this Court determines that statutory penalties or fees should be imposed on the Department, the remedy is to remand this matter to the superior court to determine the amount to be assessed under the Public Records Act. Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 649, 115 P.3d 316 (2005).

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document, BRIEF OF RESPONDENTS DEPARTMENT OF CORRECTIONS on all parties or their counsel of record on the date below as follows:

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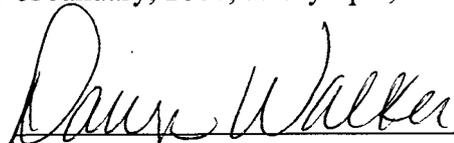
TO:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of January, 2008, at Olympia, Washington.



DAWN WALKER