No. 79856-7

SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF CORRECTIONS, Respondent-Appellee,

v.

ALLAN PARMELEE, Petitioner-Appellant.

REPLY BRIEF OF PETITIONER ALLAN PARMELEE

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor
No. 06-2-01406-2

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Parmelee
5215 Ballard Ave. NW, Ste. 2
Seattle, WA 98107
(206) 264-0643

ORIGINAL

TABLE OF CONTENTS

A. AMENDED ASSIGNMENTS OF ERROR 1

1. Assignments of Error 1

2. Amended Issues Pertaining to Assignments of Error. 1

C. ARGUMENT 2

1. The Public Records Act Clearly Requires The Reviewing Court To Defer To The Requestor, Not The Agency. 2

2. Any Claim That RCW 42.56.540 Permits A Generalized Prohibition Is Contrary To The Public Records Act 3

3. Pictures Are Not Private When There Is No Expectation Of Privacy. 7

4. Respondent Has Consistently Misrepresented Facts To Build A Case Against Mr. Parmelee 14

5. Respondent Attempts To Shift The Burden By Stating Mr. Parmelee Failed To Show His Statements About the Ten Individuals were True 16

6. The Requirement That The Agency Pay For Attorney's Fees And Costs On Appeal And The Trial Court Is Primarily Statutory 19

D. CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

Confederated Tribes v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998) 20

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002) 19

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978) 3, 4

In re Request of Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986) 4

Koenig v. Des Moines, 158 Wn.2d 173, 142 P.3d 162 (2006) 12-14

Kucera v. Dept. of Transportation, 140 Wn.2d 200, 995 P.2d 63 (2000) 6

Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 978 P.2d 481 (1999) 19

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1995) (PAWS) 3, 4

State v. Boyd; 137 Wn. App. 910, 155 P.2d 388 (2007) 11

State v. Glas; 147 Wn.2d 410, 54 P.3d 147 (2002) (en banc) 9, 10

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) 19

State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 553 P.2d 423 (1976) 6

Tiberino v. Spokane Cy., 103 Wn. App. 680, 13 P.3d 1104 (2000) .. 11, 12

Zink v. City of Mesa, ___ Wn. App. ___, 166 P.3d 738 (2007) 3

Statutes **Page**

RCW 42.17.010(11) 4

RCW 42.17.251 4

RCW 42.17.310 13

RCW 42.17.330 4

RCW 42.56.030 4

RCW 42.56.050 ..... 1, 7

RCW 42.56.280 5

RCW 42.56.540 ..... 1, 3, 4

RCW 42.56.550 19

RCW 9A.44.115 ..... 8, 9, 11

The Public Records Act (RCW 42.56 et seq.) ..... passim

A. AMENDED ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred in entering an order on January 19, 2007 when it granting the permanent injunction in accordance with RCW 42.56.540, based upon the Court's erroneous anticipation of the intended use of the requested documents.

2. The trial court erred in entering an order on January 29, 2007 when it denied Mr. Parmelee's motion for reconsideration based upon errors both in law and fact.

2. Amended Issues Pertaining to Assignments of Error.[1]

1. Should a court only look at the four corners of a document to determine if it meets an exception to the disclosure requirement of the Public Records Act or can the potential use of documents be considered?

2. Does RCW 42.56.540 by itself provide a statutory exemption in conjunction with the privacy definition in RCW 42.56.050?

3. Is the remedy for the potentially unlawful or tortious use of documents brought through the PRA or another remedy?

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[1]In the interests of more clarity, Petitioner submits an amended issues statement to more clearly match with the arguments put forth in his opening brief.

4. Did the trial court abuse its discretion when ruling on the facts of this case?

5. If Mr. Parmelee is the prevailing party on this appeal is he entitled to attorney's fees and costs from the Department of Corrections?

B. SUMMARY OF ARGUMENT

Appellant, Mr. Parmelee, will first show that our courts must defer to the requestor, not the agency. He will then show that the injunction statute does not permit a generalized exemption as claimed by Respondent. Mr. Parmelee will then show that the documents in question are not private.

Petitioner also addresses the irrelevant and often misrepresented facts presented by the Respondent and shows that the trial court's statement of facts was in error. Finally, Mr. Parmelee shows that when an agency itself uses an injunction to try to not disclose agency records to a requestor, attorney fees and costs are mandatory, not discretionary.

C. ARGUMENT

1. The Public Records Act Clearly Requires The Reviewing Court To Defer To The Requestor, Not The Agency.

Mr. Parmelee has argued that while review is de novo, the standard which must be applied by the viewing court is deference to the requestor.

The Department of Corrections claims, without authority, that Mr. Parmelee is without authority when he stated in his opening brief that deference is required to the requestor. While DOC may indeed be without authority, Mr. Parmelee certainly has authority. He cited various cases and statutes which, taken in totality, require deference. But this position is also logical. As Division III has stated:

> While agencies have some discretion in establishing procedures for making public information available, the provision for de novo review confirms that courts owe no deference to agency interpretations of the PDA, but are charged with determining when a duty to disclose exists and whether a statutory exemption applies. When a record request is subject to the PDA, the burden of proof is on the agency to establish the applicability of a specific exemption.

Zink v. City of Mesa, ___ Wn. App. ___, ¶ 9, 166 P.3d 738 (2007) (citing *Hearst Corp. v. Hoppe*, 90 2d 123, 130, 580 P.2d 246 (1978)). Thus, because the burden of proof is on the agency, deference must be shown to the requestor.

2. Any Claim That RCW 42.56.540 Permits A Generalized Prohibition Is Contrary To The Public Records Act.

The PRA requires a specific statutory exemption apply to specific requested records in order for an agency to refuse to those release those records. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d

243, 884 P.2d 592 (1995) (PAWS). In *PAWS*, this Court expressly found that

> any implication that section [RCW 42.17].330 (now RCW 42.56.540) creates an independent exemption for vital governmental interests is directly at odds with the Legislature's thrice-repeated demand that exemptions be narrowly construed. RCW 42.17.010(11); RCW 42.17.251 (now RCW 42.56.030); RCW 42.17.920. Further, such an interpretation, whether in dicta or not, replicates precisely the error of Rosier and ignores the legislative response to Rosier.

Id. at 261 n.7 (citing *In re Request of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986).

To permit an agency to claim seek relief from compliance with disclosure under RCW 42.56.540 without a specific exemption violates the legislative intent behind the Public Records Act. As was said in PAWS, "[t]he Public Records Act 'is a strongly worded mandate for broad disclosure of public records.' The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed." *PAWS*, 125 Wn.2d at 251 (quoting *Hearst,* 90 Wn.2d at 127.

It would be inconsistent with both legislative intent and the holding of *PAWS* to permit an agency to file an injunction and claim a non-enumerated exemption. This would simply eviscerate the Public

Records Act and go contrary to the directive of the Legislature charging agencies with conducting their affairs in the light of day.[2]

The Legislature took into account what defines vital governmental actions when developing this law. For example, 42.56.280 exempts various documents where "opinions are expressed or expressed or policies formulated or recommended." RCW 42.56.280. To create a new exemption goes directly against the tenants of open government and all PRA jurisprudence.

Even assuming, arguendo, that no enumerated exemption is required for an injunction, there must still be an extremely high burden which must be met by the agency before a court can grant its denial of records. The burden must exist to keep with the mandate that records be produced.

Under such a requirement, Respondent has failed to make a showing, and the arguments presented are conclusory. *See*, *e.g.* Brief of Respondent, p. 6. No evidence was produced which showed that a vital governmental function would be impaired. No evidence was produced

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[2]This can be especially critical in those agencies, like the Department of Corrections, where there exists an essentially closed society.

which established a nexus between the two small brochures and substantial and irreparable harm.

Our courts do not grant injunctive relief lightly "where there is a plain, complete, speedy and adequate remedy at law." *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (citing *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976). In *Kucera*, property owners sued to limit the speed of a ferry which passed by the beach front property of their homes. The trial court granted the injunction. *Kucera*, 140 Wn.2d at 203-207. The trial court failed to consider in its opinion whether there was a sufficient remedy at law. *Id.* at 207.

After the appellate court's consideration of the case, it was remanded for several reasons, including the fact that the trial court failed to consider whether or not there was a proper remedy at law. The *Kucera* court stated that

> [c]ourts have generally found remedies to be inadequate in three circumstances: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature.

Id. at 210 (citation omitted). Because a sufficient remedy exists for any slander or defamation, the injunction must not stand.

Furthermore, not one individual mentioned in the brochures filed a lawsuit alleged Mr. Parmelee's statements were slanderous or libelous. There has been no discovery on the issue of the truth or falsity of the proposed statements by any party. Respondent acknowledges this basic and simple fact that the case "is not a tort action for damages, it is an injunction under the Public Records Act . . ." Brief of Respondent, p. 17-18 fn. 6. Because the PRA provides for injunctive relief only when disclosure of a record would violate an person's right to privacy, the issue of the truth or falsity of any statements Mr. Parmelee intends to make are completely irrelevant. Any harm from such statements would be reparable, and should only be addressed, in a tort action, not a PRA injunction suit.

3. Pictures Are Not Private When There Is No Expectation Of Privacy.

The right of privacy, as know in the State of Washington, requires the information to be disclosed meet two separate prongs: "(1) [It w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW 42.56.050. This Court need not even reach the second prong to decide there is no right of privacy.

The Department of Corrections claimed that it is the dissemination of the photographs that makes it fit the first prong while acknowledging that the pictures are worn by staff every day, in front of prisoners and on the street.[3] CP 82-83. Every day, employees display not only their picture but also their names to inmates and the public.[4] This information simply is not private.

Furthermore, there is no right of privacy to a person's photograph in situations where there is no expectation of privacy. Anybody walking down the street, sunning at the beach, cheering a favorite football team, or otherwise engaged in daily public activities are subject to being photographed. We are constantly being photographed by ATM machines, surveillance cameras, and other devices of which we are mostly oblivious. It is the expectation of privacy at the moment the photograph is taken which determines the degree of privacy required. This basic fact is reflected in the statute defining the crime of voyeurism. See RCW 9A.44.115.

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[3]Presumably, the Department of Corrections would not require that their employees wear offensive photographs.

[4]Of course, identification badges have names on them also.

This crime is was originally defined as set forth in RCW 9A.44.115(2) as follows:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, with out that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

"A place where he or she would have a reasonable expectation of privacy" is defined as either "a place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another" or "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." RCW 9A.44.115(2).

Thus, there are two prongs for determining whether a person is in a private location. The first would place the victim in a place where a reasonable person would disrobe. *State v. Glas*, 147 Wn.2d 410, 416, 54 P.3d 147 (2002) (en banc). This would include a person's bedroom, bathroom, a dressing room or a tanning salon.

However, the second prong describes locations in which normal people remain clothed but reasonably expect to be free from surveillance. In *Glas*, both defendants had taken pictures of their victims while in a

public place. This Court was quick to point out there was no expectation of certain types of privacy in public areas.

> Considering that casual intrusions occur frequently when a person ventures out in public, it is illogical that this subsection would apply to public places. Casual surveillance frequently occurs in public. Therefore, public places could not logically constitute locations where a person could reasonably expect to be safe from casual or hostile intrusion or surveillance.

Id. at 415-16.

This Court, in *Glas*, applied the second subsection to those places where, although normally clothed, an expectation of privacy might exist.

> These locations could include any room in a person's domicile other than the bedroom or bathroom, such as the kitchen, living room or laundry room; a locker room where someone may undress in front of others, but not expect to have his or her picture taken; or an enclosed office where someone may close the door to breast feed or change for a bike ride commute home. It would also apply to places where someone may not normally disrobe, but would nonetheless expect another not to intrude, either casually or hostilely. An example would include a private suite or office. A person would reasonably expect that another individual would not place a camera under his or her desk to view or film his or her genital region. Thus, this second subsection is necessary and not superfluous because it expands the locations where a person would possess a reasonable expectation of privacy beyond those of a traditional "peeping tom," but not so far as to include public locations.

Id.

In response to the *Glas* decision, the legislature redrafted section (2). Laws of 2003, ch. 213, § 1. It now reads as follows:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

The critical difference is the focus on the language which defines what are intimate areas. *State v. Boyd*, 137 Wn. App. 910, 918-19, 155 P.2d 388 (2007) (citing RCW 9A.44.115(1)(a) ("intimate areas" are defined as "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view.')) Clearly, the face is not an intimate area. So there is no reasonable expectation that a person will be free from being photographed in the face while in public places.

DOC's reliance on *Tiberino* is unhelpful. Brief of Respondent, p. 11 (citing *Tiberino v. Spokane Cy.*, 103 Wn. App. 680, 13 P.3d 1104 (2000)). *Tiberino* involved the question of whether or not personal emails containing very personal information by a governmental employee which were located on a governmental computer were discloseable. They were not. "Ms. Tiberino's e-mails contain intimate details about her personal and private life and do not discuss specific instances of misconduct." *Id.*

at 689. *Tiberino* dealt with personal information shared between two people in private emails. The emails were deemed private because of the personal contents of those emails. It was the details contained in the emails that made them private. Here, the contents of the requested photographs contain only those details that the employees share with the public every day. The employees' faces are not private or intimate. The faces do not become more private or intimate because they have been recorded photographically. The intimacy lies in the details, not the medium. The emails in *Tiberino* were private because of the information contained in them, and the photographs in the present case are not private because the information in them is shared openly and publicly.

Furthermore, this Court's ruling in *Koenig v. Des Moines* must control this case. 158 Wn.2d 173, 142 P.3d 162 (2006). Mr. Koenig had requested various records from the City of Des Moines regarding the sexual assault on his daughter. He requested the records by using her name. After being rebuffed, he sought relief in the courts. That relief was granted and the trial court ordered the records turned over after proper redaction for statutory exemptions. *Id.* at 178-79.

After the city appealed this ruling, the Court of Appeals affirmed the disclosure but ordered further redactions of what "it termed 'sexually

explicit descriptive information' to protect Jane Doe's privacy under former RCW 42.17.310(1)(d)." *Id.* at 179. Des Moines argued that the proper response to any request for records involving a child victim of sexual assault is to deny all records because by doing so, it revealed the name of the victim, which is a statutory exemption.

The majority responded to the dissent in *Koenig* by emphasizing that there is no

> "statutory language or case law to support the notion [the courts] may look beyond the four corners of the records at issue to determine whether they were properly withheld. Nor does it provide any authority to support disclosing records to some requesters but not others, depending on how the request is made."

Id. at 183. Respondent would have Washington courts break this hard and fast rule by considering the proposed usage by Mr. Parmelee. Respondent argues that it is not the disclosure, but the disclosure "combined with Mr. Parmelee's stated intention" that renders the records private. Brief of Respondent, p. 9. But as shown by the holding of *Koenig*, looking outside the record itself is not supported by statute or case law.

Like *Koenig*, the Respondent's rationale would do nothing to prevent the disclosure of the records sought; it would only prevent them being sought by Mr. Parmelee. Any other member of the public could request the exact same records, and the agency would have no statutory

basis for denying disclosure. Thus, the records themselves are not exempt, because disclosure alone would not violate a person's privacy.

If the Department of Corrections wishes to limit the ability of inmates to request records of staff, it must seek a change in the statutory scheme and not use the courts in an attempt to expand beyond that which is statutorily mandated. *Id.* at 184.

Just like the dissent in *Koenig*, Respondent also failed to provide any authority for the proposition that the courts can consider any evidence outside the four corners of the document requested. Thus, the trial court's reliance on the proposed use of some of the photographs is simply irrelevant. The records themselves are not private, as the information contained in the photographs is shared openly with the public. Because the records are not exempt for violating the right to privacy, there is no basis for denying disclosure of the documents. Respondent's reliance on the purported intended use of the documents is not supported by either the plain statutory language or case law interpreting the PRA.

4. Respondent Has Consistently Misrepresented Facts To Build A Case Against Mr. Parmelee.

Having shown that a reviewing court can only consider the four corners of the requested document, Mr. Parmelee now wishes to point out

the factually incorrect posture of Respondent. Examination of Respondent's brief shows many errors.

Respondent misrepresented the letter Mr. Parmelee sent to Mark Kuzca, Associate Superintendent of the Penitentiary by failing to mention the purpose of the letter. Brief of Respondent, p. 4. The letter asked for any information which would show that Mr. Parmelee's concerns were not true. There was no response.

It is disturbing that the Department of Corrections has continually supplied irrelevant materials to the courts to invoke prejudice against Mr. Parmelee. A classic example is the statement in Respondent's brief about the two arson convictions for which he is serving time. Respondent's Brief, p. 3. Besides being irrelevant to the issue of the appropriateness of an injunction and prejudicial, it is also incorrect. The second of the two arsons for which Mr. Parmelee is presently serving a sentence involved an attorney who was not litigating against Mr. Parmelee.[5] Another example

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[5]Mr. Parmelee has yet to be able to appeal his convictions on these charges because after being supplied a court appointed attorney at trial, his right to appointment of counsel based upon his in forma pauperis status was revoked at sentencing without a proper evidentiary hearing.

of irrelevant materials presented by Respondent is the claim that Mr. Parmelee possessed personal juror information.[6]

The Department of Corrections also has continually portrayed Mr. Parmelee as wishing to label all DOC employees as sex offenders. No evidence supports this contention, and nothing could be further from the truth. The only evidence presented by Respondent were two suggested brochures and as pointed out in Petitioner's opening brief, not even all the individuals named in the two proposed brochures were labeled as sex offenders. Furthermore, these brochures were specific to the individuals in question and were not blanket statements.

5. Respondent Attempts To Shift The Burden By Stating Mr. Parmelee Failed To Show His Statements About the Ten Individuals were True.

Respondent has contended that Mr. Parmelee "does not disagree that the statements he intended to make were slanderous or libelous." Brief of Respondent, p. 16. These two contentions misrepresent the burdens on parties at the injunction stage of litigation.

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[6]The trial court also believed Mr. Parmelee had an associate contact a juror from Clallam Bay Corrections Center by telephone. Evidence subsequently obtained by Mr. Parmelee through the Public Records Act and recently filed with the trial court in his criminal case shows this was not true.

Mr. Parmelee certainly disagrees with the DOC's contention that the statements he intended to make are slanderous or libelous. Mr. Parmelee's contention has always been that the injunction statute provides for injunctive relief only when the party seeking enjoinment proves that disclosure itself of the requested records will cause substantial and irreparable damage. The DOC bears the burden of making this proof; Mr. Parmelee need not disprove it at this stage.

For the same reason, Mr. Parmelee need not, at this stage, prove the factual veracity of any statements he has yet to make. The trial court found that no evidence presented in the record in litigation involving the appropriateness of injunctive relief. That is not to suggest that evidence does not exist. Mr. Parmelee has consistently argued that the truth or falsity of the statements is entirely irrelevant to the issue of the injunction.

Instead, it is the State that must prove that releasing records will cause substantial and irreparable damage to individuals. The DOC has made passing references to "harassment" based on the content of Mr. Parmelee's proposed brochures. Mr. Parmelee's reliance on the potential tort remedies for slander and libel, then, has not been an admission that his brochures would be libelous, but that if they were published and proved false, any injury to specific employees could be repaired by seeking

money damages in tort. Enjoining the release of all photographs because Mr. Parmelee has proposed making brochures identifying a few specific individual employees as sexual predators exceeds the scope of the PRA's injunction procedure. The release of each photograph is not necessary to prevent substantial and irreparable harm, both because any resulting harm is reparable by tort action and because Mr. Parmelee has never manifested an intent to make any public statements about all of the employees about whom he has requested records.

Respondent argues that Petitioner's arguments in his opening brief about possible tort remedies and the right to publish should not be considered. But at Respondent so rightly pointed out, Petitioner raised the fact that the trial court considered materials outside the four corners of the documents requested when denying Mr. Parmelee's PRA requests. As such, it was Mr. Parmelee's right to show this Court that he has a right to publish materials received through the Public Records Act and that the proper remedy for non-criminal behavior which allegedly injures someone as a consequence of the publication is a tort action, not enjoinment of disclosure under the PRA.

6. The Requirement That The Agency Pay For Attorney's Fees And Costs On Appeal And The Trial Court Is Primarily Statutory.

Respondent argues that attorney fees are discretionary, not mandatory. Petitioner respectfully disagrees. Statutory attorney fees and costs must be awarded under the clear language of RCW 42.56.550:

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

The purpose of statutory interpretation is to discern the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). The plain language of the statute "may be discerned 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

RCW 42.56.550 is clear. What is required is a requestor seeking records under the PRA, an agency withholding documents, and an action to decide the correctness of withholding those documents. This language makes no distinction between the means and the ends to the documents

requested. The specific language says "any action" which clearly can encompass an injunction. Respondent DOC used an injunction to block various requests by Mr. Parmelee. If Mr. Parmelee prevails before this Court and the injunction is lifted, DOC will have to disgorge the records. In light of this language, *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998) is clearly distinguishable.

In *Confederated Tribes*, Mr. Johnson asked for various records from the Washington State Gambling Commission. The Commission took the position that the records in question were discloseable under the PRA but that it would give the Confederated Tribes who had an interest in the records a chance to file an injunction under the PRA injunction statute to fight the disclosure. An injunction was filed. *Id.* at 742-43. The action was clearly between the non-agency parties.

Contrast that situation to the present case where it is the agency itself which is filing the injunction. If the Department of Corrections had simply claimed exemptions and denied all requests, Mr. Parmelee would have been entitled to file a lawsuit to enforce his rights under the PRA.

This also comports with the public policy behind providing attorney fees and costs. To help enforce rights under the PRA, the Legislature made it possible for individual citizens to litigate for their

rights under this act. DOC, by filing an injunction, should not be permitted to circumvent the intention of providing litigants means to enforce their rights. To permit otherwise would permit agencies with the power of the attorney general's office behind it to over whelm the regular citizens of this state. Surely, this is not what the Legislature intended.

D. CONCLUSION

For the reasons stated above, Mr. Parmelee respectfully acts this Court to overturn the decision of the trial court and order the documents be produced. It is also requested that this case then be remanded back to the trial court for computation of the penalties permitted under the PRA for withholding the documents.

DATED this 3rd day of October.

Respectfully submitted,

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Parmelee