

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT/INTRODUCTION.....1

II. STATEMENT OF THE CASE1

 A. Factual History.....1

 B. Procedural History3

III. ISSUES PRESENTED4

IV. ARGUMENT4

 A. STANDARD OF REVIEW4

 B. The Department Properly Refused Inspection Of The Requested Records Under The Well-Settled Rule Established In *Sappenfield*.....5

 C. Judicial Interpretation, Including The Holding In *Sappenfield*, Does Not Violate The Separation Of Powers Doctrine.....8

 D. *Stare Decisis* Precludes Collateral Estoppel And Requires Consideration Of *Sappenfield*.....9

V. CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>City of Federal Way v. Koenig</i> 167 Wn.2d 341, 217 P.3d 1172(2009).....	9
<i>Cloud v. Summers</i> 98 Wn. App. 724, 991 P.2d 1169 (1999).....	13
<i>Commissioner of Internal Revenue v. Sunnen</i> 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).....	13
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> 110 Wn.2d 355, 753 P.2d 517 (1988).....	5
<i>In re Juvenile Director</i> 87 Wn.2d 232, 552 P.2d 163 (1976).....	8
<i>Koenig v. Thurston County</i> __ Wn. App. __, __ P.3d __, 2010 WL 1309617 (Div. 2, 2010).....	5
<i>Livingston v. Cedeno</i> 164 Wn.2d 46, 186 P.3d 1055 (2008).....	7
<i>Lutheran Day Care v. Snohomish Co.</i> 119 Wn.2d 91, 829 P.2d 746 (1992).....	10
<i>McNabb v. Department of Corrections</i> 163 Wn.2d 393, 180 P.3d 1257 (2008).....	4, 7
<i>Mithrandir v. Department of Corrections</i> 164 Mich. App. 143, 416 N.W.2d 352 (1987).....	6
<i>Montana v. United States</i> 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).....	13
<i>Oltman v. Holland Am. Line USA, Inc.</i> 163 Wn.2d 236, 178 P.3d 981 (2008).....	4

<i>Progressive Animal Welfare Society (PAWS II) v. University of Washington</i> 125 Wn.2d 243, 884 P.2d 592 (1994).....	5
<i>Rusan’s, Inc. v. State</i> 78 Wn.2d 601, 478 P.2d 724 (1970).....	8
<i>Sappenfield v. Department of Corrections</i> 127 Wn. App. 83, 110 P.3d 808 (2005).....	passim
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> 106 Wn.2d 1, 721 P.2d 1 (1986).....	5
<i>State ex rel. Humiston v. Meyers</i> 61 Wn.2d 772, 380 P.2d 735 (1963).....	8
<i>State ex rel. O’Connell v. Slavin</i> 75 Wn.2d 554, 452 P.2d 943 (1969).....	8
<i>Turner v. Safley</i> 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).....	6, 7

Statutes

RCW 42.17.260	3
RCW 42.17.270	3
RCW 42.17.300	3
RCW 42.56.070	3
RCW 42.56.520	3

I. IDENTITY OF RESPONDENT/INTRODUCTION

Appellants Derek Gronquist and Bryon Mustard were incarcerated by the Appellants, the Department of Corrections (the Department or DOC): Gronquist at the Monroe Correctional Complex, Twin Rivers Unit (TRU) in Monroe, Washington, and Mustard at Ahtanum View Correctional Complex (AVCC) in Yakima, Washington. Appellants seek review of a summary judgment entered against them in an action under the Public Records Act (PRA or the Act). Appellants contend that, contrary to well-settled case law, statutory interpretation, and *stare decisis*, they are nonetheless entitled to physically inspect the public records they requested. For the reasons set forth below, the Appellants' arguments are without merit.

II. STATEMENT OF THE CASE

A. Factual History

On January 18, 2005, Mr. Gronquist wrote to Ms. Risa Klemme, the Administrative Program Manager responsible for responding to public records requests made to AHCC at the time, requesting to inspect fourteen different categories of records as well as another single document. CP 4, Attachment A. Ms. Klemme responded on January 26, 2005 that the single page requested was ready to be mailed upon receipt of postage and copying expenses. No exemptions were claimed. As for the remaining

the documents Mr. Gronquist wanted to inspect, Ms. Klemme explained that pursuant to DOC Policy 280.510, offenders are only allowed to inspect their own central and medical files¹, and that all other public records requested by offenders must be copied and mailed. CP 4, Attachment B.

On February 16, 2007, Ms. Klemme received a request from Mr. Mustard, dated March 7, 2005², asking to inspect and verify his banking records from March 2002 through August 2003, and from September 2004 until March 2005. CP 4, Attachment C. Ms. Klemme responded February, 17, 2007, explaining that the requirements of DOC Policy 280.510. Still, Ms. Klemme advised Mr. Mustard that staff would search existing records for responsive documents. She requested 14 days to complete this task in the event that he wanted copies. CP 4, Attachment D. On March 4, 2005, Ms. Klemme again wrote to Mr. Mustard and stated that 93 pages of the responsive documents were found and were available upon payment of copying and postage expenses. CP 4, Attachment E. Again, no exemptions were claimed. *Id.*

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¹ Central files contain general information about each offender including housing assignments, programming, infraction history, sentence related information, etc.

² It appears Mr. Mustard mistakenly used March instead of February when dating this letter as it was received on February 16, 2005.

B. Procedural History

On August 15, 2006, the Appellants filed a joint “Complaint to Compel Public Disclosure” in Thurston County Superior Court naming the Department as the Defendant. Mr. Gronquist and Mr. Mustard alleged that Department personnel at AHCC violated the Public Records Act by failing to promptly make public records available for inspection in violation of RCW 42.56.070 and 42.56.520. *See* CP 1 at 6. They requested an order compelling the Department to permit inspection of the requested records as well as per day penalties for each day that the Department failed to allow inspection. *Id.* They also requested that the court enjoin the Department from enforcing DOC Policy 280.510 and to enter a declaratory judgment that the Department’s actions violate RCW 42.17.260, 42.17.270, and/or 42.17.300, 62A.2-513 and/or the Fourteenth Amendment of the U.S. Constitution. *Id.* at 6-7.

After extensive briefing, the Thurston County Superior Court considered the case, and granted summary judgment in favor of the Department and dismissed the complaint. CP 14.

Mr. Gronquist and Mr. Mustard appealed the Superior court’s dismissal to this Court on August 16, 2009. CP 15 and 16. They allege that the Superior Court erred in granting summary judgment because the Public Records Act requires agencies to allow requestors to physically

inspect requested documents, and that the separation of powers doctrine and collateral estoppel preclude this court from considering appellate case law in deciding this case.

III. ISSUES PRESENTED

1. Whether the Department properly refused inspection of the requested documents under *Sappenfield*.³
2. Whether the well-settled rule in *Sappenfield* violates the separation of powers doctrine.
3. Whether collateral estoppel prohibits the application of the rule in *Sappenfield*.

IV. ARGUMENT

A. STANDARD OF REVIEW

This court reviews summary judgment *de novo*. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). Summary judgment is apposite if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Facts and reasonable inferences are interpreted in the light most favorable to the nonmoving party. *McNabb v. Department of Corrections*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

³ *Sappenfield v. Department of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005)

This court stands in the shoes of the trial court where, as here, the record consists only of declarations, memoranda, and other documentary evidence. *Koenig v. Thurston County*, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1309617 (Div. 2, 2010) citing *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Declarations submitted in support of summary judgment must “set forth such facts as would be admissible in evidence.” CR 56(e). Allegations, arguments, conclusions and speculations do not raise issues of material fact that would preclude summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988); *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. The Department Properly Refused Inspection Of The Requested Records Under The Well-Settled Rule Established In *Sappenfield*

Appellants claim that the Public Records Act requires that agencies permit the physical inspection of non-exempt records. They make this argument despite relevant case law to the contrary. *Sappenfield v. Department of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005), *review denied*, 156 Wn.2d 1013 (2006).

In *Sappenfield*, the court considered whether DOC Policy 280.510 violated the Public Records Act. *Sappenfield*, an inmate petitioner,

requested inspection of certain public records. *Id.* at 84-85. The Department denied inspection, pursuant to the policy, but offered to copy and mail the records. *Id.* at 85-86. On appeal, the petitioner argued that “anything other than strict compliance with the precise terms of the request, even an offer to copy and mail” was a denial. *Id.* at 87. The court rejected this argument, concluding that the Department’s policy prohibiting inspection of the documents by inmates is reasonable, considering that internal prison security is generally the province of prison officials, not the courts, and inmates do not enjoy all the privileges of the public community. *Id.* at 88 (citing *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Mithrandir v. Department of Corrections.*, 164 Mich. App. 143, 147-48, 416 N.W.2d 352 (1987)). The Court went on to note that RCW 42.17.290 (now RCW 42.56.100) commands agencies to adopt and enforce reasonable rules and regulations relating to the protection of records and maintaining agency operations. *Id.* at 89. The court then concluded that the Department is “statutorily required to adopt procedures that protect the integrity of its records and also avoid interference with Corrections’ essential function to securely restrain criminal offenders.” *Id.* The court specifically observed that:

Even if requested records are on-site, inmates would have to be transported out of secure areas or records would have to be transported to them. Individual supervision would

have to be provided during personal inspection to fulfill Correction's statutory obligation to protect its records.

Id. at 88. Finally, the *Sappenfield* Court found that, while RCW 42.17.290 provides that nothing shall relieve an agency from honoring requests to mail copies of records, “[i]t does not categorically preclude denying requests for direct inspection when necessary to preserve the records and its own essential function.” *Id.* at 89. Moreover, since the *Sappenfield* decision, the Washington Supreme Court has cited to its holding on at least two occasions, suggesting agreement. *See Livingston v. Cedeno*, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008); *see also McNabb v. Department of Corrections*, 163 Wn.2d 393, 405, 180 P.3d 1257 (2008).

Sappenfield is directly on point and dispositive to a determination of the case. “Matters affecting a prison’s internal security are generally the province of prison administrators, not the courts.” *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)). The security constraints intrinsic to the prison environment and the Department’s statutory obligation to protect its records and prevent excessive interference with essential agency functions are paramount. With this in mind, the Department properly refused to permit the Appellants to inspect the requested documents in accordance with DOC Policy 280.510. Thus, their claim

that the Department violated the Public Record's Act by failing to permit physical inspection of records requested is without merit.

C. Judicial Interpretation, Including The Holding In *Sappenfield*, Does Not Violate The Separation Of Powers Doctrine

The Appellants' second assertion is that *Sappenfield* is inapplicable because the decision violates the separation of powers doctrine. Presumably, this argument is based upon a plain language reading of the Public Records Act, and that any interpretation of the Act must be limited to a literal reading of the statute regardless of competing legal interests. Appellants, however, misapprehend of the role of the judicial branch.

The appellate courts are the proper body to determine the construction and interpretation of statutes. *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969); *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 380 P.2d 735 (1963). Thus, despite an individual's or agency's interpretation of the law, it is ultimately for the appellate courts to give meaning and context to a statute by way of its own interpretation. *See Rusan's, Inc. v. State*, 78 Wn.2d 601, 478 P.2d 724 (1970). There is patently no violation of the separation of powers doctrine in this function. *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976). This is because

[b]oth history and uncontradicted authority make clear that
“(i)t is emphatically the province and duty of the judicial

department to say what the law is even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.”

Id. (internal citations omitted). Further, appellate courts “presume that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172(2009). In this way, an appellate court’s holding, in this case the *Sappenfield* decision, does not run afoul of the separation of powers doctrine.

D. *Stare Decisis* Precludes Collateral Estoppel And Requires Consideration Of *Sappenfield*

The Appellants allege that the Department is somehow collaterally estopped from preventing inspection of public records due to a prior Superior Court order. *See* CP 2 ¶ 4.18 to ¶4.23. This, however, is irrelevant in this case because it does not change the fact that the Washington Court of Appeals has since held that the Department’s policy on inspection is reasonable in light of its essential agency function. Any contrary ruling by a Superior Court is superseded by the Court of Appeals’ holding in *Sappenfield*. Even if *Sappenfield* had not been decided, the Appellants cannot support a collateral estoppel claim.

Collateral estoppel “prevents the relitigation of an issue or determination of fact after the party sought to be stopped has had a full and fair opportunity to present his or her case.” *Lutheran Day Care v. Snohomish Co.*, 119 Wn.2d 91, 114, 829 P.2d 746 (1992). Four conditions must be met in order to apply the doctrine:

(1) the issues in the two actions must be identical; (2) there must have been a final judgment in the first action; (3) the party against whom the estoppels is being pleaded must have been a party or in privity with a party to the first action; and (4) application of the doctrine cannot work an injustice on the party against whom it is pleaded.

Id. at 115.

Here, the Appellants fail to demonstrate conditions (1) and (4).⁴ They aver that they have prevailed on the identical issue currently before the court in a prior proceeding. However, it cannot reasonably be said that a determination of agency compliance with a 2001 public records request for different documents at a different institution truly resolved the issue of whether the Department personnel at Clallam Bay Corrections Center properly responded to this current public records request.

Appellants refer to a 2002 Spokane County Superior Court Judgment in *Gronquist v. Department of Corrections*, Cause No. 02-2-05518-9. CP 8, Attachment B. In that case, the court found a violation

⁴ Moreover, Appellant Mustard was not a party to the previous lawsuit. Thus, the court there entered no order in his favor that he can now assert he is collaterally estopped from challenging.

because Department personnel did not assemble the requested the documents but provided Plaintiff with a rough estimate of how many documents might exist and demanded a payment of \$300 based on that estimate before proceeding with the statutory requirement of identifying and assembling responsive the documents. CP 8, Attachment C. The court explained, “I don’t think there’s been a satisfactory showing that the fee, the \$300 was required. Therefore, I feel that the agency didn’t respond as they statutorily are supposed to.” CP 8, Attachment A, at 4. Importantly, the court noted, “I don’t know if it’s a fact that prisoners are routinely required to pay a fee when they request a public disclosure, *but that’s not before me right now*. I just don’t see a justification for the \$300 fee.” *Id.* (emphasis added). The court did not even mention the issue of inspection versus mailing copies of requested the documents but focused on the agency’s failure to at least identify and collect requested the Documents before demanding a fee. Clearly the court was considering an issue discrete from the one here.

In this case, Ms. Klemme identified and collected the documents and applied copying fees for both Plaintiffs in accordance with the Act, Department policy and applicable case law, and requested payment before mailing the Documents. *See Sappenfield, supra*. There was a clear justification for the fee which was absent in the previous action.

Apparently, the Spokane County Superior Court was unaware of how the agency processed inmate public disclosure requests generally and that information was not before the court. Importantly, had Department personnel responded the same way in the case at bar, there would still have been a violation, even under *Sappenfield*, because the agency had abdicated its statutory responsibility to identify and collect the documents in accordance with the Act before requesting payment of a fee. Thus, the issue decided in the Spokane case is not identical to the issue before the court.

Moreover, under condition (4), application of collateral estoppel would work an injustice on the Department. Not only did the Department not have the full and fair opportunity to litigate the specific issue at bar in the Spokane County case⁵ but, as the U.S. Supreme Court has stated in the context of applying collateral estoppel to federal agencies:

Modifications in “controlling legal principles,” could render a previous determination inconsistent with prevailing the doctrine, and that “[i]f such a determination is perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory

⁵ The Superior Court did not address the issue of whether an inmate must be allowed inspection of the Documents because Department personnel violated the PRA by not identifying and assembling the Documents before assessing a copying and postage fee. Moreover, *Sappenfield* had yet to be decided and could not have been relied on in that proceeding.

distinctions in tax liability, and a fertile basis for litigious confusion. [Collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.”

Montana v. United States, 440 U.S. 147, 161, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) (quoting *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 68 S. Ct. 715, 92 L. Ed. 898 (1948) [citations omitted]). Consequently, “when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate.” *Montana v. U.S.*, 440 U.S. at 162. Washington Courts have also recognized this exception in holding that “collateral estoppel does not apply where a substantial difference in applicable legal standards differentiates otherwise identical issues of mixed law and facts.” *Cloud v. Summers*, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999). In this way, assuming identical issues of law and fact, the current legal standard under *Sappenfield* precludes the application of collateral estoppel.

Here, there is a clear Departmental change in the applicable legal standards and application of collateral estoppel would work a substantive injustice on the Department. The Department would be forced into the position of treating some inmates differently because they claim vested rights under obsolete decisions. Rather than promote judicial economy, this would create a “fertile basis for litigious confusion.” *Id.* at 161. The

Department would be forced to treat certain offenders differently inequitably in attempting to comply with current legal principles while accounting for individual obsolete judgments.

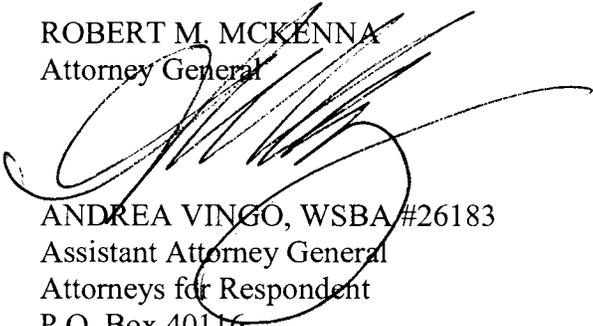
The Department respectfully submits that this Court should abstain from application of collateral estoppel in favor of the well-settled doctrine of *stare decisis* and apply the rule established in *Sappenfield* to the facts of this case.

V. CONCLUSION

For the reasons set forth above, the Department respectfully asks that this Court uphold the summary judgment previously granted and dismiss this appeal.

RESPECTFULLY SUBMITTED this 18th day of May, 2010.

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of BRIEF OF RESPONDENT on all parties or their counsel of record on the date below as follows:

- X U.S. Mail, Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand Delivered by: _____
- Facsimile

TO:

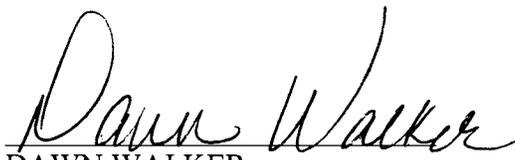
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STATE OF WASHINGTON
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DEPUTY

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

EXECUTED this 18th day of May, 2010, at Olympia, Washington.


DAWN WALKER