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COA. No. 40730-2-II

COURT OF APPEALS OF WASHINGTON
FOR DIVISION TWO

LARRY DAY

PETITIONER

vs.

PIERCE COUNTY PROSECUTING ATTORNEY OFFICE

RESPONDENT

AMENDED OPENING BRIEF

Appeal From The Superior Court of King County

Honorable Ronald Culpepper

No. 09-2-016411-3

Larry Day
Pro se Appellant
c/o Wallace & Wallace
107 South Houston Street
East Wenatchee, WA 98802

1-11-11

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I. INTRODUCTION:

Pierce County misled the process server to avoid service, and defaulted the Public Records Act (“PRA” RCW 42.56., recodified in 2006 from RCW 42.17.) case. The trial court failed to follow its own rules in avoiding Day’s default motion. Pierce County finally appeared, refusing to respond to Day’s discovery requests and sought summary judgment while opposing any in-camera review per RCW 42.56.550(3). Day’s response was rejected in its entirety and the case was dismissed with prejudice. Day timely appealed. The appeal was stayed pending the Supreme Court’s decision in Sanders v. State, 169 Wn.2d, 827, 240 P.3d 120 (2010).

II – ERRORS PRESENTED FOR REVIEW:

A. Assignments of Error:

1. Did The Trial Court Err By Not Granting Day’s CR-55 Default Motion When Defendants Where Properly Served And Failed To Ever File An Answer As Required By CR-12(a) (1)?
2. Did The Trial Court Err By Denying Day’s Motion For In-Camera Per RCW 42.56.550 (3) Permitting Secret Withholding on Factual Issues In Dispute And How And What Law Correctly Applied To Those Facts In Dispute, Depriving The Court Of Making An Informed Decision?
3. Did The Trial Court Deny Day Due Process By Denying Him All Discovery And His CR-56(f)

Motion by Allowing the Defendant to Presumptively Ignore All Discovery Requests?

4. Did the Trial Court Err By Dismissing The Case With Prejudice and Failing to Make Any CR-54 Findings Of Facts and Conclusions Of Law, Failing to Abide By Supreme Court Precedent On PRA Issues While Denying Day's Cross Motion?

B. Issues Pertaining To Assignments of Error:

1. The Trial Court Abused It's Limited Discretion By Failing to Follow It's Own Rules In Refusing To Hear and Grant Day's Motion for Default Against Defendant Three Times.
 - (i) The County Auditor and PCPAO Designated Mark Lindquist As The Proper Service Agent., And Are Equitably Estopped From Contrary Assertions.
 - (ii) The Trial Court Failed To Follow Its Own Rules by Repeatedly Refusing To Rule On Day's Default Motion, Requiring It Be Granted Here.
2. In Camera Review Was Required per RCW 42.56.550(3) to Avoid Secret Withholding of Public Records Under Both PAWS and Sanders.
3. The Trial Court Denied Mr. Day Due Process By Denying Him All Discovery Opportunities And His CR-56 (f) Motion Without any Explanation.
4. The Trial Court Acted Contrary To Supreme Court Precedent in PAWS and Sanders By Allowing Conclusory Claims To Judicially Unreviewed Public Records To Be Presumptively Withheld by Allowing Defendant to Exaggerate RCW 42.56.290 and Its Applicability Without Sufficient Evidence.
 - (i) The Trend Away From Statutory Exemptions Violates the Plain Language of the PRA By Relying On Court Rules as Exemptions.

5. The Trial Court Erred By Dismissing The Case With Prejudice For Failure To Serve Proper Party If Not Barred By Equitable Estoppel.
6. The Boilerplate Order Is Ambiguous And Fails CR-54 By Lacking Any Findings Of Fact And Conclusions Of Law.
7. Mr. Day Should Be Awarded All Costs And Fees On Appeal, And Penalties Ordered To Be Granted On Remand.

III – STATEMENT OF THE CASE:

In 2009, Plaintiff, Larry Day submitted several PRA requests to defendant, Pierce County Prosecuting Attorney’s Office (“PCPAO”) about himself and State v. Day, Pierce County #06-1-02286-8.CP-4-30. In State v. Day, the PCPAO accused Mr. Day in a shotgun approach of charging crimes, most of which were determined meritless at a jury trial. Mr. Day’s counsel withdrew after trial, leaving Day the only continuing appearing party for CrR 4.7 purposes. Thus CrR 4.7(h) cannot apply when not represented in criminal cases.

Day still sought to exonerate himself from some of the remaining accusations by exercising due diligence and seeking exculpatory evidence through PRA requests. CP-88-110. PCPAO refused to provide most of the requested records and did not provide any sufficient explanation of what specific records were withheld, and why, such as through an

exemption log. On December 15, 2009 Day filed suit under this PRA seeking those records. Id.

As the public agency per RCW 42.56.010(1) PCPAO was served a summons and complaint (CP-2-6) per CR-3 and CR-4 on October 23, 2009. CP-26. They had 20 days to answer per CR-12(a) (1). To date PCPAO has still never filed an answer. On October 23, 2009 Day's process server, Eugene Bremner, contacted PCPAO and asked who and where proper services should occur in this case. He attempted service on Pierce County Auditor's Office per RCW 4.28.080(1), but the auditor refused service and told him they were not the correct party to serve. Like the Auditor, PCPAO told Mr. Bremner the PCPAO was the correct service party of the Summons and Complaint. CP-87-88, CP-111-112.

The PCPAO never disputed this.

Day filed for a default judgment per CR-55 with a declaration in support on January 4, 2010. CP-7-44. Despite not needing to because Day was a prisoner at the time per PCLR 7(a) (8), he confirmed his motion. CP-46-48. The trial court repeatedly refused to hear the motion because the defaulting non-appearing parties per CR-70.1 had not been served the motion per CR-5, despite not requiring such service. CP-45, 49-54, & 55. PCPAO still had not filed an answer after appearing CP-125-126, CP-127-128, and remained in default when Day renewed his

Day filed a response with two declarations and a cross motion for default because PCPAO still never filed an answer. Id. He also sought an in-camera review per RCW 42.56.550(3) and to stay summary judgment pending his request to compel discovery under CR-56(f). CP-88-112.

PCPAO replied with nothing more than conclusory contentions about being work product exempt, and any records requested Day had paid for, but not necessarily received, without identifying any specific records and how privilege was properly established not waived and were determined exempt under RCW 42.56.290. PCPAO also incorrectly argued that Mr. Day could not access records about himself that may exonerate him, such as records of evidence of weapons belonging to others, he was accused of and witness evidence they lied to wrongfully convict Day. Instead the PCPAO argued court rules, as opposed to statutory exemptions as required by RCW 42.56.030,.070(1), .210, 520, 550 (1)-(3) permitting them to blindly and inconsistently withhold public records. Id.

Without any findings of fact or conclusions of law per CR-54, the trial court dismissed the case with prejudice on April 23, 2010. CP-117-119. Mr. Day timely appealed. CP-120-122.

IV LEGAL ARGUMENT:

A. Standard of Review Favors Mr. Day.

PCPAO moved for summary judgment or in the alternative, under

CR12 (b) (5). CP -56-97. The moving party has the burden to prove there is no genuine issue of material fact, with the court viewing facts most favorable to the non-moving party – Mr. Day. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000); Sub-contractors & Suppliers Collection v. PPC Connachie, 106 Wn.App. 738, 24 P.3d 1112 (2001). The trial court failed to apply this standard. CP-88-112, 117-119. This court’s standard of review is de novo, RCW 42.56.550 (3); Sanders v. State, 169, Wn.2d 827, 844-45, 240 P.3d 120 (2010). Issues of default are reviewed under a limited abuse of discretion standard. Rauch v. Zanders, 134 Wn.2d 40, 42, 234 P. 1039 (1925). The “substantial evidence” standard applies to service and filing an answer if a party has appeared, but failed to answer as required by CR-12 (a)(1). Smith ex rel., Smith v. Arnold, 127 Wn.App.98, 106, 110 P.3d 257 (2005).

1. The Trial Court Abused It’s Limited Discretion and Failed To Follow It’s Own Rules In Refusing To Hear and Grant Day’s Motion For Default Against Defendant.

Day asked the court three times to grant his motion for default per CR-12(a)(1) requiring an answer be filed with 20 days from service under CR4, per CR-55. CP-2-44, 45, 55, 88-112. Paines-Gallucoi v. Anderson, 35 Wn.2d 312, 212 , P.2d 805 (1949)(the discretion of the trial court is not absolute under CR-55, and an arbitrary exercise of discretion will be reversed).

PCPAO was the “agency” having the interest and party in litigation be sued and served per CR-4. RCW 42.56.010 (1); PRA Desk book¹. § 3.1(1)-(2).

(i) **The County Auditor and PCPAO Designated Mark Lindquist As The Proper Service Agent, and are Equitably Estopped From Contrary Assertions.**

Defendants do not dispute that both the Pierce County Auditor and PCPAO refused service on the auditor’s office as attempted by process server Eugene Bremner. The PCPAO and the Auditor instructed Mr. Bremner to serve not the county auditor, but Mark Lindquist, the elected Prosecuting Attorney for Pierce County. CP-26, CP-86-87, CP-111-112.

After doing so, the auditor and PCPAO changed their tune of deception and sought dismissal of Day’s case [with prejudice] for failing to serve the auditor as Mr. Bremner attempted, Id. and the court granted. CP-73-74, CP-117-119. PCPAO never disputed these facts, requiring they be taken as true favoring Mr. Day.

Mr. Day objected, contending that Pierce County’s contrary contentions to the process server, not once but twice by both the auditor and PCPAO to serve Mark Lindquist the summons and complaint, and Day not knowing both were wrong, relied on their representations as authorities.

As a result, PCPAO was equitably estopped from taking an opposite

¹ Washington State Bar Association’s Public Records Deskbook: Washington Public Disclosure and Open Public Meetings Laws (2006)(herein “PRA Deskbook”).

position once in court. CP-104-106, CP-111-112. They gained unfair advantage against Mr. Day and prejudiced him by both claiming their service instructions required dismissal with prejudice.

Instead, PCPAO argued equitable estoppel can never apply to service under CR-4. Contrary to PCPAO assertions, CR-4(g) (5) provides for written or verbal (“admission...”) service alternatives such as held enforceable in Thayer v. Edmonds, 8 Wn.App.36, 41-42, 503 P.2d 1110 (1972), rev. den. 82 Wn.2d 1001 (1973) (defendant can verbally agree to accept service in a manner not specified in the statute, and is bound to that agreement). The same applies here.

PCPAO failed to show competent-or-any-process based on a clear and convincing standard that Mr. Day’s process server’s statements about service instructions were incorrect. Lee v. W. Processing Co., 35 Wn.App. 466, 469, 667 P.2d 638 (1983). Here, Day’s processor server, attempted service on the Pierce County Auditor, but was told by the auditor they were not the proper service agent for PCPAO. CP-111-112. PCPAO told Day, Mark Lindquist was the proper service agent for respective lawsuit. Id. This “designation” makes sense since PCPAO and the auditor are both “experts” within the meaning of RCW 4.28.80(1) and Pierce County Charter, § 5.90.

PCPAO never filed an answer, but did eventually serve two notices of appearance. CP-125-128. Mr. Day immediately sought discovery, trying to identify any service discrepancies. CP-78-79, Interrogatory 1-1. PCPAO refused to answer all discovery contending Day must first obtain leave of the court for discovery, and show reasonableness. CP-56-58. By Day's affirmative actions to try to uncover any claimed service defects in time to correct them, should also defeat PCPAO's application of Davidheiser v. Pierce County, 92 Wn.App. 146, 153-55, 960 P.2d 998, rev.den., 137 Wn.2d 1016 (1999).

Equitable estoppel must bar PCPAO's service defect claims. Shafer v. State, 83 Wn.2d 618, 623, 521 P. 2d 736 (1974). The three part test is:

- (1) an admission, statement or act, inconsistent with the claim asserted; and
- (2). action by the other party on the faith of such admission, statement or act; and
- (3) injury or prejudice to such other party arising from permitting the first party to contradict or repudiate such an admission, statement or act. Id.

The doctrine of equitable estoppel is applicable against a state acting in its governmental as well as proprietary capacity when necessary to prevent a manifest injustice and the exercise of governmental powers will not thereby be impaired. Id. at 622. Bd. of Regents v. City of Seattle, 83 Wn.2d 545, 551, 741 P.2d 11 (1987); Arthur Anderson v. Carlisle, 556

(CP-88, 104-106), they never even addressed Day's Response and Cross Motion, that requires this court to default defendants here. Conner v. Universal Utils., 105 Wn.2d 168, 712 P.2d 849 (1986). PCPAO should be defaulted by this court.

2. **In Camera Review Was Required per RCW 42.56.550 (3) To Avoid Secret And Exaggerated Reasons For Withholding Public Records Under Both PAWS and Sanders.**

Mr. Day cross motioned per RCW 42.56.550(3) for an in-camera review of the records PCPAO claimed were exempt in full or part. CP-88-90, 92-93. PCPAO replied, contending that their conclusory and unsupported interpretation of law as applied only to facts as they paint the picture should blindly be accepted by all without any review process. They provided no authority for permission to conduct secret withholding in any PRA cases because it simply doesn't exist. Progressive Animal Welfare Socy. v. University of Washington, ("PAWS"-II) 125 Wn.2d 243, 269-71, 889 P.2d 592 (1992); Sanders v. State, 169 Wn.2d 827, 838-840, 240 P.3d 120 (2010), citing, Rental House Ass'n v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009); WSBA, PRA Deskbook, § 16.2 (5).

What PCPAO asks is for the court to remain blindfolded by PCPAO and blindly accept how they interpret public records and if a statutory exemption as they interpret it applies. This reasoning was rejected in

Dawson v. Daly, 120 Wn.2d 782, 792-794, 845 P.2d 995 (1993), reversed in part on other grounds, PAWS, 125 Wn.2d at 257-61. PCPAO makes only conclusory claims insufficient to apply the exemptions and withholdings claimed. PCPAO fails to present any sufficient evidence to support a PCPAO's vacuum approach to broad brush approach at a clumped privilege exemption claim under RCW 42.56.290. If any at all, even after in-camera review. PRA Deskbook, Ch. 10.

Since Mr. Day is presently not represented by council in his criminal matters, CrR 4.7 (h) does not exempt disclosure. Furthermore, he could file a 42.U.S.C. § 1983 action to compel disclosure of his criminal case related files he sought following continuing broad persecution affirmative disclosure obligations. Youngblood v. West Virginia, 547 U.S. 867 (2006). Osborne v. District Atty's Office, 423 F.3d 1050 (9th Cir. 2005) (criminal case defendant could sue under § 1983 to compel disclosure of prosecuting attorney's records). CP-101-102. PCPAO failed entirely to address these obligations and exceptions to non-disclosure before the trial court.

In-camera review is encouraged as a standard practice. Spokane Research & Defense Fund v. City of Spokane, 96 Wn.App. 568, 577, 983 P.2d 676 (1999), rev. den., 140 Wn.2d 1001 (2000) ("the better practice is to ... conduct an in-camera inspection. In-camera inspection enhances the

trial court's ability to assess the nature of the documents, decide applicable exemptions, and perform necessary redaction."); See also WAC 44-14-08004 (b)(describing details of in-camera review). Here, the trial court never even addressed, explicitly ruled nor explained its reasoning and ruling on Mr. Day's request for in-camera review in its order. CP-117-119. It fails CR-54 required clarity.

In-camera review would establish a method of reviewing the requested records to determine if a more detailed exemption log under PAWS, 125 Wn.2d at 270-71 and Rental Housing Ass'n. v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009)(attorney-client work privilege log must be detailed) is required. Sanders, 169 Wn.2d at 138-140. Or if some or all documents could be redacted in part and disclosed in part. Id; RCW 42.56.070 (1) & .210; Koenig v. City of Des Moines, 158 Wn.2d 173, 183-84, 142 P.3d 162 (2006). Hearst v. Hoppe, 90 Wn.2d 123, 127-28, 580 P.2d 246 (1978).

Review was also necessary to determine if PCPAO was exaggerating their exemption claims and if any privilege was waived by disclosure in court, to others, or Day's constitutional rights through Youngblood v. West Virginia, 547 U.S. 867 (2006) and Osborne v. Dist. Atty's Office, 423 F.3d 1050 (9th Cir. 2005). Exceptions to a person's own criminal case records, is easily distinguishable from PCPAO's case law where non-

parties sought records. E.g. see Oliver v. Harborview Med. Center, 94 Wn.2d 559, 565, 618 P.2d 76 (1980). PCPAO incorrectly, broadly applied the exemption to far too many records, requiring an in-camera review. Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998) (remanding for in-camera review of records claimed to be work product and finding that “in this case the only way that a court can accurately determine what portions, if any, of the files are exempt from disclosure is by an in-camera review of the files.”).

Furthermore, discovery (CP-76-85) and in-camera review such as Mr. Day sought are necessary to probe under CrR 4.7 & CR-26 (b)(1) evidence that PCPAO waived or never had a reasonable expectation of applying RCW 42.56.290 in the first place, and if PCPAO carried their burden to establish privilege relationships. Sanders, 169 Wn.2d at 838-840; Dietz v. Doe, 131 Wn.2d 835, 844, 935 P.2d 611 (1997) (Attorney privilege is limited to information related to obtaining advice only). The privilege as PCPAO claims is not so widely broad and absolute as they claimed. Id at 843; Pappas v. Holloway, 114 Wn.2d 198, 203-04, 787 P.2d 30 (1990). The Attorney claiming privilege has the burden to show documents contain privileged communications. Dietz v Doe, 131 Wn.2d at 843. They failed to do so here.

Blanket conclusory claims of privilege, silent on waivers, is a question of law as applied to facts requiring judicial review and to conduct the four-part test to qualify. Port of Seattle v. Rio, 16 Wn.App. 718, 725, 559 P.2d 18 (1977). As Hangartner v. City of Seattle, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) cautioned, privilege exemptions must be examined carefully by the court. Also see, WSBA's Washington Civil Procedure Deskbook § 26.6 (2) (d) (i) (E), (F) & (I) required detailed use of privilege exemption logs under CR-26) (waiver of work product protection). Vol. 14 Washington Practice, § 13.14-13.17 (work product waivers). Both discovery and in-camera review are required on remand.

3. **The Trial Court Denied Mr. Day Due Process By Denying Him All Discovery Opportunities And His CR-56 (f) Motion Without Explanation.**

Within a week of PCPAO's appearance on January 28, 2010 (CP-125-126) Day submitted very narrow discovery requests on February 2, 2010, within the scope of CR-26 (b)(1), CP-76-85. On the 30th day after submitting the discovery requests, PCPAO filed for summary judgment and attaching a copy of Day's discovery, contending that they would not respond at all. CP-56-58, 76-85. Day responded and per CR-56 (f) asked the court to stay summary judgment pending discovery. CP-88-110.

This court is asked to resolve both the question as applied, and generally to PRA cases, if PCPAO is correct in their contentions because it appears to deny due process in pro se cases especially like this repeatedly. CP-58. The questions are: (1) Must a litigant first get permission from the court to conduct any discovery and is a party under no obligation to respond?; (2) Should discovery be allowed only under a “sparingly” standard?; (3) May a party probe an agencies claims within the scope of CR-26(b)(1)? (CP-58). PCPAO cites no rules of authority whatsoever for their discovery limiting proposition, yet repeats itself in PRA cases involving non-lawyer litigants. Sanders, 169 Wn.2d at 838-840.

Discovery is an integral part of elementary due process. Doe v Puget Sound Blood Center, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). The discovery rules are intended to effectuate a party’s constitutional right to access to the courts. Id. According to the Doe court, the right to discovery is found within Article I, § 10 and 32 of the Washington Constitution. The Supreme Court stated that this right to discovery is a general principle, implicated whenever a party seeks discovery. Id., 117 Wn.2d at 782.

The rules of discovery are instruments intended to “make a trial less a game of blind man’s bluff and more a fair contest with the basis issues and

facts disclosed to the fullest practicable extent”. United States v. Proctor & Gamble, Co., 356 U.S. 677, 682 (1958).

Discovery responsibility is not only governed by rules 26 through 37 and CR-26 (g), but also requires good faith in responding, and sanctions for violating the spirit of the obligation. CR-26 (g) & (i). Standards of Professional Conduct (RPC) also require a duty of fairness to opposing parties. RPC 3.4 (a) & (d). e.g. see People v. Haase, 781 P.2d 80, 83, n.2 (1989).

Mr. Day sought non-privileged relevant information, such as asserted by defendants notice of appearance and later discovered to be a basis for dismissal based on claimed service defects. CP-73-79. He sought information about efforts made to respond to Day’s PRA requests. CP-79, 80-81. He asked for information about if, and to what case, and the identity of each record was withheld, were claimed exempt. CP-80. He sought policies of PCPAO governing PRA requests, responses and review. CP-81. He sought information to determine if and how the agency “provided the fullest assistance to the records requester” as required by RCW 42.56.080. CP-81. He sought records relating to the tracking, management and monitoring of PRA compliance by the agency. CP-81. He sought records relating to establishing a pervasive practice or policy of PRA violations. CP-82-83. He finally sought the agency’s PRA training

management and reference materials to measure PRA quality control and due diligence. CP-85. PCPAO did not serve any objections per CR-26(g), instead, attaching a copy of their Summary Judgment simply flaunting their intransigence that they have no intention of responding absent a court order.

Mr. Day sought discovery sanctions and a CR-56(f) stay for discovery to evaluate what specific documents are considered non-disclosable in full, or could parts be disclosed by redaction or if waiver attached as required by RCW 42.56.070(1) and .210. CP-88-92, 94-98, 100-103. The trial court failed CR-54 requirement and never even addressed Mr. Day's requests, dismissing the case, denying him due process. CP – 117-119. Coggle v. Snow, 56 Wn.App. 499, 784, P.2d 554 (1990) (“The primary consideration in the trial court's decision [under CR-56 (f)] on the motion for a continuance should have been justice.”)

4. The Trial Court Acted Contrary to PAWS and Sanders by Allowing Conclusory Claims To Judicially Unreviewed Public Records Be Presumptively Withheld By PCPAO's Exaggerating RCW 42.56 .290 And Its Applicability, And Lacking Sufficient Evidence For the Claimed Exemption.

Mr. Day's contention that PCPAO failed to present sufficient evidence as required by RCW 42.56.030, .210, .550, and .904, to pass muster under their claims for non-disclosure. PRA Deskbook, § 16.2 (2)-(3). Simply mentioning a case file, other disclosure waivers and contending that Mr.

Day must embark on endless fishing expeditions for the same records through other related sources violates the very core of the PRA. RCW 42.56.030, .080, .100 & .520 Daines v. Spokane County, 111 Wn.App. 342, 349, 44 P.3d 909 (2002) (“an applicant need not exhaust his or her own ingenuity to ‘ferret out’ records through some combination of “intuition and diligent research.”) Telling Day to go elsewhere for the same records PCPAO has for disclosure, violates the PRA. Id., CP-68-69.

The exemptions of the PRA are to be construed narrowly favoring disclosure. RCW 42.56.030. The PRA is a thrice repeated strongly worded mandate for broad disclosure of public records, including under the common interest doctrine. Sanders v. State, 169 Wn.2d at pg 853-854; PAWS, 125 Wn.2d at 251-52. Merely allowing an agency to not provide an explanation log of specific documents withheld, fails the “brief explanation” requirement of 42.56.210(3) and renders the clause superfluous. Sanders, 169 Wn.2d at 854-858; PAWS, 125 Wn.2d. at 269-71; Rental House Ass’s v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009). In RCW 42.56.070 (1) it requires “... justification [for withholding in full or part] shall be fully explained in writing,” PCPAO refused to sufficiently do.

Day urges caution in failing to follow precedent of the Supreme Court as PCPAO urged the trial court to do. Hutto v. Davis, 45 U.S. 370, 375

(1982) (judicial anarchy is the result of lower courts choosing which precedent they want to follow, no matter how wrong and misguided they think it to be). For example, as the WSBA's PRA Deskbook, § 13.3 (2) illustrates, the ruling in Cowles Publ'g v. Pierce Co. Prosecutor's Office, 111 Wn.App.502, 508, 45 P.3d 620 (2002) is contrary to Supreme Court precedent. It ruled PCPAO records relating to a criminal case were exempt by balancing against the defendant's family's rights to privacy, and was contrary to the balancing test explained in Dawson v. Daly, 120 Wn.2d. 782, 798, 845 P.2d 995 (1993). The only question should have been if the records were of "legitimate" or "reasonable" concern, against the public's interest in "efficient administration of government." It is public interest versus public interest balancing, not a public versus private interest test. Cowles, should be overturned as a result Id. PRA Deskbook, § 13.3 (2), pgs. 13-15, 13-16.

Because Dietz v. Doe, 131 Wn.2d at 843 places an affirmative burden on the party claiming privilege exists and requires a showing that the related documents actually contain information relating to strategy, impressions or trial tactics, PCPAO failed their obligation. That is why in Rental Housing Assn. v. City of Des Moines, 165 Wn.2d at 537-542, the court required a detailed privilege log, the PCPAO refused to provide.

Based on the record before us and without an in-camera review, the court has no credible nor reliable way to examine the records to determine if they were properly withheld in full or part, nor are any sufficient specific explanation provided for specific records, to even evaluate the exemption application, requiring reversal. Id; Sanders, 169 Wn.2d at 838-840.

Furthermore, the trial court failed to make any findings of fact and conclusion of law to enable if and how the court reached the conclusion it did as required by CR-54. Nelbro Packing Co. v. Bay Pack Fisheries, 101 Wn.App. 517, 522, 6 P.3d 22 (2000).

4-(i) The Trend Away From Statutory Exemptions Violates The Plain Language Of The PRA By Relying on Court Rules As Exemptions.

Without addressing this issue directly; by the courts, too many agencies such as PCPAO reveal a trend to exaggerate reasons to avoid disclosure by relying on court rules as opposed to statutory exceptions. The PRA leaves no such ambiguity. Sanders v. State, 169 Wn.2d at 838-840. PCPAO contends court rules provide a PRA exemption and, “ ideas and impressions” in a criminal case extend to anything a prosecutor considered, received, and provided or discovered relating to the overzealous criminal prosecution of Mr. Day. CP-56-87. This is contrary to the PRA. Rental Housing Assn. v. City of Des Moines, supra. A

strong and often repeated requirement that only statutes may exempt disclosure, viewing them narrowly with a perspective favoring disclosure, agencies are required to provide the records requester the fullest and most prompt assistance. PRA Deskbook, § 5.2 (7) & 5.3 (i). PCPAO failed this obligation repeatedly.

The Public Records Act is a strongly worded mandate repeating its intent:

“The people [such as Mr. Day] do not yield their sovereignty to the agencies that serve them. People [such as Mr. Day], in delegating authority, do not give [his] public servants the right to decide what is good for the people to know and what is not good for them to know. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.”

RCW 42.56.030 (emphasis and brackets added).

The legislature made it clear in their notes at RCW 42.56.050, laws 1987, Ch. 403, that “...agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records...” (emphasis added). Any “rules and regulations shall provide the fullest assistance to [records requesters] and the most timely possible action on requests for information” by the agency, including PCPAO.

RCW 42.56.100 (emphasis added). Also, RCW 42.56.520.

In RCW 42.56.550 (1)-(3) it not only places the burden on the agency to prove a statutory [as opposed to a rule] exemption applies, but even if exemption may cause inconvenience or embarrassment to public officials or others. At RCW 42.56. 904, the legislature classified its privilege exemption in RCW 42.56.290, to include disclosure of records PCPAO improperly withheld.

The Supreme court's decision in Soter v. Cowles Publ'g, 162 Wn.2d 716, 730-747, 174 P.3d 60 (2007) is distinguishable and because Mr. Day sought records about himself needed for collateral review under RCW 10.73.090-110, Rules of Appellate Procedure, Title 16 and 28 U.S.C. § 2244, these burdens on Mr. Day requires that he exercise continuing due diligence to uncover exculpatory evident previously unknown to him. This case is more analogous to Sanders v. State, *supra*, yet because Day's inquiry relates to criminal prosecution of him, the "common interest" doctrine under common law, exists and should be interpreted favoring disclosure to Mr. Day. Because both Mr. Day and the State's objective is to seek the truth, and let justice based on the truth prevail, "common interest" in the records, is the same as disclosure under CrR4.7 and Youngblood v. West Virginia, 547 U.S. 867 (2006) (following Brady v. Maryland 373 U.S. 83 (1963)). This burden on disclosure in a criminal case may be enforced both under the PRA and under 42.U.S.C. § 1983,

such as held on Osborne v. Dist. Atty's Office, 423 F.3d 1050 (9th Cir. 2005).

The Court must therefore view the PRA as a pro-disclosure public policy, to fulfill legislative intent. PRA Deskbook, § 6.

5. The Trial Court Erred By Dismissing Case with Prejudice For Failure To Serve Proper Party If not Barred By Equitable Estoppel.

If, as presented in argument 1(i) herein, this court is not inclined to accept Mr. Day's equitable estoppel on service contention, dismissal as requested by PCPAO office with prejudice, CP-73-74, was still error. CP-117-119.

If a party fails to obtain personal service under RCW 4.28.020, may only trigger dismissal without prejudice. It would presumptively also deprive the trial court of subject matter jurisdiction to rule one way or another on PCPAO's PRA exemption claims. Ware v. Phillips, 77 Wn.2d 879, 882, 468 P.2d 444 (1970). For the trial court to not resolve specifically the service issues and equitable estoppel bar, leaves subject matter jurisdiction a guess at best. The court cannot grant the reliefs the PCPAO requested, without ruling on at least one such as service, in favor of Mr. Day, which it did neither. CR-58.

Generally, only when the court obtains personal and subject matter jurisdiction, may it dismiss with prejudice.

6. The Boilerplate Order Is Ambiguous and Fails CR-54 By Lacking Any Findings Of Fact And Conclusions Of Law.

A lack of required findings can significantly extend the time for appeal. In Norquest/RCA-W Bitter Lake Partership v. City of Seattle, 72 Wn.App. 467, 864 P.2d 18 (1994), the court held that a judgment on fewer than all claims is appealable only if the trial court enters a finding that there is no just reason for delaying an appeal. Boilerplate language in an order is insufficient under CR-54 to allow clarity or if and what issues are decided and what facts are found and what law relied upon. Nelbro Packing v. Bay Pack Fisheries, 101 Wn.App.517, 6 P.3d 22 (2002).

7. Day Should Be Awarded All Costs and Fees On Appeal, And Penalties Ordered Granted On Remand.

If the court grants any of Mr. Day's issues on appeal, he requests fees and cost per RCW 42.56.550 (4) and an order for penalties on remand. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 467. 229 P.3d (2010); Sanders v. State, *supra*.

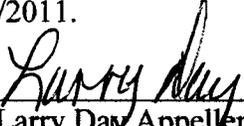
V. CONCLUSIONS:

For these reasons and the record, Mr. Day respectfully asks the court to reverse the trial court and find that : (1) PCPAO should have been defaulted under CR-55 for failing to answer the complaint that they were properly served, and if not, are equitably estopped from contrary claims; (2) The trial court erred by denying Mr. Day's cross motion for in-camera

review per RCW 42.56.550 (3) and not explaining why it refused to do so;

(3) The trial court denied Day due process by allowing PCPAO to presumptively ignore Day's discovery requests, and abused its discretion by denying Day his CR-56(f) motion without stating why as to any decision; (4) The trial court erred by accepting PCPAO's blind and insufficient claims of privilege exemption without a detailed explanation for every record exemption log, and PCPAO forfeited the opportunity to add more evidence on remand; (5) The trial court erred by dismissing the case for a failure to serve proper defendants with prejudice; (6) The trial court's order requires findings of fact and conclusion of law per CR-54, and (7) Mr. Day should be awarded fees and cost on appeal, with PRA penalties to be determined on default "bad faith" scale for any record withheld on remand.

Respectfully submitted on 04/04/2011.

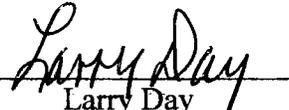


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CERTIFICATE OF SERVICE

I, hereby state under oath, penalty of perjury, and the law, of Washington State, that in accordance with RAP 18.5 and DOC practice and policy, a copy of this pleading was served on the court and all required parties via U.S. Mail on or before the date below.

Signed at Aberdeen, Washington on 04/04/2011


Larry Day

