

No. 49186-9-II

**Court of Appeals, Div. II,
of the State of Washington**

Jane Doe,

Appellant,

v.

Washington State Department of Fish and
Wildlife, et al.,

Respondents

Reply Brief of Appellant

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1. Introduction

Jane Doe's appeal presents two straightforward questions of law and one question of discretion. First, where a state employee's right to privacy requires redaction of their identity from a particular record, must it be redacted everywhere it appears in that record? Second, does an injunction under RCW 42.56.540 apply to all requests, present and future, for the records to which it applies? Finally, did the trial court abuse its discretion in failing to find WDFW's defenses frivolous?

WDFW's response spends more time complaining about the procedure leading up to the court's final decision than addressing the merits of the decision itself. WDFW's procedural frustrations are irrelevant to this Court's analysis of the assigned errors. WDFW did not appeal and did not assign error. The only issues before this Court are those raised by Jane Doe.

Jane Doe's legal issues can be determined without resort to the procedural history. The trial court entered findings of fact, which are verities on appeal (other than Finding 8, which Jane Doe has challenged). *See In re Estate of Barnes*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016). The question for this Court is whether, based on those findings, the trial court erred as a matter of law. WDFW's collateral complaints are irrelevant and should be ignored.

2. Reply to Counter-Statement of the Case

2.1 WDFW's procedural complaints are irrelevant.

WDFW's Counter-statement of the case spends an inordinate amount of time recounting procedural history that has no bearing on the trial court's final decision or the issues raised on appeal. The trial court itself was, ultimately, not concerned by the procedure and even acknowledged its own hand in the way things played out:

I want to clarify: It seemed that the parties were confused. **I had suggested a subset of records be submitted.** It wasn't for the purpose of, again, avoiding work. I had hoped that if a subset of records were provided and I provided the parties with my thinking, then the parties could work together on the remaining records and reach a resolution, but that did not occur. And so ultimately I invited the parties to submit the records via *in camera*...

RP, Apr. 29, 2016, at 26 (emphasis added). The trial court explained that it had attempted to give the parties opportunities to work out an agreed solution that the court believed could be better for Jane Doe than what the court expected its ultimate decision would be. *See id.* at 25-26. In the end, the trial court's decision was based on the content of the records and the trial court's interpretation of the applicable law. *See id.* WDFW's procedural frustrations are irrelevant. This Court can safely disregard pages 5-8 of WDFW's brief.

2.2 The privacy exemption applies even to “true allegations” in the circumstances presented in this case.

WDFW incorrectly asserts, in a footnote (Br. of Resp. at 4-5 n. 3), without citing any authority, that the PRA exemption for right to privacy could not apply to “true allegations” of Jane Doe’s conduct. While an employee’s right to privacy does not exempt disclosure of substantiated misconduct that leads to disciplinary action, *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 206, 189 P.3d 139 (2008), Jane Doe’s alleged conduct was not substantiated, and she was never disciplined, CP 322 (Finding #4) (“The investigation did not substantiate whether any of the alleged sexual conduct occurred”). She was never even investigated or charged with any wrongdoing. *Id.*

The allegations were merely rumors of conduct outside the workplace with no connection to public employment. CP 322 (Finding #5). The right to privacy exemption allows redaction of an employee’s identity where the allegations have no bearing on the employee’s public duties. *See Bellevue John Does*, 164 Wn.2d at 215 (actions outside the course of public duties, such as unsubstantiated allegations of misconduct, are subject to the right of privacy).

The trial court held that the privacy exemption applied, in part because the allegations were unsubstantiated. CP 322-24.

Whether any of the allegations was actually true—a question the court could not determine from the evidence (RP, Apr. 29, 2016, at 21) was irrelevant to the trial court’s decision. *See* CP 322-24. WDFW did not appeal the trial court’s decision. WDFW cannot now argue that Jane Doe’s right to privacy does not extend to “true allegations,” particularly where none of the allegations has been proven true.

2.3 WDFW’s claim that inconsistent redactions were not intended to be produced is not supported by the record.

WDFW claims that the pages with inconsistent redactions were never intended to be produced “in their current form.” Br. of Resp. at 9-10. Yet WDFW had given all of those pages to Jane Doe in the beginning with the representation that those were the pages that were being disclosed. *See* CP 174-76, 307-08, 311, 314-15. The inconsistencies were brought to WDFW’s attention before litigation began, *see* CP 297, yet throughout the litigation, WDFW insisted that it had redacted everything correctly. Only when Jane Doe presented the trial court with the inconsistencies during *in camera* review did WDFW admit to being the source of the inconsistencies and create its new excuse that some of the pages were not intended to be produced after all.

3. Reply Argument

3.1 The scope of the injunction should be reviewed de novo.

The proper scope of the injunction in this case is dependent entirely on the interpretation of the PRA's privacy exemption. WDFW asserts, incorrectly, that a decision regarding the terms of an injunction are reviewed for abuse of discretion. While that may be true in some contexts, it is not true when reviewing an injunction under the PRA. *DeLong v. Parmelee*, 157 Wn. App. 119, 143, 236 P.3d 936 (2010). In any event, application of an improper legal standard is an abuse of discretion. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). Under either standard of review, this Court should reverse and expand the scope of the injunction.

3.2 The trial court erred in failing to order redaction of Jane Doe's identity everywhere it appeared in the records.

In her opening brief, Jane Doe argued that the privacy exemption required redaction of her identity everywhere it appeared in the records. Br. of App. at 12-16. She argued that the trial court should have analyzed the redactions on a record-by-record basis and redacted her identity everywhere it appeared in any record that connected her to the sexual allegations. Br. of App. at 14 (citing *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015)). Because

each of the records contained sexual allegations, each record should have been redacted to remove Jane Doe's identity everywhere it appeared. Br. of App. at 14-15. Leaving her identity intact anywhere in the records would enable the reader to, as the trial court acknowledged, "connect the dots" between Jane Doe and the sexual allegations. RP, Apr. 29, 2016, at 31.

WDFW misreads *Predisik* to argue that the privacy exemption does not allow redaction of an employee's identity where the specific mention of the employee's identity is only tangentially related to misconduct allegations. Br. of Resp. at 14-15. This is not what the *Predisik* court held. The *Predisik* court very specifically identified the unit of analysis as the **record**, not the mention of the employee's identity: "Agencies and courts must review **each responsive record** and discern **from its four corners** whether the record discloses factual allegations that are truly of a private nature." *Predisik*, 182 Wn.2d at 906. The court emphasized, "a record-specific inquiry is the only way to adhere to the PRA's mandate that exemptions be construed narrowly." *Id.*

The court then applied this unit of analysis to the records at issue in that case. The court found that the three records at issue did not implicate the right to privacy because the records "do not disclose the factual allegations." *Id.* at 906. "the leave letter and spreadsheets do not disclose any salacious facts that

one might consider a private matter. Indeed, the records contain no specific allegations of misconduct at all.” *Id.* at 907. There was no right to privacy because the **records** were only tangentially related to the alleged misconduct.

Thus, the issue in *Predisik* was whether the **record** was tangentially related to misconduct allegations, not whether a specific mention of the employee’s identity was only tangentially related.¹

Consistent with *Predisik*, any record that sets forth the allegations that trigger the right to privacy is subject to the exemption. Here, all of the records contain the offensive allegations. Because any mention of Jane Doe’s identity anywhere in those records could enable a reader to connect her with the allegations, disclosure of the records violates her right of privacy unless her identity is redacted everywhere it appears.

¹ Jane Doe did not argue that the trial court conducted its analysis on a page-by-page basis, as WDFW claims. *See* Br. of Resp. at 15. Rather, Jane Doe asserted, “The trial court analyzed each proposed redaction only within its immediate context. That is, the trial court attempted to discover whether each instance of Jane Doe’s identity was directly connected to some description of private conduct.” That this was the trial court’s unit of analysis is clear from its oral decision (RP, Apr. 29, 2016, at 30-31) and from Finding #8 (which Jane Doe challenges), that “Many of the references to Jane Doe in these records ... connect her identity to the alleged sexual conduct. Some of the references do not.”

WDFW attempts to argue that Jane Doe did not raise this argument in the trial court. WDFW constructs a false narrative in which Jane Doe asked the trial court to analyze the redactions on a per-occurrence basis. In reality, Jane Doe has consistently argued that her identity must be redacted everywhere it appears in the records. The trial court recognized the difference between Jane Doe’s position, which was per-record based, and WDFW’s position, which was per-occurrence based. RP, Apr. 29, 2016, at 30.

Jane Doe began by presenting the trial court with excerpts from the records, which demonstrated that the records contained offensive allegations that would violate her right to privacy if they were disclosed without redaction of her identity. Jane Doe argued that because the records contained these allegations, her identity should be redacted everywhere it appeared. *E.g.*, CP 74 (“Jane Doe has proposed redactions that would remove any connection between her and the allegations of private sexual conduct, by removing any references to her, by name or by association.”).

The trial court then invited Jane Doe to present a more extensive set of selected pages from the records. Jane Doe did so, arguing again that because the records contained the offensive allegations, the trial court should order redaction of “every reference to Jane Doe’s identity.” CP 113.

Jane Doe's counsel emphasized the per-record analysis in the March 4, 2016, hearing:

I think that your Honor has a sense of what the standard is here. If we look at the record, does the records reveal these allegations of private sexual conduct? If they do, Jane Doe is entitled to a protection of her privacy, and her name should be redacted everywhere it appears in that record.

The issue is not trying to remove herself as a public employee. We are not asking that her name be removed from organizational charts. We are asking that her privacy be protected where she has been alleged to engage in private activity that has no connection with her public employment, and that can be done by looking at each record and the context of the records as a whole.

RP, Mar. 4, 2016, at 24.

When it became clear that *in camera* review of all of the records would be necessary, Jane Doe agreed that would be “the most appropriate course so that your Honor can determine **record by record** whether those private interests are implicated and whether a permanent injunction as to each of those records is appropriate.” RP, Mar. 4, 2016, at 13 (emphasis added). In the following motion, Jane Doe once again argued that the trial court should order redaction of “every reference to Jane Doe’s identity.” CP 284; *see also* CP 258 (focusing on the content of the records and citing *Predisik*).

As noted above, the trial court understood the approach that Jane Doe was advocating. The trial court was aware of the rule of law Jane Doe wanted the court to apply. Jane Doe's arguments here are consistent with the arguments she made in the trial court. The trial court ruled that Jane Doe's right of privacy was implicated by these records. CP 322 (Findings #3-8). However, the trial court erred by analyzing the redactions on a per-instance basis instead of a per-record basis. The appearance of Jane Doe's identity anywhere in a record that contains the offensive allegations violates her privacy. This Court should remand with instructions to the trial court to order redaction of every reference to Jane Doe's identity, whether by name or by relationship or association.

3.3 The trial court erred in refusing to make the injunction expressly apply to future requests for the records.

Jane Doe argued in her opening brief that an injunction under RCW 42.56.540 applies permanently to the records, barring all present or future requests for the enjoined records. Br. of App. at 16-19. The statutory language focuses on "any specific public record," not on a specific request. Br. of App. at 16-17 (quoting RCW 42.56.540). Jane Doe's interpretation of the statute is consistent with the plain language, common sense, and judicial economy. Br. of App. at 17. The rights of potential

future requesters are not prejudiced because the factors that go into the court's analysis would be the same in any future request as they are in the present request. Br. of App. at 18.

WDFW complains, incorrectly, that Jane Doe cited no authority in her brief. The statutory language is the authority. Our courts have not yet addressed the question of whether an injunction under RCW 42.56.540 applies to future requests for the enjoined records. This Court must interpret the plain language of the statute in the first instance.

WDFW's argument that there must be an existing request in order to trigger the right to seek injunctive relief misses the point. Here there **was** an existing request. Jane Doe properly sought injunctive relief. The trial court granted the injunction. The question now is whether that injunction continues to apply to the enjoined records when requested again in the future. The cases cited by WDFW provide no insight on this question. Even if an active request is required to initiate judicial review, that does not necessarily limit the scope of the resulting injunction, particularly where the statute links the injunction to the "specific public record," not to the requester.

WDFW argues that an injunction should not be permanent because the exemptions might change over time. But this is not a reason to limit the injunction to a per-request basis. It only recommends caution in delineating the scope of the

injunction. For example, in a case where the injunction is based on the law enforcement investigative record exemption, the injunction should apply to all present and future requests until such time as the investigation is complete. Similarly, an injunction based on the deliberative process exemption should apply to all present and future requests until the policies or recommendations are implemented.

Once a party seeking an injunction under RCW 42.56.540 has proven their entitlement to the injunction, they should not be required to re-litigate the issue with every new requester of the same enjoined records. The analysis of exemptions depends on the content of the records and the statutory language of the exemption, **not** on the identity of the requestor. *See DeLong v. Parmelee*, 157 Wn. App. 119, 152, 236 P.3d 936 (2010) (agency cannot consider an individual's status when determining whether information is subject to disclosure).

For this reason, the court's analysis of a future request by a different party will still be no different from the analysis of the original injunction. If a future requestor disagrees with the injunction, the burden should be on them to demonstrate a change in circumstances to justify a modification. Particularly in the privacy realm, a public employee who has once proven their right to privacy should not have to re-litigate every new request.

The plain language of the statute requires an injunction that applies permanently to all future requests for the same records. The trial court erred in allowing the injunction to be open to a different interpretation. This Court should remand with instructions to the trial court to make the injunction expressly apply to all future requests for the same records.

3.4 The trial court abused its discretion in denying Jane Doe’s request for an award of attorney’s fees under RCW 4.84.185 for WDFW’s frivolous defense.

Jane Doe argued that the trial court abused its discretion in denying her request for attorney’s fees under RCW 4.84.185 when WDFW’s defenses to the injunction were frivolous. Br. of App. at 19-21. A frivolous defense is one that cannot be supported by any rational argument on the law or the facts. Br. of App. at 19 (citing *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343-44, 314 P.3d 729 (2013)). WDFW’s defense was that Jane Doe’s right to privacy was not implicated at all, even though WDFW’s own, limited redactions of the records demonstrated that WDFW believed that Jane Doe was entitled to privacy in some instances. Br. of App. at 19-20 (citing as examples, CP 439, 440, 443, 444, 568). WDFW never even attempted a rational explanation for this discrepancy, or for the fact that it redacted other employees’ identities on the same pages where it refused to redact Jane Doe. Br. of App. at 20. The

defense appears to have been advanced, not for reasonable cause, but out of malice toward Jane Doe. Br. of App. at 20-21.²

WDFW mistakenly bases its argument on the trial court's erroneous application of the law in deciding the injunction, arguing that its defense had at least some merit because the trial court did not grant Jane Doe the full relief she requested.

² Despite WDFW's counsel having been reprimanded by the trial court for comments that blamed Jane Doe for the existence of the offending records, WDFW doubles down on its attempt to justify its behavior after the fact. The email speaks for itself in demonstrating WDFW's malice toward Jane Doe. After hearing WDFW's excuses, the trial court expressed its displeasure:

I think the aspect that troubles me the most about the e-mail and that statement is that it suggests that we know as a matter of substantiated fact that a person who wasn't interviewed and wasn't the subject of a[n] agency investigation did some things, and as I understand it from reviewing all the records, there's a dispute about what occurred ... So that's what troubles me ... when a lawyer representing a State agency says to a person in Miss Doe's situation ["if you hadn't behaved this way, we wouldn't be here,"] I don't know whether she behaved this way. ... I don't know what her version is about whether she did that. (RP, Apr. 29, 2016, at 19.)

As I said during oral argument, I had concerns about the remarks that the State made about Miss Doe's behavior. I'm not going to say much more other than I think when a public employee is the subject of a matter like this or is referenced in matter like this but is not the subject of the investigation and not interviewed, that people should and State employees should assume the best about her and not reference any responsibility for ending up in these records, particularly because my review of the records indicates that the allegations related to Miss Doe, even if true, all occurred outside of the workplace. (RP, Apr. 29, 2016, at 32.)

However, as demonstrated in Jane Doe’s opening brief and above, under the correct legal standards provided by the applicable statutes and case law, Jane Doe was entitled to redaction of her identity everywhere it appeared in these records. The resulting injunction should have been permanent as to those records, requiring redaction in response to all present or future requests. WDFW’s defense of “no right to privacy” was frivolous because it could not be supported by any rational argument on the law or the facts. *See Ahmad*, 178 Wn. App. at 343-44.

WDFW goes so far as to try to argue that Jane Doe’s action was frivolous.³ Jane Doe prevailed! WDFW did not appeal. No amount of complaining by WDFW can change the

³ As part of this argument, WDFW states that Jane Doe “in a sense” argued that the PRA allows all references to a state employee to be deleted from a public record. Jane Doe refuted this straw man argument in the trial court:

WDFW argues that Jane Doe “is seeking to write herself out of public employment.” Not so. Surely many records exist, including Jane Doe’s employment records with WDFW, that reveal her identity as a public employee. Jane Doe has not sought redaction of any of those records. (CP 289.)

The issue is not trying to remove herself as a public employee. We are not asking that her name be removed from organizational charts. We are asking that her privacy be protected where she has been alleged to engage in private activity that has no connection with her public employment, and that can be done by looking at each record and the context of the records as a whole. (RP, Mar. 4, 2016, at 24.)

fact that Jane Doe prevailed in part. Under the correct legal standards, Jane Doe should have prevailed in whole. There is no standard that would deem a prevailing party's action frivolous.

WDFW also attempts to argue that Jane Doe failed to preserve the issue for appeal because the final injunction order appealed from does not expressly deny her request for fees. However, an appeal from final judgment brings up with it a timely decision on a motion for fees. *See* RAP 2.4(g). Jane Doe properly requested an award of fees from the trial court. CP 283-84. The trial court expressly denied her request: "There's requests for a determination that the defenses have been frivolous and that sanctions should be issued, and ultimately I'm denying those requests." RP, Apr. 29, 2016, at 33. The denial of fees is properly before this Court.

The trial court abused its discretion in denying fees. Under the correct legal standards applicable to this case, WDFW's defense could not be supported by any rational argument on the law or the facts. This Court should reverse and remand with instructions to the trial court to award Jane Doe her reasonable attorney fees and costs in obtaining the permanent injunction, including fees and costs incurred on appeal.

4. Conclusion

The trial court erred in failing to order redaction of every reference in the records to Jane Doe's identity, whether by name or by relationship or association. The trial court erred in refusing to make the injunction expressly apply to all future requests for the records. The trial court abused its discretion in denying Jane Doe's request for attorney's fees and costs under RCW 4.84.185.

This Court should reverse and remand to the trial court with instructions to order redaction of every reference in the records to Jane Doe's identity, whether by name or by relationship or association; to amend the injunction so that it expressly applies to all future requests for the records; and to award Jane Doe her reasonable costs and attorney's fees incurred at the trial court and on appeal.

Respectfully submitted this 25th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 25, 2017, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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