

FILED  
Court of Appeals  
Division II  
State of Washington  
7/25/2019 3:39 PM

No. 52845-2

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOHN DOE (number1 through number 44),

Appellant,

vs.

COWLITZ COUNTY SHERIFF'S OFFICE,

Respondent.

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AMENDED APPELLANT'S INITIAL BRIEF

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**A. ASSIGNMENTS OF ERROR**

- 1. The lower court erred in failing to enjoin the release of the requested records pursuant to CR 65(b).**

**Issue Pertaining to Assignment of Error 1**

- a. Whether 65(b) authorizes the court to enjoin the release of the records requested as a clear legal or equitable right exists.
- 2. The lower court erred in denying injunctive relief based on a finding that the Public Records Act contains no exemption for the requested Records.**

**Issue Pertaining to Assignment of Error 2**

- a. Whether Section 240 of the Public Records Act provides a specifically stated exemption for the disclosure of intelligence information or investigative records, the disclosure of which would irreparably violate a person's right to privacy.
- 3. The lower court erred in denying injunctive relief for refusing to consider the motive of the requestor to establish a basis to enjoin the release of the requested records.**

**Issue Pertaining to Assignment of Error 3**

- a. Whether the motive of the requestor serves as a significant factor in determining whether to enjoin the release of records under Section 540 of the Public Records Act.

**B. STATEMENT OF THE CASE**

Requestor, Curtis Hart, asked for the disclosure of name, phone numbers, current addresses, photos and other sensitive information of all

Level One sex-offenders under the Washington state Public Records Act (“PRA”). CP 4. Mr. Hart was previously involved in a case where a no-contact order was entered against him by “Cowlitz County District Court for the lifetime of the protected parties” due to his harassment of a “person convicted of a sex offense as well as his parents, causing the court significant concern for their safety.” CP 73. Plaintiffs, John Does 1-44, filed a complaint in Cowlitz County Superior Court on September 21, 2018 seeking declaratory or injunctive relief. CP 1.

Judge Stephen Warning entered an order on November 1, 2018 denying the injunction. CP 72. He held that the requested information did not fall under any exemption in the PRA and that no legal authority existed under which he could consider the motivation of the requestor in determining whether to grant an injunction. The Court did find that the Requestor “is likely to misuse the information in childish, immature, and offensive ways that would likely be harmful to the plaintiffs. CP 73. The Court also found the “plaintiffs’ fear of requestor credible and understandable given their affidavits.” CP 73. The Court denied the plaintiffs’ motions for injunctive relief and stayed the order pending resolution of this appeal. CP 74.

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### C. ARGUMENT

**1. CR 65(b) authorizes the court to enjoin the release of the records requested as a clear legal or equitable right exists.**

CR 65(b) permits a Court to issue an ex parte restraining order “without written or oral notice to the adverse party or the adverse party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the applicant’s claim that notice should not be required.”

To obtain preliminary injunctive relief, a party must show that (1) it has a clear legal or equitable right, (2) it has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury to the party. *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). Since Plaintiffs meet all of these elements, and lack other adequate remedies at law, they are entitled to a preliminary injunction to preserve the status quo. The balance of equities overwhelmingly supports this result.

In determining whether a party has a clear legal or equitable right, “the court examines the likelihood that the moving party will prevail on the merits.” *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). Petitioners are likely to prevail on their claims. RCW 42.56.240(1) exempts disclosure of:

“Specific intelligence information and specific investigate records compiled by investigative, law enforcement, and penology agencies ... the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.”

“This exemption is not limited in application to only when law enforcement would cease to function were the documents in question disclosed ... The legislature’s inclusion of the word ‘effective’ allows for a broader application.” *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 117 Wn.2d 467, 300 P.3d 799, 809 (2013). As stated fully bellow, Petitioners argue that both as a matter of a right to privacy and under the plain language of the specific exemption, injunctive relief is appropriate while the case is pending at the trial level.

The Cowlitz County Sheriff’s Office has indicated its intent to release the records requested by Mr. Hart. Petitioners have no other remedy – their rights will immediately be invaded without the requested preliminary injunction. The Cowlitz County Sheriff’s Office will not be prejudiced by a preliminary injunction allowing the parties to thoroughly brief the legal and factual issues involved. The agency will not, for example, be liable for

attorney's fees where an injunction sought by a third-party blocks disclosure of a public record. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757-58, 958 P.2d 260 (1998).

If the requested records are released by the Cowlitz County Sheriff's Office, without any individualized determination under RCW 4.24.550, Petitioners will face mental and emotional damages associated with the stigma of the disclosure. As SOPB stated above, harassment, job loss, eviction, and ostracization will result from disclosure. This harm extends not only to the individual offender, but to their families and victims. To paraphrase *Confederated Tribes*, 135 Wn.2d at 758, a "trial on the merits [will be] fruitless if the records ha[ve] already been disclosed." Absent a preliminary injunction, actual and substantial injury will occur.

**2. Section 240 of the Public Records Act provides a specifically stated exemption for the disclosure of intelligence information or investigative records, the disclosure of which would irreparably violate a person's right to privacy.**

It is the position of the Petitioners that there is a specifically stated exemption under Public Records Act § 240, for intelligence information or investigative records, the disclosure of which would violate a person's right to privacy. The requested information, including, names, dates of birth, addresses, dates and descriptions of offense summaries, is exempt under RCW 42.56.240(1). Any such information constitutes "intelligence

information” under RCW 42.56.240(1), which exempts disclosure of “specific intelligence information and specific investigative records compiled by investigative, law enforcement and penology agencies . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.”

In *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002), the Court of Appeals, Division 1, looked to what “intelligence information” meant. The term is not defined in the PRA and not identified meaningfully in the RCW. The *Sheehan* court looked to the plain language definition, citing *Random House Dictionary*, which defines it as “the gathering or distribution of information, especially secret information, or information about an enemy, or any evaluated conclusions drawn from any such information.” *Sheehan*, 141 Wn.App. at 337. It also cites the Multnomah County Code § 15.551, which identifies sex offender information as “information compiled in an effort to anticipate, prevent or monitor possible criminal activity.” Sex offender registration is compiled specifically to identify and monitor a specific group of people. Such information includes personally identifying information of each registered sex-offender. The release of this information to requestor, who is highly likely to use the information in ways that will be harmful to plaintiffs, is extremely likely to violate the privacy of the Petitioners. The requested

information constitutes intelligence information and thus falls under the specifically stated exemption under RCW 42.56.240(1).

**3. Section 540 of the Public Records Act provides a vehicle by which the motive of the requestor serves as a significant factor in determining whether to enjoin the release of records.**

Section 540 of the Public Records Act authorizes the Court to enjoin the disclosure of public records if such disclosure “would substantially and irreparably damage any person.” Additionally, RCW 42.56.050 states that privacy is invaded or violated only if “disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” *DeLong v. Parmelee*, 157 Wn. App. 119, 149, 236 P.3d 936 (2010). The trial court correctly found, based on Mr. Hart’s history, including an anti-harassment order that was already granted against him, that he would make “childish, irresponsible, vindictive, and otherwise foolish use of these records.” VRP 39. The trial court felt that considering the motive as a factor in deciding whether to exempt disclosure would be creating “wholesale law from the courts.” VRP 40. The trial court thus “reluctantly c[a]me to the conclusion” that the motive of the requestor could not serve as a basis for refusing disclosure.

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Whether the disclosure of the requested information would be highly offensive to a reasonable person certainly requires substantial consideration of Mr. Hart's motive for requesting the information. The Court of Appeals has held that although an agency may not consider the motive for a specific request, "it does not necessarily follow that a volunteered and stated harmful purpose cannot be considered in determining whether to enjoin disclosure of the information." *DeLong v. Parmelee*, 157 Wn. App. 119, 149 (2010). An injunction "is an extraordinary equitable remedy designed to prevent serious harm." *Id* (citing *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792-96 (1982)). Mr. Hart's online presence and past history show a clear pattern of behavior that seems to suggest potential future violent behavior toward and harassment of Petitioners. He has publicly stated that people he defines as sex predators "deserve scorn" and that he "publicly shame[s] [sex offenders] for sport."<sup>1</sup> This kind of behavior if allowed certainly puts the individuals whose information is requested at a substantial risk of harm.

The Sex Offender Policy Board (SOPB) has stated repeatedly that the broad release of Level 1 sex offender information inhibits the government's goal of reforming offenders and reducing recidivism.

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<sup>1</sup> [https://www.facebook.com/pg/ThePunisherSquad/about/?ref=page\\_internal](https://www.facebook.com/pg/ThePunisherSquad/about/?ref=page_internal)

Collateral consequences resulting from broad disclosure of all Level 1 sex offenders' information include lack of employment and housing, tension with loved ones, and violence perpetrated against Level 1 offenders. According to the SOPB, "instability and inability to re-integrate can become a criminogenic factor that contributes to a higher risk of recidivism and a potential decrease in public safety." Washington State Sex Offender Policy Board, Chapter 261, Laws of 2015 Findings and Recommendations by the Sex Offender Policy Board (December 2015). Where the requestor's motive is certainly malicious in nature and it is clear he is likely to perpetrate violence toward and harass the people whose information he is requesting, there is cause to order an injunction preventing the release of such personally identifying information as addresses, names, photographs, phone numbers, etc. This court should find a basis for refusing to disclose records under Section 540 of the Public Records Act and consider the motive of the requestor as overwhelmingly pertinent in making this determination. The trial court ruling makes clear that Mr. Hart would abuse and misuse the information. VRP at 39. The trial court effectively ruled asking for guidance or a standard by which to apply the rationale of *Parmalee* to the current case. We believe that under the ruling of that case, there is sufficient basis for the court to grant a temporary injunction to continue the legal process and proceeding and for

additional information to be obtained through the civil process to be able to establish their case preventing release.

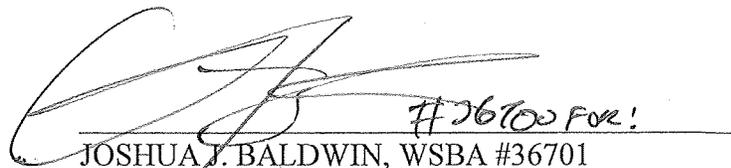
**D. CONCLUSION**

Sections 540 and 240 of the Public Records Act provide a basis for enjoining the release of the relevant requested records in this case. This Court should find the records exempt from disclosure under the Public Records Act because of the substantial risk to the individuals whose information is being requested. Additionally, this Court should hold that the motive of the requestor is a substantial factor to consider when deciding whether to enjoin the release of public records.

This Court should grant the Appellant's request for an injunction and prevent the requestor from gaining access to records which would allow him to perpetrate violence toward and harass those whose information is included in the records.

DATED: July 25, 2019.

Respectfully submitted,

  
#26700 For!  
JOSHUA J. BALDWIN, WSBA #36701  
Of Attorneys for Petitioners

CERTIFICATE

I certify that on this day I caused a copy of the foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, to Dana Gigler, Attorney for Respondent Cowlitz County Sheriff's Office and to Respondent Curtis Hart, Pro Se, addressed as follows:

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DATED this 25<sup>th</sup> day of July 2019, at Longview, Washington.



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HELEN C. FORD

# WALSTEAD MERTSCHING PS

July 25, 2019 - 3:39 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52845-2  
**Appellate Court Case Title:** John Doe 1-15, Appellant v. Cowlitz County Sheriff's Office, Respondent  
**Superior Court Case Number:** 18-2-01064-1

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