

NO.29212-6-III

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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AARON E. DOYLE, real party in interest,

Appellant,

v.

DEREK ANGUS LEE, in his capacity as the GRANT  
COUNTY PROSECUTING ATTORNEY and the GRANT  
COUNTY PROSECUTING ATTORNEY'S OFFICE, a  
division of GRANT COUNTY,

Respondents/Cross-Appellants.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITTITAS COUNTY

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REDACTED  
BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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D. ANGUS LEE  
Prosecuting Attorney

PAMELA B. LOGINSKY  
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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. RESPONDENT’S ASSIGNMENTS OF ERROR ..... 1

III. ISSUES BEFORE THE COURT ..... 2

IV. STATEMENT OF THE CASE ..... 3

V. ARGUMENT ..... 14

A. PROSECUTOR LEE WAS PROPERLY ALLOWED TO DEFEND HIMSELF IN THE INSTANT ACTION .... 14

B. JUDGE SPARKS DID NOT ABUSE HIS DISCRETION BY DISSOLVING THE ERRONEOUSLY ISSUED PRELIMINARY INJUNCTION ..... 17

C. NO VALID PRELIMINARY INJUNCTION OR TEMPORARY INJUNCTION WAS ISSUED BECAUSE THE COURT DID NOT REQUIRE DOYLE TO FURNISH SECURITY ..... 20

D. DOYLE HAS NO CLEAR LEGAL RIGHT TO HIDE HIS PAST FROM CRIMINAL DEFENDANTS ..... 26

1. The Grant County Prosecuting Attorney’s Office lawfully learned about Doyle’s past. .... 29

2. Non-parties are not bound by either the California court order or the Grant County Superior Court order. .... 31

3. California’s statutory privilege regarding the release of police officer personal records does not bar release of Doyle’s past misdeeds. .... 32

4. The Public Records Act does not establish the parameters of a defendant’s due process right to exculpatory evidence. .... 36

E. PROSECUTOR LEE’S AND THE PUBLIC’S RIGHT TO OPEN JUSTICE WAS VIOLATED BY THE TRIAL COURT ..... 40

F. PROSECUTOR LEE’S AND THE PUBLIC’S RIGHT TO OPEN JUSTICE HAS BEEN VIOLATED BY THIS COURT ..... 45

G. ATTORNEY’S FEES ARE PROPERLY AWARDED FOR WRONGFUL INJUNCTION ..... 47

VI. CONCLUSION ..... 49

TABLE OF AUTHORITY

Cases

*A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 821 N.E.2d 1238 (2004) . . . . . 47

*Abatti v. Superior Court*, 112 Cal. App. 4th 39, 4 Cal. Rptr. 3d 767 (2003) . . . . . 34

*Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 635 P.2d 108 (1981) . . . . . 29

*Alford v. The Superior Court of San Diego*, 29 Cal. 4th 1033, 63 P.3d 228, 130 Cal. Rptr. 2d 672 (2003) . . . . . 34

*Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258, 21 Media L. Rep. 1278 (1993) . . . . . 40-42, 44

*Anderson v. Dep't of Corr.*, 159 Wn.2d 849, 154 P.3d 220 (2007) . . . . . 23

*Baker v. GMC*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) . . . . . 32, 34

*Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008) . . . . . 35, 36

*Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314(1935) . . . . . 39

*Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987) . . . . . 19

*Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005), *cert. denied*, 546 U.S. 1208 (2006) . . . . . 27

*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983) . . . . . 1, 2, 6, 18, 24, 27, 31, 33, 34, 38, 39

*Branson v. Port of Seattle*, 152 Wn.2d 862, 101 P.3d 67 (2004) . . . 23, 24

*Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010) . . . . . 23, 25

*Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986) . . . . . 17

*Burt v. Dep't of Corr.*, 168 Wn.2d 828, 231 P.3d 191 (2010) . . . . . 48

<i>Cecil v. Dominy</i> , 69 Wn.2d 289, 418 P.2d 233 (1966) .....	47
<i>City of Los Angeles v. Superior Court</i> , 29 Cal.4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002) .....	33
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993) .....	6
<i>Cohen v. Everett City Council</i> , 85 Wn.2d 385, 535 P.2d 801 (1975) .....	40
<i>Commonwealth v. Barroso</i> , 122 S.W.3d 554 (Ky. 2003) .....	34
<i>Cornell Pump Co. v. City of Bellingham</i> , 123 Wn. App. 226, 98 P.3d 84 (2004) .....	48
<i>Cowles Pub'g Co. v. State Patrol</i> , 44 Wn. App. 882, 724 P.2d 379 (1986), <i>rev'd on other grounds</i> , 109 Wn.2d 712, 748 P.2d 597 (1988) .....	36
<i>Cowles Publishing Co. v. Murphy</i> , 96 Wn.2d 584, 637 P.2d 966 (1981) .....	43
<i>Cowles Publishing Co. v. State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597 (1988) .....	35, 36
<i>Daker v. State</i> , 257 Ga. App. 280, 570 S. E.2d 704 (2002) .....	5, 16
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993), <i>abrogated in part by Soter v. Cowles Publ'g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007) .....	35, 36
<i>Dependency of J.B.S.</i> , 122 Wn.2d 131, 856 P.2d 694 (1993) .....	46
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004) .....	40, 41
<i>Ebsary v. Pioneer Human Servs.</i> , 59 Wn. App. 218, 796 P.2d 769 (1990). .....	17
<i>Eulloqui v. Superior Court</i> , 181 Cal. App. 4th 1055, 105 Cal. Rptr. 3d 248 (2010) .....	33, 34
<i>Evar, Inc. v. Kurbitz</i> , 77 Wn.2d 948, 468 P.2d 677 (1970) .....	20, 22

<i>Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life</i> , 106 Wn.2d 261, 721 P.2d 946 (1986) .....	26
<i>Fisher v. Parkview Properties, Inc.</i> , 71 Wn. App. 468, 859 P.2d 77 (1993) .....	48
<i>Giglio v. United States</i> , 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) .....	24, 38
<i>Guillen v. Pierce County</i> , 144 Wn.2d 696, 31 P.3d 628 (2001), <i>rev'd on other grounds</i> , 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). .....	37
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978) .....	17
<i>Heck v. Kaiser Gypsum Co.</i> , 56 Wn.2d 212, 351 P.2d 1035 (1960) .....	48
<i>In re Criminal Investigation No. 13</i> , 82 Md. App. 609, 573 A.2d 51 (1990) .....	27
<i>In re Det. of D.F.F.</i> , 144 Wn. App. 214, 183 P.3d 302, <i>review granted</i> , 164 Wn.2d 1034 (2008) .....	41
<i>In re Koome</i> , 82 Wn.2d 816, 514 P.2d 520 (1973) .....	23
<i>In re Krynicki</i> , 983 F.2d 74 (7th Cir. 1992) .....	46, 47
<i>In re United States</i> , 872 F.2d 472 (D.C. Cir. 1989) .....	47
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997) .....	48
<i>Irwin v. Estes</i> , 77 Wn.2d 285, 461 P.2d 875 (1969) .....	20, 22
<i>Isthmian S.S. Co. v. Nat'l Marine Eng'rs Beneficial Ass'n</i> , 41 Wn.2d 106, 247 P.2d 549 (1952) .....	26
<i>Kindred v. State</i> , 521 N.E.2d 320 (Ind. 1988) .....	5, 16
<i>Kirby v. State</i> , 581 So.2d 1136 (Ala. Crim. App. 1990) .....	34
<i>Kucera v. Dep't of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63 (2000) .....	26

<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) .....	5, 28, 38, 39
<i>La Fray v. Seattle</i> , 12 Wn.2d 583, 123 P.2d 345 (1942) .....	31
<i>McCall v. Devine</i> , 334 Ill. App. 3d 192, 777 N.E.2d 405 (2004) .....	15
<i>Northwest Animal Rights Network v. State</i> , 158 Wn. App. 237, 242 P.3d 891 (2010) .....	24
<i>Northwest Land and Inv., Inc. v. New West Federal Sav. and Loan Ass'n.</i> , 64 Wn. App. 938, 827 P.2d 334, review denied, 120 Wn.2d 1002 (1992) .....	17
<i>O'Connor v. Dep't of Soc. &amp; Health Servs.</i> , 143 Wn.2d 895, 25 P.3d 426 (2001) .....	37
<i>Pacific Security Cos. v. Tanglewood, Inc.</i> , 57 Wn. App. 817, 790 P.2d 643 (1990) .....	17
<i>Pelton v. Tri-State Mem'l Hosp.</i> , 66 Wn. App. 350, 831 P.2d 1147 (1992) .....	20
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) .....	34
<i>People v. Cannedy</i> , 176 Cal. App. 4th 1474, 98 Cal. Rptr. 3d 596 (2009) .....	15
<i>People v. Gaines</i> , 46 Cal. 4th 172, 205 P.3d 1074, 92 Cal. Rptr. 3d 627 (2009) .....	38
<i>Pepsico, Inc. v. Redmond</i> , 46 F.3d 29 (7th Cir. 1995) .....	46
<i>Pitchess v. Superior Court</i> , 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974), .....	32-34
<i>Rauch v. Chapman</i> , 16 Wash. 568, 48 P. 253 (1897) .....	40
<i>Richards v. Jefferson County</i> , 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) .....	31
<i>Roe v. City and County of San Francisco</i> , 109 F.3d 578 (9th Cir. 1997) .....	27

<i>Rosales v. City of Los Angeles</i> , 82 Cal. App. 4th 419, 98 Cal. Rptr. 2d 144 (2000) .....	33
<i>Rouso v. State</i> , 170 Wn.2d 70, 239 P.3d 1084 (2010) .....	6
<i>Rufer v. Abbot Laboratories</i> , 154 Wn.2d 530, 115 P.3d 1182 (2005) .....	41, 44
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007) .....	26
<i>Seattle Firefighters Union Local No. 27 v. Hollister</i> , 48 Wn. App. 129, 737 P.2d 1302 (1987) .....	48
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1992) .....	3, 13, 41, 42, 44-46
<i>Seattle Times v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986) .....	43
<i>State ex. rel. Munro v. Kitsap County Superior Court</i> , 35 Wn.2d 217, 212 P.2d 493 (1949) .....	26
<i>State v. Loukaitis</i> , 82 Wn. App. 460, 470, 918 P.2d 535 (1996) .....	43, 44
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993) .....	33
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995) .....	41, 42
<i>State v. Brisco</i> , 78 Wn.2d 338, 474 P.2d 267 (1970) .....	39
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984), <i>cert. denied</i> , 471 U.S. 1094 (1985) .....	14
<i>State v. Coleman</i> , 151 Wn. App. 614, 214 P.3d 158 (2009) .....	40, 41
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006) .....	42, 46
<i>State v. Eisenfeldt</i> , 163 Wn.2d. 628, 185 P.3d 580 (2008) .....	30
<i>State v. Ervin</i> , 22 Wn. App. 898, 594 P.2d 934 (1979) .....	38
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967, <i>cert. denied</i> , 528 U.S. 922 (1999) .....	5, 15, 27

<i>State v. Hayes</i> , 73 Wn.2d 568, 439 P.2d 978 (1968) . . . . .	31
<i>State v. Heaton</i> , 21 Wash. 59, 56 P. 843 (1899) . . . . .	15
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005) . . . . .	17
<i>State v. Maxon</i> , 110 Wn.2d 564, 756 P.2d 1297 (1988) . . . . .	35
<i>State v. McEnry</i> , 124 Wn. App. 918, 103 P.3d 848 (2004) . . . . .	44
<i>State v. Picard</i> , 90 Wn. App. 890, 954 P.2d 336, <i>review denied</i> , 136 Wn.2d 1021 (1998) . . . . .	30
<i>State v. Sinclair</i> , 46 Wn. App. 433, 730 P.2d 742 (1986) . . . . .	16
<i>State v. Stenger</i> , 111 Wn.2d 516, 760 P.2d 357 (1988) . . . . .	15
<i>State v. Strode</i> , 167 Wn.2d 222, 217 P.3d 310 (2009) . . . . .	41, 44
<i>State v. Toliias</i> , 84 Wn. App. 696, 929 P.2d 1178 (1997), <i>rev'd on other grounds</i> , 135 Wn.2d 133, 954 P.2d 907 (1998) . . . . .	15
<i>State v. Tracer</i> , 155 Wn. App. 171, 229 P.3d 847, <i>review</i> <i>granted</i> , 169 Wn.2d 1010 (2010) . . . . .	27
<i>State v. Tyler</i> , 587 S.W.2d 918 (Mo. App. 1979) . . . . .	5, 16
<i>State v. Waldon</i> , 148 Wn. App. 952, 202 P.3d 325, <i>review</i> <i>denied</i> , 166 Wn.2d 1026 (2009) . . . . .	41
<i>State v. Walker</i> , 136 Wn.2d 678, 965 P.2d 1079 (1998) . . . . .	30
<i>Stefanelli v. Minard</i> , 342 U.S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951) . . . . .	27
<i>Tennison v. Sanders</i> , 548 F.3d 1293 (9th Cir. 2008) . . . . .	5
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001), <i>cert. denied</i> , 535 U.S. 931 (2002) . . . . .	25
<i>Turner v. City of Walla Walla</i> , 10 Wn. App. 401, 517 P.2d 985 (1974) . . . . .	17, 19
<i>Turner v. Kohler</i> , 54 Wn. App. 688, 775 P.2d 474 (1989) . . . . .	19

<i>Union Oil Co. v. Leavell</i> , 220 F.3d 562 (7th Cir. 2000) .....	46
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) .....	38, 39
<i>United States v. Bagley</i> , 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) .....	38
<i>United States v. Bland</i> , 517 F.3d 930 (7th Cir. 2008) .....	28
<i>United States v. Calise</i> , 996 F.2d 1019 (9th Cir. 1993) .....	25
<i>United States v. Kember</i> , 685 F.2d 451 (D.C. Cir.), <i>cert. denied</i> , 459 U.S. 832 (1982) .....	5, 16
<i>Van De Kamp v. Goldstein</i> , ___ U.S. ___, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009) .....	27
<i>Walder v. United States</i> , 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) .....	31
<i>Wells v. Whatcom County Water Dist.</i> , 105 Wn. App. 143, 19 P.3d 453 (2001) .....	6
<i>Westerman v. Carey</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994) .....	15
<i>Wilcox v. Dwyer</i> , 73 A.D.2d 1016, 423 N.Y.S.2d 964 (1980) .....	5, 16

#### Constitutions and Treaties

California Constitution, Article 1, § 1 .....	28
Const. art. XI, § 4 .....	14
Const. art. XI, § 5 .....	14
Fourth Amendment of the United States Constitution .....	29, 30
Washington Const. art. I, § 10 .....	2, 3, 29, 30, 40, 41, 43-46

Statutes

42 U.S.C. § 1983 .....	5
Bal. Code, § 466 .....	15
Bal. Code, § 471 .....	15
Bal. Code, § 4755 .....	15
California Penal Code Section 832.7 .....	28, 33, 34
Chapter 7.40 RCW .....	21-23
CR 52 .....	19
Laws of 1893, ch. 52, § 1 .....	15
RCW 26.50.030(5) .....	20
RCW 36.27.020(4) .....	14, 27
RCW 36.27.030 .....	15
RCW 4.92.080 .....	20
RCW 42.56.230(2) .....	36
RCW 7.24.010 .....	22
RCW 7.24.110 .....	24
RCW 7.24.190 .....	21-23, 25
RCW 7.40.020 .....	2, 8, 21, 22
RCW 7.40.080 .....	20, 22, 23
RCW 7.40.180 .....	17

Court Rules and Regulations

CR 52(a)(2)(A) .....	29
CR 60(b)(6) .....	17
CR 65(a) .....	2, 8, 21, 22
CR 65(b) .....	28
CR 65(c) .....	20
CR 65(d) .....	19, 29
CrR 4.7(a)(3) .....	1, 2, 6, 8, 18, 31, 37, 39
CrRLJ 4.7(a)(3) .....	1, 2, 6, 18, 31, 37, 39
GR 15 .....	3, 46
GR 15(c)(1) .....	7, 42
GR 15(c)(2) .....	43, 46
GR 15(c)(2)(C) .....	41
GR 31(j) .....	41
Mental Proceedings Rule 1.3 .....	41
RAP 2.5(a) .....	14
RAP 2.5(a)(1) .....	24
RPC 3.8(d) .....	1, 2, 6, 39

Other Authorities

15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 42:1 (2d ed. 2009) ..... 23

5A K. Tegland, Wash. Prac., *Evidence Law and Practice* § 501.7 (5th ed. 2007) ..... 35, 39

*Criminal Rules Task Force to the Washington Judicial Council, Washington Proposed Rules of Criminal Procedure*, comment to rule 4.7, at page 70 (1970) ..... 38

*Restatement (Second) of Conflict of Laws*, §§ 137-139 (1969 and rev. 1988) ..... 35

Washington Association of Sheriffs & Police Chiefs, *Model Policy for Law Enforcement Agencies Regarding Brady Evidence and Law Enforcement Witnesses Who Are Employees/Officers* (Nov. 19, 2009), <http://www.waspc.org/index.php?c=Professional%20Development> (last visited Feb. 9, 2011) ..... 5

WSBA Informal Opinion 1124 (1987) ..... 5, 16

## I. INTRODUCTION

This case involves the issuance of an injunction at the request of a police officer. The police officer requested the injunction because the prosecuting attorney indicated that certain information about the police officer's past may trigger the mandatory disclosure requirements of RPC 3.8(d), CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983), and its progeny.

This case requires this Court to clarify that a criminal defendant's right to potential impeachment information belongs to the defendant and is rooted in the constitutional rights of that defendant. As such, potentially exculpatory or impeaching evidence must be provided, regardless of the effect disclosure might have on the interests of a third party, and regardless of the nature of the prosecutor's relationship with that third party. Stated more particularly, this case provides an opportunity to clarify that a prosecutor may not be ordered to withhold potentially helpful impeachment information to protect a police officer's reputation or employment.

Finally, this case requires this Court to reiterate that important litigation over these matters must be conducted openly, not in secret.

## II. RESPONDENT'S ASSIGNMENTS OF ERROR

1. The trial court erred by granting the *ex parte* motion to seal records and documents, and by entering the April 8, 2010, Order Granting *ex parte* Motion to Seal Records and Documents. CP 47-48.

2. The trial court erred by granting the *ex parte* application for temporary injunction, and by entering the April 8, 2010, Order Granting *ex parte* Application for Temporary Injunction and Order to Show Cause. CP36-38.

3. The trial court erred by entering the April 12, 2010, Amended Order Granting *ex parte* Motion to Seal Records and Documents. CP 49-50.

4. The trial court erred by entering the April 23, 2010, Order Sealing File. CP 250.

5. The trial court erred by entering the April 23, 2010, Preliminary Injunction. CP 248-49.

### III. ISSUES BEFORE THE COURT

1. Whether the Grant County Prosecuting Attorney's Office should have been barred from appearing in the instant matter?

2. Whether the trial court abused its discretion by dissolving an erroneously issued preliminary injunction?

3. Whether the trial court erroneously granted an *ex parte* temporary injunction and a preliminary injunction pursuant to RCW 7.40.020 and CR 65(a), without requiring the mandatory bond?

4. Whether a prosecutor may be enjoined from discharging his or her obligations under RPC 3.8(d), CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983), and its progeny?

5. Whether the sealing of the superior court file violated Const. art.

I, § 10, when the sealing was ordered without compliance with the procedure set forth in GR 15 and in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1992)?

6. Whether this Court's sealing of its file violated Const. art. I, § 10, when the sealing was ordered without compliance with the procedure set forth in GR 15 and in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1992)?

7. Whether Prosecutor Lee is entitled to an award of attorneys fees?

#### IV. STATEMENT OF THE CASE

Aaron Doyle was a police officer in California. CP 9, at ¶ 2; CP 32, at ¶ 2. He left his employment with the Sierra County Sheriff's Office under a settlement agreement that dismissed a disciplinary action in exchange for Mr. Doyle's resignation. CP 9, at ¶ 6; CP 194, at ¶ 2. This agreement precluded Mr. Doyle from applying for or accepting employment with Sierra County for a five year period. CP 196, at ¶ 7. Before this agreement was reached, Mr. Doyle had first been subject to termination, and subsequently was placed on one year non-paid status and one-year probation. This was based, in part, upon Sierra County Sheriff's Department's internal investigation established that Mr. Doyle was dishonest. CP 193, at ¶ C and D. Nothing in the settlement agreement indicates that the factual findings of dishonesty<sup>1</sup> were ever modified or overturned. See CP 190, Exhibit A. The

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settlement agreement does, however, indicate that

CP 197, at ¶ 10).

In May of 2007, Mr. Doyle obtained employment with the Quincy Police Department. CP 10, at ¶ 9. While so employed, Mr. Doyle was involved in a romantic relationship with Haley Taylor. CP 33, at ¶ 6. This relationship ended badly, with allegations of criminal misconduct lodged against both Mr. Doyle and Ms. Taylor. CP 33, at ¶¶ 6-9.

In 2009, Mr. Doyle reported that a USB “thumb-drive” that contained documents related to his employment with Sierra County had been stolen from his home. CP 11, at ¶ 17; CP 33-34, at ¶ 9. Mr. Doyle requested police intervention in recovering the documents, and the prosecution of the alleged thief. CP 11, at ¶ 20; CP 33, at ¶ 9. Moses Lake Police Department officers recovered the “thumb-drive” from Ms. Taylor’s attorney after threatening to obtain a search warrant. CP 11-12, at ¶¶ 22-23; CP 34, at ¶ 12. The

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documents on the “thumb-drive” were necessarily reviewed by the investigating officers and by prosecutors in order to determine whether theft charges were appropriate. CP 12, at ¶ 24, 25; CP 34, at ¶ 12.

The review of the documents<sup>2</sup> revealed that an investigation in Mr. Doyle’s conduct as a sheriff’s deputy in Sierra County resulted in a sustained finding of “deception.” CP 308, at internal numbers 000002, 000003, and

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<sup>2</sup>Prosecutor Lee did not review the documents when they were initially seized by the Moses Lake Police Department pursuant to Mr. Doyle’s theft report. Prosecutor Lee transferred the theft report to a neighboring prosecutor for a charging decision. This action was taken in an overabundance of caution, as no disqualifying conflict of interest existed. CP 937-38. *See, e.g., State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (appearance of fairness doctrine does not apply to the executive branch office of prosecutor; prosecutor not disqualified from handling a capital murder case due to his friendship with the murdered deputy sheriff); *United States v. Kember*, 685 F.2d 451, 458-59 (D.C. Cir.), *cert. denied*, 459 U.S. 832 (1982) (a conflict of interest cannot be manufactured by a defendant filing a bar complaint or a civil action against the prosecutor); *Daker v. State*, 257 Ga. App. 280, 570 S. E.2d 704, 705 (2002) (same); *Kindred v. State*, 521 N.E.2d 320, 327 (Ind. 1988) (same); *State v. Tyler*, 587 S.W.2d 918, 929-930 (Mo. App. 1979) (same); *Wilcox v. Dwyer*, 73 A.D.2d 1016, 423 N.Y.S.2d 964 (1980) (a prosecutor may not be disqualified from a case solely because a witness in the case has commenced an action against the prosecutor). *Accord* WSBA Informal Opinion 1124 (1987) (“The Committee was of the opinion that when you as a prosecuting attorney had been threatened with a lawsuit by a criminal defendant, you would be presented with no conflict such as to prevent you from continuing to prosecute the defendant.”).

Prosecutor Lee reviewed the file after Moses Lake Police Chief Dean Mitchell alerted him on March 23, 2010, that Prosecutor Lee should familiarize himself with the contents of the file. CP 855. Moses Lake Police Chief Mitchell’s warning to Prosecutor Lee was consistent with the Washington Association of Sheriffs & Police Chiefs’ *Model Policy for Law Enforcement Agencies Regarding Brady Evidence and Law Enforcement Witnesses Who Are Employees/Officers* (Nov. 19, 2009), <http://www.waspc.org/index.php?c=Professional%20Development> (last visited Feb. 9, 2011), and case law. *See generally Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (prosecutors, not police officers, are responsible for determining what information must be disclosed to a criminal defendant); *Tennison v. Sanders*, 548 F.3d 1293 (9th Cir. 2008) (police officers can be found liable under 42 U.S.C. § 1983 for withholding potential exculpatory evidence from a defendant by failing to disclose the information to a prosecutor).

000014. D. Angus Lee, the Grant County Prosecuting Attorney, believed that this finding and the information supporting the finding was “potential impeachment information” that his office was required to disclose to defendants in cases in which Mr. Doyle was a witness pursuant to RPC 3.8(d), CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983), and its progeny. Prosecutor Lee notified Mr. Doyle of his preliminary determination and invited Mr. Doyle to provide any information he wished Prosecutor Lee to consider in making his *Brady* determination. CP 13-14, at ¶ 33; CP 24-25.

Mr. Doyle responded to Prosecutor Lee’s letter by filing suit in the Kittitas County Superior Court.<sup>3</sup> This suit sought declaratory relief

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<sup>3</sup>Mr. Doyle’s pleadings, throughout this action, are replete with allegations related to Prosecutor Lee’s appointment to and subsequent successful election to the office of Grant County Prosecuting Attorney. *See, e.g.*, CP 172-77. Mr. Doyle’s dissatisfaction with Prosecutor Lee’s running of his office, however, is irrelevant to the propriety of enjoining a prosecutor from complying with his obligations under RPC 3.8(d), CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady*. Mr. Doyle’s complaints, moreover, present a political question, rather than a question of law. Review of political questions are generally beyond the authority and ability of the judiciary. *See Rousso v. State*, 170 Wn.2d 70, 88, 239 P.3d 1084 (2010). The Respondents, therefore, will not respond further to these complaints.

Mr. Doyle’s brief in this Court contains many factual assertions that are unsupported by the record. For instance, pages 13-14 contain a lengthy description of meetings related to Mr. Doyle’s efforts to be appointed as the Grant County Coroner. The citations to the record throughout this section of the brief is merely “*id.*”. The last proper citation to the record prior to the string of “*id.*’s” is CP 1-6; CP 9-31. These documents, however, contain no mention of Mr. Doyle’s aspiration to the office of Coroner nor any summary of the alleged meeting between Prosecutor Lee and Mr. Doyle related to that aspiration. These “facts”, therefore, are not properly before this Court and must be disregarded. *See generally Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252, 850 P.2d 1298 (1993) (“Cases on appeal are decided only on evidence in the record.”); *Wells v. Whatcom County Water Dist.*, 105 Wn. App. 143, 154, 19 P.3d 453 (2001) (a party on appeal may not cite to evidence not in the appellate record and may be sanctioned for doing so). Neither this Court nor Prosecutor Lee is required to search the record to find

CP 5, at ¶ 28. Specifically, Mr. Doyle requested that Prosecutor Lee and his office (hereinafter referred to as “Prosecutor Lee”) be prohibited from using, distributing, or disseminating any of the documents related to Mr. Doyle’s Sierra County employment to anyone. CP 5-6. Mr. Doyle argued that this result was compelled by the settlement agreement entered into with Sierra County and by court orders issued by both the California Superior Court and the Grant County Superior Court. CP 5, at ¶ 28. Prosecutor Lee, however, was not a party to either of these lawsuits. CP 9, at ¶¶ 7, 15, 16, and 37; CP 26-29; CP 32, at ¶¶ 5, 10, and 11; CP 201- 223.

Mr. Doyle’s complaint was accompanied by an *ex parte* motion for temporary restraining order. CP 7.

CP 8. Mr. Doyle supported this motion with a declaration, but he did not provide the court with a copy of the documents that he was seeking to protect. *See* CP 10, at ¶¶ 7-8. Judge Sparks granted the motion in an order that does not identify the clear legal or equitable right at issue, and that waives the requirement of a bond. *See* CP 36-38.

Mr. Doyle also filed an *ex parte* motion to seal the pleadings related to his newly filed action. CP 39. Although the motion was

Mr. Doyle did not provide advance notice of the motion to Prosecutor Lee as required by GR 15(c)(1). *Id.* Judge Sparks, relying upon

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support for Mr. Doyle’s allegations.

federal case law, granted the motion to seal records and documents in an order that indicated sealing was appropriate because the contents of the documents might

CP 47-48.

Prosecutor Lee promptly filed a motion to dissolve the temporary injunction due to the lack of a bond. CP 156. Alternatively, Prosecutor Lee requested that the injunction be amended to allow him to comply with CrR 4.7(a)(3). *Id.*

Judge Sparks denied Prosecutor Lee's motion to dissolve the temporary injunction and entered a preliminary injunction

CP 248. This injunction did not require Mr. Doyle to post a bond or offer any other security. This injunction did, however, contain an exception to the general prohibition upon disclosure of Mr. Doyle's past improprieties:

CP 249.

At the same time as the entry of the preliminary injunction, Judge

Sparks entered an “ ” order that sealed the entire court file. CP 250 (“

”). This order was not proceeded by a hearing and was not accompanied by any findings. *Id.* Although Judge Sparks understood that his sealing order was improper,<sup>4</sup> he left the order in place until entry of the July 16, 2010, order dissolving the preliminary injunction. CP 790. That order directed that the file remain sealed until August 2, 2010, at 9:00 a.m. *Id.* No justification was given for the continued sealing of the file. *Id.* See also RP 142-143.

Prosecutor Lee sought to fulfill his obligations under the Due Process Clause to provide defendants with potential impeachment information by requesting *in camera* review of the Sierra County documents in pending criminal matters. This process diverted hundreds of hours of scarce prosecutor resources from other tasks. CP 938, at ¶ 8. In every case in which an *in camera review* took place, Prosecutor Lee was ordered to disclose the information to the defendant. See generally CP 523, Exhibit A;<sup>5</sup> CP 523,

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<sup>4</sup>Judge Sparks clearly understood the obligation to make such findings and the obligation to limit sealing orders to specific documents. See RP 2 (“

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<sup>5</sup>The order entered in *State v. Lind*, Grant County District Court Cause No. Q7320C, provided, in part, as follows:

Exhibit B.<sup>6</sup>

*In camera* reviews, however, were not possible in every case. Felony charges in *State v. Perez*, Grant County Superior Court Cause No. 10-1-00067-7, were dismissed with prejudice by the court due, in part, to a

CP

307. *See also* RP 127. Grant County Superior Court Judge Evan Sperline refused to review the materials *in camera* on the grounds that the responsibility for making a *Brady* determination rests with the prosecuting attorney, not the court. CP 940.

Prosecutor Lee filed a motion for summary judgment to dissolve the preliminary injunction on June 11, 2010. CP 289. Prosecutor Lee asserted, in part, that Mr. Doyle's case was moot, since copies of the documents had been distributed to numerous criminal defendants pursuant to the Grant County court orders. *Id.*

Six days after Prosecutor Lee filed his motion for summary judgment, Mr. Doyle served Deputy Prosecuting Attorney ("DPA") Douglas Mitchell

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CP 523, Exhibit A (CP 535-536).

<sup>6</sup>The order entered in *State v. Carillo*, Grant County Superior Court Cause No. 10-1-00133-9 (May 27, 2010), ruled that redacted copies of the Sierra County documents would "

CP 523, Exhibit B (CP 538-543).

A subsequent order required the prosecuting attorney to provide the same redacted material to eight other superior court defendants. *See* CP 523, Exhibit C (CP 545-46).

with a subpoena for deposition and a subpoena duces tecum. CP 395. Prosecutor Lee brought a motion to quash the subpoena as DPA Mitchell had appeared on his behalf in this case,<sup>7</sup> and his deposition was barred by both the attorney/client privilege and the work product doctrine. *See* CP 804. Prosecutor Lee's motion to quash the subpoenas was granted, and the court directed that further discovery be held in abeyance until after Prosecutor Lee's summary judgment motion is heard. CP 407.

Mr. Doyle took the position in his response to Prosecutor Lee's motion for summary judgment that the motion was “

CP 412. Mr. Doyle did not, however, identify what evidence he hoped to establish through discovery. Mr. Doyle, moreover, brought no motion to continue the summary judgment hearing for the purpose of obtaining specific evidence.<sup>8</sup>

Mr. Doyle supplemented his opposition to the summary judgment motion with a motion that sought to remove Prosecutor Lee “

” CP 520. This motion, Prosecutor Lee's response thereto, and various motions for contempt and/or for sanctions were all noted for the same time as the summary judgment hearing. *See, e.g.*, CP 520; CP 553; CP 791, 920.

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<sup>7</sup>*See, e.g.*, RP 1-2, RP 21.

<sup>8</sup>Mr. Doyle did obtain a four-day continuance of the summary judgment motion to accommodate his schedule. *See* CP 899.

Judge Sparks considered all of these pleadings in rendering his decision on summary judgment. *See* CP 790, at ¶ 2 (“  
”). Based upon all of these pleadings, Judge Sparks ordered the immediate termination of the preliminary injunction entered on April 23, 2010. CP 790. Judge Sparks entered this order because a close review<sup>9</sup> of the Sierra County documents established that the finding of dishonesty was sustained and that adverse employment consequences were imposed as a result of that finding. Specifically, Mr. Doyle was barred from working, in any capacity, for Sierra County for a period of five years. RP140-41, 142.

Judge Sparks further ordered the Kittitas County Clerk to keep the entire file sealed until August 2, 2010. *Id.* Judge Sparks did not identify the grounds for the continued sealing of the court file. *Id. See also* RP 142-143.

To the contrary, Judge Sparks indicated that

.” RP 146.

After Judge Sparks announced his summary judgment decision, Mr. Doyle withdrew his motion to disqualify Prosecutor Lee from cases involving him. RP 144. Mr. Doyle then changed his mind, and requested a ruling on

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<sup>9</sup>In his ruling, Judge Sparks indicated that:

the motion. *Id.* Judge Sparks denied the motion after Mr. Doyle clarified its scope, stating that his request was for either the Attorney General's Office or another prosecuting attorney's office deal with any requested *in camera* reviews of the materials. RP 145-46.

Mr. Doyle filed a timely notice of appeal. CP 813. Prosecutor Lee filed a timely notice of cross-appeal. CP 1096.

Mr. Doyle also filed a motion in this Court to stay Judge Spark's order dissolving the injunction. Commissioner McCown granted this motion, and Prosecutor Lee has continued to be subjected to the terms of the unlawfully issued injunction. Commissioner's Ruling (July 29, 2010).

Clerk Townsley sua sponte sealed this Court's entire file. Letter to Pamela Beth Loginsky from Renee S. Townsley (Sep. 3, 2010). Prosecutor Lee's motion to unseal the file was granted by this Court. Order Granting Motion to Modify Clerk's Ruling (Oct. 28, 2010). Subsequently, however, this Court ordered the sealing of the report of proceedings from hearings that were held in open court. *See* Amended Order Granting Motion to Modify Clerk's Ruling (Dec. 15, 2010). This order does not contain any *Ishikawa* findings, and was entered without providing the parties with notice and an opportunity to be heard. Citing to this order, Clerk Townsley refused to provide copies of documents in the appellate court file to a non-party on January 4, 2011. *See* Letter to Ms. Hemberry (Jan. 4, 2011).

## V. ARGUMENT

### A. PROSECUTOR LEE WAS PROPERLY ALLOWED TO DEFEND HIMSELF IN THE INSTANT ACTION

In the trial court, Mr. Doyle filed a motion to remove Prosecutor Lee from all criminal matters in which Mr. Doyle's past might become an issue. *See* CP 520; RP 145-46. In this Court, Mr. Doyle contends that Prosecutor Lee should have been disqualified in the instant action, and barred from prosecuting his motion for summary judgment. *See* Opening Brief of Appellant Aaron Doyle, at 17-21. As this motion was never made in the trial court it is not properly before this Court. *See generally* RAP 2.5(a).

The removal of a prosecuting attorney presents serious separation of power issues. The Washington Constitution vests the criminal prosecution function in the constitutionally created locally-elected executive branch office of prosecuting attorney. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). This same constitution assigns the Legislature the task of determining the duties of the prosecuting attorney. *See* Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecuting attorney). Among the duties assigned to the prosecuting attorney is the obligation to “[p]rosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county.” RCW 36.27.020(4).

In conformity with the 1889 constitution's designation of the prosecuting attorney as an independently elected officer, the legislature took affirmative action to limit the ability of the courts to remove the people's

chosen lawyer. *See generally* Bal. Code, §§ 466, 471, 4755; Laws of 1893, ch. 52, § 1. The limitations placed upon court action by the legislature have remained virtually unchanged to this day. *Compare* Laws of 1893, ch. 52, § 1 *with* RCW 36.27.030. These statutory criteria are the sole basis for replacing the people's chosen lawyer. *See State v. Heaton*, 21 Wash. 59, 61-62, 56 P. 843 (1899).

The only statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney is when the prosecuting attorney fails, from sickness or other cause, to attend court. *Heaton*, 21 Wash. at 61-62. Case law generally equates "other cause" to a conflict of interest. *See Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client's position); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (defendant was prosecutor's former client); *State v. Tolia*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev'd on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges). The mere appearance of impropriety, however, is insufficient to allow for the removal of a prosecutor. This is because the appearance of fairness doctrine does not apply to the executive branch office of prosecutor. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). *Accord People v. Cannedy*, 176 Cal. App. 4th 1474, 98 Cal. Rptr. 3d 596 (2009) (unseemliness alone is not a basis for recusal of the prosecutor).

The "actual conflict of interest" requirement is a stringent one, as the electorate's choice of counsel is not to be cast aside lightly. *McCall v.*

*Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405, 416-17 (2004). This requirement is not met in the instant case as Prosecutor Lee has never represented Mr. Doyle, CP 937, and a prosecutor may not be disqualified from an action by his opponent's filing of a lawsuit or a bar complaint. *See, e.g., United States v. Kember*, 685 F.2d 451, 458-59 (D.C. Cir.), *cert. denied*, 459 U.S. 832 (1982); *Daker v. State*, 257 Ga. App. 280, 570 S. E.2d 704, 705 (2002); *Kindred v. State*, 521 N.E.2d 320, 327 (Ind. 1988); *State v. Tyler*, 587 S.W.2d 918, 929-930 (Mo. App. 1979). *Accord* WSBA Informal Opinion 1124 (1987) ("The Committee was of the opinion that when you as a prosecuting attorney had been threatened with a lawsuit by a criminal defendant, you would be presented with no conflict such as to prevent you from continuing to prosecute the defendant."). *Cf. State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (a criminal defendant's filing of a formal complaint against his lawyer with the Washington State Bar Association does not create a conflict of interest in violation of the Code of Professional Responsibility sufficient to force the recusal of the attorney). Nor may a prosecutor be disqualified from a case solely because a witness in the case has commenced an action against the prosecutor. *See, e.g., Wilcox v. Dwyer*, 73 A.D.2d 1016, 423 N.Y.S.2d 964 (1980).

Prosecutor Lee was properly allowed to personally defend the integrity of his office. Judge Sparks did not err by allowing Prosecutor Lee to pursue his summary judgment motion to dissolve the preliminary injunction.

B. JUDGE SPARKS DID NOT ABUSE HIS DISCRETION BY DISSOLVING THE ERRONEOUSLY ISSUED PRELIMINARY INJUNCTION

The granting or denial of a preliminary injunction rests in the sound discretion of the trial court. *See, e.g., Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). “Appellate courts give great weight to the trial court’s exercise of that discretion.” *Id.* The trial court’s decision, therefore, will only be reversed for an abuse of discretion. *See, e.g., Turner v. City of Walla Walla*, 10 Wn. App. 401, 405, 517 P.2d 985 (1974). The application of an incorrect legal analysis or other error of law can constitute abuse of discretion. *See State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

A party may bring a motion to dissolve or modify an injunction at any time after its issuance. RCW 7.40.180. A trial court has the discretion to vacate a preliminary injunction if conditions have changed and the order is no longer equitable. *See generally Pacific Security Cos. v. Tanglewood, Inc.*, 57 Wn. App. 817, 820-21, 790 P.2d 643 (1990); CR 60(b)(6). A trial court’s decision to vacate a preliminary injunction or any judgment will only be reversed for an abuse of discretion. *See, e.g., Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978); *Northwest Land and Inv., Inc. v. New West Federal Sav. and Loan Ass’n.*, 64 Wn. App. 938, 942, 827 P.2d 334, *review denied*, 120 Wn.2d 1002 (1992). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Ebsary v. Pioneer Human Servs.*, 59 Wn. App. 218, 225, 796 P.2d 769 (1990).

In the instant case, conditions significantly changed between April 8, 2010, when the *ex parte* TRO was granted<sup>10</sup> and July 16, 2010, when the order dissolving the preliminary injunction and dismissing the case was entered.<sup>11</sup> First, Judge Sparks reviewed and carefully read the documents that Mr. Doyle had withheld from the court when he applied for the TRO.<sup>12</sup> This review established that there was a “sustained finding” of dishonesty that resulted in adverse consequences to Mr. Doyle. *See* RP 139-142.

Second, disinterested judges of both the Grant County District Court and the Grant County Superior Court independently determined that Prosecutor Lee had an obligation under CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and/or *Brady* to provide the Sierra County documents to defendants. *See generally* CP 523, Exhibit A; CP 523, Exhibit B. Prosecutor Lee promptly complied with these determinations, resulting in the possession of the documents by numerous defense counsel. CP 379-382.

Third, felony charges were dismissed with prejudice in one criminal case as a direct result of the preliminary injunction. CP 307. Most reasonable persons would find this too high a price to pay to shield Mr. Doyle

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<sup>10</sup>CP 36.

<sup>11</sup>CP 790.

<sup>12</sup>*See* CP 10 at ¶ 5 (“

”). Mr. Doyle retreated slightly from this position prior to the hearing on the preliminary injunction, providing Judge Sparks with a copy of the 8-page “Resignation and Resolution of Claims Agreement”. *See* CP 190, at Exhibit A. Prosecutor Lee provided Judge Sparks with the remaining 32 pages of materials when he filed for summary judgment. *See* CP 289, at Exhibit B.

from his past misdeeds.

Even if there had been no change in conditions, Judge Sparks' order dissolving the preliminary injunction must be affirmed because its issuance was contrary to the law. Specifically, as discussed *infra* in sections V. B. and V.C., the preliminary injunction was void because no bond was required and Mr. Doyle has no clear legal right to hide his past from criminal defendants. Finally, the dissolution of the preliminary injunction must also be affirmed because the injunction contains no reasons for the issuance of the order and no findings of fact or conclusions of law were entered in conjunction therewith. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 63, 738 P.2d 665 (1987); *Turner v. City of Walla Walla*, *supra*; CR 65(d); CR 52.

The initial invalidity of the preliminary injunction also renders moot Mr. Doyle's contention that Judge Sparks should have delayed the summary judgment hearing until after discovery. *See generally* Opening Brief of Appellant Aaron Doyle, at 34-37. A trial court may deny a motion for continuance where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

Here, Mr. Doyle's only stated need for discovery was “

” CP 695. Delay for the purpose of obtaining

cumulative or irrelevant evidence should not be granted by a court. Judge Spark's denial of Mr. Doyle's requested continuance was not an abuse of discretion. *See, e.g., Pelton v. Tri-State Mem'l Hosp.*, 66 Wn. App. 350, 357, 831 P.2d 1147 (1992). The order dissolving the improperly issued preliminary injunction must be affirmed.

C. NO VALID PRELIMINARY INJUNCTION OR TEMPORARY INJUNCTION WAS ISSUED BECAUSE THE COURT DID NOT REQUIRE DOYLE TO FURNISH SECURITY

Except as otherwise provided by statute,<sup>13</sup> no temporary restraining order ("TRO") or preliminary injunction may be granted until the party asking for injunctive relief furnishes security in an amount fixed by the court, conditioned to pay all damages and costs that may be incurred by any party who is found to have been wrongfully enjoined or restrained. CR 65(c); RCW 7.40.080. When security is required, it is error to grant preliminary injunctive relief without the bond. *See, e.g., Evar, Inc. v. Kurbitz*, 77 Wn.2d 948, 950-51, 468 P.2d 677 (1970); *Irwin v. Estes*, 77 Wn.2d 285, 461 P.2d 875 (1969).

Here, Judge Sparks granted Mr. Doyle a TRO that provides, in part,

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<sup>13</sup>Statutes that dispense with the bond requirement do so unequivocally. *See, e.g.,* RCW 26.50.030(5) ("A person is not required to post a bond to obtain relief in any proceeding under this section."); RCW 4.92.080 ("the state of Washington shall be, on proper showing, entitled to any orders, injunctions and writs of whatever nature without bond notwithstanding the provisions of any existing statute requiring that bonds be furnished by private parties").

that the “ .” *See* CP 36-38.<sup>14</sup> The TRO identifies no statutory basis for its issuance. *See* CP 36-38. The *ex parte* motion for the TRO, however, was

.” CP 8. Chapter 7.40 RCW contains no statutory exemption from the posting of security. Accordingly, the TRO was invalid and its issuance was error.

Judge Sparks issued a preliminary injunction “

” CP 248. Although neither RCW 7.40.020 nor CR 65(a) authorizes a court to waive the security requirement, Judge Sparks did not require Mr. Doyle to post a bond or other security.<sup>15</sup> Accordingly, the preliminary injunction was invalid and its issuance was error.

After the issuance of the TRO, but prior to the issuance of the preliminary injunction, Mr. Doyle asserted that RCW 7.24.190<sup>16</sup> permitted the Court to waive the bond requirement. *See* CP 176. Mr. Doyle claimed

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<sup>14</sup>Judge Sparks refused to revisit the bond requirement in a hearing held on April 19, 2010, and again on April 22, 2010. *See* CP 168-169.

<sup>15</sup>Judge Sparks recognized that his decision to waive the bond was made in a hearing that was conducted without Prosecutor Lee. Judge Sparks acknowledged a need to address the lack of a bond on the record, but regrettably failed to issue any subsequent oral or written ruling that either set the bond amount or explained why a bond was not required. *See* RP 37-38.

<sup>16</sup>RCW 7.24.190 states that:

The court, in its discretion and upon such conditions and with or without such bond or other security as it deems necessary and proper, may stay any ruling, order, or any court proceedings prior to final judgment or decree and may restrain all parties involved in order to secure the benefits and preserve and protect the rights of all parties to the court proceedings.

that RCW 7.24.010 et seq. governed the instant proceeding, and that “

.” CP 176. Mr.

Doyle’s position is incorrect for three reasons.

First, Chapter 7.40 RCW is not limited to public construction projects. This is established by the plain language of the chapter, which includes references to “a person’s health or life.” RCW 7.40.080<sup>17</sup> This is further established by case law which demonstrates that Chapter 7.40 RCW’s reach extends far beyond “

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There are Washington Supreme Court cases that recognize that a TRO or injunction is invalid if it was issued without the bond required by RCW 7.40.80. Neither case dealt with contractors or public construction projects. *See Evar, Inc. v. Kurbitz, supra* (enjoin stockholder); *Irwin v. Estes, supra* (rock concert).

Second, neither the TRO nor the preliminary injunction in this case indicates that it was issued pursuant to RCW 7.24.190. To the contrary, the preliminary injunction identifies the authority under which the order was issued as “

.” CP 248. The TRO, which cites no authority for its issuance, was “

,” CP 36,

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<sup>17</sup>Mr. Doyle “paraphrased” the statutory language in his pleadings, arguing that RCW 7.40.080 authorizes the court to waive the bond requirement in cases in which the “

.” CP 176. The actual language of RCW 7.40.080, which Mr. Doyle successfully urged the court to “

”, CP 176, limits the court’s ability to waive the bond requirement to “situations in which a person's health or life would be jeopardized.” A reputation tarnished by fact hardly satisfies this language.

<sup>18</sup>CP 176.

and the only legal authorities cited by Mr. Doyle in support of the issuance of the TRO was “ .” CP 7-8.

Third, no published appellate court case explains how RCW 7.24.190 and RCW 7.40.080 should be reconciled. If simply joining a prayer for a declaratory judgment to any action seeking an injunction under Chapter 7.40 RCW could excuse the security requirement, then RCW 7.40.080 would have been repealed by implication. The Supreme Court, however, does not favor repeal by implication. Where potentially conflicting acts can be harmonized, each should be construed to maintain the integrity of the other. *See, e.g., Anderson v. Dep't of Corr.*, 159 Wn.2d 849, 858-59, 154 P.3d 220 (2007).

Here, the integrity of both RCW 7.40.080 and RCW 7.24.190<sup>19</sup> can be maintained by a simple requirement. Before a restraining order may be issued under RCW 7.24.190, the issuing court must find that the court’s jurisdiction was properly invoked under the Uniform Declaratory Judgment Act. This jurisdictional finding turns on two factors: (1) a justiciable controversy, and (2) the joinder of all necessary parties. *See generally Brown v. Vail*, 169 Wn.2d 318, 333-34, 237 P.3d 263 (2010); *Branson v. Port*

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<sup>19</sup>Other manners of reconciling the two statutes also exist. RCW 7.24.190 authorizes both “stays” and “restraining orders.” Although these two words are frequently used interchangeably, “the two mediums of equitable relief are not, technically, identical judicial creatures.” *In re Koome*, 82 Wn.2d 816, 819, 514 P.2d 520 (1973). The security waiver authorization in RCW 7.24.190 could rationally be limited to “stays” and other orders that are consistent with the rule that “[a] declaratory judgment ‘has no direct, coercive effect.’ 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 42:1 (2d ed. 2009).” *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010). This would leave Chapter 7.40 RCW intact in cases in which, like here, the petitioner requested an order that will have a direct, coercive effect.

*of Seattle*, 152 Wn.2d 862, 878, 101 P.3d 67 (2004); *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 242-45, 242 P.3d 891 (2010); RCW 7.24.110.

In the instant case, Judge Sparks never found that the court's jurisdiction was properly invoked under the Uniform Declaratory Judgement Act.<sup>20</sup> Nor could he, as a claim is not justiciable where the plaintiff fails to join indispensable parties. *Northwest Animal Rights Network*, 158 Wn. App. at 242.

An indispensable or necessary party to a declaratory judgment action is any person whose "interest would be affected by the declaration." RCW 7.24.110. *See also Branson*, 152 Wn.2d at 878 (a party is a "necessary party" under RCW 7.24.110 if it is one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment in the current case). Clearly, each and every defendant currently facing trial in a case in which Mr. Doyle participated in the arrest or investigation satisfies this definition. Each of these fifty or more defendants<sup>21</sup> had a clear constitutional right to the impeachment evidence contained in the Sierra County files. *See generally Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (government's duty to disclose favorable evidence under *Brady* includes information that could be used to impeach government witnesses);

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<sup>20</sup>This issue may properly be raised for the first time on appeal. *See* RAP 2.5(a)(1).

<sup>21</sup>*See* CP 379-82.

*United States v. Calise*, 996 F.2d 1019, 1021-22 (9th Cir. 1993) (error for government not to disclose magistrate judge’s finding in an unrelated case that agent’s testimony was “absolutely incredible”). Judge Sparks recognized that these individuals had an interest that could be affected by his actions when he made an allowance in the preliminary injunction for Prosecutor Lee to provide discovery to the criminal defendants. *See* CP 249.

Judge Sparks also lacked jurisdiction to invoke RCW 7.24.190 in the instant case by the absence of the fourth element of a justiciable controversy.<sup>22</sup> So long as Mr. Doyle remains a police officer, every individual who faces a criminal trial on facts gathered or developed by Mr. Doyle is entitled to learn about the contents of the Sierra County files. It is thus conceivable, that one year, five years, or even ten years after the instant case ended, criminal defendants could still bring an action to gain access to the Sierra County files. In other words, any opinion that Judge Sparks might have issued under the Uniform Declaratory Judgement Act would have only been advisory. Advisory opinions are issued in only the rarest circumstances. *Brown*, 169 Wn.2d at 334-35. Mr. Doyle’s desire to keep his past hidden from individuals he arrests does not constitute such a “rare circumstance.” *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149

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<sup>22</sup>A justiciable controversy involves (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Brown*, 169 Wn.2d at 334.

(2001), *cert. denied*, 535 U.S. 931 (2002) (advisory opinions will be issued only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming).

D. DOYLE HAS NO CLEAR LEGAL RIGHT TO HIDE HIS PAST FROM CRIMINAL DEFENDANTS

In Washington, a person is only entitled to injunctive relief if he can establish (1) that he has a clear legal or equitable right, (2) that he has a well grounded fear of immediate invasion of that right by the one against whom the injunction is sought, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *See, e.g., San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007). The failure to establish any of these criteria requires the denial of injunctive relief. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 210, 995 P.2d 63 (2000).

A preliminary injunction should not issue in a doubtful case. *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986) (quoting *Isthmian S.S. Co. v. Nat'l Marine Eng'rs Beneficial Ass'n*, 41 Wn.2d 106, 117, 247 P.2d 549 (1952)). An injunction, like the instant one, that interferes with the execution and enforcement of criminal laws should not issue unless the statute or ordinance that is being enforced is unconstitutional or otherwise invalid and its enforcement will destroy property rights. *State ex. rel. Munro v. Kitsap County Superior Court*, 35 Wn.2d 217, 221, 212 P.2d 493 (1949). This rule "summarizes

centuries of weighty experience in Anglo-American law," *Stefanelli v. Minard*, 342 U.S. 117, 120, 96 L. Ed. 138, 72 S. Ct. 118 (1951). It is designed to prevent the judiciary from breaching the separation of powers. *In re Criminal Investigation No. 13*, 82 Md. App. 609, 573 A.2d 51, 54 (1990).

The TRO and the preliminary injunction issued by Judge Sparks violated both of these precepts. Mr. Doyle never established a likelihood of success on the merits. Both the TRO and the preliminary injunction, moreover, directly impacted more than fifty pending criminal cases. The impacts included a delay in the release of relevant discovery to defendants, unnecessary judicial involvement in the executive branch's *Brady* determinations,<sup>23</sup> diversion of scarce prosecutorial resources from other

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<sup>23</sup>Among the functions vested solely in the executive branch prosecutor is the decision whether to initially file charges, the decision what charges to file, and the decision of when to file charges. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999); *State v. Tracer*, 155 Wn. App. 171, 182, 229 P.3d 847, review granted, 169 Wn.2d 1010 (2010). The prosecutor is also vested with the sole responsibility for presenting the State's case in court. See RCW 36.27.020(4). Intimately associated with this function is the selection of witnesses and the processing of discovery, including the making of *Brady* determinations.

When a prosecutor is engaged in any of the above core functions, the prosecutor is absolutely immune from civil liability. See generally *Van De Kamp v. Goldstein*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 855, 858-59, 172 L. Ed. 2d 706 (2009) (prosecutor's absolute immunity extends to claims that the prosecution failed to disclose impeachment material and/or established a flawed system for handling potential impeachment material); *Botello v. Gammick*, 413 F.3d 971, 977 (9th Cir. 2005), cert. denied, 546 U.S. 1208 (2006) (a prosecutor's decision not to prosecute any cases in which a particular police officer participated in any phase of the investigative process and their communication of the decision to the police officer's department is entitled to absolute immunity); *Roe v. City and County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997) ("a prosecutor is entitled to absolute immunity for the decision not to prosecute . . . a prosecutor's professional evaluation of a witness is entitled to absolute immunity even if that judgment is harsh, unfair

duties, the consumption of limited court time, and the involuntary dismissal of criminal charges.

In the instant case, the basis of Mr. Doyle's claimed right to hide his past misconduct from criminal defendants is far from clear. A charitable reading of Mr. Doyle's complaint indicates that this "right" is based upon " . . . . . ." and " . . . . . ."

. . . . . ." See CP 2, at ¶¶ 6-7, and CP 6 at ¶ B.5. However, neither Mr. Doyle's motion in support of the *ex parte* TRO nor the *ex parte* TRO, itself, identify the source of Mr. Doyle's equitable or legal right. See CP 7-8, 36-38.

On the day set for the mandatory CR 65(b) hearing, Mr. Doyle filed a memorandum in support of his request for permanent injunctive relief. In this document, Mr. Doyle claimed that his clear legal or equitable right to relief rested in: (1) California Penal Code Section 832.7 and California Constitution, Article 1, § 1; (2) the sealed California settlement decision

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or clouded by personal animus").

As a general rule, courts have rejected a defendant's demand that the court, rather than the prosecutor, make the determination of materiality. See, e.g., *United States v. Bland*, 517 F.3d 930, 935 (7th Cir. 2008) (a court is under no general independent duty to review government files for potential *Brady* material). Instead, courts recognize that the responsibility for making *Brady* determinations rests with the prosecuting attorney. See *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (the prosecutor is the entity responsible for determining what information must be disclosed to a criminal defendant).

between Mr. Doyle and Sierra County and court orders sealing the documents that were entered in cases to which Prosecutor Lee was not a party; and (3) the manner in which the documents came into the hands of Prosecutor Lee. See CP 170-189. Mr. Doyle arguably identified two more sources for his “clear legal or equitable right to relief”: (1) “

”; and (2)“

.” CP

418.<sup>24</sup>

None of the above theories, however, establish a clear legal or equitable right to deprive criminal defendants of their due process right to potentially exculpatory evidence. Accordingly, both the TRO and the preliminary injunction were erroneously issued.

1. The Grant County Prosecuting Attorney’s Office lawfully learned about Doyle’s past.

Mr. Doyle alleged that his ex-girlfriend stole the Sierra County documents that he is seeking to recover.<sup>25</sup> Mr. Doyle, however, does not claim that his ex-girlfriend acted at the direction of Prosecutor Lee or of any law enforcement officer. Her taking of the documents, therefore, does not

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<sup>24</sup>Judge Sparks did not enter findings of fact and conclusions of law that identify his reasons for issuing a preliminary injunction. *Contra Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 233-34, 635 P.2d 108 (1981); CR 52(a)(2)(A); CR 65(d). Thus, both Prosecutor Lee and this Court are left to guess what clear equitable or legal right the injunction was designed to protect.

<sup>25</sup>See generally CP 32-35.

implicate either the Fourth Amendment or Const. art. I, § 7. *See generally State v. Eisenfeldt*, 163 Wn.2d. 628, 635 n.3, 185 P.3d 580 (2008) (“Article I, section 7 and Fourth Amendment protections apply only to searches by state actors, not to searches by private individuals.”).

The documents allegedly stolen by Mr. Doyle’s ex-girlfriend came into police custody at Mr. Doyle’s request and with his consent. Specifically, Mr. Doyle asked for police assistance in recovering the allegedly stolen documents from a third party. Mr. Doyle also requested that charges be filed against his ex-girlfriend and her lawyer for the alleged theft.<sup>26</sup> Mr. Doyle, who served as a police officer for more than seven years, clearly knew that before a charging decision could be made, the contents of the documents would be reviewed by both investigating officers and prosecuting attorneys. The potential impeachment information related to Mr. Doyle’s prior misconduct was in plain view, and could properly be acted upon.

In any event, the remedy for the unlawful seizure of evidence is suppression in any case in which the wronged person is a party. The evidence may, however, still be admitted in cases in which the wronged person is not a party. *See, e.g., State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998) (evidence obtained in violation of the husband’s constitutional rights was still admissible against his wife); *State v. Picard*, 90 Wn. App. 890, 895-97, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998) (space heater that was

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<sup>26</sup>*See generally* CP 11-12; CP 33-34.

seized in violation of the defendant's mother's Fourth Amendment rights could be utilized by the State in its arson prosecution of the defendant). Prosecutor Lee's April 2, 2010, letter did not reveal any intent to utilize the documents in any proceeding in which Mr. Doyle was a party. To the contrary, Prosecutor Lee indicated that his only intended use was to comply with his obligations under CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady* in cases in which Mr. Doyle is a witness. *See* CP 24-25. This use is consistent with the rule that unlawfully obtained evidence may be used to impeach a criminal defendant's credibility. *See generally Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968).

2. Non-parties are not bound by either the California court order or the Grant County Superior Court order.

Third parties cannot be bound as a matter of law to judgments, orders or decrees entered in proceedings in which they did not participate. *See generally Richards v. Jefferson County*, 517 U.S. 793, 796-98, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); *La Fray v. Seattle*, 12 Wn.2d 583, 588, 123 P.2d 345 (1942). Neither Prosecutor Lee nor the fifty-plus criminal defendants currently facing trials in which Mr. Doyle is a subpoenaed witness, were parties to the Sierra County, California action<sup>27</sup> or the Grant

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<sup>27</sup>The Sierra County Superior Court entered an Order to File Records Under Seal [California Rules of Court, Rule 2.551(e)] on February 7, 2007, in an action entitled *Sierra County Sheriff's Department v. The Board of Supervisors for The County of Sierra*, Sierra County Superior Court Cause No. 6705. *See* CP 202. The Sierra County Superior Court's decision to seal its records was apparently sustained with respect to Haley Taylor, Peggy Gray and Robert Gray's motion to unseal. *See*

County Superior Court matter.<sup>28</sup> Neither Prosecutor Lee nor the fifty-plus criminal defendants currently facing trials in which Mr. Doyle is a subpoenaed witness, are in privity with any of the parties to the Sierra County, California action or the Grant County Superior Court matter. The orders entered in those matters, therefore, do not vest Mr. Doyle with a “clear legal or equitable right” to violate a criminal defendant’s due process right to potentially exculpatory evidence. *See Baker v. GMC*, 522 U.S. 222, 238-39, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (consent decree obtained by GMC which enjoined a party opponent from testifying against GMC did not prevent survivors in a wrongful death proceeding from calling the party opponent in an action against GMC).

3. California’s statutory privilege regarding the release of police officer personal records does not bar release of Doyle’s past misdeeds.

California, like Washington, restricts a criminal defendant’s access to a police officer’s personnel file absent a showing by the defendant that the requested information is material to the preparation of his defense. The California rule, which was initially announced in *Pitchess v. Superior Court*,

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CP 210-217.

A similar order was issued on May 7, 2007, in an action entitled *Aaron Doyle v. The Board of Supervisors for The County of Sierra County of Sierra, and Does 1-10, inclusive*, Sierra County Superior Court Cause No. 6721. CP 206.

<sup>28</sup>The Grant County Superior Court entered an Order on Plaintiff’s Motion for Protective Order and Return of Records regarding the Sierra County documents on October 21, 2009, in an action entitled *Aaron E. Doyle v. Haley Taylor, Peggy Gray and Robert Gray*, Grant County Superior Court Cause No. 09-2-00169-0. *See* CP 26.

11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974),<sup>29</sup> was codified by the Legislature in California Penal Code section 832.7. While this provision states that police officer's personnel files are "confidential" and subject to discovery only pursuant to the procedures set out in the Evidence Code, California Penal Code section 832.7 does not create a private cause of action on the part of a police officer whose files are disclosed in violation of the statutory procedures. See *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 98 Cal. Rptr. 2d 144 (2000).

California Penal Code section 832.7 operates independently from a prosecutor's obligations pursuant to *Brady*. *Eulloqui v. Superior Court*, 181 Cal. App. 4th 1055, 1064-65, 105 Cal. Rptr. 3d 248 (2010).<sup>30</sup> A prosecutor

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<sup>29</sup>The parallel Washington case is *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993).

<sup>30</sup>In *City of Los Angeles v. Superior Court*, 29 Cal.4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002), the California Supreme Court clarified the distinctions between, and interplay of, *Brady* and *Pitchess*.

The court noted that *Pitchess* "creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady*, *supra*, 373 U.S. 83. Unlike *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial [citation], that is, 'all information pertinent to the defense' [citation]." (*Brandon*, at p. 14.) "Unlike the high court's constitutional materiality standard in *Brady*, which tests whether evidence is material to the fairness of trial, a defendant seeking *Pitchess* disclosure must, under statutory law, make a threshold showing of 'materiality.' (... § 1043, subd. (b).) Under *Pitchess*, a defendant need only show that the information sought is material 'to the subject matter involved in the pending litigation.' (... § 1043, subd. (b)(3).) Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*. (... § 1045, subd. (b).)" (*Brandon*, at p. 10.) The court held that the five-year time limit set forth in section

who learns of information that bears on the officer's credibility through the *Pitchess* process or through another channel is obligated to disclose such information to a criminal defendant. See *Alford v. The Superior Court of San Diego*, 29 Cal. 4th 1033, 63 P.3d 228, 130 Cal. Rptr. 2d 672, 681-82 n. 6 and 7 (2003); *Abatti v. Superior Court*, 112 Cal. App. 4th 39, 4 Cal. Rptr. 3d 767 (2003). California's recognition that California Penal Code section 832.7 cannot bar disclosure pursuant to *Brady* of exculpatory information is consistent with the rule that "constitutional rights prevail over conflicting statutes and rules." *Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003). Accord *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (child protection services records); *Kirby v. State*, 581 So.2d 1136 (Ala. Crim. App. 1990) (physician/client privilege).

Even if California did not recognize a *Brady* exception to California Penal Code section 832.7, that statute has no bearing on the instant matter. California lacks authority to control Washington courts. Washington law controls what witnesses are competent to testify and what evidence is relevant and admissible in its courts' search for the truth. See *Baker*, 522 U.S. at 238-

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1045, subdivision (b)(1) did not operate to bar disclosure under *Brady*: the *Pitchess* process "operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*Brandon*, at p. 14.) Thus, if materiality under the more stringent *Brady* standard is shown, the statutory restrictions pertaining to the *Pitchess* procedure are inapplicable (*Brandon*, at p. 14); but if the defendant only shows materiality under the less stringent *Pitchess* standard, the statutory limitations apply (*Brandon*, at pp. 14, 16).

*Eulloqui*, 105 Cal. Rptr. 3rd at 254-55.

39; *Restatement (Second) of Conflict of Laws*, §§ 137-139 (1969 and rev. 1988) (forum's own law governs witness competence and grounds for excluding evidence); 5A K. Tegland, *Wash. Prac., Evidence Law and Practice* § 501.7 (5th ed. 2007) (indicating that a forum's policy favoring admission will generally be given effect).

Washington courts recognize that any privilege conflicts with the essential and inherent judicial power to compel the production of evidence. Consequently, statutory privileges are strictly construed and new privileges are not lightly embraced. *See generally State v. Maxon*, 110 Wn.2d 564, 756 P.2d 1297 (1988).

Washington provides no protection against the disclosure of a public employee's misconduct. To the contrary, Washington law recognizes that such information should be freely available to the general public. *See, e.g., Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (substantiated findings of sexual abuse or misconduct by teachers must be disclosed to the public); *Dawson v. Daly*, 120 Wn.2d 782, 797-800, 845 P.2d 995 (1993) (performance evaluations which discuss specific instances of misconduct are subject to release), *abrogated in part by Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007); *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 726-27, 748 P.2d 597 (1988) (a police officer's right to privacy is not violated when a complaint about a specific instance of misconduct, substantiated after an internal investigation, is disclosed; "Instances of misconduct of a police officer while on the job are

not private, intimate, personal details of the officer's life” because the misconduct “occurred in the course of public service.”); *Cowles Pub'g Co. v. State Patrol*, 44 Wn. App. 882, 892-93, 724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988) (the disclosure of the details of an officer's misconduct, while in the performance of his public duties, is of legitimate concern to the public). Surely, no lesser access to such information can be extended to an individual facing criminal prosecution.

4. The Public Records Act does not establish the parameters of a defendant's due process right to exculpatory evidence.

The Public Records Act (“PRA”) exempts from disclosure, under the “personal information”<sup>31</sup> exemption, false or unsubstantiated allegations of misconduct. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, *supra*. If, however, an investigation results in a determination that the misconduct occurred, the allegation is “substantiated” or “proven.” *Cf. Bellevue John Does 1-11*, 164 Wn.2d at 219 (citing to standard in statutes related to “sexual misconduct”). Substantiated or proven misconduct must, absent another statutory exception to disclosure, be disclosed under the Public Records Act. *See Dawson v. Daly*, *supra*; *Cowles Publishing Co. v. State Patrol*, *supra*.

Mr. Doyle contended that the allegation of wrongdoing in Sierra County was “unsubstantiated.” The record, however, does not support his position. The Sierra County Sheriff's Department's determined, upon

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<sup>31</sup>RCW 42.56.230(2).

completion of its internal investigation, that Mr. Doyle lied. CP 311-12. This finding was not altered during the ensuing appeals. Those appeals merely reduced the punishment from termination, to suspension and probation. See CP 190, Exhibit A; CP 193, at ¶ C and D. The internal investigation led directly to Mr. Doyle's resignation and his agreement not to seek employment with Sierra County for a period of five years. See RP 139-142. Thus the Sierra County record, if it had been generated by a Washington agency, would be disclosable under the PRA as a "sustained" allegation.

Mr. Doyle's reliance upon the PRA, however, is a complete red herring. The PRA operates independently of the discovery court rules. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 907-910, 25 P.3d 426 (2001) (a plaintiff in a civil action against a government agency may seek public records from the state agency under both the pretrial rules of discovery and the Public Records Act). While any materials that would not be discoverable in the context of a controversy under the civil rules of pretrial discovery are also exempt from public disclosure under the PRA, the reverse is not true. *Guillen v. Pierce County*, 144 Wn.2d 696, 713, 715-16, 31 P.3d 628 (2001), *rev'd on other grounds*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). The same rules should apply to criminal pretrial discovery rules.

CrR 4.7(a)(3) and CrRLJ 4.7(a)(3) require the prosecuting attorney to "disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as

to the offense charged.” These rules “were included in order to satisfy the requirements of *Brady v. Maryland*, 373 U.S. 83, 87-88, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). *Criminal Rules Task Force to the Washington Judicial Council, Washington Proposed Rules of Criminal Procedure* (1971), comment to rule 4.7, at page 70.” *State v. Ervin*, 22 Wn. App. 898, 903 n. 1, 594 P.2d 934 (1979). They must, therefore, be interpreted in a manner that is consistent with *Brady*.

*Brady* held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. Subsequent decisions established that: (1) a due process violation is not dependent upon a defendant’s request for the potentially exculpatory evidence; and (2) the prosecuting attorney is deemed to know all of the information known to other members of the prosecution team. *See generally Kyles v. Whitley, supra; United States v. Agurs*, 427 U.S. 97, 106-07, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

Exculpatory evidence includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). This includes impeachment of peace officers. *People v. Gaines*, 46 Cal. 4th 172, 205 P.3d 1074, 1083, 92 Cal. Rptr. 3d 627 (2009). Prior acts of dishonesty have probative value where officer credibility is at issue.

A prosecutor, in satisfying his obligations under *Brady* and its progeny, must make a judgment call about what counts as favorable evidence. *Kyles*, 514 U.S. at 439. In doing so, the prosecutor should err on the side of disclosure. *Id.*, 514 U.S. at 439 (“This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.”)<sup>32</sup>; *Agurs*, 427 U.S. at 108 (“The prudent prosecutor will resolve doubtful questions in favor of disclosure.”). Accordingly, a prudent prosecutor will disclose any possible impeachment material that has a plausible factual foundation. *Cf. State v. Brisco*, 78 Wn.2d 338, 341, 474 P.2d 267 (1970) (cross-examination about specific incidents must have a foundation in fact); 5A K. Tegland, *supra*, § 608.5, at 430 (“Before inquiring about specific instances of conduct, the cross-examiner must of course have a good faith basis for the questioning.”).

In the instant case the Sierra County documents clearly provide a plausible factual basis for a defense counsel to inquire whether Mr. Doyle had ever been found to have lied with respect to his official duties. Prosecutor Lee, therefore, was compelled by CrR 4.7(a)(3), CrRLJ 4.7(a)(3), RPC 3.8(d), and *Brady* to disclose those documents to defense counsel in cases in which

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<sup>32</sup>The Supreme Court also noted that “[t]he prudence of the careful prosecutor should not therefore be discouraged” as such conduct serves “to justify trust in the prosecutor as ‘the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” *Kyles*, 514 U.S. at 439-440, quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). Needless to say, temporary and preliminary injunctions, such as the one obtained by Mr. Doyle, are designed to “discourage” a prosecutor from acting prudently.

Mr. Doyle was a witness.

E. PROSECUTOR LEE'S AND THE PUBLIC'S RIGHT TO  
OPEN JUSTICE WAS VIOLATED BY THE TRIAL  
COURT

Washington Constitution art. 1 §10 states, "Justice in all cases shall be administered openly, and without unnecessary delay." Compliance with this constitutional provision is mandatory, and extends to both court records and court proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004), citing *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975); *Rauch v. Chapman*, 16 Wash. 568, 575, 48 P. 253 (1897).

The purpose of Const. art. I, § 10 is to foster confidence in the courts. "Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity." *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258, 21 Media L. Rep. 1278 (1993). "The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified." *Dreiling*, 151 Wn.2d at 903-04.

A court is not excused from making the required carefully considered, specifically justified decision to close a court proceeding or record by the existence of a statute or court rule. *See State v. Coleman*, 151 Wn. App. 614, 622, 214 P.3d 158 (2009) (court rules cannot be interpreted to circumvent or

supersede a constitutional mandate).<sup>33</sup> This requirement exists because every document and pleading filed with a court is presumptively accessible to the public. *Dreiling*, 151 Wn.2d at 909-13. Sealing of documents requires the identification of a “compelling interest” and the balancing of that interest against the public’s interest in open courts. No “per se” list of “compelling interests” that will always justify closure can be compiled as the Constitution requires a case-by-case analysis. *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 550, 115 P.3d 1182 (2005).

To assist courts in deciding whether a motion to restrict access to court proceedings or records meets constitutional requirements, a five factor test referred to as both an *Ishikawa*<sup>34</sup> analysis and a *Bone-Club*<sup>35</sup> analysis must be undertaken. *See, e.g., State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *Dreiling*, 151 Wn.2d at 909-13. The failure to perform such an

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<sup>33</sup>A number of cases have applied this principle to strike down statutes and/or to vacate sealing orders. *See, e.g., Allied Daily Newspapers v. Eikenberry, supra* (a law that required courts to ensure that information identifying child victims of sexual assault not be disclosed to the public or the press in the course of judicial proceedings or in any court records was unconstitutional as it did not permit trial courts to comply with the *Ishikawa* guidelines); *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009) (although GR 31(j) provides that individual juror information is presumed to be private, a court may engage in a *Bone-Club* analysis before sealing juror questionnaires); *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325, *review denied*, 166 Wn.2d 1026 (2009) (although GR 15(c)(2)(C) lists the vacation of a conviction as a ground for sealing a court record, a court must apply the *Ishikawa* factors to such a motion); *In re Det. of D.F.F.*, 144 Wn. App. 214, 183 P.3d 302, *review granted*, 164 Wn.2d 1034 (2008) (Mental Proceedings Rule 1.3 violates article I, section 10 by making mental illness commitment proceedings presumptively closed).

<sup>34</sup>*Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982).

<sup>35</sup>*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (paraphrasing the *Ishikawa* test).

analysis is reversible error. *See, e.g., State v. Easterling*, 157 Wn.2d 167, 170-71, 179, 137 P.3d 825 (2006). This required analysis was never performed by Kittitas County Superior Court Judge Sparks.

An *Ishikawa/Bone-Club* analysis requires consideration and application of five factors:

“1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

“2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

“3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

“4. The court must weigh the competing interests of the proponent of closure and the public.

“5. The order must be no broader in its application or duration than necessary to serve its purpose.”

*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In the instant case the April 23, 2010, order sealing the entire court file was entered by Judge Sparks “ ” and “ ”, with no advance notice to the parties. *See* CP 250. This violated GR 15(c)(1). This also violated the public’s right to object to closure. The sealing order should be reversed on these grounds alone.

The April 23, 2010, order contains “no written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” GR 15(c)(2). The April 23, 2010, order should be reversed on this ground alone.

In the trial court, Mr. Doyle identified two grounds for secrecy. First, Mr. Doyle claimed that disclosure to the public of the facts surrounding his prior misconduct would be unduly embarrassing to him. *See* CP 637, at 3, quoting an order entered in *Doyle v. Board of Supervisors*, Sierra County Superior Court Cause No. 6721 (May 7, 2007). Second, Mr. Doyle claimed that disclosure to the public of the facts surrounding his prior misconduct might imperil his current employment. CP 35, at ¶ 18. Neither ground, however, satisfies the “compelling interest” requirement of Const. art. I, § 10.

To date, only two compelling or overriding interests have been acknowledged as sufficient to support the sealing or closure of court records and/or hearings. Specifically, sealing is appropriate for a limited period of time to protect the integrity of an on-going criminal investigation. *See Seattle Times v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986) (search warrants may be sealed until charges are filed); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981) (search warrants may be sealed until files are charged). Sealing or closure is also appropriate to protect a criminal defendant's right to a fair trial, but only when other alternatives are insufficient to avoid prejudice. *See, e.g., State v. Loukaitis*, 82 Wn. App.

460, 470, 918 P.2d 535 (1996).

Embarrassment has been specifically rejected as a basis for closing courts and court records. *See, e.g., State v. Loukaitis*, 82 Wn. App. 460, 918 P.2d 535 (1996) (embarrassment to defendant and defendant's family members insufficient to justify sealing). *Accord State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (privacy of prospective juror insufficient of itself to justify sealing voir dire); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258, 21 Media L. Rep. 1278 (1993) (privacy of child victims of sexual assault insufficient to justify sealing the victim's name).

Economic concerns, including the impact a disclosure may have upon a person's employment, have been specifically rejected as grounds for sealing court records. *See Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 115 P.3d 1182 (2005) (risk of misuse or unfair economic advantage to competitors was insufficient to seal proprietary information that the trial court considered in ruling upon a motion); *State v. McEnry*, 124 Wn. App. 918, 103 P.3d 848 (2004) (order sealing record of vacated conviction because of its potential adverse impact on current or possible future employment was improper under the *Ishikawa* factors).

Even if Mr. Doyle's fear of embarrassment and employment consequences were "overriding interests" sufficient to justify the sealing of some records, Const. art. I, § 10 as implemented by *Ishikawa*, required Judge Sparks to redact the sensitive portions of any pleading, instead of sealing the entire pleading. That Judge Sparks' decision to seal the entire court file was

error,<sup>36</sup> is established by the fact that Mr. Doyle, himself, never requested the sealing of the entire superior court file. *See* CP 637, at 1-2 (specifying what portions of the court file Mr. Doyle was requesting to have sealed under the *Ishikawa* procedure). This Court, therefore, should order the immediate unsealing of the Kittitas Superior Court file.

F. PROSECUTOR LEE'S AND THE PUBLIC'S RIGHT TO OPEN JUSTICE HAS BEEN VIOLATED BY THIS COURT

Prosecutor Lee respectfully notes that Judge Sparks' violation of Const. art. I, § 10's open administration of justice provision has been exacerbated by this Court's actions. Although Judge Sparks ordered that the superior court file should be unsealed on August 2, 2010, this Court stayed the implementation of that order. This Court's stay order contains no analysis of the *Ishikawa* factors. A subsequent order of this Court sealed the verbatim report of proceedings from hearings that were, themselves, open to the public.<sup>37</sup> This order contains no analysis of the *Ishikawa* factors, and identifies no compelling reason for restricting public access. Clerk Townsley, moreover, has restricted the public's access to appellate court pleadings that merely "discuss" trial court pleadings. *See* Letter to Nanette Hemberry (Jan. 4, 2011).

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<sup>36</sup>Judge Sparks, himself, acknowledged that his order was improper. *See* RP 2 (" .").

<sup>37</sup>Judge Sparks initially ordered the closure of the July 16, 2010, hearing, but promptly reversed himself when Prosecutor Lee objected on Const. art. I, § 10 grounds. *See* RP 94-95.

Const. art. I, § 10's open administration of justice provision applies to appellate courts. *Dependency of J.B.S.*, 122 Wn.2d 131, 856 P.2d 694 (1993). An appellate court that wishes to close a hearing or seal a document or file must comply with the requirements of GR 15 and apply the five factor *Ishikawa* test to the decision. *Dependency of J.B.S.*, 122 Wn.2d at 137-39. Failure to do so is reversible error. *Easterling*, 157 Wn.2d at 170-71 (2006).

The sealing of documents in this Court fails for the same reasons as did the sealing of the superior court file. Neither embarrassment to Mr. Doyle nor the potential adverse impact on Mr. Doyle's current or possible future employment constitutes a "compelling privacy or safety concern[]" that outweigh[s] the public interest in access to the court record." GR 15(c)(2).

The sealing of portions of the appellate record in this case also fails under the tests developed by jurisdictions that are not subject to Washington's strict constitutional open court provision. Non-Const. art. I, § 10 jurisdictions essentially limit the sealing of appellate records to cases involving national security. *See, e.g., Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) (noting that courts have uniformly determined that a party's preference for seclusion is insufficient to justify the sealing of an appellate court file); *Pepsico, Inc. v. Redmond*, 46 F.3d 29 (7th Cir. 1995) (financial or commercial concerns will not justify the sealing of an entire court file); *In re Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992) (noting that briefs in the *Pentagon Papers* case and the hydrogen bomb plans case were largely available to the press, and the United States Supreme Court denied a motion

to close part of the oral argument in the *Pentagon Papers* case); *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 821 N.E.2d 1238, 1248 (2004) (stating that all but the most extraordinary cases, like weighty national security matters, must be public; “The mere fact that a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing a court file.”). Even in cases dealing with national security matters, the preference is for sealing appendices that disclose the critical information, rather than the entire case file. *See, e.g., Krynicky*, 983 F.2d at 76 (noting that “in cases such as the *Pentagon Papers*, where disclosure was said to threaten the national security, and *The Progressive*, where disclosure was said to threaten the survival of mankind”, only appendices that discussed in detail the documents for which protection was sought were sealed from the public); *In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (public briefs and opinion in a national security case, although parts of the dissenting opinion were sealed to protect confidences).

This Court should immediately remove any restrictions that have been placed upon the public’s access to the record in this case.

G. ATTORNEY’S FEES ARE PROPERLY AWARDED FOR WRONGFUL INJUNCTION

Attorney fees incurred in dissolving a preliminary injunction are authorized by case law. *See, e.g., Cecil v. Dominy*, 69 Wn.2d 289, 418 P.2d 233 (1966). The award of attorney fees is separate and distinct from an action on the injunction bond for damages resulting from the issuance of the

injunction, and is not limited to the amount of the bond. *See, e.g. Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142-44, 937 P.2d 154 (1997). The attorney fee award may include appellate fees. *Id.*; *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 737 P.2d 1302 (1987).

Attorney fees may only be recovered when a motion to dissolve the preliminary injunction was filed by the respondent. *See, e.g., Heck v. Kaiser Gypsum Co.*, 56 Wn.2d 212, 214, 351 P.2d 1035 (1960). Prosecutor Lee satisfied this requirement by filing an unsuccessful motion in the trial court to dissolve the wrongfully issued preliminary injunction, and by filing a summary judgment motion to terminate the wrongfully issued preliminary injunction. *See* CP 156 and 289. Prosecutor Lee continued his efforts by unsuccessfully opposing Mr. Doyle's efforts to stay the order dissolving the preliminary injunction, and through his cross-appeal.

An award of attorney fees is discretionary with the Court. *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 231, 98 P.3d 84 (2004). The award is proper when, as here, the plaintiff provided the issuing magistrate with incomplete or erroneous information. *Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 475, 859 P.2d 77 (1993). The award is proper when, as here, the plaintiff did not name necessary parties. *See Burt v. Dep't of Corr.*, 168 Wn.2d 828, 840, 231 P.3d 191 (2010) (Sanders, J., concurring). The award is proper when, as here, no bond is available to compensate Prosecutor Lee and his office for the damages incurred in complying with the wrongfully issued injunction. The award is also proper

when, as here, a baseless motion is used to discourage a public prosecutor from exercising his lawful obligations under our Constitution, to the detriment of county residents and criminal defendants.

VI. CONCLUSION

Prosecutor Lee respectfully requests that this Court unseal both the superior court records and this Court's records. Prosecutor Lee further requests that this Court dissolve the wrongfully issued injunction, and grant him an award of actual attorney fees.

DATED this 28th day of March, 2011.

Respectfully submitted,

D. ANGUS LEE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive, flowing style.

PAMELA B. LOGINSKY  
WSBA NO. 18096  
Special Deputy Prosecuting Attorney