

No. 34519-0-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONNA ZINK, et ux

v.

BENTON COUNTY, et al

RESPONSE BRIEF OF APPELLANT DONNA ZINK

DONNA ZINK
Pro Se Appellant
P.O. Box 263
Mesa, WA 99343
(509) 265-4417
dlczink@outlook.com
jeffzink@outlook.com

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I. RESPONSE

Benton County argues that Zink has no claim upon which relief can be requested under the strongly worded mandate of the Public Records Act (PRA). Benton County claims that RCW 42.56.540 allows an agency to deny access to public records and avoid any and all consequences by notifying third parties to seek injunction, despite a lack of “need” if an agency “wants to.” Benton County misrepresents the legal issue being appealed. Zink did not file a claim under RCW 42.56.540. Zink’s claims are filed pursuant to RCW 42.56.550 (CP 26:24-25; 30:8-12; 31:8-10; 31:24-25).

To uphold the trial court’s order that Zink failed to state a claim upon which relief can be granted, this Court must mandate that agencies notifying third parties for any reason cannot be held accountable for their actions under RCW 42.56.550. This flies in the face of the strongly worded mandate of the people that all non-exempt public records and information must be promptly released absent an identified exemption. While an agency may have the option to notify, a requester does not lose their statutory right under RCW 42.56.550 to request review of the reasonableness of the agencies actions.

Here, Zink claims under RCW 42.56.550 are that 1) Benton County unreasonably denied access to the records requested on July 15, 2013, September 18, 2013 and April 17, 2014; 2) Benton County knew the

requested records were not exempt at the time they notified third parties (CP 30:1-5; 30:19-22; 299-300; 370); 3) Benton County notified third parties to prevent the release of the records through expensive litigation (RP (September 25, 2016) 13:10-14:23); 4) Benton County notified third parties to intimidation and harassment Zink into withdrawing her request (CP 294; 296; 357).¹

Pursuant to Civil Rule (CR) 12(b)(6), an action cannot be dismissed for failure to state a claim if it is possible that facts could be established to support the allegations in the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962). Clearly RCW 42.56.550(1)(2) provides a statutory right to request review of an agencies action in notifying third parties to prevent release of the records. Clearly Benton County has not proven that they had an arguable exemption or that Zink has no right to such a review. The trial court's order dismissing Zink's claims is error and must be reversed.

A. RCW 42.56.550 Allows Requesters to Seek Judicial Review of an Agencies Actions in Denying or Delaying Production of Public Records and Assessment of Penalties for PRA Violations.

¹ Zink also requested review of Benton County's actions in assessing excessive fees and costs (CP 30:15-18).

RCW 42.56.540 mandates that certain requirements must be met, in a particular order, for the trial court to enjoin public records under RCW 42.56.540.

Thus, if an agency is claiming an exemption, the agency bears the burden of proving it applies. RCW 42.56.550(1). If it is another party, besides an agency, that is seeking to prevent disclosure, then that party must seek an injunction. RCW 42.56.540. In such a case, the party must prove (1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function. *Id.*; see *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007); see also *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 591, 243 P.3d 919 (2010).

Ameriquest Mortg. Co. v. Office of Att'y Gen., 177 Wn.2d 467, ¶36, 300 P.3d 799 (2013). The very first requirement is that an exemption must apply.

Benton County claims that the PRA does not allow penalties against an agency for providing third party notice if the agency has an arguable exemption, citing to *Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998) (Resp. 11).² Benton County states that this is clarified further by WAC 44-14-04003(11) which states that “an agency must have a reasonable belief that a record is arguably exempt prior to providing notice” and that the agency has no obligation to notify anyone

² Benton County extends their argument to attorney fees and costs. However, in this case Zink is pro se and there are no attorney fees to claim. Zink does claim costs associated with this appeal.

(Resp. 8). Benton County has not proven, beyond a reasonable doubt, that they had an arguable exemption when they notified third parties. Rather, Benton County argues that this Court should take their word for it and that they were acting in good faith because other courts had enjoined the same type of records (Resp. 6). As noted, the evidence shows that Benton County knew the records were not exempt and notified third parties despite a lack of exemption. To now argue that they had an arguable exemption is disingenuous. Especially in light of the fact that Benton County at all times argued the records were not exempt and must be released (CP 370)

Benton County misrepresents the facts. Benton County was the first agency to notify third parties and instigate these injunctions. All other Superior Courts across the State of Washington based their decision to enjoin the sex offender records on the decision made in the Benton County Superior Court. The Supreme Court's decision reversing the trial court in *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016) merely shows that all of the trial courts were incorrect in their judicial determinations. Which may have been due to the fact that they all relied on the Benton County Superior Court decision as a basis for that decision.

The evidence provided shows that Benton County knew that the records were not exempt (CP 299-300; 370). Benton County had previously notified third parties prior to Zink's request without an

exemption (RP (September 25, 2016) 17:17-18:11; CP 299-300; 370). Benton County knew they had no reasonably arguable exemption when they argued in court that no exemption applied to any of the requested records; the first requirement under RCW 42.56.540 (CP 370).

A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the claim could be sustained. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975). Benton County has not shown that they believed the records were arguably exempt or that they were acting in good faith. Even the trial court did not find Benton County was acting in good faith. Rather the trial court found an agency need not act in good faith or have an arguable exemption to notify third parties.

The agency need not give that notice in good faith. There's no good faith requirement, and they need not even believe that the records are exempt. In fact, I think the thing is designed to where the agency doesn't feel that they can assert in good faith an exemption, yet they still consistent with this public policy that people should be entitled to protect their own privacy will allow those parties to bring their own lawsuit and to try to protect their privacy if they can. So, understanding that your claim is limited to what I would call a wrongful notification of -- the wrongful exercise of the option of notification to third parties under RCW 42.56.540, I find that no such claim exists and I must dismiss it.

(RP (September 25, 2016) 20:19-21:7). The trial court's determination is error. Zink has a right under RCW 42.56.550 to judicial review of Benton

County's actions in unreasonably delaying the release of public records in this case erroneously using RCW 42.56.540.

Next Benton County argues that WAC 44-14-04003(11) also provides that if the agency acted in good faith, it cannot be held liable for failing to notify enough parties (Resp. 9). This argument supports Zink's claim that Benton County did not need to, or have a right to, notify third parties without an arguable exemption (RCW 42.56.520). Benton County argues that if they had claimed an exemption there would be no need to notify the sex offenders of the request (Resp. 9). This is false. Benton County is not only required to redact any exempt information from a record, a trial court is authorized pursuant to RCW 42.56.210(2) to release exempt information and records, if an agency is not going to apply the exemption on the agencies behalf (Resp. 10) and a third party cannot meet all requirements necessary for a court to enjoin the records.

Courts should construe exemptions narrowly to allow the PRA's purpose of open government to prevail where possible. RCW 42.56.030. If there is information in a public record that is exempt and redaction and disclosure is possible, then it is required. See Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 261, 884 P.2d 592 (1994) (PAWS) ("Portions of records which do not come under a specific exemption must be disclosed."). A court may even allow for the inspection and copying of exempt records if it finds "that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital government function." RCW 42.56.210(2); Oliver v. Harborview Med. Ctr., 94 Wn.2d 559, 567-68, 618 P.2d 76 (1980) (burden shifts to the party seeking disclosure to establish that the exemption is clearly unnecessary).

Ameriquet Mortg. Co. v. Office of Att'y Gen., 177 Wn.2d 467, ¶36, 300 P.3d 799 (2013)(emphasis added). The facts presented by Zink show that Benton County notified Zink of “potential” exemptions, not arguable exemptions, and informed her that notifications would be sent to all sex offender on August 16th and she should contact them if she had any questions or concerns about the third party notification (CP 155). Zink informed them that if the records were not released she would seek penalties for wrongful denial and suggested they contact the Washington State Attorney General’s office (CP 156). Benton County knew that the requested records were not exempt at the time they notified third party sex offenders to prevent release (CP 299-300; 370).³ Benton County used the provisions of RCW 42.56.540 to intentionally withhold records, cause economic loss through expensive litigation without the ability for recovery, and to harass and intimidate (CP 294; 296).

Benton County’s claim that Zink’s theory of liability associated with third party notice flies in the face of the overarching theme of the PRA notice provisions is ridiculous (Resp. 13). While RCW 42.56.540 allows an agency to notify third parties if they have an arguable exemption to

³ Much of Zink’s evidence showing the actions of Benton County were submitted in the other causes of action which were all heard by the Honorable Bruce Spanner (RP (September 25, 2016) 9:1-15). Benton County received this letter to Dr. Tolcacher in response to a request for sex offender information from the Prosser School District. The evidence presented in the four other cases were that Dr. Tolcacher withdrew his request when faced with third party notification.

claim (Resp. 8), that provision does not conflict with Zink's right to request judicial review of Benton County's actions in notifying third parties without an arguable exemption under RCW 42.56.550 to deny release of public records.

Finally, Benton County claims that they were justified in providing Zink's contact information because they are not a part of the Washington Association of Sheriffs and Police Chiefs (WASPC) since they do not operate a registration program and are a distinct and separate entity (Resp. 11). RCW 42.56.240(8).

RCW 42.56.240(8) states:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter: ... (8) Information submitted to the statewide unified sex offender notification and registration program under RCW 36.28A.040(6) by a person for the purpose of receiving notification regarding a registered sex offender, including the person's name, residential address, and email address ...

RCW 36.28A.040(6) states:

When funded, the Washington association of sheriffs and police chiefs shall implement and operate an electronic statewide unified sex offender notification and registration program. Information submitted to the program by a person for the purpose of receiving notification regarding a registered sex offender, including the person's name, residential address, and email address, are exempt from public inspection and copying under chapter 42.56 RCW.

RCW 36.28A.040(6). Benton County claims that they notified third party sex offenders of Zink's requests pursuant to RCW 4.24.550 (Resp. 6).⁴

Within five business days of the Washington association of sheriffs and police chiefs receiving any public record request under chapter 42.56 RCW for sex offender and kidnapping offender information, records or web site data it holds or maintains pursuant to this section or a unified sex offender registry, the Washington association of sheriffs and police chiefs shall refer the requester in writing to the appropriate law enforcement agency or agencies for submission of such a request. The Washington association of sheriffs and police chiefs shall have no further obligation under chapter 42.56 RCW for responding to such a request.

(ii) This subparagraph (c) of this section is remedial and applies retroactively.

RCW 4.24.550(5)(b)(c)(i)(ii)(emphasis added). Under RCW 4.24.550 Benton County does operate a registration program and they are not a distinct and separate entity from WASPC. On the contrary, they are to respond to any requests for public records made to WASPC pursuant to RCW 4.24.550.

B. RCW 42.56.550 Mandates Penalties for Unreasonable Delays in Production of Public Records

Benton County again claims that if an arguable exemption exists, a requester has no legal right to penalties under the PRA (Resp. 8; 11).

⁴ Benton County's argument that they were acting in good faith when they notified third parties since courts across the state had enjoined the records is nonsensical. Benton County Superior Court was the first court to enjoin the requested registration forms found to be non-exempt by the Supreme Court. Therefore, Benton County cannot argue that they somehow knew other courts would find likewise.

While this is yet to be proven, RCW 42.56.540 does not pre-empt a claim under RCW 42.56.550 and Benton County has not proven they had an arguable exemption. Instead, Benton County claims that the requirement to claim an arguable exemption prior to providing third party notice is logically inconsistent with the PRA (Resp. 9). Benton County's argument is irrational. If an agency is required to have an arguable exemption prior to notification under WAC 44-14-04003(11), if there is no arguable exemption identified, the agency has no right to notify third parties and deny release of public records.

Benton County plays games with the PRA and cannot have it both ways. Either an agency must identify an exemption prior to notification or not. In either case, Zink has a right under RCW 42.56.550 to request judicial review of Benton County's actions in denying release of the requested records using third party notification without an arguable exemption. The issue of whether Benton County had an arguable exemption and appropriately notified third parties is a question of fact that has not been resolved and Zink's claims cannot be dismissed under CR 12(b)(6).

Benton County argues that under the Supreme Court's decision in *Confederate Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998), penalties and attorney fees are not available to

requester if it is a third party seeking to enjoin the records.⁵ Benton County argues that when an individual rather than an agency opposes disclosure and the action is brought to prevent rather than compel disclosure penalties, attorney fees and costs are not available (Resp. 11-12). Benton County misunderstands the issue now before the Court.

Zink is not asking for recovery of attorney fees and costs against the sex offenders. Zink is requesting review of Benton County's actions in delaying the release of the public records under RCW 42.56.550(2). In other words, Zink's claims are to compel disclosure and hold Benton County responsible for their actions in wrongfully notifying third parties. By Benton County's reasoning (Resp. 13), agencies, as a matter of law, can never act in bad faith, be questioned about their actions, or be held accountable for their actions if they notify third parties whether an exemption applies to the records or not. Under the strict rules of the PRA, if an agency notifies third parties without a need or an arguable exemption they must be held accountable for violations of the PRA under RCW 42.56.550.

Benton County argues that allowing a requester to request judicial review of an agencies action in notifying third parties flies directly in the face of RCW 42.56.540 and WAC 44-14-040's permissive notice

⁵ Zink is a pro se litigant and therefore there are no attorney fees at issue in this case.

provisions. This is an erroneous interpretation of the notice provisions. While RCW 42.56.540 allows an agency to notify third parties, an agency is only authorized to do so if there is a need, and as discussed in opening briefing, and exemption to mandatory to withhold public records. Benton County had no need to notify and not exemption to claim. As argued by Benton County (Resp. 8), WAC 44-14-04003(11) mandates that an agency must have an identified arguable exemption prior to notifying third parties and has no legal requirement to notify anyone. Had Benton County followed the requirements set out in RCW 42.56.540 and WAC 44-14-04003(11), no litigation would have been filed and the records would have been released in a timely fashion. Instead, Zink had to fight for access to the records and now has a claim of unreasonable delay in release of public records under RCW 42.56.550(2).

Benton County argues that our Supreme Court made it abundantly clear in *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016). As noted by Benton County, Zink did not file an action against WASPC under RCW 42.56.550. This is significant in law since there are no provisions RCW 42.56.540 for penalties as noted by the Supreme Court. Rather, it is an injunction statute which sets out the mandatory requirements for injunction of public records and nothing more. Zink filed this crossclaim action under RCW 42.56.550 which mandates penalties against an agency found to have wrongfully withheld public records.

Our Supreme Court has repeatedly opined that under a CR 12(b)(6) motion, a Plaintiff's factual allegations are assumed to be true, and can only be dismissed if the defendant can prove "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to the requested relief." *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978); *Stangland v. Brock*, 109 Wn.2d 675, 677, 747 P.2d 464 (1987).

Here Zink has a right to judicial review of Benton County's actions under RCW 42.56.550 and the factual allegations show that Benton County had no reasonable arguable exemption and unreasonably denied and delayed the release of public records in violation of the strongly worded mandate of the PRA for prompt and broad production of public records.

II. CONCLUSION

RCW 42.56.540 is not a loop hole in the strongly worded PRA allowing agencies to withhold public records without the need to follow other mandatory requirements of the PRA. To find otherwise would completely gut the strong language of the PRA and allow agencies to withhold records by unjustified notification of third parties. Zink has a statutory right to request judicial review of Benton County's responses to

her requests under RCW 42.56.550 and has shown that Benton County was not acting in good faith in the notification of third parties in this case.

Zink requests this Court to reverse the trial court's order dismissing Zink's claims under CR 12(b)(6) and remand the case back to the trial court for trial to determine whether Benton County had an arguable exemption, was reasonable in notifying third parties and assess penalties for violations of the PRA.

RESPECTFULLY SUBMITTED this 24th day of May 2017.

By 

Donna Zink
Pro se

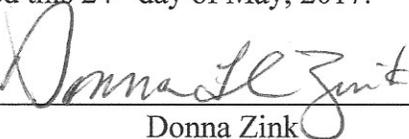
III. CERTIFICATION OF SERVICE

I declare that on the 24th day of May, 2017, I sent a true and correct copy of appellant's "*Response Brief of Appellants Donna and Jeff Zink*" via e-mail service to the following addresses:

- RYAN LUKSON
WSBA #43377
Benton County Prosecuting Attorney
7122 W. Okanogan Place, Bldg. A
Kennewick, Washington 99336
Phone: 509-735-3591/Fax: 509-222-3705
E-mail: Ryan.Lukson@co.benton.wa.us; and

- RICHARD D. WHALEY
WSBA #44317
Telquist Ziobro McMillen Clare PLLC
1321 Columbia Park Trail
Richland, Washington 99352
Phone: 509-737-8500/Fax: 509-373-9500
E-mail: rich@tzmlaw.com

Dated this 24th day of May, 2017.

By 

Donna Zink
Pro se

DONNA ZINK - FILING PRO SE

May 24, 2017 - 4:23 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34519-0
Appellate Court Case Title: John Doe v. Benton County, et al
Superior Court Case Number: 15-2-01587-4

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- dlczink@outlook.com

Comments:

Sender Name: Donna Zink - Email: dlczink@outlook.com
Address:
PO Box 263
Mesa, WA, 99343
Phone: (509) 265-4417

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