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APR 24, 2017
Court of Appeals
Division III
State of Washington

No. 34519-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOHN DOE, Respondent

v.

**BENTON COUNTY, Respondent, and
DONNA ZINK, Appellant, and JEFF ZINK, Appellant**

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY**

NO. 15-2-01587-4

BRIEF OF RESPONDENT BENTON COUNTY

**ANDY MILLER
Prosecuting Attorney
for Benton County**

**Ryan J. Lukson, Deputy
Prosecuting Attorney
BAR NO. 43377
OFFICE ID 91004**

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. STATEMENT OF ISSUES

- A. Is an agency required to provide an exemption log claiming exemption of records and/or immediately produce records to a requestor if it is not asserting an exemption, but rather is enjoined from releasing records pursuant to court order after providing third party notice of the request?
- B. Is an agency subject to penalties and attorney's fees under the Public Records Act (PRA) when it provides third party notice to individual sex offenders identified in records that are arguably exempt from disclosure when the agency is not exempting identifiable information on their behalf?

II. STATEMENT OF FACTS

On July 15, 2013, Appellant, Donna Zink, submitted a public records request to Benton County (hereinafter "the County") for "all level one sex offender registration forms filed with Benton County" and "a list of all level one sex offenders registered in Benton County, to include Level 2 and Level 3 if available." CP 2 (¶2.5, ¶2.6), CP 351. On July 31, 2013, the County notified Ms. Zink the records requested were potentially exempt from disclosure pursuant to RCW 4.24.550(3) and RCW 42.56.240(1). CP 2 (¶2.7). On August 5, 2013, the County provided notice to level I sex offenders identified in records requested by Ms. Zink as

permitted by RCW 42.56.540. *See* CP 2 (§2.7), CP 28-29 (§14, §20, §21).

Subsequent to that notice, the County was enjoined in four separate actions brought by the affected sex offenders from releasing any records related to Ms. Zink's request for level I sex offenders. Benton County cause numbers 13-2-02037-5, 13-2-02039-1, 13-2-02146-2, 13-2-027283-3; Division III COA cause numbers 325920 and 323021(consolidated with numbers 323030 and 323048).

On April 17, 2014, Ms. Zink submitted an additional public records request for all emails sent or received by the County concerning her previous requests for sex offenders' information between July 15, 2013, and April 17, 2014. CP 3 (§2.11), CP 364. This new request resulted in responsive records identifying additional sex offenders that were not identified in Ms. Zink's original requests for sex offender records. As a result, on July 1, 2015, prior to its final installment to the April 17, 2014, request, the County notified all level I sex offenders identified in the records who were not previously named in Ms. Zink's July 15, 2013, request, or who were previously named and had received injunctions against the County. CP 4 (§2.16), CP 413. On July 16, 2015, the County received notice from counsel for John Doe that he planned to seek a temporary restraining order to enjoin the County's production of records to Ms. Zink. CP 415. On the same date, John Doe filed a complaint for

declaratory and injunctive relief seeking to enjoin the County from producing any records that identified John Doe. *Id.* Subsequently, an amended complaint for declaratory and injunctive relief was filed. CP 1-5. On July 17, 2015, a temporary restraining order was granted enjoining the County from releasing any records related to Ms. Zink's public records requests, including but not limited to, Ms. Zink's request of April 17, 2014. CP 11-12. On August 6, 2015, Ms. Zink filed a cross claim against the County alleging a violation of the Public Records Act (PRA) for providing third party notice to level 1 sex offenders identified in her public records requests. CP 28-31.

On August 28, 2015, John Doe's motion for a preliminary injunction was granted, enjoining the County from releasing any lists of level I sex offenders responsive to Ms. Zink's April 17, 2014, request without first redacting John Doe's name, date of birth, registration level, registration status, and city of residence until a permanent injunction hearing could be held. CP 90-95. Subsequently, the County provided Ms. Zink with a copy of the record at issue, redacting the information it was enjoined from releasing. *See* RP 08/14/2016 at 37-39. On September 25, 2015, Ms. Zink's cross claim against the County was dismissed for failure to state a claim upon which relief could be granted. CR 101-04. On May 20, 2016, the trial court entered an order dissolving the preliminary

injunction and dismissing the complaint with prejudice following the Washington State Supreme Court's ruling in *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 385, 374 P.3d 63 (2016), in which they determined "that Level I sex offender registration information is subject to disclosure under a PRA request." CP 123-25. Ms. Zink was provided an unredacted copy of the record identifying John Doe shortly thereafter, and subsequently appealed the dismissal of her cross claim against the County for providing third party notice to the level I sex offenders of her request.

III. ARGUMENT

A. CR 12(b)(6) standard of review.

A trial court's ruling on a motion to dismiss under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts should dismiss a claim under CR 12(b)(6) only if beyond a reasonable doubt no facts exist that would justify recovery. *Id.* "While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). "If a plaintiff's claim remains

legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.” *Id.*

B. The County properly notified level I sex offenders identified in the records requested by Ms. Zink pursuant to RCW 42.56.540 and it is not required to claim exemption prior to providing notice.

The Zinks’ position, without any supporting authority, is that the County is legally required to claim an exemption prior to providing third party notice. This position is in direct contradiction with the permissive nature of RCW 42.56.540 and PRA model rule WAC 44-14-040(4). While the model rules are advisory only, and non-binding, they were adopted after extensive statewide hearings from a wide variety of interested parties and should be carefully considered by both requestors and agencies. WAC 44-14-00003. The County closely follows their guidance as a result.

RCW 42.56.540 states an “agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.” In addition, RCW 42.56.520 allows additional time to respond to a request when there is a need to “notify third persons or agencies affected by the request” In processing Ms. Zink’s PRA requests, the County exercised its statutory notification authority in accordance with WAC 44-14-040(4) which contemplates doing so when the “records contain information that may

affect rights of others and may be exempt from disclosure” This WAC also provides that such notice should be given in such a manner to make it possible for the affected persons to contact the requestor and ask him or her to revise the request, or, if necessary seek a court order to prevent or limit disclosure. WAC 44-14-040(4).

Shortly after Ms. Zink’s request for sex offender records on July 15, 2013, the County identified the potential statutory conflict between RCW 4.24.550’s prohibition on releasing level I sex offender information, and the PRA’s mandate of disclosure of records. While the County’s position at that time, and throughout the course of litigation, was that the records were not exempt from disclosure, it recognized a good faith argument could be made for their exemption. This is precisely why the County exercised its discretion in notifying the affected level I sex offenders pursuant to the above cited statutes and WAC provision. As a result of Ms. Zink’s numerous requests across the state for sex offender records, Benton County, and several other counties and state agencies across the state, became involved in litigation on this very issue.

Ultimately, Benton County was enjoined in four separate matters from releasing records to Ms. Zink (Benton County cause numbers 13-2-02037-5, 13-2-02039-1, 13-2-02146-2, and 13-2-027283-3; Division III COA cause numbers 325920 and 323021 (consolidated with cause numbers

323030 and 323048)). The question of the interplay between RCW 42.56.520's disclosure requirements, and RCW 4.24.550's prohibition on releasing sex offender information, was ultimately decided by the Washington State Supreme Court in *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016). In that case, the Court determined "that level I sex offender registration information is subject to disclosure under a PRA request." *Id.* at 385. Clearly, the County's belief that there could be a difference of opinion as to whether level I sex offender information could be released upon request was validated by the Supreme Court's opinion which reversed the trial court's determination of exemption.

In the midst of the substantial litigation of the question as to whether the County could release level I sex offender information, Ms. Zink made an additional request on April 17, 2014, for all emails sent or received by the County concerning her previous requests for sex offender information between July 15, 2013, and April 17, 2014. Some of the records contained additional names of level I sex offenders who were not previously notified of Ms. Zink's July 15, 2013, request. Given the fact the County was enjoined at that time from giving out level I sex offender information in four separate actions in Superior Court, the County felt compelled to provide notice to all sex offenders identified in this new

public records request who had not been previously notified of Ms. Zink's previous requests, or who had previously received an injunction against the County. Clearly, the release of records identifying individuals as level I sex offenders affected the rights of those individuals. As such, it would have been irresponsible of the County not to provide notice given the pending litigation it was involved with on this very issue. As a result of this notification, suit was filed against the County and on August 28, 2015, John Doe's motion for a preliminary injunction was granted, enjoining the County from releasing any lists of level I sex offenders responsive to Ms. Zink's April 17, 2014, request without first redacting John Doe's name, date of birth, registration level, registration status, and city of residence until a permanent injunction hearing could be held.

The purpose of RCW 42.56.540 is to give agencies the option of notifying third parties if they believe an arguable exemption exists. This is further clarified by WAC 44-14-040 which states a public records officer may give notice to third parties if the records contain information that may affect their rights and may be exempt from disclosure. In addition, WAC 44-14-04003(11) provides that an agency must have a reasonable belief that a record is arguably exempt prior to providing notice, and that an agency has wide discretion in deciding whom to notify and whether to notify at all. 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 people. *See also* RCW 42.56.060 (stating no agency shall be liable for any loss of damages based upon the release of a public record if it acted in good faith in attempting to comply with the PRA).

In this matter, the County gave notice to level I sex offenders identified in records requested by Ms. Zink due to the potential exemption it identified under RCW 4.24.550. This notice and Ms. Zink's additional public records requests produced five suits, including this matter, from registered sex offenders in Benton County, and dozens of suits across the state. Ultimately, RCW 4.24.550 was determined not to be an other statute exemption to the PRA by the Supreme Court in *Doe ex rel. Roe v. Washington State Patrol*. 185 Wn.2d 363. It is axiomatic that the County was operating in good faith in providing third party notice to level I sex offenders identified in Ms. Zink's requests. To require the County to claim an exemption prior to providing third party notice is logically inconsistent. If the County were to have agreed with the trial court, and exempted the identities of the level I sex offenders pursuant to RCW 4.24.550, there would have been no need to notify the sex offenders of the request because Ms. Zink would not have received their identities. The PRA allows agencies to afford individuals identified in records the opportunity to seek a judicial determination of whether a record is exempt from

disclosure if the agency is not going to apply the exemption on their behalf. The Zinks conflate the issues of the County being required to identify a potential exemption prior to giving third party notice pursuant to RCW 42.56.540 and WAC 44-14-04003(11), and the County independently exempting the record itself. The permissive nature of the third party notification provision of the PRA, RCW 42.56.540, and WACs 44-14-040 and 44-14-04003(11) permit the County to provide third party notice in this matter. As such, the basis for the Zinks' alleged PRA violation fails to state a claim upon which relief can be granted and was properly dismissed by the trial court.

Finally, the Zinks argue the County operated in bad faith by releasing their "confidential information" to the identified sex offenders. *See* Appellant's Brief at 36. The fact Ms. Zink made a public records request to the County is, in and of itself, a public record. In following the requirements of WAC 44-14-040, the County is required in its third party notice letter to give notice to the affected individuals so they can "contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure." This is exactly what the County did in this matter. In addition, a careful analysis of RCW 36.28A.040(6) makes clear Ms. Zink's public records requests to the County do not meet the criteria for exemption under that statute. RCW

36.28A.040(6)'s exemption to the PRA relates to information provided to the Washington Association of Sheriffs and Police Chiefs (WASPC) electronic statewide unified sex offender notification and registration program for the purpose of receiving notification regarding a registered sex offender. The County does not operate such a program and is a distinct and separate entity from the WASPC, and as such, this exemption is not applicable to Ms. Zink's requests.

C. Penalties against the County are not available under the PRA for providing third party notice.

The PRA does not permit penalties and attorney's fees against an agency for providing third party notice of a request to individuals who have an interest in the records requested when an arguable exemption exists. The Washington State Supreme Court in *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998), made clear the penalty and attorney's fee provision of the PRA, RCW 42.56.550(4),¹ is "inapplicable to cases in which an individual—rather than the agency—opposes disclosure of the records, and where the action was brought to prevent, rather than compel, disclosure." The Court went on to state that

[t]his interpretation is consistent with the purpose of [RCW 42.56.550(4)], which is to encourage broad disclosure and

¹ The Supreme Court cites to RCW 42.17.340 which was recodified as RCW 42.56.550 in 2005.

to deter agencies from improperly denying public records. This provision does not authorize an award [under RCW 42.56.550(4)] in an action brought by a private party, pursuant to [RCW 42.56.540²], to prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order.

Id. (internal citation omitted); *see also Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.3d 370 (2014) (holding RCW 42.56.540(4)'s fees and costs provision inapplicable where the City determined there were no PRA exemptions, provided third party notice, and the requestor prevailed against the third party who opposed disclosure, not the city); *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 328 P.3d 905 (2014) (affirming summary judgment of a cross claim by requestor against the State because fees, costs, and penalties cannot be awarded to a third party where the agency has agreed to release the records but is prevented from doing so by court order regardless of the whether injunction is upheld or overturned by a higher court).

The Zinks attempt to distinguish *Confederated Tribes* and *Robbins, Geller, Rudman & Dowd, LLP v. State* by pointing out that in those matters, the agencies arguably had an affirmative obligation to provide third party notice, and in this matter no such legal obligation existed. With respect to the facts of this matter, that is a distinction without

² The Supreme Court cites to RCW 42.17.330, the injunction provision in the PRA,

consequence. Based upon the facts asserted in the Zinks' cross claim, and the judicial notice taken by the trial court of pending litigation involving the issue of whether level I sex offender records were exempt from disclosure, there is no question as a matter of law the County operated in good faith by providing third party notice. As a result of Ms. Zink's requests, several level I sex offenders received multiple injunctions against the County enjoining the release of any record that identified them as a level I offender. Under the Zinks' theory of liability associated with agencies providing third party notice, anytime an agency provides notice to an interested third party, they are liable for potential damages. Such a theory flies directly in the face of RCW 42.56.540's and WAC 44-14-040's permissive notice provisions. The overarching theme of the PRA's notice provision is to give agencies the option of notifying third parties who have an interest in a record if there is an arguable exemption at issue. In this matter, there can be no question as a matter of law that WAC 44-14-04003(11)'s good faith requirement was met by the County given the fact the trial court in Benton County enjoined the County from releasing all records of level I sex offenders in five separate actions including this case. The fact the Washington State Supreme Court in *Doe ex rel. Roe v. Washington State Patrol* disagreed with the trial court's analysis leaves no

which was recodified as RCW 42.56.540 in 2005.

question reasonable minds could, and in fact did, differ as to whether the records requested were exempt from release. The Zinks' argument that the County operated in bad faith by providing third party notice is logically inconsistent and as such, their cross claim against the County failed to state a claim upon which relief could be granted and was properly dismissed by the trial court.

As highlighted in the case law cited above, penalties are not available under the PRA for providing third party notice to interested parties and following the terms of an injunction prohibiting the release of records. This point was made abundantly clear by the Supreme Court in Ms. Zink's own case, *Doe ex rel. Roe v. Washington State Patrol*, where this very issue of third party notification was decided by the Supreme Court. In that case, Ms. Zink argued that the WASPC violated the PRA when they provided third party notice to level I sex offenders identified in the records sought. 185 Wn.2d at 387. WASPC had no legal obligation to provide notice to the sex offenders, but did so as permitted under the PRA when an arguable exemption exists it is not asserting on a third party's behalf. To this point, the Court specifically noted the PRA section RCW 42.56.540 controls the analysis and that "[n]othing about the WASPC's conduct [of providing third party notice] was wrongful. Therefore Zink's request for an award of attorney fees, costs, and per diem penalties is

denied.” *Id.* The Court in its ruling definitively held that providing third party notice to level I sex offenders regarding a public records request is not wrongful. With no citation to relevant authority, the Zinks try to distinguish the ruling in this matter based on the fact in the *Doe ex rel. Roe v. Washington State Patrol* matter she did not file a cross claim against WASPC. The filing of a cross claim, or not, has no bearing on the legal analysis performed regarding whether there is liability under the PRA for providing third party notification to level I sex offenders. As the Supreme Court noted, an agency has the option of providing third party notice, and based on that analysis the trial court in this matter properly dismissed Ms. Zink’s counter claim for failure to state a claim upon which relief could be granted.

IV. CONCLUSION

Based on the foregoing, even under Ms. Zink’s hypothetical version of the facts, her cross claim fails to state a claim upon which relief can be granted. As such, the trial court’s dismissal was warranted under CR 12(b)(6) and the County respectfully requests this Court affirm its decision.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read 'R. Lukson', written over a horizontal line.

Ryan J. Lukson, Deputy
Prosecuting Attorney
Bar No. 43377
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

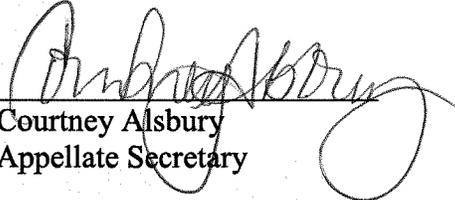
Donna and Jeff Zink
P.O. Box 263
Mesa, WA 99343

E-mail service by agreement was made to the following parties:
dlczink@outlook.com
jeffzink@outlook.com

Richard D. Whaley
Telquist Ziobro McMillen, PLLC
1321 Columbia Park Trail
Richland, WA 99352-4770

E-mail service by agreement was made to the following parties:
rich@tzmlaw.com

Signed at Kennewick, Washington on April 24, 2017.


Courtney Alsbury
Appellate Secretary