

No. 79608-4

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MICHAEL LIVINGSTON,
Appellant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON AND WASHINGTON COALITION
FOR OPEN GOVERNMENT**

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The court of appeals majority held that a public agency complies with the Public Records Act, RCW 42.56 (“PRA”)¹, when the agency takes an action to completely deny the requester’s access to non-exempt records, so long as the agency public records officer has made an earlier, ineffective and intentionally thwarted attempt to provide access to the records. Moreover, the majority held that an agency could bar access to public records without even offering a rationale for doing so. If left undisturbed, this reasoning could be used by any public agency to frustrate the purpose of the Public Records Act.

The Department of Corrections (“DOC”) has never contended, and does not argue here, that any of the PRA’s enumerated statutory exemptions bars Mr. Livingston’s access to the public records at issue. DOC’s public records coordinator mailed the requested public records to Mr. Livingston, but then DOC invoked an internal mail policy in an attempt to override its statutory obligations to facilitate delivery of those public records. The PRA nowhere authorizes an agency to adopt its own internal policies to withhold public records not otherwise exempt from disclosure under any statutory exemption.

¹ The Public Records Act, recodified in 2006 at RCW 42.56, was formerly codified as part of the Public Disclosure Act, in RCW 42.17. This brief will make reference to the current citations for the relevant statutory sections, even while discussing cases that were decided under the former statute.

This case is best resolved by honoring the long-established rule that an agency may bar access to requested documents only if it meets its burden to demonstrate a valid statutory basis for its actions. Here DOC's censorship was not authorized by any statute, including the prison mail statute, RCW 72.09.530. Because the agency has not met its burden, the decision of the court of appeals should be reversed.

I. IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU has long been an advocate for open government as envisioned by the state's Public Records Act and an advocate for the rights of inmates. The ACLU has submitted amici briefs to this Court in other cases involving related issues, including *Prison Legal News v. Department of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005).

The Washington Coalition for Open Government ("WCOG") is an independent, non-partisan, non-profit organization dedicated to promoting and defending citizen's right to know matters of public interest and in the conduct of the public's business. WCOG's focus is fostering open government through the state's Public Records Act and the state's Open Public Meetings Act. WCOG has submitted amicus briefs to this Court in

other cases involving the PRA including *Does v. Bellevue School District*, 158 Wn.2d 1024, 149 P.3d 376 (2007).

This case presents an opportunity to clarify that an agency cannot use an internal policy to evade its statutory obligations under the PRA. Amici's interest in this case is to ensure that the PRA remains an effective tool for access to government records, rather than a mere formality whose chief purpose can be evaded through an agency's sleight-of-hand.

II. STATEMENT OF THE CASE

While incarcerated at Olympic Corrections Center ("OCC"), Michael Livingston made a public records request for the training records of corrections officer Marleen Amundsen. The public records coordinator determined that the records were not protected by any statutory exemption. After receiving notice of the request, Officer Amundsen did not seek to have the documents declared exempt. The public records coordinator mailed copies of the requested records to Mr. Livingston at Cedar Creek Corrections Center ("Cedar Creek"), where he had since been moved. But Mr. Livingston never received the records because mailroom staff at Cedar Creek withheld the mail under a catchall provision in the Department of Corrections' ("DOC") Mailroom Policy 450.100, which allows rejection of any "items identified by the Superintendent/Field Administrator and/or facility field instructions." CP 131;

Policy 450.100(IV)(A)(31). The Superintendent stated without further explanation that he would not “allow an employee training record into the institution to be given to an inmate.” CP 5.

Mr. Livingston filed suit under the PRA. A superior court judge and then two judges on the court of appeals concluded that DOC fully complied with PRA requirements by placing the records in the mail, whether or not they ultimately were received. *Livingston v. Cedeno*, 135 Wn. App. 976, 146 P.3d 1220 (2006). The majority considered it irrelevant that delivery was blocked by the agency responsible for disclosing the records. During the litigation, DOC has never offered any rationale for its censorship decision, *see id.*, at 978 n.2, and the majority was unconcerned that DOC acted pursuant to a non-statutory policy that purported to grant it authority to reject mail for any reason or no reason at all. Judge Armstrong dissented, and this Court accepted review.

III. ARGUMENT

A. An Agency Violates the PRA When Its Actions Deprive Access to Public Records Without Statutory Authority

“Access is the underlying theme of the Act.” *ACLU v. Blaine Sch. Dist.*, 86 Wn. App. 688, 696, 937 P.2d 1176 (1997). As such, agencies must provide “the fullest assistance to inquirers,” RCW 42.56.100, not the response that is the most convenient or least disruptive for the agency. *See Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993) (mere

embarrassment to agency is insufficient ground for nondisclosure); *see also Zink v. City of Mesa*, ___ Wn. App. ___, 166 P.3d 738, 743-44 (2007) (PRA violated where agency refused admittance to view documents except for one hour daily and charged exorbitant copying fees). For example, in *ACLU v. Blaine*, the court interpreted the statutory requirement that agencies “honor requests received by mail” to oblige agencies to provide copies of records by mail when requested. 86 Wn. App. at 694-95. The court rejected the disclosing agency’s argument that it satisfied the statute by answering a request that had been delivered by mail with an invitation to view the identified records at its office some two hundred miles away from the requestor’s place of business. *Id.* at 695-96.

To encourage full access and deter improper withholding, the Act penalizes bad faith withholding as well as bad faith or carelessness in an agency’s method of responding to requests with increased financial penalties. *Yousoufian v. Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian I*) (penalty above statutory minimum required where county was dilatory and grossly negligent in responding to PRA request, even absent any evidence of bad faith); *Zink*, 166 P.3d at 747 (remanding for assessment of penalties in light of PRA violation; bad faith primary factor in assessing amount of penalty); *Yacobellis v. City of Bellingham*,

64 Wn. App. 295, 300-01, 825 P.2d 324 (1992) (bad faith the primary factor in assessing amount of penalty for PRA violation).

Despite its statutory obligations under the PRA (and constitutional standards limiting restrictions on inmates' access to mail), DOC invoked the Superintendent's discretionary authority under the catchall provision in its Policy 450.100 to deny Mr. Livingston access to public records that he had requested. The department's public records coordinator already had determined that the records Mr. Livingston requested were public records not exempt from disclosure under any legislatively approved exemption. The Superintendent of Cedar Creek, acting through his orders to mail room staff, then subjected the public records to a second evaluation under Policy 450.100's discretionary determination of "other items" that ought to be banned. This second evaluation is far broader, allowing completely unspecified and potentially arbitrary exemptions to defeat disclosure, unlike the PRA's exclusive and narrowly drawn exemptions. As a result DOC withheld public records that *already had been determined to be non-exempt*. The vague and broad catchall of a non-legislated policy eviscerates the guarantees of the legislatively enacted PRA with one blow.

In other settings, an agency's mere knowledge that its communications have not been received gives rise to a duty to renew efforts to deliver the message. *Jones v. Flowers*, 547 U.S. 220, 234,

126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). Here, DOC had more than knowledge that the records it mailed had not been delivered. DOC itself was responsible for the non-delivery. The very agency with the duty to provide Mr. Livingston with the “fullest assistance” is the agency that affirmatively sought to prevent his access to those public records. *Blaine, Yousoufian, Yacobellis, and Zink* emphasize that the PRA will not tolerate agency laziness, half-heartedness, or bad faith in responding to a request. By the same token, this Court should not permit an agency to claim full compliance with its statutory obligations under the PRA when it offers the requested records with one hand, but then snatches those same public records out of the requestor’s grasp with the other hand.

By statute, “the burden of proof shall be on the agency” to show that its actions are “in accordance with a statute” authorizing a denial of access. RCW 42.56.550(1); *see also PAWS v. Univ. of Wash.*, 125 Wn.2d 243, 257-61, 884 P.2d 592 (1994). The court of appeals majority erred by ignoring this burden. Instead of demanding compliance with the PRA, the majority relied upon an agency-promulgated rule that purports to allow DOC to block access to public records for any reason or no reason at all. This Court should reiterate that statutory authority is required whenever an agency takes action to deny a requester’s access to the agency’s public records.

B. No Statute Authorized DOC's Denial of Mr. Livingston's Access to the Requested Public Records

1. The PRA Does Not Allow An Agency To Refuse To Deliver Records To Prison Inmates

The PRA is premised on open access to government information, irrespective of the source or anticipated purpose of a particular request for disclosure. "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request...." RCW 42.56.080; *see also King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002); *Zink v. City of Mesa*, 166 P.3d at 744-45. Indeed, allowing agencies to consider the source or intended purpose of requests would undermine the Act's goal of facilitating government accountability, by permitting an agency to withhold access from "its most vocal critics, while supplying the same information to its friends." *King County v. Sheehan*, 114 Wn. App. at 341.

The bar on discrimination includes prison inmates. An inmate's right of access to information does not stop at the prison gate. The statute neither contemplates nor tolerates discrepancies in treatment between public records requests initiated by prison inmates and those originating from individuals not incarcerated. *See, e.g.*, H.B. 2138, 59th Leg. Reg. Sess. (Wash. 2005) § (1)(ggg) (proposed legislation seeking to limit inmates' access to public records; not adopted by the legislature). If an

inquirer's incarceration prevents him from accessing records in the manner usually provided by the agency, the Act requires the agency to facilitate access by shepherding the responsive records in a manner calculated to provide access. Thus, in *Sappenfield v. Dep't of Corr.*, DOC complied with the PRA by mailing records to an inmate, even though a free person might have been permitted to inspect the records in person where they were in storage. *Sappenfield v. Dep't of Corr.*, 127 Wn. App. 83, 89, 110 P.3d 808 (2005), *review denied*, 156 Wn. 2d 1013 (2006). Any differential treatment of Sappenfield, an inmate, from free persons was caused by his inability to present himself for in-person inspection. *Id.* at 87. Sappenfield's *manner* of access was affected by his imprisonment, but the *fact* and *content* of his access remained, as it must, identical to that of any public records requestor, regardless of personal circumstances.

2. The Prison Mail Statute Does Not Justify DOC's Refusal to Delivery the Public Records

Although it was not the theory adopted by the court of appeals, DOC argued below that its actions were justified by the prison mail statute. RCW 72.09.530. That statute directs DOC to adopt a policy for the confiscation of contraband introduced into prisons. DOC suggests, although it does not say so expressly, that this statute overrides the PRA in cases of non-delivery of public records. DOC has failed to show that the

prison mail statute is one of the “other statutes” incorporated into the PRA under RCW 42.56.070(1). It is not enough for DOC to provide a bare citation to a statute that might authorize nondisclosure. It must demonstrate that the cited statute “exempts or prohibits disclosure in whole or in part of *specific information or records*.” RCW 42.56.550(1) (emphasis added); 42.56.070(1). In other words, in each instance where it denies access in reliance on the statute, the agency must prove the applicability of the statute to the particular records in question. *Prison Legal News v. Dep’t of Corr.*, 154 Wn.2d 628, 636, 115 P.3d 316 (2005). As noted by the court of appeals, DOC has never offered any rationale for its censorship decision in this case, and the judges disagreed about whether one could even be speculated. *See Livingston*, 135 Wn. App. at 978 n.2 (majority) and 982 n.7 (Armstrong, J., dissenting).

The prison mail statute directs DOC to adopt a policy for contraband that enters the prison, including entry by U.S. Mail. This statutory authority is broad but not unbounded.

The rule shall provide consistent maximum protection of legitimate penological interests, including prison security and order and deterrence of criminal activity. The rule shall protect the legitimate interests of the public and inmates in the exchange of ideas. The secretary shall establish a method of reviewing all incoming and outgoing material, consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband.

RCW 72.09.530 (emphasis added). By contrast, Policy 450.100's catchall clause purports to give the superintendent wholly unfettered discretion to declare any "items identified by the Superintendent" to be contraband, regardless of the reasons. The policy violates the prison mail statute for two reasons. First, it is not limited to legitimate penological interests including prison security and order; instead, it can be exercised for any reason including illegitimate reasons. Second, unfettered discretion to restrict speech for any reason or no reason at all is an unconstitutional prior restraint and here not "consistent with constitutional constraints" as required by RCW 72.09.530. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) ("in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship") (citations omitted).

The specific censorship decision in this case also goes beyond the statute, because it is not "consistent with constitutional constraints." To be sure, prison administrators have latitude to regulate communications between inmates and the outside world, but this latitude is not without limits. It offends the First Amendment for a prison to reject mail if the rejection is not reasonably related to legitimate penological objectives, as defined by the four-part test from *Turner v. Safley*, 482 U.S. 78, 89-90,

107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001). Prison censorship that is an “exaggerated response” to administrators’ concerns is not allowed. *Turner*, 482 U.S. at 90. The Ninth Circuit has applied the *Turner* standards to strike down numerous institutional policies that sought to deny inmates’ access to their mail in the name of purported institutional security and efficiency. *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005) (struck down ban on all bulk mail, including subscriptions and mailings solicited by inmates); *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148 (9th Cir. 2004) (rejected ban on mail containing material printed from the internet); *Ashker v. Cal. Dep’t of Corr.*, 350 F.3d 917 (9th Cir. 2003) (overruled ban on books mailed without vendor sticker or stamp); *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001) (struck down ban on for-profit subscription publications based on postage rate used); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (rejected ban on non-profit subscription publications based on postage rate used); *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999) (overruled blanket ban on publications purchased for inmates as gifts). Just as the PRA places the burden on agencies to demonstrate a valid basis for nondisclosure, the constitution places the burden on government to demonstrate the

constitutionality of actions that burden First Amendment rights. *Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004).

Even if DOC had attempted to meet its burden here, it is doubtful that it would have succeeded. Mr. Livingston requested only documents showing what training Officer Amundsen had received. The documents would not facilitate escape plots or reveal details of any ongoing investigation. The PRA exempts portions of employment files the disclosure of which would invade privacy, RCW 42.56.230(2), but it was determined that this document was not one of them. Nor could the records have provided fodder for “retaliation” or an opportunity for Mr. Livingston to cause Officer Amundsen “personal harm,” as contended by Superintendent Ceden, or for Mr. Livingston to use the information as “leverage” against the officer, as imagined by the court of appeals. Officer Amundsen did not seek to prevent the disclosure. Moreover, Officer Amundsen did not even work at Cedar Creek, the institution that rejected the document, and where Mr. Livingston was housed. OCC, where she did work, believed disclosure to Mr. Livingston was appropriate. Judge Armstrong was correct to observe that “it is not easy to find a connection between a correction officer’s training records and a security threat.” *Livingston*, 135 Wn. App. at 982 n.7.

There is of course no general principle that law enforcement officers are entitled to greater privacy rights than other government employees. For example, in *King County v. Sheehan*, Division I emphasized that the police officials' enunciated concern that release of police officers' names would endanger officer privacy and safety, though it had some foundation, could not justify non-disclosure since that information was routinely published in other venues and response to the PRA request would not unreasonably hamper effective law enforcement. 114 Wn. App. 325, 340-41, 57 P.3d 307 (2005); *see also Prison Legal News v. DOC*, 154 Wn.2d at 641-44 ("effective law enforcement" exemption inapplicable to law enforcement officers' job performance records); *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 671 P.2d 280 (1983) (same); *Nicholas v. Wallenstein*, 266 F.3d 1083 (9th Cir. 2001) (Washington PRA does not exempt jail incident reports that contain the names of jail personnel).

3. Public Policy Favors Inmate Access to Public Records Such as Those At Issue Here

Not only do DOC's speculative reasons for denying access fail to pass constitutional muster, to the contrary, penological interests are served by inquiries such as Mr. Livingston's. An inmate has an especially strong interest in ensuring adequate training and accountability of the guards who

exercise near-complete power over their daily activities. Although the record does not disclose the purpose of Mr. Livingston's request (and the PRA does not require that he disclose it), inmates wishing to pursue grievances against guards have an interest in access to documents that would support those claims, and prisons have an interest in assuring that any grievances or claims are based on accurate information.

Beyond Mr. Livingston's private interests, the public at large benefits when inmates have access to nonexempt information about an important state agency. Inmates are particularly well situated to inquire into the adequacy of correctional officers' training. For example, in *Prison Legal News v. DOC*, a publication run by and for inmates investigated concerns about the adequacy of medical care in prisons by inquiring into job performance records of institutional medical staff. 154 Wn.2d at 632-33. Similarly here, inmates like Mr. Livingston possess the most immediate concerns as to whether correctional officers have current training on CPR, safe restraint techniques, and the like, and are best positioned to investigate and understand those issues. The public benefits when an inmate inquiry leads to a discovery about improper training that may lead to injuries or public liability.

C. Mr. Livingston Was Entitled To Rely On The PRA, And Was Not Limited To a Civil Rights or APA Action

When an agency bars access to a public records request under the PRA, it makes perfect sense to resolve any resulting disputes using the procedures set forth in the PRA. DOC correctly observes that Mr. Livingston had multiple legal avenues to challenge Cedar Creek's wrongful censorship, including a civil rights action under 42 U.S.C. § 1983 or an action under the state Administrative Procedures Act. Supplemental Brief at 18. But these alternate causes of action are not exclusive and do not diminish Mr. Livingston's rights under the PRA.

There are significant differences between the causes of action that could reasonably lead a plaintiff in Mr. Livingston's situation to rely upon the PRA. Federal civil rights suits brought by state inmates are limited by the Prison Litigation Reform Act of 1995, which imposes potentially difficult and formalistic exhaustion requirements, *Woodford v. Ngo*, ___ U.S. ___, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006), and imposes a cap on the available attorney's fees, 42 U.S.C. § 1997e(d)(3). A prevailing party in an APA suit may seek fees only under the Washington Equal Access to Justice Act, RCW 4.84.350, which has a more difficult "substantially justified" standard for an award of attorneys fees, in contrast to the PRA's award of fees to any prevailing plaintiff. Neither § 1983 nor the APA has

a daily penalty provision. Most importantly, proof on the merits is different. In a civil rights action, the plaintiff has the burden to prove a constitutional violation. In an APA action, the plaintiff has the burden to prove the agency made one of the types of errors specified in RCW 34.05.570(3). Under the PRA, the plaintiff will prevail if the agency cannot satisfy its burden to show a statutory basis for withholding the public records. While resolution of Mr. Livingston's suit requires constitutional analysis because of the working of the prison mail statute, the challenge was properly brought and can be fully resolved under the PRA.

IV. CONCLUSION

In ruling that DOC's duties under the PRA ended when the response to Mr. Livingston's request left the OCC public records office, Division II abandoned decades of precedent requiring agencies to provide assistance to requestors and facilitate access whenever possible. The ruling permits agency sleight-of-hand to circumvent the statute's plain language. Most worrisome, Division II's decision bestows blind deference to a wide-reaching internal policy that grants exceptional discretion to the agency. Where the agency claims another statute, such as RCW 79.09.530 here, permits withholding of public records, the agency has the burden to prove that statute's applicability to the particular records

withheld. DOC has failed to meet that burden in this case. If the court of appeals' decision stands, DOC's policy and others like it could be used to cloak myriad public records from view of those persons most interested in the records and best positioned to understand and make productive use of them.

Amici urge this Court to reverse Division II's decision and hold that DOC did not satisfy its responsibilities under the PRA by compiling and mailing responsive public records, when the agency then removed those public records from the mail and stopped them from being delivered to the requestor. This ruling will give teeth to the PRA in a context where it serves as the primary avenue for government oversight

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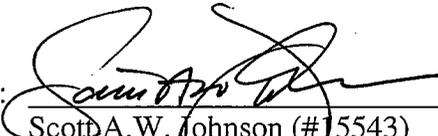
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and accountability, and will reinforce the PRA's message that government transparency benefits the entire public.

DATED this 5th day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of November, 2007, I caused a true and correct copy of the foregoing document, "BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF MICHAEL LIVINGSTON," to be sent by email and by U.S. First Class Mail to all counsel of record, postage prepaid and addressed as follows:

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