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No. 80998-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC BURT, GARY EDWARDS, SHERRY HARTFORD, JOANN IRWIN, JOHN MOORE, CLIFFORD PEASE, DAVID SNELL, HAROLD SNIVELY, ALAN WALTER, DUSTIN WEST, PAUL-DAVID WINTERS, CHERI STERLIN, LAURA COLEMAN, CHARLES CROW, AND RICHARD "JASON" MORGAN,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent,

ALLAN PARMELEE,

Petitioner.

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STATE OF WASHINGTON
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BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 24,000 members, dedicated to the preservation and defense of constitutional and civil liberties, including the right of the public to inspect public documents pursuant to the Public Records Act ("PRA"). It supports the right of any member of the public to promote government transparency and accountability through public records requests, and believes that those who exercise their right to access should not be penalized for doing so. Consistent with these principles, the ACLU believes that PRA requesters should be given notice sufficient to allow them to timely advocate for their interests (which may differ from the government's) and to allow them to timely intervene in an action regarding their PRA request. However, PRA requesters should be protected from being involuntarily haled into court as a consequence of exercising their right of access.

Amicus has reviewed the documents and pleadings in this case and is familiar with the issues and arguments of the parties.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus submits that the issue before the court is this: Under the Public Records Act and due process, what notice must a public agency provide to a PRA requester in the event that the subject of the record

invokes RCW 42.56.540 to enjoin the agency from disclosure of the record?

The parties dispute whether the requester, Allan Parmelee, timely filed his motion for intervention in the plaintiff Department of Corrections employees' PRA injunction action and whether Mr. Parmelee must be joined as a necessary party to the PRA injunction action. *Amicus* does not take a position on whether Mr. Parmelee's motion to intervene was timely under CR 24. However, the issue of timeliness depends on whether Mr. Parmelee received adequate notice of the employees' PRA injunction action. The parties do not dispute that at least *some* notice of the injunction action to a non-party requester is required. The question then is, *how much* notice is required?

RCW 42.56.540, referred to herein as the "PRA injunction statute," allows a person who is named in a record sought by a requester to file an action against the agency to enjoin the release of documents. The PRA injunction statute states that the agency has the option of notifying any person named in the record that the record has been requested, unless the agency is required by law to provide notice to that person. The subject of the record may then sue the agency and move to enjoin the release of such record. In other words, RCW 42.56.540 gives the subject of the record a remedy against the agency to force the agency to deny the

requester's request. But it does not specify any procedure to notify the requester that a third-party has filed a PRA injunction action, even though the requester clearly has an interest in what the proceedings will mean for his or her request.

RCW 42.56.540, however, does not live in isolation. The Public Records Act is a mandate for the broad disclosure of public records. The language of the PRA clearly identifies the public's interest in full disclosure: "The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that ***the public interest will be fully protected***." RCW 42.56.030 (emphasis added).

Amicus respectfully submits that the only construction of the PRA injunction statute that would comport with the PRA's mandate to fully protect the public interest is to require notice to the requester sufficient to allow the requester to timely intervene and advocate his or her own interests, rather than gambling with whether the government will fully advocate for and protect the requester's interests. Additionally, in order to satisfy due process, that notice must be specific enough to allow the requester an opportunity to be heard "at a meaningful time and in a meaningful manner."

Amicus explains below why adequate notice in this context means the agency must provide the requester with a copy of the Complaint (including the case number, court in which the action is being brought, parties, and alleged grounds for denying the request), along with known hearing dates, and information regarding how the requester may participate in the PRA injunction action if he or she chooses to do so. This notice requirement is necessary to afford due process to requesters and to allow agencies to fulfill their obligation to provide "the fullest assistance" to requesters. This Court has the inherent authority and obligation, where a statute is silent on procedure, to provide procedures necessary to satisfy due process requirements and which comport with the relevant statutory scheme.

Amicus also explains below why the Court should not conclude that the requester is **always** an indispensable party under CR 19 in a PRA injunction action. Requesters should be protected from being involuntarily haled into court as a consequence of exercising their right of access to public records.

III. ARGUMENTS OF AMICUS CURIAE

A. THE PRA AND DUE PROCESS REQUIRE A PUBLIC AGENCY TO PROVIDE ADEQUATE NOTICE TO REQUESTERS IN PRA INJUNCTION ACTIONS

1. The PRA Should Be Construed to Promote Full Access to Public Records

The Public Records Act became law in 1972 by the direct vote of the people.[1] *See Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). The PRA is a strongly worded mandate for the broad disclosure of public records. *Id.*

The purpose of the Public Records Act is "nothing less than the preservation of the most central tenants of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995). "The provisions of the act are to be liberally construed to promote full access to public records so as to assure continuing public confidence in governmental processes, and to assure the public interest will be fully protected." *Spokane Police Guild v. Washington State Liquor Control Board, supra*, 112 Wn.2d at 33.

To this end, the PRA mandates agencies to "adopt and enforce reasonable rules and regulations ... consonant with the intent of this chapter to provide full public access to public records" that "provide for

[1] The Public Records Act, formerly referred to as the Public Disclosure Act, was recodified in 2006. The Public Disclosure Act was formerly codified at RCW 42.17 *et seq.*

the fullest assistance to inquirers and the most timely possible action on requests for information." *See* RCW 42.56.100.

2. The PRA Recognizes Three Distinct Interests, and Procedural Safeguards in the PRA Ensure that the Public's Interest is Fully Protected

The PRA and this Court have recognized that the Public Records Act protects three interests: the public's right to inspect public documents; the agency's responsibilities to fulfill PRA requests without interfering with other essential agency functions; and privacy and other interests for which a specific exemption from disclosure is provided. *See* RCW 42.56.030; RCW 42.56.050; RCW 42.56.100; *Spokane Police Guild v. Washington State Liquor Control Board, supra,* 112 Wn.2d at 33-34. This Court has noted that there may be tensions between the three interests, but that disclosure is the primary objective of the PRA:

> Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. Indeed, as the act recognizes, society's interest in an open government can conflict with its interest in protecting personal privacy rights and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure. ***It is this task of accommodating opposing concerns, with disclosure as the primary objective, that the state freedom of information act seeks to accomplish.***

Spokane Police Guild v. Washington State Liquor Control Board, supra, 112 Wn.2d at 33-34 (emphasis added).

The public's interest in full disclosure is clearly identified in the PRA: "The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that ***the public interest will be fully protected***." RCW 42.56.030 (emphasis added).

The Attorney General's Office has also made it clear that "[t]he basic purpose of the [Public Records Act] is to allow for unimpeded access by citizens to public records." AGO 1991 No. 6 (Feb. 27, 1991). Even where requests create burdens on essential agency functions or create embarrassment to the subject of the record being sought, where there is a legitimate public interest in the disclosure of the public record, that record must be disclosed unless exempted. *See, e.g., Tiberino v. Spokane County*, 103 Wn.App. 680, 686, 13 P.3d 1104 (2000); *King County v. Sheehan*, 114 Wn.App. 325, 347-348, 57 P.3d 307 (2002).

Recognizing that the governmental agency's interest and the public's interest are distinct, the PRA contains numerous safeguards to protect the public's interest. The PRA expressly provides *de novo* judicial review to requesters who have been refused access to public

records by an agency and reviewing courts must take into account the policy of free and open examination of public records. RCW 42.56.550. Recognizing the harm that improper withholding may cause to the public interest, the PRA authorizes courts to impose a per diem penalty for each day the requester was denied the right to inspect or copy public records. *Id.* The PRA eloquently puts it this way: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030.

The Court of Appeals below stated that "Mr. Parmelee was not needed for a just adjudication" because his "request and his interest as a member of the public were easily apparent to the trial court." *Burt v. Washington State Department of Corrections*, 141 Wn.App. 573, 580, 170 P.3d 608 (2007). To the extent the Court of Appeals reached this conclusion based on the assumption that the Department of Corrections would represent the public's interest or Mr. Parmelee's interest in disclosure, such reasoning is not supported by the PRA or by case law. *See, e.g., King County v. Sheehan*, 114 Wn.App. 325, 344-345, 57 P.3d 307 (2002).

3. The PRA and Due Process Requires Notification to Requesters Not Named in PRA Injunction Actions, and This Court May Provide Guidance on Such Notice Requirements

Under the PRA, judicial review is allowed in one of three ways. First, the requester may file an action to obtain judicial review of the agency's action refusing disclosure. Second, an agency can proceed under the injunction statute to enjoin the release of records and name the requester as a respondent. Third, the subject of a requested record ("subject-party") can sue the agency under the injunction statute to enjoin the release of records. RCW 42.56.550; RCW 42.56.540; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753, 174 P.3d 60 (2007).

It is the third method of judicial review--where a subject-party names the agency as respondent in an injunction action--where the injunction statute itself does not mention a procedure to ensure that the requester has the opportunity to fully protect his or her interests and for meaningful due process.[2] This Court has recognized that the PRA injunction statute is a "procedural provision" that "governs access to a remedy" and is not a substantive right. *Progressive Animal Welfare*

[2] In the first two methods, the requester is either initiating the action against the agency or being named as a respondent by the agency, so the requester's interest is already represented in the injunction action.

Society v. University of Washington, 125 Wn.2d 243, 257-258, 884 P.2d 592 (1995).[3]

The injunction statute, RCW 42.56.540, must be construed in light of the policy of the PRA. The public's right to access is given paramount importance in the PRA. Thus, the only construction of the injunction statute that is consistent with the PRA's policy of full disclosure is that requesters must be given the opportunity to participate in a PRA injunction action. Notice to the non-party requester in a PRA injunction action is necessary to allow the requester to represent the public's interest and his or her own interest in the action.

Due process also compels a notice requirement to requesters. The fundamental requirement of due process is to provide the opportunity to be heard "at a meaningful time and in a meaningful manner." *Gourley v. Gourley*, 158 Wn.2d. 460, 467, 145 P.3d 1185 (2006), citing *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976). Notice is sufficient if it is "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover*

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[3] The PRA injunction statute, codified at RCW 42.56.540, allows a superior court to enjoin the release of specific public records if they fall within specific exemptions. *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 257, 884 P.2d 592 (1995). It does not create an independent exemption to disclosure based on personal privacy or vital government interests. *Id.* at 260.

Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950); *see also Nisqually Delta Assoc. v. DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985).

If the statute does not contain all of the process that is due, this Court has inherent authority to provide additional procedures to satisfy due process requirements. *State v. Thorne*, 129 Wn.2d 736, 769, 921 P.2d 514 (1996). A court's authority to provide additional procedures to satisfy due process is codified in RCW 2.28.150, which states "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws." *See also Rogoski v. Hammond*, 9 Wn.App. 500, 503-504, 513 P.2d 285 (1973) (where attachment statute lacked express provision for a prejudgment attachment hearing, court may provide such procedure to ensure a fair hearing), cited in *Abad v. Cozza*, 128 Wn.2d. 575, 588, 911 P.2d 376 (1996). RCW 2.28.150 is applicable if jurisdiction is otherwise conferred on the court, no course of proceeding is specifically pointed out, and the mode of proceeding is "most conformable to the spirit of the laws." *In re Cross*, 99 Wn.2d 373, 380, 662 P.2d 828 (1983).

Here, the PRA clearly recognizes that requesters are interested parties in their requests for public records. Especially where the interest

of the requester and the public agency are not the identical, the requester may be best suited to represent the public's interest in disclosure. Due process requires that all interested parties be provided the opportunity to be heard "at a meaningful time and in a meaningful manner." The PRA injunction statute is a procedural statute that ostensibly omits a procedure to notify requesters not named in a PRA injunction action. Where the PRA does not provide all the procedures necessary to ensure due process and where additional procedural rules would conform with the spirit of the statute, this Court has the authority to provide those additional rules.

The parties in this case do not dispute that ***some*** notice is required to requesters in PRA injunction actions to ensure due process and to comply with the purposes of the PRA.[4] The question is how much notice? *Amicus* respectfully submits that the PRA and due process require the public agency to provide the requester with a copy of the PRA injunction action Complaint (including the case number, court in which the action is being brought, parties and alleged grounds for denying the request), along with known hearing dates and information regarding how the requester may participate in the PRA injunction action if they choose to do so.

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[4] *See* Resp. Supp. Br. At 12, n.4. (noting that a requester is likely to "'claim[] an interest relating to the subject of the action [a request] and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest....'").

Anything less runs the risk that the requester will not be able to adequately protect his or her interest or the public's interest.

4. The PRA Agency Model Rules Also Recognize the Interests of a Requester in a PRA Injunction Action and Provide Adequate Notice Procedures for the Requester

The Attorney General's Office recognizes the legal interest of the requester in a PRA injunction action as well. In 2005, the Legislature directed the Attorney General to adopt "advisory model rules" by February 1, 2006 for state and local agencies to provide the fullest assistance to requesters, among other things. *See* RCW 42.56.570. The Attorney General's model rules were adopted "after extensive statewide hearings and voluminous comments from a wide variety of interested parties." WAC 44-14-00005. The Attorney General's model rules are codified at Chapter 44-14 of the Washington Administrative Code.

The comments to the Model Rules explicitly recognize that "[t]he ***requestor has an interest in any legal action*** to prevent the disclosure of the records he or she requested." WAC 44-14-04003 (11) (emphasis added). To protect the interest of the requester, the comments state, "If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action ***to allow the requestor to intervene***." *Id.* (emphasis added).

The Model Rules and comments recognize that, at a minimum, the notice given to requesters must be sufficient to allow the requester to intervene. Given the agencies' statutory mandate to provide the fullest assistance to requesters, this notice requirement should be the responsibility of the agency.

In sum, the text and policy of the PRA and the Attorney General's Model PRA rules recognize the requester's interest in a PRA injunction action. Due process requires that all interested parties be provided the opportunity to be heard "at a meaningful time and in a meaningful manner." Important pieces of information were omitted in the notice the Department of Corrections sent to Mr. Parmelee. The question of "how much notice?" is likely to recur, *see Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 749-750, 174 P.3d 60 (2007), and this Court has the inherent authority to resolve the question now by requiring adequate notice to requesters.

To ensure sufficient due process in a manner that comports with the PRA, *Amicus* respectfully requests this Court to construe RCW 42.56.540 and the PRA to require agencies to inform the requester of the Complaint and the requester's right to participate in a PRA injunction action and the steps necessary to do so as soon as the action is filed.

B. REQUIRING REQUESTERS BE JOINED AS INDISPENSIBLE PARTIES IN ALL PRA INJUNCTION ACTIONS IS UNNECCESARY AND WOULD HAVE A CHILLING EFFECT ON PUBLIC ACCESS TO RECORDS

In order to determine whether a party is an indispensable party under CR 19, the Court engages in a two-part analysis. First, the court determines whether the party is needed for just adjudication and second, if an absent party is needed but not available, whether the action may proceed in "equity and good conscience" without the absent party. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494-495, 145 P.3d 1196 (2006). The analysis under CR 19 "calls for determinations that are heavily influenced by the facts and circumstances of individual cases." *Id.* at 495, citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1604, at 39 (3d ed. 2001).)

Amicus respectfully submits that a *per se* rule that the requester is an indispensable party to any PRA injunction action would deter members of the public from exercising their right of access. There are many reasons why a non-party requester may want to intervene. If for example, the requester perceives that the agency's interest is consistent with the subject-party's interest, the requester may choose to intervene. Even where the agency determines that disclosure is warranted, the requester may still want to intervene to represent his or her interests. *See, e.g., Spokane*

Police Guild v. Washington State Liquor Control Board, 112 Wn.2d 30, 32, 769 P.2d 283 (1989) (newspaper publisher was allowed to intervene in PRA injunction action by subject-party against agency). In other cases, a requester in one PRA request may want to intervene in an action involving another person's PRA request for the same documents. *See, e.g.*, *Spokane Research & Defense Fund v. City of Spokane*, 115 Wn.2d 89, 105, 117 P.3d 1117 (2005) (requester who already filed an action could intervene in another requester's PRA action where the same documents are at issue); *King County v. Sheehan*, 114 Wn.App. 325, 333, 57 P.3d 307 (2002) (in injunction action brought by agency against requester, another requester who subsequently made the same request was allowed to intervene in injunction action). In all these cases, a rule *requiring* a requester to participate as an indispensable party in a PRA injunction action would expose those persons who exercise their right of access to the threat of litigation.

Providing adequate notice to requesters, on the other hand, would eliminate any need to hold requesters as indispensable parties all the time. Upon receiving adequate notice of a PRA injunction action, a requester would have the opportunity to choose to intervene to protect his or her rights.

This Court addressed the issue of requesters being haled into court under the PRA injunction statute in *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753, fn 16, 174 P.3d 60 (2007) ("*Soter*"). The Court noted that a requester who was named by an agency in a PRA injunction action who did not wish to engage in a court battle could "simply withdraw the public records request" or move for involuntary dismissal to avoid litigation. *Id.* This essentially gives the requester the difficult choice of withdrawing its PRA request or participating in an injunction action against its wishes. Still, the Court perceived "no chilling effect on record requesters." *Id.*

A similar reasoning is not required here for a number of reasons. First, the result in *Soter* –holding that an agency could sue a requester under the PRA injunction statute—was compelled by the express text of the PRA and its legislative history. Here, the PRA is silent on whether a requester is an indispensable party and this Court is not compelled to invoke the harsh reasoning in *Soter*. Second, the issue in *Soter* was whether an ***agency*** could bring an injunction action against a requester. Here, the issue is what notice is required to a requester where a ***subject-party*** files a PRA injunction action against an agency. Although both the agency and the third-party have the same burden of proof in an injunction action, the agency is subject to daily penalties for each day it improperly denies access to a public record and a requester is not. *See Soter, supra,*

162 Wn. at 757. In other words, the PRA contains safeguards against baseless agency injunction actions but no safeguards against baseless subject-party actions. A requester should not be faced with the option of withdrawing its PRA request or participating in an injunction action against its wishes every time a subject-party invokes the PRA injunction statute. Finally, as a policy matter, allowing requesters to be haled into court by subject-parties would chill the public's right of access to public documents. This result contravenes the mandate for broad disclosure and has no support in the text, the legislative history or the AG's model rules for the PRA.

Providing adequate notice to requesters would allow the requester to choose to participate in the PRA injunction action where the requester believes that the interests of the public or the requester would not be sufficiently represented by the agency. But it would not force litigation on individuals who simply exercised their right to request public records.

IV. CONCLUSION

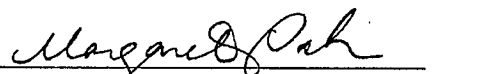
The parties do not dispute that at least some notice is required to satisfy a requester's due process rights in a PRA injunction action. In answering the question what form of notice is enough, *Amicus* respectfully submits that the only answer to this question that is consistent with the PRA is this: enough to allow the requester to timely intervene.

Amicus respectfully requests this Court to establish a procedure that, at a minimum, would require the public agency to provide a copy of the Complaint to the requester not named as a party in a PRA injunction action, including the case number, name of court, parties, alleged grounds for denying the request, along with known hearing dates, and information explaining how the requester may intervene. This procedural requirement would allow agencies to fulfill their mandate to provide the "fullest assistance" to requesters and allow requesters to timely intervene to represent the public's interest in disclosure or their own.

Amicus also respectfully requests this Court to hold that a PRA requester is not an indispensable party to a PRA injunction action in every case. Requesters should be protected from being involuntarily haled into court as a consequence of exercising their right of access.

Respectfully submitted this 19th day of December, 2008.

ACLU OF WASHINGTON FOUNDATION

By 

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APPENDIX

RCW 42.56.540

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. 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. However, this option does not exist where the agency is required by law to provide such notice.