

No. 80998-4

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

BURT , Et al,

Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
08 OCT -7 AM 7:47  
BY RONALD R. CARPENTER  
CLERK

---

APPEAL FROM THE SUPERIOR COURT FOR  
WALLA WALLA COUNTY

The Honorable Robert Zagelow  
05-2-00075-0

---

*P*ETITIONER'S  
APPELLANT'S SUPPLEMENTAL BRIEF

---

MICHAEL C. KAHR, WSBA #27085  
ALEX B. BROWN, WSBA #39402  
Attorneys for Appellant Parmelee  
5215 Ballard Ave. NW, Ste. 2  
Seattle, WA 98107  
(206) 264-0643

ORIGINAL

TABLE OF CONTENTS

- I. INTRODUCTION ..... 1
- II. DISCUSSION ..... 2
  - A. THE REQUESTER IS A NECESSARY PARTY TO ANY ACTION WHICH WILL AFFECT HER RIGHTS TO OBTAIN RECORDS FROM AN AGENCY UNDER THE PUBLIC RECORDS ACT ..... 2
    - 1. Our Adversarial System Requires All Critical Parties Be Present For A Fair Adjudication On The Merits ..... 3
    - 2. It Is Unrealistic To Expect An Adversarial Relationship Between An Agency And Its Employees When Records Pertaining To Those Employees Are Sought Under The Public Records Act By A Member Of The Public ..... 7
    - 3. The Requester Is A Necessary Party To Preserve An Adversarial Hearing And Prevent Collusion And Inoculation ..... 10
  - B. THE DEPARTMENT OF CORRECTIONS FAILED TO PROVIDE THE FULLEST ASSISTANCE TO THE REQUESTER REQUIRED BY RCW 42.56.100 WHEN IT FAILED TO PROVIDE ALL NECESSARY INFORMATION TO PERMIT MR. PARMELEE TO TIMELY INTERVENE ..... 11
    - 1. The Department Failed To Provide The Fullest Assistance To A Requester When It Provided Insufficient Notice Of The Pendency Of The Injunction Action ..... 11

2.	<u>Due Process Requires Sufficient Notice To A Potential Litigant That Allows Timely Participation</u>	13
3.	<u>Mr. Parmelee’s Motion To Intervene Was Timely Because The Agency’s Minimalist Approach Did Not Provide Sufficient Notice And Meet The Standard Of Fullest Assistance Or Due Process</u>	14
C.	PROPER PROCEDURES MUST BE FOLLOWED BY ALL PARTIES EVEN IN PUBLIC RECORDS ACT INJUNCTION ACTIONS	14
D.	A SUCCESSFUL CHALLENGER BY THE THIRD PARTY REQUESTER TO AN INJUNCTION WHEN AN AGENCY ACTIVELY OPPOSES DISCLOSURE REQUIRES THE AGENCY PAY REASONABLE ATTORNEY FEES AND COSTS	15
1.	<u>If This Court Determines A Requester Is A Necessary Party, Reasonable Attorney Fees And Costs Are Appropriate</u>	17
2.	<u>If This Court Determines That An Agency Violated Its Obligation To Provide Fullest Assistance Under The PRA Or Sufficient Notice Under Due Process, Reasonable Attorney Fees And Costs Are Appropriate</u>	18
III.	CONCLUSION	20

## TABLE OF AUTHORITIES

Cases	Page
<u>Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.,</u> 96 Wn.2d 201, 634 P.2d 853 (1981) .....	17
<u>Confederated Tribes v. Johnson,</u> 135 Wn.2d 734, 958 P.2d 260 (1998) .....	16
<u>Dragonslayer v. Wash. State Gambling Com'n,</u> 139 Wn. App. 433, 161 P.3d 428 (2007) .....	7
<u>Gilliam v. Dept. of Social and Health Services,</u> 89 Wn. App. 569, 950 P.2d 20 (1998) .....	3
<u>Hearst Corp. v. Hoppe,</u> 90 Wn.2d 123, 580 P.2d 246 (1978) .....	4-6, 10
<u>Lenzi v. Redland Insurance Co.,</u> 140 Wn.2d 267, 996 P.2d 603 (2000) .....	14
<u>Lindberg v. Kitsap County,</u> 133 Wn.2d 729, 948 P.2d 805 (1997) .....	6
<u>Mullane v. Central Hanover Bank &amp; Trust Co.,</u> 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950) .....	13
<u>Progressive Animal Welfare Soc'y v. Univ. of Wash.,</u> 114 Wn.2d 677, 790 P.2d 604 (1990) .....	17
<u>Progressive Animal Welfare Soc'y v. Univ. of Wash.,</u> 125 Wn.2d 243, 884 P.2d 592 (1995) .....	4
<u>Soter v. Cowles Pub'g Co.,</u> 162 Wn.2d 716, 174 P.3d 60 (2007) .....	5, 6

<b>Cases</b>	<b>Page</b>
<u>Spokane Police Guild v. Liquor Control Bd.</u> , 112 Wn.2d 30, 769 P.2d 283 (1989) .....	8

<b>Statutes</b>	
Public Records Act (RCW 42.56 et seq.) .....	passim
RCW 42.56.030 .....	5, 17
RCW 42.56.100 .....	3, 11, 12
RCW 42.56.540 .....	2, 4, 5, 10, 16
RCW 42.56.550 .....	3, 17

<b>Other Authorities</b>	
CR 11 .....	15, 20
CR 19 .....	17
Wash. Const. art. I, sec. 3 .....	11, 13, 14, 20
William Shakespeare, Hamlet, Act. 1, sc. 4 .....	1

## I. INTRODUCTION

Something is rotten in the State of Washington when a Public Records Act (“PRA”) requester is not permitted to participate in a lawsuit that specifically addressed his right to access the very the records he requested.<sup>1</sup> Such is and would remain the effect if Division III’s ruling in this case is permitted to stand. Participation of the requester was anticipated, nay – almost mandated, by the drafters of the then Public Disclosure Act when it gave citizens the power to enforce its precepts with clear and definitive penalties including attorney fees and costs.<sup>2</sup>

Petitioner Allan Parmelee will show not only that the requester is an indispensable party to an injunction whose subject matter is that request but that this is consistent with the stated principals behind the Public Records Act. Mr. Parmelee will also show that notice of a lawsuit must include all pertinent information to permit any individual, under any condition including incarceration or hospitalization, to participate in the lawsuit and that the

---

<sup>1</sup>With much appreciation to William Shakespeare, Hamlet, Act. 1, sc. 4.

<sup>2</sup>In 2005, the Public Disclosure Act was recodified and renamed the Public Records Act. Unless set forth in a quotation, Petitioner will cite to the present statutory scheme.

parties to the lawsuit cannot later avoid responsibility if such information is not provided.

Mr. Parmelee will finally show that the ultimate stated legal position of the agency determines whether or not attorney fees and costs must be awarded, not the mere presence of an employee of that agency in litigation. This must be so to prevent the awesome power of the State from colluding with its employees to prevent disclosure of public records without penalty.

## **II. DISCUSSION**

### **A. THE REQUESTER IS A NECESSARY PARTY TO ANY ACTION WHICH WILL AFFECT HER RIGHTS TO OBTAIN RECORDS FROM AN AGENCY UNDER THE PUBLIC RECORDS ACT.**

When an injunction is sought by “a person who is named in the record or to whom the record specifically pertains,” the requester is in the best position to ensure that the public’s interest in disclosure is adequately presented to a trial court. RCW 42.56.540. First, because the requester’s interest ensures an adverse proceeding in the public’s interest. Second, it is unrealistic to expect the adversarial relationship between an agency and its employees necessary to test the claimed exemptions in a court of law.

1. Our Adversarial System Requires All Critical Parties Be Present For A Fair Adjudication On The Merits.

Our legal system is adversarial and the presence of advocates for contrary positions prevents misrepresentations because of “the knowledge that their assertions will be contested by their adversaries in open court.” Gilliam v. Dept. of Social and Health Services, 89 Wn. App. 569, 581, 950 P.2d 20 (1998). The exemption claimed by the Department was not tested in this crucible of conflict at the trial court level because a critical party was not present – the requester.

The PRA recognizes that an agency’s interests are potentially adverse to the public’s right to open access to their government, despite the agency’s explicit duty to render the fullest assistance to a requester. RCW 42.56.100. Hence, a means has been provided to permit the requester to challenge the adverse positions taken by an agency. RCW 42.56.550. This section provides records requesters the means to challenge an agency’s actions before a court of law, both procedurally and substantively.<sup>3</sup> It allows requesters to challenge an agency’s determinations of reasonableness of time to comply

---

<sup>3</sup>Procedurally, the requester is permitted to file a suit in superior court to challenge any possible violations of the law. Substantively, RCW 42.56.550 provides the means for all citizens to challenge agency actions by providing both costs and attorney fees – a critical component of enforcement.

with requests. RCW 42.56.550(2). Not only is a lower court's ruling reviewed *de novo* with no deference given to an agency's interpretation of its obligations under the PRA but the burden of proof is placed upon the agency to show that any claimed exemption is appropriate. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 130, 580 P.2d 246 (1978).

An injunction action brought by a third party can be no different. The public has an interest in an agency's actions, whether in equity or law. And there can be no doubt that public interest is affected by the entry of an injunction. When an injunction is granted preventing disclosure, the public is permanently denied the opportunity to examine the requested document(s).<sup>4</sup> This is an extreme result. Consequently, it is necessary that all parties who have an interest in disclosure participate in the injunction action.

The Department has purposely excluded Mr. Parmelee in the current injunction action, arguing that the injunction statute recognizes only two

---

<sup>4</sup> This, of course, assumes that an injunction is entered in compliance with the PRA. An injunction is appropriate only when a particular record is exempt under a specific provision of the PRA and "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." Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1995), RCW 42.56.540. Mr. Parmelee does not concede that the injunction entered below was properly within the scope of the injunction statute. Nonetheless, the injunction as entered does prejudice the public's right to examine public records.

interested parties - the agency and the person named or pertained to in the document requested. *See* Response of the Department of Corrections to Petition for Discretionary Review, p. 13. The Department's argument blithely ignores the most important interested party – the public as represented by the individual requester. The Department's argument is unsupported in light of the mandate that the PRA is to be construed liberally to support disclosure. *See* RCW 42.56.030. The Department's argument is simply another way of arguing that the agency should be trusted to know when its records are public or not, contrary to this Court's holding in Hearst Corp., 90 Wn.2d at 123.

In Hearst, the King County Assessor's office argued it had discretion to determine what records may be disclosed. *Id.* at 129. This Court disagreed:

The assessor, in essence, contends that the act leaves interpretation and enforcement of its requirements to the very persons it was designed to regulate. We ... reject this approach; leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization. (Citations omitted).

*Id.* at 135. This holding jibes with this Court's recent decision in Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 174 P.3d 60 (2007). In permitting an agency to seek judicial review in accordance with RCW 42.56.540, this Court

directed its attention on the requester to determine whether judicial review would occur.

[A] public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency's action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public record.

Id. at 753 n.16. Taken together, both Hearst and Soter make it clear that the presence of the requester is required to determine the outcome of the controversy. The only other case in which this Court considered the intersection of the Public Records Act and an indispensable party is Lindberg v. Kitsap County, 133 Wn.2d 729, 948 P.2d 805 (1997).

Lindberg is not controlling for several reasons. First, the requester was a party and filed the initial lawsuit – it was not an injunction. Id. at 731. Second, the holder of the copyright had other means to enforce its rights. Id. at 750 (Sanders, J. dissenting) (noting that the majority's order of disclosure would not preclude the copyright-holder's bringing an infringement action). In contrast, Mr. Parmelee as requester has absolutely no other avenue to enforce his rights under the PRA.

2. It Is Unrealistic To Expect An Adversarial Relationship Between An Agency And Its Employees When Records Pertaining To Those Employees Are Sought Under The Public Records Act By A Member Of The Public.

When an injunction action is brought by a party with whom an agency does not have a mutually beneficial relationship, the agency's participation may be adequate to protect the public's right to records. However, when the petitioner is an employee of the agency, an agency is in a conflicted position in trying to balance its duty to provide the fullest assist to the requester and its duty to protect its employees. In these situations, it is absolutely necessary that the records requester is an indispensable party, to ensure that at least one party in the injunction action has an undivided interest in disclosure of the records at issue.

The ability of an agency to protect the public interest when the party is not an employee is clearly shown in Dragonslayer v. Wash. State Gambling Com'n, 139 Wn. App. 433, 161 P.3d 428 (2007). In Dragonslayer, the Gambling Commission vigorously opposed the injunction sought by the two card rooms at the trial court and at the appellate level. Id. at 430-31. The Commission had an arms-length relationship with the injunction plaintiff, so its affirmative duty to assist the requester and protect the public interest was unhindered.

When the subject matter is employee records, however, an agency is clearly inadequate to protect the interests of the public. *See Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989). In Spokane Police Guild, a newspaper sought records of a Washington State Liquor Control Board investigation of a Police Guild Club party. The Board, after determining it would release the full report, was sued by the Police Guild to prevent its release. *Id.* at 31-32.

The court permitted the City of Spokane, the agency that employed the Guild members, to intervene. *Id.* at 32. Not surprisingly, the City sided with its employees and argued in favor of the injunction. *Id.* at 31 (The City of Spokane was also an appellant.). The bottom line is that agencies cannot be relied upon to argue for release of records when those records might adversely affect the agencies' relationship with its own employees. To expect otherwise is to ignore human nature.

The present case bears this out. The injunction employees are all employees of the Department, and they expect that their employer will protect them as best it can from disclosing employee information, which may include negative evaluations. This conflict of interest is especially acute in the prison setting because those members of the public who are most interested in public

oversight of Washington prisons tend largely to be those who are most familiar with the inner workings of the Department – prisoners or their families. Unfortunately, this relationship is often adversarial.

When an agency faces a conflict between the interest of the public and the interest of its own employees, the risk of the agency colluding to prevent the release of public documents is at its greatest. In these situations, at the very least, it is necessary for the public to be represented by a party who is not conflicted and who is motivated to protect the public interest in disclosure. This very risk of collusion has become a reality in this case.

The Department received the injunction petition from the employees and responded by actively supporting entry of the employees' injunction. The Department supplemented the facts in the employees' petition. The Department failed to argue the employees' failure to follow the civil rules, an argument that a truly adverse party would likely have made. Finally, when Mr. Parmelee sought to intervene in the action, the Department took the lead in arguing to exclude him.

The trial court's decision effectively inoculated the Department from permitting Mr. Parmelee to examine not only the documents he has already requested but all "subsequent similar requests." CP 110-114. It also

inoculated the Department from requests from any other members of the public that the Department “believes may be an agent of, in privity with, or acting on behalf of Mr. Parmelee.” Id.<sup>5</sup> The language of the injunction merely requires that any third party receive a copy of the injunction without providing a means for the subsequent requester to argue that he or she is *not* acting on behalf of Mr. Parmelee. Once again, the Department is operating as the gatekeeper, something which this Court has explicitly warned against. Hearst Corp., 90 Wn.2d at 135.

3. The Requester Is A Necessary Party To Preserve An Adversarial Hearing And Prevent Collusion And Inoculation.

Because Mr. Parmelee was indispensable to the injunction action, the entry of the injunction was improper. It was improper because only the requester can ensure that the interests of the public are protected in an adversarial proceeding. This also prevents collusion and inoculation between the agency and its employees. Finally, an agency is often caught between the proverbial rock and a hard place between the interests of the public and its employees. A rock hard rule must be imposed by this Court to avoid this very real problem – mandatory joinder of the requester is required.

---

<sup>5</sup>The Department’s position, taken to its illogical conclusion, could permit it or its employees to inoculate themselves from PRA requests before the requests actually happen. There is no explicit language in RCW 42.56.540 to prevent such an occurrence.

- B. THE DEPARTMENT OF CORRECTIONS FAILED TO PROVIDE THE FULLEST ASSISTANCE TO THE REQUESTER REQUIRED BY RCW 42.56.100 WHEN IT FAILED TO PROVIDE ALL NECESSARY INFORMATION TO PERMIT MR. PARMELEE TO TIMELY INTERVENE.

If this Court finds that Mr. Parmelee is not an indispensable party, the trial court's order denying intervention should be overturned. It is indisputable that Mr. Parmelee had the necessary interest in this action because he was the records requester. It has been previously shown that the existing parties could not adequately represent his interests. Section A, *supra*. The public's right to participate through Mr. Parmelee was violated when the Department failed to provide proper notice as required by RCW 42.56.100 and due process as set forth in the art. I, sec. 3.

1. The Department Failed To Provide The Fullest Assistance To A Requester When It Provided Insufficient Notice Of The Pendency Of The Injunction Action.

Mr. Parmelee was not provided adequate notice of the injunction action by the Department prior to its entry. RCW 42.56.100 requires the agency to provide the fullest assistance to the requester. Fullest assistance requires timely notice. The failure to provide this proper notice violates the agencies' duties under the Public Records Act.

Mr. Parmelee suggests that there are three pieces of information that are critical to notice. The first critical piece of information is the name of the court where the action was filed. The second critical piece of information is either the parties' name(s) or a cause number. This information would provide a requestor with the means to obtain from the court the status of any case. An agency, as a party to an injunction, would have this critical information and requiring its dissemination would be a *de minimis* burden.

In stark contrast, the Department adopted a minimal-notice approach because it apparently did not want Mr. Parmelee to actively participate in the injunction action. The Department has repeatedly argued that its minimalist approach was somehow sufficient, because Mr. Parmelee could have taken the numerous difficult steps necessary to seek intervention prior to the entry of the injunction.<sup>6</sup> However, the proper frame to decide the issue of sufficiency of notice is not what Mr. Parmelee could have or should have done to protect the public interest in disclosure, but what duty the Department owes to Mr. Parmelee under its explicit mandate to provide fullest assistance to requesters. RCW 42.56.100. The Department's minimum-assistance

---

<sup>6</sup>It has been argued that Mr. Parmelee could have obtained the information necessary to participate on his own. However, this argument overlooks the daunting task of asking for a cause number when you don't even know the parties' names while incarcerated. Especially when clerk's offices do not take collect phone calls from prisoners.

policy falls far short of what should be expected of an agency that is required to provide the fullest assistance to a requester.

The Department failed to fully assist Mr. Parmelee, because it did not timely notify him that an injunction action had actually been filed. At that point, an agency providing fullest assistance would need to inform the requester of the case number, caption names and court in which the action had been filed, as well as informing him of the right to seek to intervene under CR 24. Instead, the Department told Mr. Parmelee nothing worthwhile.

The real notice came in the form of the service of the final injunction. Upon receiving the injunction, Mr. Parmelee acted quickly in preparing pleadings seeking to intervene or join the action and to quash the injunction that prejudiced his right to examine public records. When Mr. Parmelee sought to intervene, the Department argued *against* Mr. Parmelee's participation in the case, once again failing to give him even minimal assistance.

2. Due Process Requires Sufficient Notice To A Potential Litigant That Allows Timely Participation.

In his Petition for Review, Mr. Parmelee has argued that due process requires proper notice, citing Mullane v. Central Hanover Bank & Trust Co.,

339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950) (notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . .”) and this Court’s holding in Lenzi v. Redland Insurance Co., 140 Wn.2d 267, 275-76, 996 P.2d 603 (2000) (receipt of the complaint and summons deemed sufficient notice). As previously discussed, there are three crucial pieces of information that are critical to notice: (1) the court; (2) the parties; and (3) the cause number. It is not a burden by any stretch of the imagination to impose this less than onerous duty. Due process requires no less.

3. Mr. Parmelee’s Motion To Intervene Was Timely Because The Agency’s Minimalist Approach Did Not Provide Sufficient Notice And Meet The Standard Of Fullest Assistance Or Due Process.

The Department failed to provide Mr. Parmelee sufficient notice until after March 25, 2005 while in possession of all relevant information. This violated the requirements of RCW 42.56.100 and Mr. Parmelee’s due process rights.

C. PROPER PROCEDURES MUST BE FOLLOWED BY ALL PARTIES EVEN IN PUBLIC RECORDS ACT INJUNCTION ACTIONS.

This case is not the only case in which numerous employees have challenged a records request. See Abbott v. Department of Corrections, Div.

III, No.25880-7-III (approximately 700 petitioners sought an injunction; the case is presently stayed pending this Court's decision in the present case). This type of case is not atypical where a request may affect many employees of an agency. Clarifying what CR 11 requires in such a situation will provide guidance in the future to many potential litigants.

D. A SUCCESSFUL CHALLENGE BY A THIRD PARTY REQUESTER TO AN INJUNCTION WHEN THE AGENCY ACTIVELY OPPOSES DISCLOSURE REQUIRES THAT THE AGENCY PAY REASONABLE ATTORNEY FEES AND COSTS.

1. The Department Of Corrections Was The Adverse Party In This Action.

At all stages of the present litigation, the Department has been adverse to the record requester's interests. The Department actively supported the issuance of the injunction, turning a blind eye to the previously discussed improperly signed pleadings. When Mr. Parmelee moved to intervene upon receiving actual and sufficient notice of the injunction, the Department filed a response arguing that Mr. Parmelee was not entitled to intervene. When Mr. Parmelee sought reconsideration of the denial of his intervention motion and claimed he was a necessary party, the Department again argued strenuously to keep Mr. Parmelee out. When Mr. Parmelee appealed the letter order denying his attempt to participate, the Department filed a lengthy

brief arguing against Mr. Parmelee's interests. When Mr. Parmelee sought review in this Court, the Department filed a Response arguing against review. At all times, from the inception of the injunction action, the agency in this action has fought tooth and nail against the requester's interest.<sup>7</sup>

This opposition has forced the requester, Mr. Parmelee, to litigate against an agency, the Department of Corrections, to preserve his right to participate in litigation affecting his request. Participation is the sole remedy under the PRA sought. Thus, the holding in Confederated Tribes v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998) is simply not relevant.

2. Attorney Fees And Costs Should Be Granted Because Participation Was The Focus Of This Lawsuit.

The sole PRA remedy sought by Mr. Parmelee was participation. If this Court finds that the injunction should be dismissed for failure to join the requester, Mr. Parmelee, as a necessary party or remanded for failure to permit him to intervene then Mr. Parmelee obtained the relief requested. As such, he would be entitled to attorney fees and costs under RCW 42.56.540(4). He will have prevailed against the agency's deliberate attempts to prevent the requester from participating.<sup>8</sup>

---

<sup>7</sup>Since its original filing in trial court, the original employees along with the four added subsequently have filed no separate brief at any subsequent level.

<sup>8</sup>The Department had so many other options. It could have claimed an exception and then waited for Mr. Parmelee to file a lawsuit. It could have

This will also clarify the rights of all requesters to participate in litigation affecting their rights under the Public Records Act. As such, attorney fees and costs must be permitted because critical rights will have been established under the Public Records Act.

1. If This Court Determines A Requester Is A Necessary Party, Reasonable Attorney Fees And Costs Are Appropriate.

RCW 42.56.550(4) allows for an award of fees on appeal. Progressive Animal Welfare Soc’y v. Univ. of Wash., 114 Wn.2d 677, 690, 790 P.2d 604 (1990). When construed in light of the PRA requirement that “this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy,” RCW 42.56.030, an award of attorney fees is always appropriate when a requester has had to assert her rights under the Public Records Act. Fees and costs are also appropriate because the requester, Mr. Parmelee, will have prevailed on the merits of this case.

Besides the right to attorney fees and costs under the PRA, the right to attorney fees and costs has also been asserted for equitable reasons. This assertion is based upon CR 19’s foundation of basic equitable considerations.

Cathcart-Maltby-Clearview Comm’ty Coun. v. Snohomish Cy., 96 Wn.2d \_\_\_\_\_  
filed an injunction against Mr. Parmelee. If he prevailed in either one, he would be entitled to both fees and costs without question.

201, 206, 634 P.2d 853 (1981). It is equitable to grant fees and costs to a requester who asserted the basic right of all records requesters to have their day in court.

Otherwise, under a worst case scenario, an agency and its employees could collude to keep records out of the hands of the requester by means of a mutually agreeable injunction where the trial court is unaware of the necessary party requirement. Without attorney fees and costs provided to the individual trying to participate, it may well be prohibitively expensive to the requestor to litigate her right of participation.<sup>9</sup>

2. If This Court Determines That An Agency Violated Its Obligation To Provide Fullest Assistance Under The PRA Or Sufficient Notice Under Due Process, Reasonable Attorney Fees And Costs Are Appropriate.

While this Court has not ruled directly on the issue of the appropriateness of an award of fees upon successful intervention, the broad language of the PRA's attorney fee provision strongly favors an award of fees when an agency argues against the public interest in any PRA action. If this

---

<sup>9</sup>It is easy to conceive of a situation where, if this Court determines the requester is a necessary party, the requester is shut out of the litigation at the trial court level through collusion. It is easy to conceive because our trial courts rely on the adversarial system to inform them of the state of the law. The requestor would be relegated to a post-judgment attack which, if attorney fees and costs are not provided, would require her to pony up her own fees and costs.

Court finds that a requester in Mr. Parmelee's position is entitled to intervene, Mr. Parmelee will have prevailed against the Department and its repeated arguments against Mr. Parmelee's participation in the injunction action.<sup>10</sup>

In its Response to Petition for Discretionary Review, the Department argued that disposition of this case will not reach any issue for which fees are awardable, because the only issue appealed dealt with procedural matters. Response of Department of Corrections to Petition for Discretionary Review 18-19. However, the procedures at issue here go to the heart of the PRA, and the public's ability to assert its rights to access of government records. The issue that Mr. Parmelee has litigated is centered on his right, as a member of the public, to participate procedurally in an injunction action related to his public records request. Because the Department argued at the trial court and on appeal that it is not required, *under the PRA*, to include a requester in an injunction action, the resolution of this case requires interpretation of the public rights and agency duties under the PRA. Lest we forget, it was the

---

<sup>10</sup>Hypothetically, the Department could have chosen to refuse to provide the records under some claimed enumerated exemption. If such an action had occurred and had been successfully challenged, there would have been no question that attorney fees and costs would be awarded if reversed.

Department, not the petitioner employees, who argued against joinder or intervention.

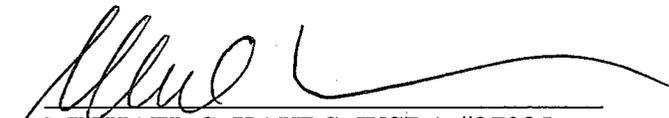
### III. CONCLUSION

This Court should rule that any public records requester is an indispensable party to any litigation based upon that person's request, and this Court should dismiss the injunction. If this Court determines the requestor is not an indispensable party, this Court should clarify what information must be provided to the requestor, an interested party, to satisfy the requirements of fullest assistance and due process. If this Court decides insufficient notice was provided to Mr. Parmelee, this Court should strike the injunction and order Mr. Parmelee intervenor status. This Court should also clarify CR 11 requirements in PRA injunction actions. Finally, if Mr. Parmelee prevails on either the indispensable party or intervention issue, this Court should grant reasonable attorney fees and costs.

DATED this 6<sup>th</sup> day of October.

Respectfully submitted,

KAHRS LAW FIRM, P.S.

  
MICHAEL C. KAHRS, WSBA #27085

**CERTIFICATE OF SERVICE**

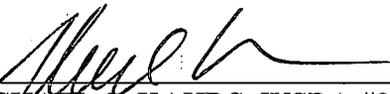
I certify under the penalty of perjury under the laws of the State of Washington that on October 6, 2008, in Seattle, County of King, State of Washington, that I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S SUPPLEMENTAL BRIEF

Peter Berney  
Criminal Justice Division  
P.O. Box 40116  
Olympia, WA 98504-0116

Clifford Pease  
John Moore  
Gary Edwards  
Richard "Jason" Morgan  
David Snell  
Paul-David Winters  
Dustin West  
Eric Burt  
Cheri Sterlin  
Joann Irwin  
Laura Coleman  
Charles Crow  
Sherry Hartford  
Alan Walter  
Harold Snively

1313 N. 13<sup>th</sup> Ave.  
Walla Walla, WA 99362

By:   
MICHAEL C. KAHRS, WSBA #27085

Date: 10/6/08