

80998-4

DEC 10 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

24076-2

No. _____

FILED
DEC 19 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

THE SUPREME COURT
OF THE STATE OF WASHINGTON

BURT , Et al,

Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
WALLA WALLA COUNTY

The Honorable Robert Zagelow
05-2-00075-0

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC -5 PM 3:49

PETITION FOR REVIEW

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

TABLE OF CONTENTS

A. IDENTIFY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 8

 1. THE PUBLIC HAS A SUBSTANTIAL INTEREST ENSURING FAIR AND EQUAL TREATMENT, REQUIRING ALL LITIGANTS TO FOLLOW THE CIVIL RULES, WHETHER PRO SE OR REPRESENTED BY COUNSEL 8

 2. THE PUBLIC HAS A CRITICAL INTEREST IN A CLEAR STATEMENT REGARDING WHAT PROCEDURES THE PRA’S INJUNCTION STATUTE REQUIRES 11

 3. THE DEFINITION OF WHAT IS SUFFICIENT NOTICE TO OVERCOME THE PRESUMPTION OF UNTIMELINESS OF A MOTION TO INTERVENE IS AN ISSUE OF BOTH CONSTITUTIONAL MAGNITUDE AND DISTINCT PUBLIC INTEREST, ESPECIALLY FOR THE PUBLIC RECORDS ACT 16

 a) Due Process Requires An Interested Party Be Provided Proper Notice Including The Case Number or Names of the Parties To Comport With Due Process 17

 b) Proper Notice Must Be Provided To The Intervenor To Fulfill The Mandates Of The Public Records Act 19

4. THE PUBLIC HAS AN INTEREST IN MAKING SURE THAT RECORDS REQUESTORS CAN ASSERT THEIR RIGHTS IN AN OTHERWISE NON-ADVERSARIAL HEARING AND THE AWARD OF ATTORNEY FEES AND COSTS WILL ENSURE THIS INTEREST IS PROTECTED 20

a) The Public Has A Significant Interest In Attorney Fees And Costs Being Granted When An Agency Has Not Fought For Release Against A Third Party Request 20

b) The Public Also Has An Interest In Equitable Considerations Being Granted For Non-Opposed Injunctions Under The Public Records Act 23

F. CONCLUSION 25

TABLE OF AUTHORITIES

Cases	Page
<i>Aguirre v. AT&T Wireless Servs.</i> , 109 Wn. App. 80, 33 P.3d 1110 (2001).	16
<i>Bellevue John Does v. Bellevue School Dist. 405</i> ; 129 Wn. App. 832, 120 P.3d 616 (2003)	22
<i>Breda v. B.P.O. Elks Lake City</i> , 120 Wn. App. 351, 90 P.2d 1079 (2004)	5, 13
<i>Cecil v. Dominy</i> , 69 Wn.2d 289, 418 P.2d 233 (1996)	24
<i>Coastal Bldg. Corp. v. City of Seattle</i> , 65 Wn. App. 1, 828 P.2d 7 (1992)	12
<i>Confederated Tribes v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998)	20-23
<i>Doe I v. Washington State Patrol</i> , 80 Wn. App. 296, 908 P.2d 914 (1996)	21
<i>In re Treatment of C.E.</i> , 78 Wn.App. 420, 897 P.2d 1275 (1995)	8
<i>Lakemoor Comm'ty Club, Inc. v. Swanson</i> , 24 Wn. App. 10, 600 P.2d 1022 (1979)	12
<i>Lenzi v. Redland Insurance Co.</i> , 140 Wn.2d 267, 996 P.2d 603 (2000)	18
<i>Lindberg v. Kitsap Count</i> , 133 Wn.2d 729, 948 P.2d 805 (1997) (en banc)	12, 13, 23
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)	17

Cases	Page
<i>National Homeowners v. Seattle</i> , 82 Wn. App. 640, 919 P.2d 615 (1996)	12
<i>Progressive Animal Welfare Soc'y v. University of Wash.</i> , 114 Wn.2d 677, 790 P.2d 604 (1990)	20
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1995)	14
<i>Seattle Fire Fighters Union, Local 27 v. Hollister</i> , 48 Wn. App. 129, 737 P.2d 1302 (1987)	24
<i>Shields v. Barrow</i> , 58 U.S. (17 Howe) 130, 15 L. Ed. 158 (1854)	12
<i>State v. Watson</i> , 155 Wn.2d 574, 122 P.3d 903 (2005)	9, 10
 Statutes	
Public Records Act (Public Disclosure Act)	passim
RCW 2.48.180	9
RCW 42.17.250 et seq.	2
RCW 42.17.330	2
RCW 42.56 et seq	2
RCW 42.56.030	14
RCW 42.56.070	7
RCW 42.56.100	19
RCW 42.56.540	21
RCW 42.56.550	2, 15, 20

Rules and Other Authorities

CR 11 1, 8

CR 19 1, 7, 11, 25

CR 24 1, 7, 17, 19, 25

RAP 13.4 9, 18

RAP 3.1 1, 5, 13

Wash. Const. art. 1, sec. 3 14

A. IDENTIFY OF PETITIONER

The petitioner is Allan Parmelee. Mr. Parmelee requested records from the Department of Corrections (“DOC”) through the Public Records Act (“PRA”). The DOC employees filed an injunction against DOC to stop the release of the records. Mr. Parmelee asked the trial court to include him in the litigation. This was denied. The Court of Appeals Commissioner subsequently found that Mr. Parmelee was an aggrieved party in accordance with RAP 3.1 and has standing in this case.

B. COURT OF APPEALS DECISION

A copy of the decision dated October 6, 2007 is in the Appendix at pages A- 1 through A - 7.

C. ISSUES PRESENTED FOR REVIEW

1. Must all pro se litigants comply with the requirements of CR 11?
2. Is a Public Records Act requestor an indispensable party under CR 19 when the request is subject to an injunction by third parties against the agency in question and the requestor is not made a party to the action?

3. What type of notice, in accordance with CR 24, must be provided a Public Records Act requestor before a decision is made by a trial court that will permanently affect the requestor's right to disclosure?

4. Is a Public Records Act requestor entitled to attorney fees and costs when an agency actively supported the injunction and the requestor is the only party advocating for disclosure?

D. STATEMENT OF THE CASE

On October 7, 2004, Mr. Parmelee submitted two requests under the Public Disclosure Act (now the Public Records Act and so referred herein) to both the Public Disclosure Coordinator and the Superintendent at the Washington State Penitentiary ("WSP").¹ CP 28-31.

A DOC employee responded on October 13, 2004, informing Mr. Parmelee it would take approximately 30 business days to review files. On separate letterhead, Megan Murray, the Public Disclosure Coordinator at WSP, also asked for some clarification. CP 33-36.

Ms. Murray wrote to Mr. Parmelee on December 22, 2004 stating that staff "affected" by the records request would be seeking protection in accordance with RCW 42.17.330, and until a decision was rendered by

¹The Public Disclosure Act, RCW 42.17.250 et seq., was recodified in 2006 and retitled as the Public Records Act, RCW 42.56 et seq.

Walla Walla Superior Court, no staff records would be disclosed. The case had not yet been filed.

On January 26, 2005, eleven plaintiffs filed a signed complaint with the Walla Walla County Superior Court against the Washington Department of Corrections (“DOC”).² CP 1-5. With this complaint was a Motion for a Protective Order signed only by Alan Walters, as “representative” for the other plaintiffs. CP 6-11. The requestor, Allan Parmelee, was not made a party to this lawsuit.

During the pendency of the proceedings, Mr. Parmelee was being held in administrative segregation. CP 226-255. On February 1, 2005, Ms. Murray informed Mr. Parmelee there was a hearing date of February 22, 2005. She did not provide Mr. Parmelee with the actual names of the parties, the cause number, nor did she confirm her earlier statement that it was filed in Walla Walla Superior Court. CP 500. She simply stated in her letter to Mr. Parmelee that she would “notify you of the outcome of the hearing on or before March 1, 2005.” *Id.*

²The eleven named plaintiffs who signed the original complaint were Eric Burt, Gary Edwards, Sherry Hartford, JoAnn Irwin, John Moore, Clifford Pease, David Snell, Harold Snively, Alan Walter, Dustin West, and Paul-David Winters.

The Department of Corrections filed a memorandum on March 14, 2005. CP 12-19. In this memorandum, DOC argued the protective order should be granted. The DOC also answered the complaint on March 15, 2005 with exhibits attached. CP 20-109. No reply was filed by Plaintiffs.

After the hearing, the Court ordered a permanent injunction and issued Findings of Fact, Conclusions of Law and Order. CP 110-114. The order was presented by Peter Berney, Assistant Attorney General on behalf of DOC and Alan Walter, titled Pro Se Plaintiffs Representative.

The Court also signed the stipulated motion to amend the complaint to add four additional plaintiffs.³ The amended complaint, while listing all fifteen plaintiffs, had only four signatures affixed to the signature block, those of the four new plaintiffs. CP 117-120.

Mr. Parmelee was then sent a letter dated March 25, 2005 along with a copy of the Court's signed order granting the permanent injunction. CP 193. In the letter, Mr. Parmelee's PRA request was denied.

Having finally received actual notice of the case, including the names of the parties, the cause number, and the county of filing, Mr. Parmelee filed a Limited Notice of Appearance in order to move to

³These plaintiffs were Cheri Sterlin, Laura Coleman, Charles Crow and Richard "Jason" Morgan. CP 115-116.

intervene and reconsider. CP 123-310. In this motion, Mr. Parmelee asserted that the first pleading he had seen was the final March 16, 2005 order he received with the March 25th letter. CP 124.

The Department of Corrections filed a response, filed May 11, 2005. CP 316-322. Without waiting for a reply, the trial court issued a letter order denying the motion to intervene and mooting all other motions. CP 322-323. On May 16, 2005, a reply along with a motion to reconsider were submitted. CP 325-356.

Mr. Parmelee made it clear that because he was housed in prison, he had difficulty in accessing courts. CP 371-73, 448-476. His difficulties included being transferred to another prison. CP 377.

The trial court issued a final order denying the intervention and the reconsideration. CP 483-85. Mr. Parmelee then filed a notice of appeal, and an amended notice of appeal. CP 486-495.

In the Court of Appeals, the Commissioner, after receiving briefing, entered a ruling stating the order being appealed was a final order and that Mr. Parmelee was an aggrieved person in accordance with RAP 3.1 and *Breda v. B.P.O. Elks Lake City*, 120 Wn. App. 351, 353, 90 P.2d 1079 (2004).

Mr. Parmelee, after receiving the response brief filed by DOC and a subsequent motion to join signed by only 13 of the original plaintiffs, moved to strike the joinder motion. The Commissioner denied the motion on March 1, 2007, even though the failure to sign the joinder motion by two of the parties was brought to the courts' attention.⁴ A motion to modify was filed and Mr. Parmelee drew attention to the failure of two parties to join the action. On May 4, 2007, the Court of Appeals denied the motion to modify.

Mr. Parmelee filed a motion to strike the pleadings of the pro se litigants in the Court of Appeals. In this motion, it was pointed out the motion to join had only 13 signatures. In response, Mr. Walters informed the court that two individuals had left DOC employee. They were not dropped from the appeal and the lawsuit.

Subsequently, on November 6, 2007, the Court of Appeals, Division III, denied Mr. Parmelee's appeal on all issues. In its decision, the Court of Appeals held that any failure to sign the appropriate documents was acceptable because the agency which employed these individuals acquiesced.

⁴The pro se parties informed the Court of Appeals that they no longer worked for the Department of Corrections.

The Court of Appeals also ruled that the motion to intervene under CR 24 was untimely. The Court of Appeals noted that Mr. Parmelee was informed of the probable court and subsequently, the hearing date. The Court failed to note that Mr. Parmelee was not provided any of the parties' names or cause number.

The ruling on whether the requestor is an indispensable party under CR 19 was summarily dismissed.

Public documents are presumed viewable by the public. RCW 42.56.070(1). Joining Mr. Parmelee as a party would not affect the employees' burden to overcome this presumption. And, Mr. Parmelee's disclosure request and his interest as a member of the public were easily apparent to the trial court. Given all, Mr. Parmelee was not needed for a just adjudication nor was he needed in equity and good conscience to proceed.

Finally, because Mr. Parmelee did not prevail on any of his claims, the Court of Appeals denied his request for attorney fees and costs. The proper standard for how to handle fees and costs in an injunction where the state actors are in agreement was not addressed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE PUBLIC HAS A SUBSTANTIAL INTEREST ENSURING FAIR AND EQUAL TREATMENT, REQUIRING ALL LITIGANTS TO FOLLOW THE CIVIL RULES, WHETHER PRO SE OR REPRESENTED BY COUNSEL.

CR 11(a) states that “[a] party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address.” The original complaint was signed by eleven plaintiffs. One of the named Plaintiffs, Mr. Alan Walters, signed and filed a memorandum, as representing all named plaintiffs. This clearly violates CR 11.

Mr. Walters had no legal authority to sign for any party other than himself, absent statutory authority. See *In re Treatment of C.E.*, 78 Wn. App. 420, 897 P.2d 1275 (1995) (statutory authority given to mental health official to sign legal documents). There is no such statutory authority for Mr. Walters. “If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” CR 11(a).

Subsequent to filing the complaint, apparently through the “representative,” the existing Plaintiffs and Defendant stipulated to amend the complaint and add four new plaintiffs. Only the newly added

plaintiffs signed the amended complaint. Only the “representative” signed the order granting the injunction. Once again, Plaintiffs failed to abide by the Civil Rules when only the four new Plaintiffs signed the amended complaint.

The Court of Appeals dismissed this issue, stating that because the Defendant stipulated with the Plaintiffs, the issue was form over substance. The problem is that there is no record that all the parties so stipulated.⁵

RAP 13.4(b)(4) states that review should be accepted for “an issue of substantial public interest that should be determined by the Supreme Court.” This Court has made it clear that numerosity is one consideration. See *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005). In *Watson*, the class involved “every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.” *Id.* at 577. There can be no doubt that any issue involving the generalized application of any civil rule potentially affects all civil cases. Here, it

⁵Ostensibly, all the previously named Plaintiffs must have agreed to the new pleading and parties but we have no way of telling because not one of them, besides Allan Walters, signed the original motion as the “representative” and even he did not sign the amended complaint. A possible consequence of this action is criminal liability for practicing law without a license. RCW 2.48.180.

potentially affects all cases involving pro se litigants. Thus, to avoid confusion and provide consistency, this issue should be heard.

The public also has a significant interest in this matter. The limitations placed on non-lawyers are matters of common sense, because there is no recourse for those who are defrauded or otherwise harmed by such a person. Lawyers are required to carry malpractice insurance. The Washington State Bar has a fund for individuals who have suffered harm as the direct consequence of an action of any member of the Bar. To permit non-lawyers to represent other non-lawyers removes this protection. Thus, this is a significant public issue involving many types of cases before all our trial courts.

There is also the issue discussed in *Watson* about the possible effect on the judicial system. This Court was very concerned about potential effects on the ability of counsel and the court to make policy considerations. *Id.* It is thus appropriate for this Court to take on review any issue which potentially affects the general judicial process.

2. THE PUBLIC HAS A CRITICAL INTEREST IN A CLEAR STATEMENT REGARDING WHAT PROCEDURES THE PRA'S INJUNCTION STATUTE REQUIRES.

Mr. Parmelee had argued he was an indispensable party in accordance with CR 19(a). The Court of Appeals did not agree. Instead, the Court of Appeals ruled Mr. Parmelee was not required for a just adjudication on the merits. This decision goes to the heart of the PRA's procedural mechanisms for balancing the interests of open government against the need to protect people whose personal information is held by State agencies. A clear statement from this Court that the PRA requires the inclusion of the requestor as a party in an injunction action will put lower courts in the best position to weigh these competing interests.

CR 19(a)(2)(A) has defined what a indispensable party is:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest . . .

Our courts have defined what a necessary party requires:

A party is necessary if the party's absence would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability.

National Homeowners v. Seattle, 82 Wn. App. 640, 643, 919 P.2d 615 (1996) (quoting *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, 828 P.2d 7 (1992) (quotations removed)). In other words, indispensable parties are:

[those] [p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Lakemoor Comm'ty Club, Inc. v. Swanson, 24 Wn. App. 10, 17, 600 P.2d 1022 (1979) (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139, 15 L. Ed. 158 (1854)).

This court has embraced the necessary party doctrine in the context of the Public Records Act. See *Lindberg v. Kitsap Count*, 133 Wn.2d 729, 948 P.2d 805 (1997) (en banc). In *Lindberg*, the plaintiffs sought engineering drawings in the possession of Kitsap County. These drawings were copyrighted by the firm that produced them. While holding that the federal fair use doctrine permitted the copying of these documents, this Court went on to say the following:

The indispensable party doctrine is not jurisdictional, but founded on equitable considerations. When a complete determination of a controversy cannot be made without the presence and participation of other parties than those already in a case, it is mandatory that they be joined in the action. When a complete determination can

be made without those other parties, it is within the discretion of the court to allow them to be joined. Persons who may be involved in the subject matter of an action are not necessary parties where no recovery is sought against them and they would not be prejudiced by the judgment.

Id. at 744-45 (citations removed).

The Commissioner found Mr. Parmelee to be interested in the outcome of the suit in the July 24, 2006 ruling on appealability. As the Commissioner stated: “Mr. Parmelee . . . is an aggrieved person as the whole purpose of the order is to prevent Mr. Parmelee from obtaining the documents he requested . . .” *Citing* RAP 3.1; *Breda v. B.P.O. Elks Lake City*, 120 Wn. App. at 353.

Mr. Parmelee claimed a critical interest in the proceedings as it was his Public Records Act request which was the subject matter of the filings by Plaintiff. Clearly, the disposition by the trial court which did not mandate joinder totally impeded Mr. Parmelee’s ability to protect that interest, because the result was a non-adversarial proceeding. Defendant’s Answer made this clear:

Respondent does not object to a permanent restraining order being entered against prohibiting disclosure of the documents in question to Alan (sic) Parmelee, his agents or other inmates incarcerated by Respondent.

CP 21.

Legal issues involving the Public Records Act, by its very existence, are of substantial public interest. This Court has made this point abundantly clear. “The purpose of the Public Records Act is to preserve ‘the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.’” *O’Connor v. Dept. of Soc. & Health Serve.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (quoting *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995)).

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. 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.

RCW 42.56.030.

It is not in the public’s interest to have an agency and its employees keep out interested parties, especially the original records requestor. It is also a critical question whether an agency and its employees can ever be in an adversarial position in the context of the Public Records Act.

Additionally, the PRA recognizes that agencies and requestors may have different interpretations of the applicability of exemptions. RCW 42.56.550. When a requestor and an agency are in disagreement, a trial court is called upon to balance the arguments by the adverse parties to determine whether the agency has complied with the PRA's broad mandate for public disclosure. In these cases, the court does not defer to the agency's interpretation of the applicability of exemptions. RCW 42.56.550(3). Instead, the PRA contemplates that there are instances in which an agency, for whatever reason, will attempt to interpret exemptions too broadly.

For the same reason, agencies in injunction actions brought by third parties are not in an adequate position to protect and advocate for the rights of requestors and the public. This problem is especially acute in such situations as the present case. The DOC is simply not in a position to vigorously advocate for disclosure of public documents to an inmate when those documents arguably contain personal information about DOC employees. The most efficient way to avoid collusive litigation and ensure that the public's interest in open government is protected is to require that a requestor be a named party, with the right (and obligation) to

present argument to the trial court in support of disclosure of requested records.

Given all these concerns, it is an issue of critical public interest that this Court clarify the procedural requirements of the PRA's injunction statute and require that requestors be included as parties when third parties seek to enjoin the disclosure of public records. Without this requirement, the interests of requestors – and by extension the public – are not adequately represented. The result, as was shown in the proceedings below, is at a minimum the acquiescence, the maximum the collusion in preventing the disclosure of documents to the requestor without that requestor's input. This clearly violates the Public Record Act's broad mandate for disclosure of documents in the interest of open government.

3. THE DEFINITION OF WHAT IS SUFFICIENT NOTICE TO OVERCOME THE PRESUMPTION OF UNTIMELINESS OF A MOTION TO INTERVENE IS AN ISSUE OF BOTH CONSTITUTIONAL MAGNITUDE AND DISTINCT PUBLIC INTEREST, ESPECIALLY FOR THE PUBLIC RECORDS ACT.

It was not challenged that Mr. Parmelee had an interest in the subject of the action, that any decision would affect his interests, and that Mr. Parmelee's interests were not protected by any of the existing parties.

Aguirre v. AT&T Wireless Servs., 109 Wn. App. 80, 86-87, 33 P.3d 1110

(2001). Timeliness for his CR 24 motion to intervene was the only issue addressed below.

- a) Due Process Requires An Interested Party Be Provided Proper Notice Including The Case Number or Names of the Parties To Comport With Due Process.

Mr. Parmelee has shown he received no actual notice of the necessary information he required while incarcerated to properly intervene and that he did not delay moving to intervene once he received the notice of the court and case number. Neither of the letters provided Mr. Parmelee with either the case number or the names of the parties.⁶ The actual trial court was not confirmed in the letter. These are undisputed facts. Given Mr. Parmelee's interest in the disclosure of the requests he requested, he clearly met the interested party definition of CR 24 and the lack of notice provided violated his due process rights.

Due process requires that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). This Court has examined this issue in the context of whether being provided a copy of the

⁶It is unreasonable to expect a busy court clerk to be able to find a case without either the parties' names or a case number.

complaint constituted proper notice. See *Lenzi v. Redland Insurance Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000). In *Lenzi*, the plaintiffs sent Redland a copy of the complaint and summons filed with the court against the tortfeasor defendant. The complaint had a date-received stamp and a court stamped file number. *Id.* at 271. Redland Insurance did not intervene and the Lenzis obtained a default judgment. The Plaintiffs then demanded Redland pay the judgment. *Id.* at 272. Rejecting the argument that the Lenzis needed to inform Redland when the complaint had been served, the Court of Appeals held receipt of the complaint and summons sufficient notice. *Id.* at 275-76. At this court stated:

Receipt of such pleadings is sufficient to put an alert and concerned party on notice that further proceedings in which it might have an interest may occur, and that in order to protect its interests, the interested party needs to act to assure receipt of subsequent pleadings.

Id. at 276. Contrast that to the present case where Mr. Parmelee received absolutely no useful information. Clearly, what is sufficient notice under the due process clause is constitutionally important in accordance with RAP 13.4(b)(3).

b) Proper Notice Must Be Provided To The Intervenor To Fulfill The Mandates Of The Public Records Act.

Under CR 24(a), intervention as a matter of right is set forth as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

Mr. Parmelee clearly met this definition under section (2) because no party adequately represented his interests and the disposition impaired his ability to protect that interest. Any member of the public could have been in Mr. Parmelee's position. This is why a clear statement direction from this Court requiring sufficient notice must be provided.

Furthermore, an agency must provide all assistance to a requestor. RCW 42.56.100. This means that the agency must provide proper notice to the requestor which includes providing the caption and the case number. This then removes any ambiguity as to the sufficiency of the notice. The citizens of Washington, as requestors and citizens interested in open government, have a great interest in this Court setting forth clear

rules for agencies to follow when third parties move to enjoin the disclosure, especially when these parties are agency employees or agents.

4. THE PUBLIC HAS AN INTEREST IN MAKING SURE THAT RECORDS REQUESTORS CAN ASSERT THEIR RIGHTS IN AN OTHERWISE NON-ADVERSARIAL HEARING AND THE AWARD OF ATTORNEY FEES AND COSTS WILL ENSURE THIS INTEREST IS PROTECTED.

a) The Public Has A Significant Interest In Attorney Fees And Costs Being Granted When An Agency Has Not Fought For Release Against A Third Party Request.

Under both the old and new codification of the Public Records Act, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4). The Public Records Act's authorization of attorney fees includes fees on appeal. *Progressive Animal Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

This Court's prior decision has held that when an agency is willing to disclose the records and it is the individual who bring an action to prevent disclosure, and the *agency does not actively oppose the requestor*, attorney fees are not applicable. (Emphasis added). See *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998). However, the Court of Appeals has determined that when the agency prefers the rights

of its employee over that of the requestor, the agency is liable for attorney fees and costs. See *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996). Examination of *Doe I* and *Confederated Tribes* clarifies the concept of the prevailing party.

The basic rule for the award of attorney fees was set forth in *Confederated Tribes*:

This provision does not authorize an award of attorney fees in an action brought by a private party, pursuant to RCW 42.56.540, 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. Mr. Johnson prevailed against the Tribes, not against the agency.

Id. at 757. However, it is the procedural posture of the agency which is critical – whether or not the agency is participating in preventing the records from being given to Mr. Parmelee.

In *Doe I*, the agency notified the person affected by the records request but did not follow through with its statutory requirements to notify the requestor that the PRA request was received. The State Patrol then argued it was a neutral party and left the decision to the trial court. *Doe I*, 80 Wn. App. at 303. The Court of Appeals pointed out that the State Patrol had failed to give the “fullest assistance” statutorily required by RCW 42.56.100.

In a more recent case applying this test, the trial court denied attorney fees because the agency did not fight disclosure, although the Petitioners did. *Bellevue John Does v. Bellevue School Dist.* 405; 129 Wn. App. 832, 866, 120 P.3d 616 (2003) (“The record confirms that the school districts did not oppose the Times' disclosure request in court.”). The holding comports with the trial court’s ruling when it applied *Confederated Tribes*:

The tribes resisted disclosure; but the agency - the Gambling Commission - did not. The requester of the records was denied an award of attorney fees because he 'prevailed against the Tribes, not against the agency.'

Id. at 864-65 (quoting *Confederated Tribes*, 135 Wn.2d at 756-57). The *Bellevue* court quoted the trial court’s ruling, which stated that “because the government agencies involved, the School Districts, did not oppose the Times' request; the opposition came from the individual.” *Bellevue*, 129 Wn. App at 864-65. The facts of the *Bellevue* case were similar to the facts in *Confederated Tribes*. There, the Gambling Commission did not take a position on the various exemptions claimed by the Tribes.

Those factual scenarios contrast with the present case. Upon being served the complaint, DOC not only did not oppose the petition, but they factually supplemented it. Unlike the Gambling Commission in

Confederated Tribes, DOC did not remain neutral on the validity of exemptions, but strongly supported the legal position advocated by the employees. DOC also recognized the use of a “representative” for the Petitioners, no matter how legally questionable it was. Because both the Plaintiffs and DOC were and are sitting at the same table, eating out of the same dish, the holding in *Confederated Tribes* cannot apply.⁷

The stated purpose of the attorney fees provision “is to encourage broad disclosure and to deter agencies from improperly denying access to public records.” *Confederated Tribes*, 135 Wn.2d at 757 (citing *Lindberg v. Kitsap County*, 133 Wn.2d at 746)). It clearly is in the public’s interest to make sure that the agency and its employees are opposed when these two parties have agreed on one position that is in direct contrast to the PRA’s mandate for broad disclosure.

b) The Public Also Has An Interest In Equitable Considerations Being Granted For Non-Opposed Injunctions Under The Public Records Act.

Our courts have also granted costs and attorney fees based on equitable considerations. See *Confederated Tribes*, 135 Wn.2d at 758. As

⁷This simple fact was made abundantly clear below at the Court of Appeals. It was the Department of Corrections who filed the response brief opposing Mr. Parmelee’s arguments for inclusion in this injunction action. The thirteen remaining pro se litigants just filed a motion to join DOC’s brief.

this Court has said, “[t]he applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. *Id.* (citations removed).

Equitable considerations form the basis for awarding damages in an injunction action.

Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987).

Mr. Parmelee never had the opportunity to address any issues at an injunction hearing because there was no opposition to the motion for the protective order. He has had seek redress in our appellate courts. He is not alone. It is a matter of substantial public interest that any requestor, opposed in his request by both the agency and third parties seeking the injunction, be granted attorney fees and costs. This public interest includes an interest in providing these fees and costs when an appellate

court has remanded a case, like this one, with an order that the requestor be made a party.

F. CONCLUSION

Mr. Parmelee respectfully requests this Court rule that the issues presented in this Petition for Review are in the public interest and must be addressed. Upon review, Mr. Parmelee asks that he be made a party to this lawsuit and that it be remanded back to the trial court for consideration on the merits. He finally asks that all appellate fees and costs be assessed because of the determination he is a necessary party under either CR 19 or CR 24.

DATED this 5th day of December, 2007.

Respectfully submitted,

KAHRS LAW FIRM, P.S.



MICHAEL C. KAHRS, WSBA #27085

ALEX B. BROWN, WSBA #39402

Attorneys for Appellant Parmelee

5215 Ballard Ave. NW, Ste. 2

Seattle, WA 98107

APPENDIX A

FILED

NOV 06 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS 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,)
RICHARD "JASON" MORGAN,)

Respondents,)

v.)

WASHINGTON STATE DEPARTMENT)
OF CORRECTIONS,)

Respondent,)

ALLAN PARMELEE,)

Appellant.)

No. 24076-2-III

Division Three

PUBLISHED OPINION

BROWN, J. — This dispute arose in 2004 under RCW 42.17.330 of the public disclosure act (PDA), now RCW 42.56.540 of the public records act (PRA).. Washington State Penitentiary (WSP) inmate Allan Parmelee requested disclosure of personal information for a number of Department of Corrections (DOC) employees at WSP. The

employees successfully enjoined disclosure under RCW 42.17.330 in the Walla Walla Superior Court. On appeal, Mr. Parmelee contends civil rule violations invalidate the injunction and the trial court erred in denying his request to intervene or be joined as an indispensable party. Finding no reversible error, we affirm.

FACTS

On October 6, 2004, WSP intensive management unit inmate Parmelee was charged with violating WSP disciplinary rules for threatening and intimidating a staff member. The next day, Mr. Parmelee sent a letter to Megan Murray, DOC's public disclosure coordinator, requesting personal information on a number of WSP workers.

On December 5, 2004, Mr. Parmelee was again charged with intimidating staff members based on a letter to a friend requesting home addresses "on a couple pigs here" and commenting, "we need to find a couple big ugly dudes to come to Walla Walla for some late night service on these punks." Clerk's Papers (CP) at 101.

On December 22, 2004, Ms. Murray informed Mr. Parmelee the affected employees would be requesting injunctive relief and that DOC would not release the requested documents "until a hearing date is scheduled and a decision is made by [the] Walla Walla Superior Court." CP at 500.

On January 26, 2005, 11 pro se employees sued DOC in the Walla Walla Superior Court, asking for a protective order. The complaint contained 11 signatures without any addresses. That day, Alan Walter, as the plaintiffs' representative, moved

for a protective order in a pleading without an address. Four more plaintiffs were added by an amended complaint, again without providing any address for the plaintiffs.

On February 1, 2005, Ms. Murray informed Mr. Parmelee of the superior court hearing date on the protective order and that she would let him know soon after whether DOC would be releasing the requested information. On March 16, the court granted the motion to enjoin release of the requested information. Pro se, Mr. Parmelee requested intervention, joinder as an indispensable party, and reconsideration without providing legal argument regarding whether he was an indispensable party in his opening pleadings. Mr. Parmelee briefly discussed joinder in his response to DOC's briefing.

The trial court decided Mr. Parmelee's motion to intervene was untimely and reasoned all other motions and requests were moot. Mr. Parmelee appealed.

ANALYSIS

A. Sufficiency of Pleadings

The issue is whether under our civil rules of procedure the pleadings were reversibly deficient. Mr. Parmelee contends the employees' failure to provide an address in their pleadings, sign the amended complaint, and their failure to all sign the motion for protective order constitutes reversible error. We disagree.

DOC contends this issue cannot be raised for the first time on appeal. But our commissioner ruled Mr. Parmelee has a right to appeal. We find no error in this ruling because Mr. Parmelee was interested in the trial court's decision, and unsuccessfully sought participation and reconsideration.

Under the PDA and PRA, if an agency intends to disclose records to a requester, an interested third party may object and seek judicial intervention to prevent disclosure. RCW 42.56.540 (formerly RCW 42.17.330); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 34-35, 769 P.2d 283 (1989). Here, the employees sought judicial intervention pro se without providing addresses on the pleadings.

Under CR 11(a), “[a] party who is not represented by an attorney shall sign and date the party’s pleading, motion, or legal memorandum and state the party’s address.” The civil rules govern all civil proceedings, “[e]xcept where inconsistent with rules or statutes applicable to special proceedings.” CR 81. RCW 42.56.540 provides a means to preclude disclosure. Providing addresses on the pleadings, the very information Mr. Parmelee wanted disclosed, would be inconsistent with RCW 42.56.540. Accordingly, the plaintiffs’ addresses were not required on the pleadings. Moreover, considering Mr. Parmelee is acquainted with the plaintiffs as DOC employees and actually resided at their employment address, he possessed adequate contact information.

Mr. Parmelee argues all 11 plaintiffs were required to sign the motion for protective order and all 15 plaintiffs were required to sign the amended complaint. As noted, CR 11 requires an unrepresented party to sign the party’s pleading. Here, all 11 plaintiffs signed the complaint and one plaintiff signed the motion the day it was filed. Four more plaintiffs later signed an identical complaint. DOC did not object. The court, understanding the dispute and the parties, properly asserted personal and subject matter jurisdiction. Thus, the pleadings are sufficient. The trial court avoided any CR

11 technical deficiency by combining the signatures on the original pro se complaint with the signatures on the amended pro se complaint with DOC acquiescence, a procedure favoring substance over form.

B. Intervention and Joinder as Indispensable Party

The issue is whether the trial court erred in denying Mr. Parmelee's intervention and indispensable party motions.

We review de novo rulings on intervention as a matter of right. *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). Timeliness rulings, however, are reviewed for an abuse of discretion. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Parmelee asked to intervene as a matter of right under CR 24(a). "*Upon timely application* anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction." CR 24(a) (emphasis added). "A critical requirement is that the motion be timely. A strong showing must be made to intervene after judgment." *Martin v. Pickering*, 85 Wn.2d 241, 243-44, 533 P.2d 380 (1975) (citing *United States v. Wilhelm Reich Found.*, 17 F.R.D. 96 (D. Me. 1954)). The timing of the motion is not dispositive. The court must examine the surrounding circumstances, such as opportunity to identify the threatened interest, reason for delay, and any adverse impact of delayed intervention. *Kreidler*, 111 Wn.2d at 832-33.

Mr. Parmelee waited until April 2005 to file his intervention motion. Mr. Parmelee delayed filing his motion even though he was informed in December 2004 that staff members would be requesting injunctive relief and that DOC would not release the requested documents "until a hearing date is scheduled and a decision is made by [the] Walla Walla Superior Court." CP at 500. He continued to delay his motion to intervene after being notified in February 2005 of the superior court's hearing date. Mr. Parmelee fails to articulate a sufficient basis for his delay. A potential party cannot wait until the court issues a protective order under RCW 42.56.540 and then request intervention. Based on the timing of Mr. Parmelee's motion and the surrounding circumstances, the trial court had a tenable basis to conclude Mr. Parmelee's motion was untimely.

Relying on RAP 2.5(a), DOC contends that the indispensable party issue is impermissibly raised for the first time on appeal. While Mr. Parmelee did not extensively argue this issue below, he mentioned joinder in the caption of his motion and cited CR 19 in his reply memorandum. This is sufficient to satisfy RAP 2.5(a).

Under CR 19(a), a trial court undertakes a two-part analysis to determine whether a party is indispensable. First, the court must determine whether a party is needed for just adjudication and, second, whether in equity and good conscience the action should proceed among the parties before it. *Matheson v. Gregoire*, ____ Wn.2d ____ 161 P.3d 486, 492 (2007).

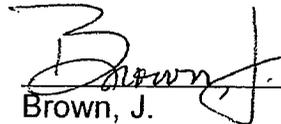
In an RCW 42.56.540 proceeding to prevent public document disclosure, the party seeking to prevent disclosure has the burden to prove that the public record

No. 24076-2-III
Burt v. Dep't of Corr.

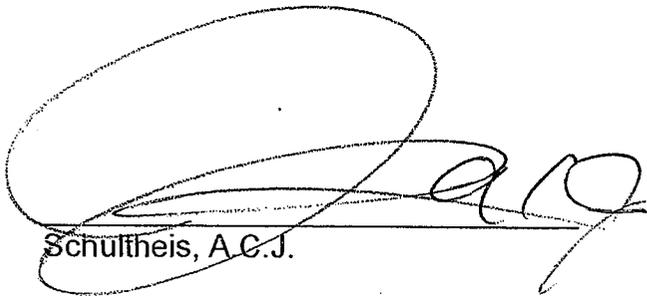
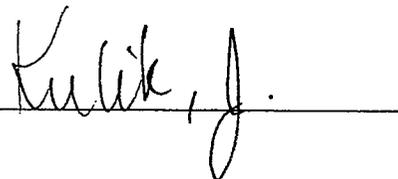
should not be disclosed. *Spokane Police Guild*, 112 Wn.2d at 35. Public documents are presumed viewable by the public. RCW 42.56.070(1). Joining Mr. Parmelee as a party would not affect the employees' burden to overcome this presumption. And, Mr. Parmelee's disclosure request and his interest as a member of the public were easily apparent to the trial court. Given all, Mr. Parmelee was not needed for a just adjudication nor was he needed in equity and good conscience to proceed.

In sum, the trial court did not err. Mr. Parmelee requests attorney fees and costs under RCW 42.56.550(4). Since Mr. Parmelee has not prevailed, his request is denied.

Affirmed.


Brown, J.

WE CONCUR:


Schultheis, A.C.J.
Kulik, J.

FILED

DEC 10 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT
OF THE STATE OF WASHINGTON

ERIC BURT, et al, Plaintiffs/Respondents; v. Washington State Department of Corrections; Defendant/Respondent.

No. _____

PROOF OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on December 5, 2007, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. PETITION FOR REVIEW

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

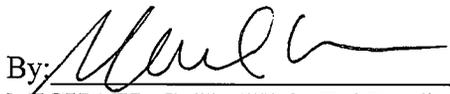
Clifford Pease
John Moore
Gary Edwards
Richard "Jason" Morgan
David Snell
Paul-David Winters
Dustin West
Eric Burt
Cheri Sterlin
Joann Irwin

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC -5 PM 3:49

ORIGINAL

Laura Coleman
Charles Crow
Sherry Hartford
Alan Walter
Harold Snively

1313 N. 13th Ave.
Walla Walla, WA 99362

By: 
MICHAEL C. KAHRs, WSBA #27085

Date: 12/5/07