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No. 86410-1

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THE SUPREME COURT
OF THE STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE, et al.
Appellants,

v.

ALLAN PARMELEE,
Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG”), a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know in matters of public interest and in the conduct of the public’s business. WCOG’s mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government. Its board of directors exemplifies this diversity. A description of WCOG’s board of directors is attached to WCOG’s *Motion for Leave to File Brief of Amicus Curiae* as an **Appendix**.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the parties’ briefs.

III. ARGUMENT

This case requires the Court to correctly analyze and explain the process by which an agency may seek judicial review of its own response to a request for records under the Public Records Act, Chap. 42.56 RCW (“PRA”). The Court’s website identifies the issue in this case as follows: “Whether a trial court has equitable authority to consider the identity of the person making a public records request when determining whether to

enjoin disclosure under the Public Records Act.”¹ Although the Court of Appeals erroneously concluded that a court may consider the identity of the requester in issuing an injunction under RCW 42.56.540, it was not necessary or appropriate for the Court of Appeals to reach that issue at all. The Court of Appeals erroneously assumed that the findings required for an injunction under RCW 42.56.540 are necessary where an agency seeks judicial review of its own response to a PRA request.

On the contrary, the only issue that the trial court and/or the Court of Appeals should have addressed is whether the requested records were exempt pursuant to a specific PRA exemption “or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). The additional findings required for an injunction under RCW 42.56.540 are only necessary where a **third party** seeks an injunction against the disclosure of exempt records. This Court has never held otherwise. As the agency in possession of the requested records, the County does not need an “injunction” against itself.

Due to the erroneous assumptions of the parties and the lower courts, as well as the Court’s decision to decide this case without oral argument, WCOG urges this Court to decide this case on narrow grounds.

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http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2012May#P317_20310 (last visited April 17, 2012).

The Court should reverse the Court of Appeals based on its erroneous interpretation of RCW 42.56.540, and remand this matter to the trial court for a determination of whether the requested records are exempt pursuant to specific statutory exemptions. It is neither necessary nor appropriate for the Court to address any of the other issues raised by the parties.

- A. Where an agency seeks judicial review of its own response to a PRA request the only issue is whether the records are exempt. The additional findings required for an injunction under RCW 42.56.540 are only necessary where a third party seeks an injunction against the disclosure of exempt records.**

The decision of the Court of Appeals and the arguments of the parties in this case are based on erroneous assumptions about the process by which an agency may seek judicial review of its own response to a request for records under the PRA. This Court has repeatedly held that public records must be disclosed unless the records are exempt from disclosure pursuant to a specific statutory exemption or other statute which exempts or prohibits disclosure of specific information or records. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994); *Seattle Times v. Serko*, 170 Wn.2d 581, 596, 243 P.3d 919 (2010); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 807, 246 P.3d 768 (2011); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409, 259 P.3d 190 (2011); *see* RCW 42.56.070(1).

In this case, the County erroneously assumed, and the trial court apparently agreed, that an injunction against the release of records could be based solely on the findings required by RCW 42.56.540. CP 61-63, 64-68. As a result, the trial court erroneously issued a preliminary injunction without first determining whether the requested records were exempt. CP 61-63.

More importantly, the lower courts and the parties have erroneously assumed that the findings required for an **injunction** under RCW 42.56.540 are necessary where an agency seeks judicial review of its own response to a PRA request. This Court has never held that an agency must obtain an injunction against itself, or that the additional findings required for an injunction under RCW 42.56.540 are necessary where, as here, an agency seeks judicial review of its own response to a PRA request.

In this case, the trial court withdrew its original injunction, and correctly refused to consider the identity an purpose of the requester. CP 8-9. Rather than address the relevant question of whether the requested records were exempt, the County sought discretionary review. The County finally acknowledged in its *Reply Brief of Appellant* that it was also required to establish that the requested records were exempt. *Reply Br.* at 2. But by that point the analytical damage was done. The Court of

Appeals ignored the relevant issue of whether the records were exempt, and erroneously addressed the question of whether a court may consider the identity of the requester in issuing an injunction under RCW 42.56.540. *Franklin County Sheriff's Office v. Parmelee*, 162 Wn. App. 289, 292, 253 P.3d 1131 (2011).

A correct analysis of the process for judicial review under the PRA requires the Court to revisit the history of RCW 42.56.540 and its own cases interpreting that statute. The original Public Disclosure Act, enacted in 1972 by Initiative 276, included the following injunction provision:

The examination of any specific record may be enjoined if, upon motion and affidavit, 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.

Former RCW 42.17.330. Nothing in the text of the original PRA suggested that an agency was permitted to seek judicial review of its own response to a request for records. As this Court later observed, this section of the original PRA did not specify which parties could seek such relief. *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 752, 174 P.3d 60 (2007).

In 1989, this Court addressed the interpretation of former RCW 42.17.330 in a case in which a third party sought to enjoin the release of records by an agency. In *Spokane Police Guild v. Wash. State Liquor*

Control Board, 112 Wn.2d 30, 36, 769 P.2d 283 (1989), the Court explained that former RCW 42.17.330 did not permit an injunction unless the records fell within specific statutory exemptions. In that case, a reporter requested an investigative report of liquor violations during a party at the Spokane Police Guild Club. The Spokane Police Guild sought to enjoin the release of the report. The requester was allowed to intervene, and the trial court ordered the report to be produced. 112 Wn.2d at 32. Affirming, this Court interpreted the injunction provision (former RCW 42.17.330) as follows:

To analyze the case, we start with the proposition that the act establishes an affirmative duty to disclose public records unless the records fall within specific statutory exemptions or prohibitions. **It follows, that in an action brought pursuant to the injunction statute (RCW 42.17.330) the initial determination will ordinarily be whether the information involved is in fact within one of the act's exemptions or within some other statute which exempts or prohibits disclosure of specific information or records.** If it is not so exempted or prohibited, then the records are to be released subject to the agency's right in certain situations to delete identifying details from the record, in accordance with another specific provision of the act. **If it is exempted or prohibited, then the judicial inquiry commences.** (Emphasis added).

112 Wn.2d at 36. The court upheld the trial court's determination that the records were not exempt from disclosure. 112 Wn.2d at 38-39. Consequently, the court never addressed the questions of public interest or damage to a person or vital governmental function.

The 1992 legislature made a number of amendments to the public records provisions of the Public Disclosure Act, Chapter 42.17 RCW (PDA). *See* Laws of 1992, Ch. 139. Although the original House Bill would have precluded agencies from seeking judicial review, the Senate amended the bill to provide for such review. *Soter*, 162 Wn.2d at 752-763. Unfortunately, the Senate accomplished this by simply adding agencies to the list of parties entitled to seek an injunction under former RCW 42.17.330. There is no legislative history to suggest that the legislature actually considered whether an agency needed the additional findings required for an injunction in order to withhold its own exempt records. The resulting amended statute provided:

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.

Former RCW 42.17.330; Laws of 1992, Ch. 139, § 7.

In *Dawson v. Daly*, 120 Wash.2d 782, 793-94, 845 P.2d 995 (1993), the Court erroneously suggested, in dicta, that former RCW 42.17.330 created an independent source of PRA exemptions.

The following year, in *PAWS II*, 125 Wn.2d at 261 n.7, the Court expressly rejected the dicta in *Dawson*, holding that former RCW 42.17.330 merely provided an injunction remedy and was not a separate, substantive basis for withholding records. Citing its earlier decision in *Spokane Police Guild*, the Court clarified that the disclosure of public records may not be enjoined under former RCW 42.17.330 unless such records are governed by a specific statutory exemption. 125 Wn.2d at 257-58 (citing *Spokane Police Guild*, 112 Wn.2d at 35-37).

In 2005, the public records provisions of the PDA, Chapter 42.17 RCW, were re-codified as the Public Records Act, Chapter 42.56 RCW (PRA). Former RCW 42.17.330 became RCW 42.56.540. See RCW 42.56.001; Laws of 2005, ch. 274.

In *Soter v. Cowles Publishing Co.*, *supra*, this Court specifically addressed the question of “[w]hether an agency can petition for a judicial determination that records are exempt from disclosure.” 162 Wn.2d at 723. The Court held that agencies may seek review of exemptions. “We conclude that pursuant to RCW 42.56.540, a state or local government

entity can seek judgment in superior court as to whether a particular record is subject to disclosure under the Public Records Act.” *Id.*

Soter also clarified that additional findings are required for an injunction against the release of exempt records under RCW 42.56.540:

It may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest. But if we assume that the additional findings contemplated by RCW 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous. We therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest. RCW 42.56.540. (Citations omitted).

Id. at 756-57. It was not actually necessary for the Court to reach this issue in *Soter* because the Court held that the records were exempt. The Court may have decided to address the issue anyway because the Court of Appeals held otherwise, or because a third-party (*Soter*) sought an injunction. *Soter* clearly states that the additional findings required by RCW 42.56.540 are necessary where a third party seeks an injunction. However, to the extent the language in *Soter* (above) suggests that an agency needs the additional findings required by RCW 42.56.540 in order to lawfully withhold its own exempt records, that part of the *Soter* opinion is dicta.

As *Soter* noted, the additional findings required by RCW 42.56.540 are not superfluous because a third party cannot obtain an injunction under RCW 42.56.540 unless the records are exempt *and* the additional findings are made. *See Morgan v. Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009). **However, this Court has never held that an agency is required to meet the additional injunction requirements of RCW 42.56.540 in order to withhold its own exempt records.** Subsequent cases applying RCW 42.56.540 have either involved third parties or not reached the issue of the additional findings required for an injunction. *See Morgan*, 166 Wn.2d at 756-57 (declining to reach issue because records were not exempt); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 807, 246 P.3d 768 (2011) (noting that third-party defense attorneys sought injunction under RCW 42.56.540); *Bainbridge Island Police Guild*, 172 Wn.2d at 420 (holding that officer's identity was exempt under former RCW 42.56.230(2), **and** that additional requirements for injunction under RCW 42.56.540 were met).²

² There is at least one situation in which even a third party is not required to establish the additional findings required for an injunction under RCW 42.56.540. In *Ameriquist Mortgage Company v. Attorney General*, 170 Wn.2d 418, 241 P.3d 1245 (2010), a third party (Ameriquist) sought to enjoin the release of certain loan files by the Attorney General to a private attorney who requested the files. Ameriquist argued that disclosure was prohibited by a federal banking statute, the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801-6809. This Court concluded that the GLBA was an "other statute" that prohibited disclosure of the records. **The Court did not even mention RCW 42.56.540.** That is because a third party does not need to establish the additional findings required for an injunction RCW 42.56.540 where disclosure of the records is actually prohibited

Taken together, RCW 42.56.540 and this Court's prior decisions establish simple rules for judicial review under the APA:

- An agency may seek judicial review of its own exemption claims rather than waiting to be sued (or waiting for the limitations period to run out).
 - If the records are **not** exempt, then the agency must provide the records, and the agency is liable for attorney's fees and penalties.
 - If the records are exempt, the agency has no duty to produce the records and the case is simply over. The "public interest" and "damage" elements of RCW 42.56.540 are never addressed because no third party seeks an injunction.
- A third party may seek an injunction under RCW 42.56.540 to prevent the disclosure of exempt records.
 - If the records are not exempt then the injunction must be denied, and the "public interest" and "damage" elements of RCW 42.56.540 are never addressed.

by law (as opposed to where the records are merely exempt under an exemption in the PRA).

- If the records are exempt then the third party also needs to establish the “public interest” and “damage” elements of RCW 42.56.540 in order to obtain an injunction against the agency.

A requester may, of course, seek judicial review under RCW 42.56.550.

In this case, the lower courts and the parties have erroneously assumed that that the findings required for an **injunction** under RCW 42.56.540 are necessary where an agency seeks judicial review of its own response to a PRA request. But there is no third party seeking an injunction in this case. As set forth above, the only issue to be determined by the trial court is whether the records are exempt. If the records are determined to be exempt, the County has no obligation to provide the records to Parmelee. If the records are not exempt, then the records must be produced.

This Court should reverse the Court of Appeals based on that court’s erroneous interpretation of RCW 42.56.540, and remand this matter to the trial court for a determination of whether the requested records are exempt pursuant to specific statutory exemptions. It is neither necessary nor appropriate for the Court to address the irrelevant question of whether a court may consider the identity of a requester in making the additional findings required for an injunction under RCW 42.56.540.

B. The special injunction provisions of RCW 42.56.565 are not applicable to this case.

In 2009, the legislature enacted RCW 42.56.565 to curtail PRA requests by prison inmates where the request was made to harass agency staff or for other improper reasons. Laws of 2009, Ch. 10.³ This statute authorizes courts to enjoin the disclosure of **nonexempt** public records to an inmate where certain specific findings are made. *See King County Dep't of Adult Detention v. Parmelee*, 162 Wn. App. 337, 349, 254 P.3d 927 (2011). For purposes of this brief, WCOG expresses no opinion on the wisdom, constitutionality, or application of RCW 42.56.565.

It is unclear why the Court of Appeals in this case addressed either RCW 42.56.565 or the question of whether that statute applies retroactively. Both the County's petition for an injunction and the trial court's ruling predate the enactment of RCW 42.56.565. CP 8, 64-69. In this case, the County sought judicial review under RCW 42.56.540. CP 64. The question of whether the County might be entitled to an injunction under RCW 42.56.565 is not presented, and should not be addressed by this Court in this case. Although a separate injunction under RCW 42.56.565 might render this case moot, *see DeLong v. Parmelee*, 164 Wn. App. 781, 267 P.3d 410 (2011), that issue should be addressed on remand.

³ RCW 42.56.565 was amended in 2011 to provide that courts shall not award statutory penalties to prison inmates. *See* Laws of 2011, ch. 300.

C. A court may not consider the identity of a requester or the purpose of a request in issuing an injunction under RCW 42.56.540.

As explained in section (A), it is not necessary to address the question of whether a court may consider the identity or purpose of a requester in determining whether to issue an injunction under RCW 42.56.540 because there is no third party seeking an injunction in this case. WCOG urges the Court to reverse and remand this case without reaching that issue in this case. Nonetheless, if the Court decides to reach the issue, the erroneous decision of the Court of Appeals should be reversed for several reasons.

First, the Court of Appeals improperly drew upon common law concepts of equity and injunctions. Citing the erroneous opinion of Division II in *DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010), *remanded*, 171 Wn.2d 1004 (2011),⁴ the court recited a list of generic factors to be considered in issuing an injunction. *Franklin County*, 162 Wn. App. at 296. But an action for an injunction under RCW

⁴ In *DeLong v. Parmelee*, 157 Wn. App. 119, 151-52, 236 P.3d 936 (2010), the Court of Appeals erroneously held that a third-party may obtain an injunction against the release of **non-exempt** records under RCW 42.56.540. This Court summarily granted review and remanded the *DeLong* case to the Court of Appeals for reconsideration in light of *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010) and RCW 42.56.565. *DeLong*, 171 Wn.2d 1004 (2011). On remand, the Court of Appeals determined that another injunction issued against the same requester under RCW 42.56.565 rendered the appeal moot. *DeLong v. Parmelee*, 164 Wn. App. 781, 267 P.3d 410 (2011). This Court denied review on March 27, 2012.

42.56.540 is not a generic injunction action. RCW 42.56.540 provides a specific remedy to specific parties in a specific legal situation. There is no room or need for such common law equitable considerations to supplement or modify the specific provisions of RCW 42.56.540.

As explained in section (A), the additional findings required for an injunction under RCW 42.56.540 are only necessary where a third party seeks an injunction against an agency's disclosure of **exempt** records. The statute sets forth two specific findings that must be made to enjoin the agency: (i) that examination of specific records would clearly not be in the public interest, and (ii) that examination of the records would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. RCW 42.56.540. Where those findings are made, the statute provides only one specific remedy: an injunction against the release of the specific records at issue.

As shown by this Court's recent decision in *Bainbridge Island Police Guild, supra*, the injunction findings required by RCW 42.56.540 can be made without considering the identity of the requester or the purpose of a request. In that case, the Court held that the police officer's identity was exempt under former RCW 42.56.230(2). 172 Wn.2d at 418. Turning to the injunction findings under RCW 42.56.540, the Court held that (i) production of the records without redaction of the officer's name

would “substantially and irreparably damage” the officer, and (ii) redaction would not infringe upon the public interest. *Id.* at 420. The Court made these findings without commenting upon the identity of the requester or her presumed purpose in requesting the records. *Id.*

Second, the Court of Appeals erroneously relied on RCW 42.56.565, stating that “the requester’s identity must be considered” for purposes of RCW 42.56.565. 162 Wn. App. at 295. Unlike RCW 42.56.540, the special injunction provided by RCW 42.56.565 expressly requires a court to consider the identity of a requester and/or the purpose of a request for records. That statute sheds no light on the interpretation of RCW 42.56.540.

Third, the Court of Appeals violated the PRA’s clear prohibition on consideration of the identity of a requester or the purpose of a request. RCW 42.56.080 provides, in relevant part:

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person ... Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons ...

Washington courts have interpreted this section as a general prohibition against any consideration of either the identity of the requester or the purpose of a request in responding to a request for records under the PRA. *See Livingston v. Cedeno*, 164 Wn.2d 46, 52-54, 186 P.3d 1055 (2008); *Koenig v. Des Moines*, 158 Wn.2d 173, 190, 142 P.3d 162 (2006) (Fairhurst, J., dissenting); *King County v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002).

In this case, the Court of Appeals noted that RCW 42.56.080 refers to “agencies,” and concluded that the section was not applicable because a court is not an “agency.” 162 Wn. App. at 295-96. This superficial analysis misinterprets RCW 42.56.080 and the PRA as a whole. That section prohibits discrimination among requesters. But as interpreted by the Court of Appeals in this case, RCW 42.56.540 would allow an agency to obtain judicial permission to engage in exactly the same sort of discrimination prohibited by RCW 42.56.080.

Finally, the Court of Appeals ignored the obvious constitutional implications of allowing a court to consider the identity of a requester or the purpose of a request for public records. Any inquiry into the requester’s actual or threatened use of public records implicates the requester’s right to free expression under the First Amendment and Const. art I, §5. In this case, the County complains that Parmelee “has a history

of using public records requests to harass and endanger public officials.” But the County has not established that Parmelee’s statements and publications, in which public records were used, are not protected speech. If they are, then the County seeks to withhold public records from Parmelee based on his protected expression.⁵

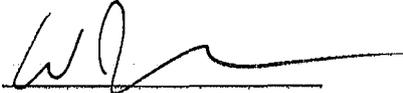
For all these reasons, the Court of Appeals’ analysis of RCW 42.56.540 should be rejected. If the Court reaches the issue at all, then the Court should hold that a court may not consider the identity or purpose of a requester in issuing an injunction under RCW 42.56.540.

IV. CONCLUSION

For all these reasons, the Court should reverse the Court of Appeals based on its erroneous interpretation of RCW 42.56.540, and remand this matter to the trial court for a determination of whether the requested records are exempt pursuant to specific statutory exemptions. It is neither necessary nor appropriate for the Court to address any of the other issues raised by the parties.

⁵ Similar allegations were made against the requesters in *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002). In that case, the Court of Appeals ordered the release of records to the requesters despite the county’s allegations that the requesters used the records to operate a web site that threatened the safety of police officers. 114 Wn. App. at 333, 340. While the *King County* case was pending, the 2002 legislature enacted a statute (former RCW 4.24.680) that prohibited the publication of personal information about police officers “with the intent to harm or intimidate.” Former RCW 4.24.680; Laws of 2002, ch. 336 § 1. A federal court subsequently determined that the statute was facially unconstitutional. *Sheehan v. Gregoire*, 272 F.Supp.2d 1135 (W.D. Wash. 2003).

RESPECTFULLY SUBMITTED this 24th day of April, 2012.



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The undersigned certifies that on 24th day of April, 2012, true and correct copies of the attached *Brief of Amicus Curiae* and *Motion for Leave to File Brief of Amicus Curiae* were served on each of the parties as follows:

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Cc: RVerhulp@co.franklin.wa.us; 'Kenneth Harper'; 'Kathy George'; 'Pat Brown'
Subject: RE: Franklin County v. Parmelee, No. 86410-1

Rec. 4-24-12

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From: William John Crittenden [<mailto:wjcrittenden@comcast.net>]
Sent: Tuesday, April 24, 2012 11:26 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: RVerhulp@co.franklin.wa.us; 'Kenneth Harper'; 'Kathy George'; 'Pat Brown'
Subject: Franklin County v. Parmelee, No. 86410-1

Dear Clerk-

Enclosed please find the amicus brief of the Washington Coalition for Open Government and the accompanying motion for leave to file amicus brief.

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