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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

GASTON CORNU-LABAT,

Respondent,

v.

HOSPITAL DISTRICT #2 OF GRANT COUNTY, d/b/a QUINCY  
VALLEY HOSPITAL,

Appellant.

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STATE OF WASHINGTON  
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BRIEF OF AMICI CURIAE FREEDOM FOUNDATION and  
WASHINGTON COALITION FOR OPEN GOVERNMENT

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ORIGINAL

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## **I. INTRODUCTION**

This is a public records case. Dr. Gaston Cornu-Labat requested certain records from Quincy Valley Medical Center (QVMC), a public hospital. Under the Public Records Act (PRA), QVMC must produce those records unless a specific exemption applies.

QVMC has asserted three statutory provisions to withhold the records. Two of these statutes are incorporated by reference into the PRA, but the hospital has not shown that they apply to the records at issue. The third statutory provision asserted by QVMC does not address public records and cannot be relied upon as an exemption. QVMC asks this Court to ignore well-established rules of statutory construction and previous interpretations of the PRA, and invokes the common law and vague public policy concerns to justify non-production.

This brief addresses the proper construction of the PRA and urges this Court to hold that QVMC's refusal to produce public records is not in accordance with the PRA.

## **II. INTEREST AND IDENTITY OF AMICI CURIAE**

The Freedom Foundation is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government, and is supported by approximately 5,000 Washington residents and other individuals. The Foundation believes that

state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent and open manner. Access to public records is an essential tool of transparency that should be protected and encouraged.

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.

### III. STATEMENT OF THE CASE

*Amici* adopt the Respondent's Statement of the Case.

### IV. ARGUMENT

#### A. **QVMC Improperly Argues that Asserted Exemptions Must be Liberally Construed.**

Appellant QVMC cites three statutes—RCW 4.24.250, RCW 70.41.200, and RCW 70.44.062(1)—to justify non-disclosure, and argues these statutes should be liberally construed to protect the confidentiality of the records at issue. Br. of Appellant at 18-19. Later QVMC argues that

public policy considerations should weigh heavily in favor of confidentiality. *Id.* at 35-39. These assertions ignore the plain language of the PRA, as well as decades of cases interpreting it.

“The Washington public disclosure act is a strongly-worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The purpose of the Act is “nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Contrary to QVMC’s argument, the PRA is to be “**liberally construed** and its **exemptions narrowly construed** to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030 (emphasis added). Additionally, in the event of a conflict between the PRA and any other act, the PRA prevails. *Id.*

Dr. Cornu-Labat seeks records concerning a public employee’s on-the-job conduct. The people of Washington have a significant interest in monitoring public employees, even if disclosure causes “inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). Even in cases where an allegation of misconduct is unsubstantiated, this Court has

recognized the public's interest in evaluating the quality of any investigation of the allegations. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416, 259 P.3d 190 (2011) (the public has a "legitimate interest in how a police department responds to and investigates such an allegation against an officer.").

QVMC's argument that public policy considerations should favor non-production has no basis in the PRA or the cases interpreting it.

**B. The Statutes Asserted by QVMC Do Not Apply to the Records Sought.**

QVMC has asserted three statutory provisions. The first two, RCW 4.24.250 and RCW 70.41.200, are incorporated by reference into the PRA at RCW 42.56.360(1)(c). The third statute, RCW 70.44.062(1), deals with the confidential meetings of public hospital districts but does not exempt records from disclosure.

Agencies bear the burden of proof to establish that a statute exempts documents from production. RCW 42.56.550(1). Given the narrow application of any exemption, QVMC cannot demonstrate that non-production would be permitted under the PRA.

**1. RCW 4.24.250 Exempts Records of Regularly-Constituted Peer Review Committees.**

RCW 4.24.250 pertains to certain records related to a hospital's peer review committee. It is incorporated by reference into the PRA and

can exempt certain records from production. RCW 42.56.360(1)(c). Several requirements must be met for QVMC to show this exemption applies: the committee must regularly-constituted, the committee must be a peer review committee, and the records must be “proceedings, reports, and written records” of the committee. *See* RCW 4.24.250(1). Cornu-Labat argues that QVMC’s investigation was not conducted by a regularly-constituted peer review committee. Br. of Resp’t at 14-29. *Amici* agree with this argument and will only address the peer review issue.

The trial court held that RCW 4.24.250 applies to committees comprised only of physicians. QVMC’s chief argument against that holding is that the statute is not limited to physician committees because the statute does not include the phrase “peer review.” Br. of Appellant at 21. While this characterization of the statute’s text is accurate—RCW 4.24.250 does not use the phrase—the trial court’s ruling is confirmed by other statutes and this Court’s own interpretation of RCW 4.24.250.

The Washington Legislature has characterized the committee in RCW 4.24.250 as a “peer review committee” in **five** separate statutes. *See* RCW 42.56.360(1)(c) (exempting records created or maintained for “a peer review committee under RCW 4.24.250”); RCW 43.70.510(6); RCW 70.41.200(8); RCW 70.56.050(2)(a); and RCW 70.230.080(8). The Legislature’s characterizations of statutes is persuasive. Even if there is a

conflict between RCW 4.24.250 and these other statutes, “provisions of a specific more recent statute prevail in a conflict with a more general predecessor.” *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990).

This Court’s interpretation of RCW 4.24.250 also confirms that the provision relates to peer review committees. *See Anderson v. Breda*, 103 Wn.2d 901, 907, 700 P.2d 737 (1985) (“The purpose of this statute is to keep peer review studies, discussions, and deliberations confidential.”) and *Coburn v. Seda*, 101 Wn.2d 270, 277 n.3, 677 P.2d 173 (1984) (statute prohibits discovery of reports of “peer review committees”).

**2. QVMC May Not Rely on RCW 70.41.200 After Concessions Below.**

The second statute asserted by QVMC, RCW 70.41.200, deals with quality improvement committees and is incorporated into the PRA. RCW 42.56.360(1)(c). Narrowly construed, RCW 70.41.200 does not apply to the records at issue. Perhaps recognizing this, QVMC provides an overly-complicated recital of its bylaws and procedures. Br. of Appellant at 31-34. The flaw in QVMC’s argument is that it would apply RCW 70.41.200 so broadly that nearly *any* activity of *any* employee that *somehow* relates to the quality of medical care could be viewed as an action of the quality improvement committee.

This Court need not address RCW 70.41.200. QVMC cannot rely on the statute as it conceded at trial that its quality improvement committee was not involved in the investigations of Dr. Cornu-Labat. Br. of Resp't at 34-35. The hospital now argues that it may have multiple quality improvement committees that could prohibit release of the records. Br. of Appellant at 33-34.

QVMC should not be permitted to take inconsistent factual positions on appeal. "Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage." *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009). The core factors for applying the judicial estoppel doctrine are: (1) whether the later position is clearly inconsistent with the earlier position, (2) whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and (3) whether the party asserting the inconsistent position would obtain an unfair advantage if not estopped. *Ashmore*, 165 Wn.2d at 951-52.

The doctrine applies in this context. First, QVMC's new position is inconsistent with prior admissions. Cornu-Labat makes this point in his response brief and QVMC makes no attempt to explain the inconsistency in its reply. Second, a conclusion by this Court that the investigations

were, in fact, the actions of a quality improvement committee would create the perception that the trial court was misled. In the trial court's summary judgment ruling of September 4, 2010, the court noted the significance of the fact that QVMC did not argue that the quality improvement committee exemption applied. Third, allowing QVMC to assert an inconsistent position would give the hospital the unfair advantage of raising an issue that it admits was inadequately briefed below.<sup>1</sup>

**3. RCW 70.44.062(1) Does Not Create an Exemption For Written Materials.**

The third statutory provision asserted by QVMC does not allow the hospital to withhold records because the statute applies to meetings and deliberations, and does not create an exemption for written materials.

There are no published cases interpreting RCW 70.44.062(1). Any interpretation of a statute starts with its text. "Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language." *Dot Foods, Inc. v. Washington Dept. of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009).

Chapter 70.44 RCW authorizes the establishment of public hospital districts to provide health care services for the residents of the district. RCW 70.44.003. Public hospital districts are governed by a

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<sup>1</sup> QVMC admits on appeal: "QVMC never alleged that its quality improvement committee had involvement in the allegations that the Plaintiff was incompetent to practice medicine." Br. of Appellant at 32.

multimember board of commissioners, the members of which are elected.  
RCW 70.44.040.

RCW 70.44.062(1) creates a confidentiality privilege when the board of commissioners is considering a doctor's staff privileges. It states: "All meetings, proceedings, and deliberations of the board of commissioners, its staff or agents, concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges of a physician or other health care provider . . . shall be confidential . . ."

QVMC argues that RCW 70.44.062(1) is incorporated into the PRA through the "other statute" provision found at RCW 42.56.070(1). Br. of Appellant at 30-31. The other statute provision, however, only incorporates statutes that exempt records or information. It does not incorporate face-to-face meetings.

The text of RCW 70.44.062(1) creates a privilege for "meetings, proceedings, and deliberations" but says nothing about exempting records from disclosure. Records that happen to be referenced or relied upon in one of these meetings cannot be withheld unless some other statutory exemption applies. A confidential proceeding does not automatically create a PRA exemption.

Courts have confronted this issue in two cases.

First, in *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), a newspaper publishing company requested records related to teacher certificate revocations over a 10-year period. The teachers' union argued that the certificate revocation law granted teachers a right to a closed hearing, and that this provision should be treated as a PRA exemption. This Court rejected the argument. "The closed hearing provision does not specifically exempt anything from disclosure." 114 Wn.2d at 800.

Second, in *American Civil Liberties Union of Washington v. City of Seattle*, 121 Wn.App. 544, 89 P.3d 295 (2004), the ACLU sought records related to labor negotiations between the city and the police guild. The city argued that the Open Public Meetings Act, chapter 42.30 RCW, should be treated as an "other statute" exemption to the PRA. The OPMA requires certain meetings to be public, but exempts labor negotiations from that rule. *See* RCW 42.30.140(4). The city argued that documents exchanged in labor negotiations should be exempted from disclosure. The Court of Appeals disagreed, holding that the OPMA cannot be interpreted as a blanket exception for all labor negotiation records. "The OPMA does not expressly exempt written materials from disclosure, and we may not imply an exemption." 121 Wn.App. at 555.

**C. Common Law Cannot Contradict the Public Records Act.**

QVMC invokes the common law to justify withholding records, arguing that at common law a physician was not entitled to review records related to an investigation of that physician. Br. of Appellant at 19. QVMC offers no citation or reference to support this assertion. But even if QVMC were able to establish what common law would say about physician investigations, it would not compel a conclusion that such records should be exempt from production. Common law may supplement statutory gaps but cannot conflict with enacted statutes.

Washington state recognizes common law “so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington . . . .” RCW 4.04.010. Addressing RCW 4.04.010, this Court has said: “Where a case is not governed by statute law . . . it is an appropriate occasion for this court to apply the common law to determine the outcome of the case.” *Senear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) (citations omitted).

On the other hand, when the Legislature enacts a law intended to be comprehensive upon a subject, this “pre-empts that field” and a court’s function is “thereafter limited to an interpretation of what the legislature meant by the language used in the statute.” *Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 36, 323 P.2d 241 (1958). Washington courts may

then only look to the common law to “address gaps in existing statutory enactments.” *In re Parentage of L.B.*, 155 Wn.2d 679, 689, 122 P.3d 161 (2005).

Courts have addressed the interrelation of the PRA and common law. For example, in *Hearst Corp. v. Hoppe*, this Court noted that the PRA failed to define the term “right to privacy” in former RCW 42.17.310(1)(c) (recodified as RCW 42.56.210). 90 Wn.2d at 135-36. The Court looked to the common law tort of invasion of privacy by public disclosure of private facts, and adopted the definition of “invasion of privacy” as provided in *Restatement (Second) of Torts* § 652D (1977). *Id.* Notably, the Court’s reliance on common law did not contradict the PRA, but simply supplemented the law by providing a definition the legislature had failed to provide.

In another case, this Court declined to rely on the common law to add a conflicting provision to the PRA. *DeLong v. Parmelee*, 157 Wn.App. 119, 236 P.3d 936 (2010). Allan Parmelee was an inmate in the custody of the Department of Corrections who sought various public records. The Attorney General submitted an *amicus curiae* brief arguing that under common law and the state constitution, incarcerated felons possess diminished legal rights, and that inmates should fall outside of the scope of the PRA. 157 Wn.App. at 143-44. This Court expressly rejected

this argument. “However sensible the stated policy, the plain language of the PRA does not permit such a ruling.” 157 Wn.App. at 144.

Turning to the present case, the Legislature has addressed the subject of public records in a comprehensive manner: Chapter 42.56 RCW provides wide-ranging guidance on the obligation of public agencies to provide public records upon request. The Legislature specifically addressed the question of health care records at RCW 42.56.360. The PRA also incorporates two of the statutory exemptions asserted by QVMC. RCW 42.56.360(1)(c).

This Court need not look to common law to evaluate this case. While common law may be invoked to fill in statutory “gaps,” no such gaps exist here. To the extent that common law is inconsistent with a statute, the statute must prevail.

**D. A Public Agency Cannot Avoid Its Obligation to Comply with the Public Records Act through an Employment Agreement.**

QVMC argues that its various bylaws and guidelines require confidentiality and that Cornu-Labat agreed to the strictures of these confidentiality requirements by executing his employment agreement. Br. of Appellant at 35-39. The hospital fails to quote a specific provision that prohibits a member of the medical staff from requesting public records. But even if such a provision were in the record it would not change the

outcome. QVMC, as a public agency, cannot relieve itself of its obligation to comply with the Public Records Act.

In case after case, courts have refused to allow agencies to adopt regulations or policies that would conflict with the PRA's mandate of broad disclosure. For example, the Supreme Court held that an agency cannot refuse to release investigative records based on the agency's promise of confidentiality. *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989). In this case several off-duty police officers attended a bachelor party where various liquor law violations occurred. The Liquor Control Board investigated the incident and a newspaper requested the investigative report. The police guild argued that statements by attendees had been taken under a pledge of confidentiality by the Liquor Board investigator. The Supreme Court held that the agency's assurances were irrelevant: "promises cannot override the requirements of the disclosure law." 112 Wn.2d at 40.

This Court again refused to defer to an agency's policy of confidentiality in *Hearst v. Hoppe*. A newspaper sought information from the King County Assessor and the assessor claimed he was invested with a public trust to protect private information provided by taxpayers. The Supreme Court held that "an agency's promise of confidentiality or privacy is not adequate to establish the nondisclosability of information;

promises cannot override the [PRA].” 90 Wn.2d at 137. Agencies do not enjoy the ability to decide when to comply with the PRA. “[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” 90 Wn.2d at 131.

An agency’s administrative regulation was an insufficient basis for withholding records in *Brouillet v. Cowles Pub. Co.* There, the superintendent of public instruction opposed disclosure of various records by arguing that an administrative regulation guaranteed confidentiality. The Supreme Court rejected this argument. “Our unanimous decision in *Hearst* precludes granting any deference to this regulation. In *Hearst*, we explained that the agency is without authority to determine the scope of exemptions under the act.” 114 Wn.2d at 794.

Under the PRA, QVMC has a “positive duty to disclose public records unless they fall within the specific exemptions.” *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995). QVMC’s bylaws and procedures cannot displace its duties under the PRA. Neither can QVMC cite an employee’s confidentiality agreement to relive itself of the duty to disclose records.

QVMC’s argument that its employees should be barred from obtaining public records in its possession runs afoul of another PRA provision. RCW 42.56.080 states that agencies may not inquire into the

reason for the request or distinguish among requesters. QVMC invites this Court to treat requesters differently by imposing restrictions not found in the PRA upon medical center employees. If a public record must be disclosed to a non-employee, then the same record must be disclosed to an employee. Cornu-Labat's employment status is irrelevant in this case.

**E. Respondent Cornu-Labat is Entitled to Respond to Issues Raised by the Appellant.**

QVMC complains that Cornu-Labat raises issues for the first time on appeal. Appellant's Reply at 3-4. Specifically, QVMC asserts that Cornu-Labat failed to address the applicability of RCW 4.24.250 and RCW 70.44.062(1) at summary judgment, as well as the question of whether an employment agreement can trump the PRA. QVMC argues Cornu-Labat should now be barred from addressing those issues.

This would be a bizarre distortion of well-established rules. It is entirely appropriate for a respondent to respond to the arguments raised by an appellant. RAP 10.3(b) states that a respondent may "answer the brief of appellant or petitioner." In its opening brief QVMC cites the three statutory provisions as the basis for withholding records. Br. of Appellant at 19. Later QVMC argued that Cornu-Labat's employment agreement prohibits him from requesting investigative records. *Id.* at 35. Cornu-Labat is entitled to respond to these issues.

## V. CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.



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