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DIVISION ONE
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No. 63876-9

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

RUSSELL PHILLIPS,

Appellant/Cross Respondent,

v.

VALLEY COMMUNICATIONS,

Respondent/Cross Appellant.

AMICUS CURIAE BRIEF OF WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF
RESPONDENT/CROSS APPELLANT VALLEY
COMMUNICATIONS

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ORIGINAL

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A. IDENTITY OF AMICUS CURIAE.

Amicus is the Washington State Association of Municipal Attorneys (hereinafter WSAMA) the organization of municipal attorneys representing the cities and towns across the State, (hereinafter Amicus).

B. STATEMENT OF CASE.

Amicus, WSAMA, references and incorporates herein the Statements of the Case as set forth in the pleadings of the Respondent, Valley Communications. Amicus also commends to the Court the thorough briefing and argument submitted by the Respondent herein.

C. SUMMARY OF ARGUMENT.

Amicus joins with the Respondent in asking this Court to adopt the better reasoning of *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d (1995), notwithstanding the holdings in *Progressive Animal Welfare Society (PAWS) v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) and *Soter v. Cowles Publishing Company*, 62 Wn.2d 716, 174 P.3d 60 (2007), and to hold that RCW 42.56.540 allows for injunctive relief in cases where there is no specific exemption to disclosure. The language of the statute sets forth independent grounds for injunctive relief when an agency can show disclosure is “clearly not in the public interest or disclosure will irreparably harm vital governmental functions.”

Nothing in this provision of the statute requires a separate exemption to exist before relief can be requested. The interpretation of 42.56.540 that best gives equal effect to all of the provisions of the Public Records Act would be to say that when there is no clear exemption under the Public Records Act, a municipality may seek an injunction. Interpreting 42.56.540 in this manner allows the “injunctive relief” and the “liberal construction” provisions of the Public Records Act to be given their full effect.

D. ARGUMENT.

By allowing municipalities to seek the same level of protection against vexatious requestors that courts grant themselves against vexatious litigants, the court can give full effect to both the injunctive and liberal construction provisions of the Public Records Act.

1. Courts have historically protected themselves against vexatious litigants.

As a result of Appellant’s repeated requests, the Respondent moved for a protective order in two separate show cause motions. Respondent requested relief in the form of an injunction prohibiting the Appellant from filing duplicate public record requests or otherwise requesting documents which had already been provided to him or originated from him through previous public record requests or during pending litigation. The request for injunctive relief did not include a prohibition on a request for new

documents, but was designed as a means to relieve the agency from re-identifying records that were previously provided or were exempt, and simplifying the indexing requirements attached to each separate request. Even though the last Judge to hear the show cause matter suggested that the Respondent request a protective order prohibiting the former employee from filing a new cause of action unless he obtained permission from the court in a motion for reconsideration, the judge refused to grant that relief.

However, the court did prohibit Appellant from filing any appeals or further claims against Defendant arising out of the same transaction, saying: “[I]n Washington, every court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings.” *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849, *review denied*, 164 Wn.2d 1037, 197 P.3d 1186 (2008).

Respondent asks this Court to apply the plain language of RCW 42.56.540 in order to provide the same protection against the conduct of requestors whose requests disclosure are “clearly not in the public interest or disclosure will irreparably harm vital governmental functions” as the Court provides to itself against vexatious litigants.

2. Allowing Injunctive Relief is consistent with rules of statutory interpretation that require all provisions of a statute to be given equal effect.

If a specific exemption applies to a records request, the municipality from which the records are requested has no need to request injunctive relief from the courts. Instead, the municipality simply withholds the records (after providing an exemption log as required by the Act). If the requestor does not agree with the municipality's decision to withhold, the requestor can seek the judicial remedies in RCW 42.56.540's provision for injunctive relief only makes sense if it can be applied in the absence of a specific exemption because

The facts of the instant case illustrate the kinds of abuse of process that supports a policy interpretation to allow municipalities to file a request for injunctive relief without the necessity of showing that a specific exemption already exists.

In order to make the injunctive remedy a viable tool, it must not be inextricably tied to the perpetual fear of penalties, fees and costs associated with a refusal to disclose records. Instead, it should provide a basis for an early judicial resolution to frequently-recurring questions about privacy vs. disclosure. A request for injunctive relief should provide a middle ground to assist public agencies and the courts to strike the proper balance between disclosure, the need to withhold records, or preventing the use of future

public disclosure requests to disrupt public services.

Allowing an agency to seek an injunction regardless of there being a specific exemption is necessary in part because the agency's ability to rely on any particular exemption has been eroded by case law. *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002); *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007). Statutes outside the public disclosure requirements also require an agency to maintain records to protect privacy and confidentiality. The conflict between these legislative provisions, along with the promise of attorney's fees and costs, as well as mandated penalties simply prompt litigation, rather than resolving disclosure issues with the needs of the requester, agency and public interests in mind.

Despite the fact that the plain language of RCW 42.56.540 allows a public agency to seek a protective order before finalizing its response to a request for information, the value of this provision has been eroded by *PAWS* (limiting use of injunctive relief section of the Public Records Act to the enumerated exemptions) and *Soter* (holding 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).

The result is that trial judges feel their legal options are limited by the broad and sweeping decisions which focus only on the statutory terms “liberally construed.” Even non-litigated disclosure requests can cost the agency significant need to seek an injunctive order. *See Doe I v. Washington State Patrol*, 80 Wn. App. 296, 301, 908 P.2d 914 (1996). Furthermore, in disputes involving public records requests, courts are also reluctant to use their inherent authority to control litigation.

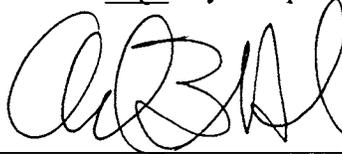
In the instant case, it would appear that the superior court judges felt constrained by what they saw as the interpretation given by *PAWS* regarding the injunction provided by RCW 42.56.540. While a clear legislative statement regarding the application of 42.56.540 would be helpful in providing broader answers to these problems, in the interim, it is appropriate for the Court to interpret the Act in a way that allows a reasonable balance between fairness to requestor of records, and allowing agencies to seek equitable relief from vexatious requestors., while at the same time provide clear direction for the lower courts.

E. CONCLUSION.

For all of the reasons set forth above, and those presented by the Respondent, Valley Communications, Amicus requests that this Court return to the more reasoned analysis of *Dawson v. Daly*, and clarify the meaning of

PAWS and *Soter*, so that it is clear that the 42.56.540's injunctive relief is not limited to cases where specific exemptions to disclosure exist.

Respectfully submitted this 26th day of April, 2010.

A handwritten signature in black ink, appearing to read "DBH", written over a horizontal line.

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for Amicus, Washington State Association of
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