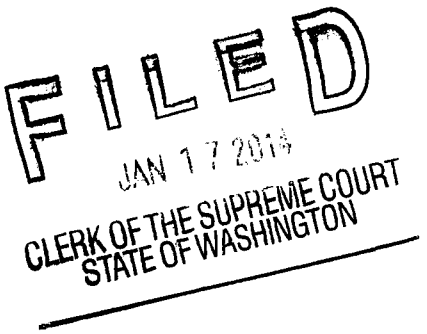
No. 89790-5
COA No. 42774-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

DEREK E. GRONQUIST,

Petitioner,



V.

DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR REVIEW

Derek E. Gronquist
#943857 H-A-25
Coyote Ridge Corr. Center
P.O. Box 769
Connell, WA 99326

FILED IN COA ON JANUARY 6, 2014

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A. IDENTITY OF PETITIONER.

Petitioner Derek E. Gronquist is the plaintiff/appellant in the lawsuit below.

B. COURT OF APPEALS DECISION.

Mr. Gronquist seeks review of the Court of Appeals opinion entered in Derek E. Gronquist v. Department of Corrections, COA No. 42774-5-II, on October 29, 2013. The decision is attached at Appendix A. Reconsideration was denied on December 9, 2013. Appendix B.

C. ISSUES PRESENTED FOR REVIEW.

1. Whether RCW 42.56.565(1) overrules the holding in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004), to grant courts discretion to reduce the penalty period for a violation of the Public Records Act?

2. Did the Department of Corrections conduct a reasonable search for undocumented alien labor records under the Public Records Act, by denying the existence of records after making a telephone call to an official who falsely claimed that "offenders are not identified by citizenship"?

3. Can the Department of Corrections establish that video surveillance recordings capturing the involvement of Correctional Officers

in an assault upon an inmate contain "specific intelligence information" the non-disclosure of which is "esstential to effective law enforcement" under RCW 42.56.240(1), through generalized claims about the surveillance system, and never locating, reviewing, or retaining the records requested?

4. Does a complaint alleging that Department of Corrections officials subject public records to a prior restraint censorship state a claim under the Free Speech clause of the State Constitution?

D. STATEMENT OF THE CASE.

This case concerns two Public Records Act (PRA) requests made to the Department of Corrections (DOC or Department).

1. Undocumented Alien Employment Records.

Mr. Gronquist witnessed an increase in DOC's use of undocumented alien labor in Class II Correctional Industries.[1] CP 354-355. To determine if DOC's use of undocumented alien labor violated the Immigration Reform and Constrol Act,[2] he made a PRA to DOC for:

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[1] "Class II Industries" are state owned businesses operated for the benefit of governmental agencies and nonprofit organizations. RCW 72.09.100(2).

1. All Department of Corrections (DOC) inmate identification badges/cards[3] from undocumented alien workers[4] employed by DOC's Class II Industries from January 1, 2004, to today's date.

2. All records demonstrating the payment of any wages, gratuities, or other form of payment,[5] to undocumented alien workers employed by the DOC's Class II Industries from January 1, 2004, to today's date.

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[2] The Immigration Reform and Control Act (IRCA) prohibits employment of illegal aliens, 8 U.S.C. 1324a, and requires employers to verify the identity, citizenship, and eligibility for employment of all new hires. 8 U.S.C. 1324a(b). Employers who violate IRCA are subject to civil fines and criminal prosecution. 8 U.S.C. 1324a(a)(4)(A) & (5), and 1324a(f)(1).

[3] Identification cards are created under DOC Policy 400.025, which states: "Offenders housed in Department facilities will be issued an ID card," who "will wear them so that they are visible at all times." CP 151 §§ II(C) & VI(A). Identification cards are used to "[c]lock offenders in and out of CI to track offender movement for pay and security purposes." CP 153.

[4] "Undocumented alien worker" means any person who is not a United States citizen and who does not possess a current and valid work permit or similar document authorizing such persons to be employed in the United States. CP 197. DOC has never disputed that it uses undocumented alien labor in Class II Industries. Compare CP 354-356 with CP 295-311 & 137-143.

[5] Inmates working in Class II Industries receive pay for their labor. RCW 72.09.100(2); RCW 72.09.111(4); & CP 392. That compensation is documented "in accordance with generally accepted accounting principles." CP 393 § III(A)(1). DOC deposits pay in a Trust Account. CP 398 § I(E). Policy 200.000 requires the deposit to "be . . . recorded in the Trust Accounting System." CP 398 § III(A); CP 167.

> 3. All records revealing internal DOC communications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program regardless of class.[6] This third request seeks all records in existence on this subject.

CP 196-197.

The request was received by Michael Holthe, who had just been temporarily assigned as the Public Disclosure Coordinator for the Clallam Bay Corrections Center (CBCC). CP 199 & 247. Mr. Holthe's only effort to locate responsive records was to call CBCC's Correctional Industries Manager, who responded: "[o]ffenders are not identified by their citizenship,[7] nor is it a part of the employment process." CP 359. Based upon that statement, Holthe suspended his search and sent Gronquist a letter stating:

> Per the Correctional Industries Manager at Clallam Bay Corrections Center, Offenders are not identified by their citizenship, nor is it a part of the employment process.

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[6] DOC's Correctional Industries has five classes of work programs. RCW 72.09.100.

[7] Policy 330.700 provides: "The Department will identify offenders who are citizens of other nations...." CP 415. Identification of citizenship occurs upon DOC's reception of an inmate. Id.

CP 199.

Mr. Gronquist complained about the lack of response to his request, to which Holthe replied:

> If you not agree with the decision made by this office that there are no documents responsive to your request, you may appeal the decision to: Kay Wilson-Kirby, Appeals Officer, P.O. Box 41114, Olympia, WA 98504.

CP 201 & 203.

Gronquist filed this lawsuit. CP 435-439. The superior court ordered DOC to show cause, in pertinent part, why:

> 1. A full and complete search for records responsive to Plaintiff's July 30, 2007, public records request should not be compelled; [and]
>
> 2. Disclosure of all records requested by Plaintiff's July 30, 2007, public records request should not be compelled[.]

CP 326-327.

DOC responded that "[b]ecause inmates are not employees of or employed by the Department,[8] Mr. Gronquist's requests, by its language and defined

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[8]Class II Industries workers are DOC employees. National Electrical Constractors Association v. Riveland, 138 Wn.2d 9, 27. 978 P.2d 481 (1991)(admitting "Class II inmates ... are deemed employees because of their coverage under industrial insurance.). Policy 710.400 is titled "Correctional Industries Class II Employment," and states "[e]mployment in Correctional Industries Class II is voluntary for offenders.").

terms seeks records that do not exist." CP 134-136 & 304. Based upon that statement, the superior court held that responsive records did not exist. CP 125-126.

The Court of Appeals affirmed, holding "there were no identifiable records matching Gronquist's request," and Mr. Gronquist did not challenge DOC's search below. Opinion at 13-15.

2. Assault and Extortion Attempt Records.

On June 17, 2007, a CBCC officer unlocked Mr. Gronquist's Pod and Cell door for an inmate to assault him as he slept as part of an extortion plot. CP 357. To identify the officer and gather evidence, Mr. Gronquist made a PRA request to DOC for, in pertinenet part:

> 1. All documents created in response to, or because of, this incident;
> . . .
>
> 4. The surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. on June 17, 2007;
> 5. The surveillance video of the chow hall used for C-unit inmates on June 17, 2007;
> . . . [and]
>
> 9. The complete Internal Investigations file[.]

CP 205-206.

DOC responded by informing Gronquist that it will take up to 40 business days "to **review and assemble** the documentation requested. . . ." CP

369-370 & 376 (emphasis added). On September 24, 2007, Mr. Gronquist was notified that records had been assembled, and would be mailed to him upon payment of $23.80. CP 378.

Upon receipt of payment, Mr. Holthe mailed the records to Gronquist at the Stafford Creek Corrections Center (SCCC). CP 378 & 382. Included with the records was a document stating that video surveillance recordings were exempt under RCW 42.56.420(2). CP 383. SCCC's Mail Room intercepted the records and refused to permit Gronquist to receive 39 pages of documents and 11 photographs. CP 324. Upon receipt of the remaining records, Gronquist discovered that part of an Internal Investigations report had been withheld without a claim of exemption. CP 358.

These actions were joined with this lawsuit. DOC's Answer "further alleged" that surveillance recordings were exempt under RCW 42.56.240(1). CP 432. As a defense, DOC claimed it "acted in good faith **in responding to** Plaintiff's public disclosure requests . . . [and] any documents not produced were withheld under **lawfully cited** exemptions." CP 432-433 (emphasis added). Gronquist amended his complaint to include a claim

for injunctive relief against DOC's censorship of records sent through the mail under Const. Article I, Section 5. CP 319-325.

After this lawsuit was served, Mr. Holthe disclosed the withheld portion of the Internal Investigation report. CP 227 & 358. About the same time, CBCC officials and representatives from the Attorney General's Office had several conversations[9] regarding whether the surveillance recordings had been searched for, located, reviewed, and secured in response to Mr. Gronquist's request. CP 67-71. Officials were unable to locate any records indicating that a search had been done, and no copy of the recordings was placed in the public records file as required by DOC policy. CP 62-67. The only determination made was that the surveillance recordings had been destroyed. CP 69-70.

On July 17, 2009, the superior court ordered DOC to show cause, in pertinenet part, why:

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[9]Neither Mr. Gronquist nor the superior court were informed about these conversations or the facts they revealed.

> 3. Disclosure of video surveillance recordings by Plaintiff's August 9, 2007, public records request should not be compelled; and
>
> 4. Why the court should not award penalties and costs to the Plaintiff. . . .

CP 326-327.

DOC responded that the surveillance recordings were exempt under RCW 42.56.240(1). CP 295-311. It submitted the declaration Division of Prisons Director Richard Morgan,[10] who asserted that DOC's video surveillence system contained "intelligence information" the non-disclosure of which "is essential to effective law enforcement by DOC, including the effective enforcement of DOC disciplinary regulations." CP 291-292.

DOC also claimed that withholding part of the Internal Investigations report did not violate the PRA, and if it did, the penalty period should be reduced to "the span of time from Mr. Gronquist's constructive notification to the Department through service of summons and complaint . . . and

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[10] Moran never viewed the surveillance recordings Gronquist requested. CBCC officials who reviewed the video recordings pursuant to the investigation of the assault testified that the surveillance video came from a single static overhead camera that did not contain any of the special capabilities asserted by Mr. Morgan. Compare CP 77-90 with CP 289-292.

the ultimate disclosure . . . on August 11, 2008 (24 days)." CP 295-311.

On December 18, 2009, the superior court held that DOC violated the PRA by withholding part of the investigatory report, awarding $15 per-day in penalties for 24 days; and "properly claimed 42.56.240(1) as an exemption . . . [and] properly withheld surveillance video tapes from disclosure pursuant to RCW 42.56.240(1)[.]" CP 125-126.

DOC also filed a CR 12(b)(6) motion to dismiss the Article I, Section 5, claim; asserting that courts lack authority to enforce the constitution and DOC possesses unchallengable authority to censor inmate mail under RCW 72.09.530 and Livingston v. Cedeno, 164 Wn.2d 46, 186 P.3d 1055 (2008). CP 118-123. The superior court granted the motion in part; dismissing the facial challenge to DOC's authority to censor public records. CP 98-99.

The assault of Mr. Gronquist resulted in the filing of a separate action for damages. Derek E. Gronquist v. Faye Nicholas, et al., USDC WDWA No. C10-5374 RBL/KLS. Discovery revealed that DOC did not search for, locate, review, or secure the surveillance recordings prior to the show cause

hearing, and had "recorded over [them] in the normal course of business. . . ." CP 54 & 58-59. Discovery also revealed that another Internal Investigations report on staff involvement in the assault had been withheld. CP 80-81.

With this new evidence, Gronquist moved to vacate the December 18, 2009, order. CP 19-96. DOC responded that it is under no legal duty to search for, identify, review, or preserve surveillance recordings. CP 14-17. The superior court denied the motion, holding its previous "[o]rder was correct, in that video recordings are categorically exempt from disclosure." CP 11.

Mr. Gronquist also sought leave to amend his complaint to add a claim that DOC failed to search for the Internal Investigations report on staff involvement in the assault. CP 468-474 & 479-482. The superior court denied the motion, and dismissed the case with prejudice. CP 459-460.

The Court of Appeals affirmed these rulings, as discussed in detail below. Opinion at 6-19.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

RAP 13.4(b) stated that a petition for review may be accepted when the Court of Appeals decision is in conflict with a decision of this

Court, another decision of the Court of Appeals, presents a significant constitutional question, or contains an issue of significant public interest.

I. THE COURT OF APPEALS SUE SPONTE RETROACTIVE APPLICATION OF RCW 42.56.565(1) TO AUTHORIZE REDUCTION OF THE PENALTY PERIOD CONFLICTS WITH DECISIONS OF THIS COURT

In Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004, this Court held:

> the [PRA] unambiguously requires a penalty 'for each day.' The [PRA] does not contain a provision granting the trial court discretion to reduce the penalty period if it finds the plaintiff could have achived the disclosure of the records in a more timely fashion. . . .

Yousoufian, 152 Wn.2d at 471.

In this case, the superior court reduced the penalty period from 223 to 24 days. CP 125-126 & 134-136. Gronquist appealed, arguing the superior court was prohibited from reducing the penalty period by Yousoufian. Second Amended Opening Brief at 20-22. The Court of Appeals held:

> RCW 42.56.565(1) defeats this argument because (1) DOC did provide him the missing [record] when it became aware of its inadvertent earlier omission from the 96 pages it had timely provided in response to his second PRA request; (2) the superior court expressly found that DOC had not acted in bad faith in having inadvertently omitted this [record]; and (3) RCW 42.56.565(1) prohibits an award of **any** PRA penalties to a prison inmate serving a criminal sentence absent a showing of bad faith.

Opinion at 7.

That opinion squarely conflicts with Yousoufian by granting courts discretion to reduce the penalty period.

Moreover, RCW 42.56.565(1) only applies to the "**award**" of penalties -- not to calculation of the penalty period. The superior court's decision to "award" penalties was not appealed, and left "intact" by the Court of Appeals. Opinion at 9. Nothing in RCW 42.56.565(1) indicates an intent to overrule Yousoufian or permit a reduction to the penalty period after penalties are awarded.

The Court of Appeals application of RCW 42.56.565(1) without notice, for the first time on appeal, conflicts with Franklin County Sheriff's Office v. Parmelee, 175 Wn.2d 476, 481, 285 P.3d 67 (2012) and Clark County v. Western Wash. Growth Management Hearding Rev. Bd., 177 Wn.2d 136, 298 P.3d 704 (2013). Parmelee held that Division Three erred in applying the injunctive provisions of RCW 42.56.565 retroactively for the first time upon appeal. Growth Management prohibited the Court of Appeals from adjudicating a claim that was not raised on appeal and separate and distinct from the issue presented.

Before this appeal, RCW 42.56.565(1) did not exist. Mr. Gronquist was not required to prove bad faith, and there was no need to appeal a finding which had no impact upon this case. If RCW 42.56.565(1) overrules Yousoufian, Mr. Gronquist should have been given the opportunity to present evidence to meet this new element.

II. THE COURT OF APPEALS HOLDING THAT DOC DID NOT NEED TO SEARCH FOR UNDOCUMENTED ALIEN LABOR RECORDS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURT OF APPEALS

Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), requires agencies to conduct a search "reasonably calculated to uncover all relevant documents" responsive to a PRA request. 172 Wn.2d at 720. The agency bears the burden of proving beyond material doubt that its search was adequate. Id., at 721. To do so, the agency must submit a detailed nonconclusory affidavit showing the search terms, the type of search performed, and establishing that "all places likely to contain responsive materials were searched." Id. An inadequate search constitutes a denial of public records. Id.

The Court of Appeals excused DOC's failure to produce such evidence, holding Gronquist "failed

to raise this alleged error below,"[11] and the "superior court did not err in ruling that Gronquist's request had been for non-existent, or identifiable, records." Opinion at 15.

That holding conflicts with Neighborhood Alliance because it shifts the inquiry from the reasonableness of an agency's search to whether responsive documents actually exist:

> the focus of the inqury is not whether responsive documents do in fact exist, but whether the search itself was adequate.

Neighborhood Alliance, 172 Wn.2d at 720-721; Forbes v. City of Gold Bar, 171 Wn.App. 857, 288 P.3d 384, 388 (2012)(same).

This also conflicts with Bonamy v. City of Seattle, 92 Wn.App. 403, 409-410, 960 P.2d 447 (1998); which held that a PRA request seeks "identifiable" records when there is "a reasonable description enabling the government employee to locate the requested records." The distinction

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[11] Mr. Gronquist challenged the sufficiency of DOC's search in the superior court. CP 342 § 2 & CP 346-347. This is clear from the superior court's order requiring DOC to show cause why "[a] full and complete search for records responsive to Plaintiff's July 30, 2007, public records request should not be compelled[.]" CP 326-327.

drawn in Bonamy was between a request for "information" versus a request for "records".

Mr. Gronquist's request sought specific, identifiable records which DOC uses daily. See § D(1), supra. DOC concedes that it could locate responsive records if it chose to search:

> In order to fulfill his request, the Department would have needed to create a list of all prisoners not citizens of the United States. Next, it would have to determine what prisoners on the list did not have a work visa. Then, it would have needed to cross check the names without work visas with all offenders who work in Class II Industries to determine if there were any prisoners who met the "undocumented alien worker" definition in Mr. Gronquist's PRA request. Finally, it would then have needed to identify any badges/cards or payroll information related to these offenders.

Respondent's Brief at 18.

Rather than search, DOC chose to evade its responsibilities by falsely claiming that records "did not exist" and Mr. Gronquist did not request "identifiable" records. Sustaining such conduct conflicts with Neighborhood Alliance and renders the PRA's vigorous provisions superfluous.

III. THE COURT OF APPEALS HOLDING THAT PRISON VIDEO SURVEILLANCE RECORDINGS ARE EXEMPT UNDER RCW 42.56.240(1) CONFLICTS WITH DECISIONS OF THIS COURT

In Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 643, 115 P.3d 316 (2005), this Court held that the internal operations of DOC does not constitute "law enforcement" under RCW 42.56.240(1):

> Were we to accept DOC's definition, investigations of all aspects of DOC operations would be off limits from public disclosure and only by accepting DOC's invitation to define every activity it undertakes as "law enforcement" can we uphold the lower court.

Prison Legal News, 154 Wn.2d at 640.

The Court also rejected DOC's assertion that "all" records could be exempt without determining what information in each record fell within an exemption. Id., at 644-649.

In conflict with Prison Legal News, the Court of Appeals held that internal operations of DOC **are** "law enforcement" under RCW 42.56.240(1), and DOC video surveillance recordings could be withheld without determining if specific information in the recordings requested fell within the exemption. Opinion at 12.

Resident Action Council v. Seattle Housing Authority, 177 Wn.2d 417, 463-464, 300 P.3d 376 (2013), requires agencies to review requested records to determine if an exemption applies. If

an exemption applies, the agency must determine if it is categorical or conditional. If the exemption is conditional, the agency must determine if protected information can be redacted from the record. If it can, the record must be redacted and produced. 177 Wn.2d at 384.

RCW 42.56.240(1) is a conditional exemption. Id., at 463-464. The superior court, however, held RCW 42.56.240(1) "categorically" exempts prison surveillance recordings. CP 11. The Court of Appeals treated RCW 42.56.240(1) as a categorical exemption; overlooking DOC's failure to search for, review, and preserve the recordings. Opinion at 9-12.

Neither DOC, the trial court, nor the Court of Appeals ever viewed the surveillance recordings Gronquist requested, or determined if redaction was possible, contrary to Resident Action Council. Cf. Prison Legal News v. Executive Office for United States, 628 F.3d 1243 (10th Cir. 2011)(effectively redacting prison video recordings to permit disclosure under FOIA).

Affirmance of the denial of Gronquist's motion to vacate this holding conflicts with Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d

260 (1968), because it focused on the presumptive correctness of the exemption ruling rather than DOC's conduct in obtaining a judgment by fraud.

The ruling also conflicts with Neighborhood Alliance, Sanders v. State, 169 Wn.2d 827, 836, 854-856, 240 P.3d 120 (2010), and Rental Housing Association v. Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009), by permitting DOC to withhold records without searching for them, identifying them, or providing any valid basis for the claimed exemption.

IV. MR. GRONQUIST'S FREE SPEECH CLAIM RAISED SIGNIFICANT CONSTITUTIONAL QUESTIONS THAT SHOULD NOT HAVE BEEN DISMISSED UNDER CR 12(B)(6)

This case presents an issue of first impression: Whether Const. Art. I, § 5 prohibits DOC from censoring public records mailed to prisoners. Brief at 37-49. Article I, Section 5, applies to "every person" and includes the right to receive public records. Fritz v. Gorton, 82 Wn.2d 275, 296-297, 517 P.2d 911 (1974). Prior restraints are so offensive that administrative agencies are prohibited from imposing them. Adams v. Hinkle, 51 Wn.2d 763, 322 P.2d 844 (1958); Fine Arts Guild, Inc. v. Seattle, 74 Wn.2d 503, 454 P.2d 602 (1968). Even the judiciary is enjoined,

where "the information sought to be restrained was lawfully obtained, true, and a matter of public record." State v. Coe, 101 Wn.2d 364, 375, 679 P.2d 353 (1984).

But the superior court held that DOC possesses unchallengable authority to censor inmate mail under RCW 72.09.530 and Livingston v. Cedeno, 164 Wn.2d 46, 186 P.3d 1055 (2008). CP 98-99 & 118-123. The Court of Appeals affirmed.[12] Opinion at 17-19. Livingston, however, only held that DOC's censorship of public records did not violate **the PRA**. 164 Wn.2d at 55-56. The rulings also failed to follow the standard of review for a CR 12(b)(6) dismissal required by Bravo v. Dolsen Co., 125 Wn.2d 745, 750, 888 P.2d 147 (1995)

Submited this 26th day of December, 2013.

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[12] Contrary to the Court of Appeals holding, the complaint presented two claims: to enjoin censorship of **the public records at issue**; and "a prospective injunction" to enjoin DOC from censoring "**any** public record". CP 325 §§ B & C. The later claim was dismissed under CR 12(b)(6), properly appealed, and not abandoned or moot. CP 98-99 & 100. CP 325.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEREK E. GRONQUIST, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondents.	No. 42774-5-II (consolidated with)
DEREK E. GRONQUIST, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondents	No. 43500-4-II PART PUBLISHED OPINION

HUNT, J. — Derek E. Gronquist appeals several superior court orders and findings entered in his Public Records Act (PRA)[1] lawsuit. He argues that the superior court erred in (1) limiting the penalty period of the Department of Corrections (DOC)'s PRA violation and awarding a penalty amount that was too small; and (2) concluding that the surveillance video

[1] Chapter 42.56 RCW.

recordings he requested on August 5, 2007, were exempt from disclosure under the PRA. We hold that RCW 42.56.565(1) bars an award of PRA penalties to Gronquist because (1) he was serving a criminal sentence in a correctional facility when he made his PRA request to DOC; (2) the superior court found no bad faith in DOC's inadvertent omission of one page from the documents it produced in response to his PRA request; and (3) no final judgment had yet been entered in his PRA action at the time the legislature enacted this prohibition in 2011. We further hold that the prison surveillance video recordings that Gronquist requested were exempt from disclosure under RCW 42.56.240(1). Accordingly, we affirm.[2]

FACTS

I. PRA REQUESTS TO DOC

A. July 30, 2007 Request

On July 24, 2007, DOC inmate Derek E. Gronquist sent a PRA request to DOC seeking:

> 1. All [DOC] inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries[3] [. . . .];
> 2. All records demonstrating the payment of any wages, gratuities, or other forms of payment to undocumented alien workers employed by the DOC[. . . .];
> 3. All records revealing internal DOC communications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program.

Clerk's Papers (CP) at 252-53. Gronquist clarified that "'undocumented alien worker'" meant "any person who is not a [U]nited [S]tates citizen and who does not possess a current and valid work permit or similar document authorizing such person to be employed in the [U]nited

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[2] Because DOC did not cross-appeal the superior court's award of a PRA penalty to Gronquist, the propriety of this award is not before us in the instant appeal.

[3] Neither Gronquist's request nor the record explains what "DOC's Class II Industries program" encompasses.

[S]tates." CP at 253. DOC received this request on July 30. The next day, DOC responded that it had no records to disclose in response to Gronquist's request because DOC's Class II Industries program did not identify offenders by citizenship and citizenship was not a part of its employment process.

B. August 9, 2007 Request

On August 9, DOC received from Gronquist a second, unrelated PRA request to DOC dated August 5, stating:

> I am requesting the following records concerning an assault and/or extortion attempt that happened to me at the Clallam Bay Correction[s] Center on June 17, 2007:
>
> 1. All documents created in response to, or because of, this incident;
>
> [. . .]
>
> 4. The surv[e]illance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007;
>
> 5. The surv[e]illance video of the chow hall used for C-unit inmates on and for the [b]reakfast meal on June 17, 2007;
>
> [. . .]
>
> 9. The complete [i]nternal [i]nvestigations file.

CP at 215-16. In response to this request, on October 26, DOC staff (1) mailed Gronquist 96 pages of documents, from which 1 page was inadvertently missing; and (2) claimed that the surveillance video recordings were exempt from PRA disclosure under former RCW 42.56.420(2) (2005), providing a brief explanation for this claimed exemption. On November 2, the Stafford Creek Corrections Center intercepted this mail and withheld 39 pages of documents and 11 photographs in accordance with DOC's mail rejection policy.[4]

[4] The record on appeal neither includes nor explains DOC's mail rejection policy.

Eventually DOC released these intercepted documents to Gronquist during the discovery process in an unrelated case. Gronquist did not alert DOC about the single missing page from the 96 pages it had provided. When DOC later learned about the missing page through Gronquist's lawsuit, it located and supplied it to him.

II. JUDICIAL REVIEW

On June 12, 2009, Gronquist filed a motion for judicial review under the PRA, asking the superior court to require DOC to "show cause" why "disclosure of requested public records should not be compelled and sanctions imposed" for DOC's alleged PRA violations. CP at 429. On July 27, Gronquist filed a complaint in superior court, claiming DOC had violated the PRA in (1) failing to conduct an adequate search for records involving "undocumented alien workers"; (2) withholding surveillance video recordings; and (3) improperly withholding one page from the internal investigation report. CP at 321. Gronquist also alleged that Stafford Creek's screening and withholding of 39 pages and 11 photographs of his PRA documents violated the free speech clause of the Washington Constitution, article I, section 5.

A. December 18, 2009 PRA Order, Findings, and Penalty

On December 18, 2009, the superior court ruled that (1) DOC had violated the PRA by inadvertently withholding one page of the documents it had provided in response to Gronquist's August 9, 2007 PRA request; (2) DOC's omission had not been in bad faith; (3) Gronquist had failed to request identifiable records when he requested information about undocumented alien workers (because "records in the form requested did not exist"); and (4) DOC properly withheld

surveillance video tapes from disclosure under RCW 42.56.240(1).[5] I CP at 125. For inadvertently having withheld 1 page, the superior court ordered DOC to pay a PRA penalty of $15 per day for 24 days, for a total of $260 to Gronquist.

Arguing fraud, Gronquist later moved to vacate the superior court's December 18 order. The superior court denied this motion.

B. Motion To Dismiss; January 3, 2011 Order

On October 8, 2010, DOC moved to dismiss Gronquist's PRA action under CR 12(b)(6). DOC argued that (1) the superior court had resolved all of Gronquist's PRA claims in its December 18, 2009 show cause order; and (2) the superior court should dismiss Gronquist's remaining art. 1, § 5 claim as a matter of law because (a) violations of the Washington Constitution are not independently actionable torts, and (b) Gronquist had no protected interest in receiving uncensored mail in prison. On January 3, 2011, the superior court granted the motion in part and dismissed all of Gronquist's PRA claims except his claim for injunctive relief from DOC's withholding a portion of his incoming mail "without legitimate peneological [sic] reasons." I CP at 98-99.

C. Motion To Amend; February 27, 2012 Order

On January 31, 2012, Gronquist moved for leave to file a second amended complaint, restating his previously resolved and dismissed PRA claims, but adding an allegation that DOC had violated the PRA by failing to conduct an adequate search for records. On February 27, the

[5] The legislature amended RCW 42.56.240 in 2010, 2012, and 2013. LAWS OF 2013, ch. 315 § 2; ch. 190 § 7; ch. 183 § 1; LAWS OF 2012, ch. 88 § 1; LAWS OF 2010, ch. 266 § 2; ch. 182 § 5. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

superior court (1) denied Gronquist's motion as untimely; and (2) dismissed Gronquist's sole remaining art. I, § 5 claim with prejudice because he had stated in his memorandum that his art. I, § 5 claim was "moot."[6] Suppl. CP at 477.

Gronquist appeals the superior court's (1) December 18, 2009 findings and penalty order[7]; (2) January 3, 2011 order granting in part and denying in part DOC's motion to dismiss; and (3) February 27, 2012 order denying Gronquist's motion for leave to amend his complaint and dismissing his remaining claims.

ANALYSIS

I. RCW 42.56.565(1): ABSENCE OF BAD FAITH BARS PRA PENALTY FOR PRISONER

Gronquist challenges the amount of the superior court's December 18, 2009 penalties. He argues that the superior court lacked authority to reduce the penalty period for DOC's inadvertent late disclosure of 1 page of the 96 pages of documents it had provided in response to his PRA request. We hold that RCW 42.56.565(1) defeats this argument because (1) DOC did provide him the missing page when it became aware of its inadvertent earlier omission from the 96 pages it had timely provided in response to his second PRA request; (2) the superior court expressly found that DOC had not acted in bad faith in having inadvertently omitted this page;

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[6] *See* Gronquist's memorandum in support of this motion. *See also* Gronquist's related motion, in which he stated that because he had since received the records that were the basis of his art. I, § 5 claim, injunctive relief was no longer necessary.

[7] DOC does not cross-appeal the trial court's imposition of PRA penalties, including the amount. It challenges only Gronquist's assertion that the trial court erred in calculating penalties that were too low, or, in the alternative, that Gronquist's claim is moot in light of RCW 42.56.565(1).

and (3) RCW 42.56.565(1) prohibits an award of *any* PRA penalties to a prison inmate serving a criminal sentence absent a showing of bad faith.[8]

The question of whether the PRA authorizes a trial court to reduce the penalty period is a question of law, which we review de novo. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).[9] We look to a statute's plain language to give effect to legislative intent. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

RCW 42.56.565(1) provides:

> A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency *acted in bad faith* in denying the person the opportunity to inspect or copy a public record.

[8] Although neither party argues that RCW 42.56.565(1) generally prohibits prisoners' receipt of *any* PRA penalties (*see* discussion later in this Analysis), we may affirm the superior court on any ground the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

[9] The legislature's 2005 recodification of the Public Disclosure Act, chapter 42.17 RCW, as the Public Records Act, chapter 42.56 RCW, LAWS OF 2005, ch. 274, § 1, did not alter the pertinent language on which our Supreme Court relied in *Yousoufian*. *See* former RCW 42.17; RCW 42.56. Accordingly, we refer to the PDA by its current title, the PRA.

(Emphasis added).[10] The legislature further specified that the above subsection (1) "applies to all actions brought under RCW 42.56.550 in which *final judgment has not been entered* as of the effective date of this section [July 22, 2011]." LAWS OF 2011, ch. 300, § 2 (emphasis added).

Generally, a "final judgment" is a judgment that ends all litigation, including appellate review, leaving nothing for the court to do but to execute the judgment. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn. App. 221, 225, 901 P.2d 1060 (1995) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)), *aff'd*, 130 Wn.2d 862, 929 P.2d 379 (1996). But the legislature did not specify whether its statutory reference to a "final judgment" in the comment to RCW 42.56.565(1) encompasses this broad concept of complete and final adjudication of an issue, including exhaustion of appellate review. *See In re Skylstad*, 160 Wn.2d 944, 948-49, 162 P.3d 413 (2007) (judgment becomes final "when all litigation on the merits ends," interpreting RCW 10.30.090 in criminal context).

This broad interpretation of "final judgment" is consistent with several recent Washington cases addressing RCW 42.56.565. *See Franklin County Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 481 n.5, 285 P.3d 67 (2012) (contemplating the superior court's application of RCW 42.56.565 on remand, notwithstanding its being enacted *after* the plaintiff sought interlocutory review), *cert. denied*, 133 S. Ct. 2037 (2013); *DeLong v. Parmelee*, 164 Wn. App. 781, 786-87, 267 P.3d 410 (2011) (applying RCW 42.56.565(1) on appeal to bar an inmate's recovery of PRA penalties, notwithstanding its being enacted *after* the original trial),

[10] *See Burt v. Washington State Department of Corrections*, 168 Wn.2d 828, 837 n.9, 231 P.3d 191 (2010) (noting that legislature's enacting of RCW 42.56.565 would "greatly curtail abusive prisoner requests for public records").

review denied, 173 Wn.2d 1027 (2012). We apply this generally accepted broad definition of "final judgment" here.

In 2011, while Gronquist's PRA claims were awaiting appellate review, our legislature promulgated RCW 42.56.565(1), accompanied by a "final judgment" limitation in the related comment; thus, no "final judgment" has yet been entered in his action. Gronquist is serving a criminal sentence. And the superior court found no bad faith in DOC's inadvertently omitting one page from the documents it provided in response to Gronquist's second PRA request. Thus, RCW 42.56.565(1) applies to bar his claim for PRA penalties. Holding that because Gronquist is not statutorily entitled to *any* amount of PRA penalties, we do not further consider his argument that the penalty amounts the superior court awarded him were too small. DOC did not cross appeal this award, thus, we must leave the superior court's PRA penalty intact.

II. SURVEILLANCE VIDEO RECORDINGS; STATUTORY EXEMPTION

Gronquist next argues that the superior court erred in concluding that the surveillance video recordings he requested on August 9, 2007, were exempt from disclosure. Again, we disagree.

We liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. RCW 42.56.030. The PRA requires agencies to disclose any public record upon request unless an enumerated exemption applies. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010); RCW 42.56.070(1). The burden of proof is on the agency to establish that a specific exemption applies. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

Gronquist's August 9, 2007 PRA request sought "surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007" and "surveillance video of the chow hall used for C-unit inmates on and for the [b]reakfast meal on June 17, 2007." CP at 215-16. In its response to Gronquist's show cause motion, DOC argued that the surveillance video recordings were exempt under RCW 42.56.240, which provides:

> The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

CP at 191.

To demonstrate how nondisclosure of these surveillance videos is "essential to effective law enforcement,"[11] the DOC supplied the declaration of Richard Morgan, DOC's Director of Prisons. Morgan explained that DOC's surveillance system is (1) "[o]ne of the most important tools for maintaining the security and orderly operation of prisons,"[12] and (2) "an essential element of effective control of a population that is 100 [percent] criminal in its composition and is accustomed to evading detection and exploiting the absence of authority, monitoring, and accountability"[13] as follows:

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[11] RCW 42.56.240(1).

[12] CP at 290.

[13] CP at 290.

> Since the resources are not available to accomplish 100 [percent] surveillance at all times, it is mission critical that offenders and their cohorts not know the capabilities and the limitations of DOC's surveillance capabilities.
> [. . .]
>
> It is a significant advantage to have offenders uncertain as to what is being monitored, what is recorded, and what is in the field of view. Offenders will often use "blind spots" (locations that have infrequent staff presence and no electronic surveillance) to commit acts of violence and purveying contraband. In reconstructing incidents and interviewing offenders, it has been found that incident location is often chosen due to a perceived lack of surveillance. In my expert opinion, surveillance, real or imagined, is a powerful deterrent to assaults and other problematic behaviors by offenders.

CP at 290-91. Morgan concluded, "Providing offenders access to recordings of DOC surveillance videos would allow them to accurately determine which areas are weak or devoid in DOC's ability to capture identities in the aftermath of an incident or crime." CP at 291. The record contains no controverting evidence.[14]

Under RCW 42.56.240(1), an investigative, law enforcement, or penology agency must have compiled the "[s]pecific intelligence information and specific investigative records" that the requester seeks. Secondly, the agency must show that the "nondisclosure" of the information is "essential to effective law enforcement." RCW 42.56.240(1). Gronquist does not contend that DOC is not a law enforcement agency. And, as Morgan explained, providing inmates with

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[14] Gronquist cites *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 643, 115 P.3d 316 (2005), to argue that DOC's claiming exemption of disclosure of prison video surveillance recordings is contrary to our general instruction to construe PRA exemptions narrowly. *Prison Legal News*, however, does not control here. In *Prison Legal News*, DOC attempted to withhold identifying information in public records related to medical misconduct investigations in Washington prisons. 154 Wn.2d at 632. Examining the "specific investigative records" exemption of former RCW 42.17.310(1)(d) (2003), now codified as RCW 42.56.240(1), our Supreme Court held that DOC failed to meet its burden in proving that the redactions were "'essential to effective law enforcement.'" *Prison Legal News* at 639. Here, as we note above, DOC has sustained its burden in showing that nondisclosure is "essential to effective law enforcement."

access to recordings of DOC's surveillance videos would allow prisoners to exploit weaknesses in DOC's surveillance system. As Division One of our court has held, "Intelligence information provided by video surveillance systems . . . falls squarely within the core definitions of 'law enforcement,'" thereby exempting surveillance video recordings from disclosure under RCW 42.56.240(1). *Fischer v. Wash. State Dep't of Corr.*, 160 Wn. App. 722, 727-28, 254 P.3d 824 (2011), *review denied*, 172 Wn.2d 1001 (2011). We hold, therefore, that the superior court did not err in concluding that the surveillance video recordings Gronquist sought were exempt from the PRA's otherwise broad disclosure requirements.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Gronquist further argues that the superior court erred in (1) denying his motion to vacate the December 18, 2009 show cause order; (2) concluding that his July 30, 2007 PRA request did not seek identifiable public records; (3) denying his motion to amend his complaint as untimely; and (4) dismissing his free speech claim. Gronquist also argues that DOC failed to conduct an objectively reasonable search for records in response to his July 30, 2007 PRA request and that RCW 72.09.530 is unconstitutionally overbroad. Holding that the superior court did not err and refusing to consider unpreserved arguments Gronquist raises for the first time on appeal, we affirm.

III. MOTION TO VACATE

Gronquist contends that the superior court abused its discretion in denying his motion to vacate the December 18, 2009 show cause order, which decision, he argues, "was based upon the

untenable conclusion that the previous '[o]rder was correct, in that video recordings are categorically exempt from disclosure." Second Amend. Br. of Appellant at 51 (alteration in original) (quoting CP at 11). We have just held that the trial court did not err in concluding that the surveillance video recordings were exempt under RCW 42.56.240(1). Because Gronquist fails to articulate any other reason why the superior court's decision was in error, we do not further address this claim.

IV. REQUEST FOR NONEXISTENT "UNDOCUMENTED ALIEN LABOR" RECORDS

A. Unidentifiable Records Request

Gronquist next argues that the superior court erred in its December 18, 2009[15] order when it concluded that his July 30, 2007 PRA request for "[a]ll [DOC] inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries"[16] did not seek "identifiable" public records. Second Am. Br. of Appellant at 22, 28. We disagree.

The PRA requires agencies to respond to requests for only "identifiable public records." RCW 42.56.080; *see also Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004). A party seeking public records under the PRA must, "at a minimum, provide notice that the request is made pursuant to the [PRA] and identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner*, 151 Wn.2d at 447 (citing *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000)). "The [PRA] does not require agencies to research or

[15] The Second Amended Br. of Appellant at 28 refers to the superior court's "December 18, 2007" order. We believe this to be a scrivener's error and reference should be to the court's December 18, 2009 order.

[16] CP at 252.

explain public records, but only to make those records accessible to the public." *Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000) (citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012 (1999)). Moreover, an agency has no duty to create or produce records that are nonexistent. *West v. Wash. State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012).

Gronquist argues that because DOC Policy 330.700 states that DOC "will identify offenders who are citizens of other nations," the superior court erred in finding that Gronquist's request for "undocumented alien workers" in DOC's Class II Industries program did not seek identifiable public records.[17] Second Am. Br. of Appellant at 24, 26-27 (quoting CP at 425). There is no support for this claim in law or in the record. Michael Holthe, Clallam Bay Corrections Center's Public Disclosure Coordinator, declared that after receiving Gronquist's July 30, 2007 request, he had inquired with the Class II Industries program manager, who explained that Class II Industries did not identify offenders by citizenship and that such

[17] Contrary to Gronquist's assertion, DOC's identification of offenders by citizenship does not suggest that DOC's Class II Industries program similarly identifies its workers by their citizenship. Moreover, there is nothing further in the record to suggest that the superior court erred in concluding that "records *in the form requested* did not exist." CP at 125 (emphasis added).

classification was not part of its employment process.[18] Thus, the record supports the superior court's ruling that there were no identifiable records matching Gronquist's request. We hold, therefore, that the superior court did not err in ruling that Gronquist's request had been for non-existent, or unidentifiable, records.

B. Objectively Reasonable Search for Records

In a related argument, Gronquist contends for the first time on appeal that DOC failed to conduct an objectively reasonable search for "undocumented alien labor" records. Second Am. Br. of Appellant at 29. Because Gronquist failed to raise this issue below, we do not address it on appeal.

"An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (citing *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996)). Furthermore, we "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Because Gronquist failed to raise this alleged error below, we decline to review it for the first time on appeal.

[18] Gronquist argues extensively that, because DOC has access to a variety of information about its inmates, including citizenship, it *could have compared* each of its Class II Industries workers against its other records to provide Gronquist his requested information. As we have already explained, the PRA does not require any agency to create documents in response to PRA requests. *See Smith*, 100 Wn. App. at 12 ("An important distinction must be drawn between a request for information about public records and a request for the records themselves."); *West*, 163 Wn. App. at 242 (Agency has no duty to create or produce a record that is nonexistent).

V. MOTION TO AMEND COMPLAINT

Gronquist next argues that the superior court erred in denying as untimely his request for leave to amend his complaint to add a new PRA claim. Again, we disagree.

We review for abuse of discretion a trial court's ruling on a motion to amend the complaint. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a). A trial court must grant leave freely "when justice so requires." CR 15(a). But undue delay is a proper ground for denying leave to amend. *Elliott v. Barnes*, 32 Wn. App. 88, 92, 645 P.2d 1136 (1982); *see also Wilson v. Horsley*, 137 Wn.2d 500, 507, 974 P.2d 316 (1999) (request to amend on eve of trial supported denial of leave to amend).

Here, Gronquist requested leave from the superior court to file a second amended complaint on January 31, 2012, more than two and a half years after he filed his first amended complaint and DOC filed its answer, and more than one year after the superior court dismissed his remaining PRA claims. Moreover, Gronquist has neither designated any record nor identified in his brief any reason to show why the superior court erred in ruling that his motion to amend was untimely. *See* RAP 10.3(a)(6) (Appellant must provide argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record). "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West v. Thurston County*, 168 Wn. App. 162, 187,

275 P.3d 1200 (2012) (alteration in original) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Thus, we do not further consider this unsupported argument.

VI. ART I, § 5 CLAIMS

Gronquist next argues that Stafford Creek's seizure of some of the PRA documents DOC had mailed to him violated his freedom of speech contrary to article I, section 5 of the Washington Constitution. He also argues for the first time on appeal that RCW 72.09.530 is unconstitutionally overbroad. These claims fail.

A. Mail Room Seizure Claim Abandoned

"It is a long-standing rule that abandoned issues will not be addressed on appeal." *Green v. Normandy Park*, 137 Wn. App. 665, 688, 151, P.3d 1038 (2007); RAP 2.5(a).[19] In his memorandum in support of his motion requesting leave to amend his complaint, Gronquist notified the superior court that since bringing his original complaint alleging his art. I, § 5 challenge, DOC had "produced the previously censored records at issue" and that the production of these records rendered his art. I, § 5 claim "moot."[20] Suppl. CP at 476, 477. The record

[19] *See also Peck v. Davies*, 154 Wash. 559, 563, 283 P. 173 (1929); *Gregory v. Peabody*, 138 Wash. 591, 597, 244 P. 998 (1926); *Buckeye Buggy Co. v. Montana Stables, Inc.*, 43 Wash. 49, 51, 85 P. 1077 (1906); *Soderberg Adver., Inc. v. Kent–Moore Corp.*, 11 Wn. App. 721, 737, 524 P.2d 1355 (1974); *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wn. App. 790, 793–94, 478 P.2d 253 (1970).

[20] Gronquist argues that (1) his first amended complaint raised both "facial" and "as applied" free speech challenges, (2) the superior court dismissed the "facial" challenge in response to DOC's motion to dismiss, and (3) he abandoned only his "as applied" challenge as "moot." Reply Br. of Appellant at 10-11. But after a careful review of the record on appeal, we conclude that Gronquist's characterization of his first amended complaint is inaccurate: Gronquist alleged that DOC's censorship of public records "violate[d] the Free Speech Clause of Article I, Section 5 of the Washington State Constitution." CP at 324. Contrary to his assertions on appeal, his first amended complaint did not raise two separate free speech challenges.

shows that the superior court relied on Gronquist's assertion that his claim was "moot" when it dismissed his art. I, § 5 challenge and denied Gronquist's motion requesting leave to amend his complaint to add a new PRA claim that DOC failed "to locate, identify, and allow inspection of records relating to . . . staff involvement in the assault of Mr. Gronquist." Suppl. CP at 477. Thus, there was no reason for the superior court to consider this claim further; similarly, there is no justiciable issue for us to address in this appeal. Holding that Gronquist abandoned his free speech challenge below, we do not further consider Gronquist's "facial" challenge on appeal.

B. RCW 72.09.530 Constitutionality Claim Moot

Gronquist also argues for the first time on appeal that that RCW 72.09.530, which prohibits an inmate's "receipt or possession of anything that is determined to be contraband," is unconstitutionally overbroad. Even assuming, without deciding, that Gronquist can raise this argument in his reply brief, we disagree that he is articulating a "manifest constitutional error that may be raised for the first time on appeal" under RAP 2.5(a)(3),[21] especially in light of the mootness of this claim. Reply Br. of Appellant at 12 (citing RAP 2.5(a)(3)).

As a general rule, Washington appellate courts will not address "moot questions or abstract propositions." *Norman v. Chelan County Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 635,

[21] Moreover, Gronquist's argument—that RCW 72.09.530 is unconstitutionally overbroad—is not an "error" that was "manifest" in any proceeding below; rather, it is a challenge to the constitutionality of the statute itself and not an error committed by the superior court. *See State v. Grimes*, 165 Wn. App. 172, 187, 267 P.3d 454 (2011), *review denied*, 175 Wn.2d 1010 (2012) (for RAP 2.5(a)(3) to apply, an appellant must show both that (1) the error implicates a specifically identified constitutional right, and (2) the error is "manifest," in that it had "practical and identifiable consequences" in the trial below). Merely challenging the constitutionality of the statute does not permit Gronquist to avail himself of RAP 2.5(a)(3)'s exception to the general rule precluding review of issues not preserved below.

673 P.2d 189 (1983) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). An appeal is moot where it presents "purely academic"[22] questions and where "'the court cannot provide the basic relief originally sought, or can no longer provide effective relief.'" *IBF, LLC v. Heuft*, 141 Wn. App. 624, 630-31, 174 P.3d 95 (2007) (internal quotation marks omitted) (quoting *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 622, 45 P.3d 627 (2002)). Because Gronquist has since received the records that Stafford Creek seized in the mail room, we cannot afford him any relief. Thus this issue is moot, and we need not further address it.

We affirm.

A majority of the panel having determined that this part of the opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, C.J.

Maxa, J.

[22] *City of Sequim v. Malkasian*, 157 Wn.2d 251, 258, 138 P.3d 943 (2006) (internal quotation marks omitted) (quoting *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEREK. E. GRONQUIST,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

No. 42774-5-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **October 29, 2013** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Hunt, Maxa

DATED this 10th day of December, 2013.

FOR THE COURT:

CHIEF JUDGE

Brian James Considine
Washington State Attorney General's Office
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed and stamped envelope in the United States Mail, containing: Petition for Review. Said envelope(s) was directed to:

Brian J. Considine
Assistant Attorney General
P.O. Box 40116
Olympia, WA 98504; and

David C. Ponzoha, Clerk
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Tacoma, WA 98402-4454

Dated this 2 day of January, 2014.

Barbara J. Parker
Barbara J. Parker