

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Feb 04, 2014, 1:47 pm  
BY RONALD R. CARPENTER  
CLERK

E CCF  
RECEIVED BY E-MAIL

NO. 89790-5

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

DEREK E. GRONQUIST,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

---

**ANSWER TO PETITION FOR REVIEW**

---

ROBERT W. FERGUSON  
Attorney General

BRIAN J. CONSIDINE, WSBA #39517  
Assistant Attorney General  
Corrections Division OID #91025  
P.O. Box 40116  
Olympia, WA 98504-0116  
(360) 586-1445  
BrianC1@atg.wa.gov

 ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. RESTATEMENT OF THE ISSUES .....2

III. RESTATEMENT OF THE CASE .....3

    A. PRA Requests To The Department Of Corrections .....3

        1. July 30, 2007 Request.....3

        2. August 9, 2007 Request.....4

    B. Mr. Gronquist’s PRA Action .....6

        1. Superior Court’s December 18, 2009 Ruling .....6

        2. Department’s Motion to Dismiss and Superior Court’s January 3, 2011 Order .....7

        3. Motion To Vacate; September 28, 2011 Order .....7

        4. Motion To Amend; February 27, 2012 Order .....8

IV. REASONS WHY REVIEW SHOULD BE DENIED .....10

    A. The Court Of Appeals Application Of RCW 42.56.565(1)’s Prohibition Of PRA Penalties To A Prison Inmate Serving A Criminal Sentence Absent A Showing Of Bad Faith Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court Of Appeals.....10

    B. The Court of Appeals Determination That “Undocumented Alien Workers” records asked for nonexistent, Unidentifiable Records under RCW 42.56.080 Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court of Appeals.....12

    C. The Court Of Appeals’ Determination That Prison Video Surveillance Videos Are Exempt From Disclosure Under

RCW 42.56.240(1) When The Videos Are Found To Be Specific Intelligence Information And The Nondisclosure Of The Videos Is Essential To Effective Law Enforcement Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court Of Appeals.....13

D. The Court Of Appeals Decision Dismissing Mr. Gronquist’s Article I, Section 5 Claims Because He Abandoned Them In The Superior Court Or Attempted To Raise Them For The First Time On Appeal Does Not Raise A Significant Question Of Law Under The Constitution.....15

V. CONCLUSION .....16

APPENDIX 1 *Gronquist v. DOC*, Court of Appeals Case No. 42774-5-II, Part Published Opinion

## TABLE OF AUTHORITIES

### Cases

<i>Fischer v. Wash. State Dep't of Corr.</i> , 160 Wn. App. 722, 254 P.3d 824, <i>review denied</i> , 172 Wn.2d 1001, 257 P.3d 666 (2011) .....	9, 15
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	13
<i>Livingston v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008).....	5
<i>Prison Legal News, Inc. v. Dep't of Corrections</i> , 154 Wn.2d 628, 115 P.3d 316 (2005).....	14
<i>Smith v. Okanogan County</i> , 100 Wn. App. 7, 994 P.2d 857 (2000).....	12
<i>West v. Washington State Dep't of Natural Res.</i> , 163 Wn. App. 235, 258 P.3d 78 (2011), <i>review denied</i> , 173 Wn.2d 1020, 272 P.3d 850 (2012) .....	12
<i>Yousoufian v. Office of Ron Sims</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	10

### Statutes

RCW 42.56.080 .....	2
RCW 42.56.240 .....	5
RCW 42.56.240(1).....	passim
RCW 42.56.565 .....	10
RCW 42.56.565 (as amended by Laws of 2011, ch. 300, § 2) .....	11
RCW 42.56.565(1).....	1, 9, 10, 11

**Rules**

CR 60(b)(4)..... 7

RAP 13.4(b) ..... 16

RAP 13.4(b)(1) ..... 1, 12, 13, 15

RAP 13.4(b)(2) ..... 1, 12, 13, 15

RAP 13.4(b)(3) ..... 1

## I. INTRODUCTION

Derek Gronquist, a Washington State prisoner, argues review should be granted under RAP 13.4(b)(1) and (b)(2) because (1) the Court of Appeals misapplied RCW 42.56.565(1) determining it barred review of his claim when the trial court found the Department of Corrections (Department) did not act in “bad faith;” (2) prison surveillance videos were exempt from disclosure under RCW 42.56.240(1); and (3) a request for inmate badges/cards from undocumented alien workers in the Department’s Class II Industries asked for unidentifiable records because the records did not exist. Mr. Gronquist also argues for review of his dismissed free speech claims under RAP 13.4(b)(3) even though the Court of Appeals dismissed them because they were abandoned and/or moot.

Mr. Gronquist fails to show the Court of Appeals’ decision satisfies any of the criteria for granting review. The decision is entirely consistent with the Public Records Act (PRA), RCW 42.56.565(1), RCW 42.56.240(1), and case law applicable to Mr. Gronquist’s claims. Additionally, the court appropriately dismissed claims that were abandoned and/or not raised in the trial court. Mr. Gronquist’s petition fails to demonstrate any actual conflict; it merely reveals his dissatisfaction with the appeal court’s correct application of state law. Therefore, his petition should be denied.

## II. RESTATEMENT OF THE ISSUES

1. Should the Court accept review when the application of RCW 42.56.565(1) prohibiting an award of any PRA penalties to a prison inmate serving a criminal sentence absent a showing of bad faith is not in conflict with any decision of this court or a decision by the court of appeals because the trial court found there was no bad faith barring the Appellant from challenging the penalties?

2. Should the Court accept review when the application of RCW 42.56.240(1) does not conflict with any decision of this court or a decision by the court of appeals because it allows prison video surveillance to be exempt from disclosure when the videos are found to be specific intelligence information and the nondisclosure of these videos is essential to effective law enforcement?

3. Should the Court accept review when the application of RCW 42.56.080's "identifiable public records" requirement does not conflict with any decision of this court or a decision by the court of appeals because the Appellant failed to make a request for an identifiable public record under RCW 42.56.080 when he requested records that did not exist in the form requested?

4. Should the Court accept review of the Appellant's article I, section 5, claims when he does not raise a significant question of law

under the Constitution because he abandoned these claims at the trial court level or raised them for the first time on appeal?

### **III. RESTATEMENT OF THE CASE**

#### **A. PRA Requests To The Department Of Corrections**

##### **1. July 30, 2007 Request**

On July 30, 2007, the Department received a public records request from Mr. Gronquist seeking:

1. All [DOC] inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries [....];
2. All records demonstrating the payment of any wages, gratuities, or other forms of payment to undocumented alien workers employed by the DOC's Class II Industries [....]; and
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 247, 252-53. Mr. Gronquist clarified "undocumented alien worker" meant "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 person to be employed in the United States. CP at 253. The Department responded to Mr. Gronquist informing him it had no responsive records to disclose because its Class II Industries

program did not identify offenders by citizenship and citizenship was not a part of its employment process. CP at 248.

**2. August 9, 2007 Request**

On August 9, 2007, the Department received a second PRA request from Mr. Gronquist stating:

I am requesting the following records concerning an assault and/or extortion attempt that happened to me at the Clallam Bay Corrections Center on June 17, 2007:

1. All documents created in response to, or because of, this incident;
2. All infraction reports, witness statements, inmate statements, disciplinary hearing findings and recommendations, confidential information summaries, and administrative segregation placement, referrals and/or recommendations;
3. All photographs;
4. The surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007;
5. The surveillance video of the chow hall used for C-unit inmates on and for the breakfast meal on June 17, 2007;
6. All records of staff interviews;
7. All inmate statements;
8. Any summaries or reports;
9. The complete internal investigations file;
10. All communications, letters, and emails;

11. Any recommendations;
12. All disciplinary actions taken against staff;
13. Any information or documentation gathered, made, or obtained because of events occurring since June 17, 2007 which may relate to this event; and
14. All documents and communications from outside law enforcement officials.

CP 215-216.

On October 26, 2007, the Department mailed Mr. Gronquist ninety-six (96) pages of responsive records, inadvertently omitting one page in the group, and claimed an exemption from disclosure for requested prison surveillance tapes under RCW 42.56.240. CP at 249-250. On November 2, 2007, the Stafford Creek Corrections Center mail room screened the records and withheld portions of the enclosed records in accordance with the Department's mail policy. CP 315. The Department informed him that thirty-nine pages of documents and eleven photographs were rejected pursuant to Policy No. 450.100. CP 315; *see Livingston v. Cedeno*, 164 Wn.2d 46, 50-51, 186 P.3d 1055 (2008) (The Department screened and properly rejected parts of a public records request based on Policy No. 450.100.).

Eventually the Department released the intercepted documents to Mr. Gronquist during the discovery process in an unrelated case. *See* CP

at 25-30. Mr. Gronquist did not alert DOC about the single missing page from the ninety-six pages it had provided. CP 125-26. When DOC later learned about the missing page through Mr. Gronquist's lawsuit, it located and supplied it to him. CP 125-26.

**B. Mr. Gronquist's PRA Action**

**1. Superior Court's December 18, 2009 Ruling**

On August 1, 2008, Mr. Gronquist filed a *pro se* civil complaint alleging violations of the PRA. CP 435-39. On July 27, 2009, Mr. Gronquist filed an amended complaint alleging the Department violated the PRA by: (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. He also alleged that Stafford Creek's screening and withholding of thirty-nine pages and eleven photographs of his PRA documents violated the free speech clause of the Washington Constitution, article I, section 5. CP 323-24.

On December 18, 2009, the superior court ruled (1) the Department inadvertently withheld one page of ninety-six pages provided in response to the August 9, 2007 PRA request; (2) its omission did not amount to bad faith; (3) Mr. 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 recordings from disclosure under RCW 42.56.240(1). CP 125-26.

**2. Department’s Motion to Dismiss and Superior Court’s January 3, 2011 Order**

On October 8, 2010, the Department filed a motion to dismiss arguing (1) the superior court had resolved all of Mr. Gronquist’s PRA claims in its December 18, 2009 show cause order; and (2) the superior court should dismiss Mr. Gronquist’s remaining article 1, section 5 claim as a matter of law because ( a) violations of the Washington Constitution are not independently actionable torts, and (b) Mr. Gronquist had no protected interest in receiving uncensored mail in prison. CP at 118-24. On January 3, 2011, the superior court granted the motion in part and dismissed all of Mr. 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” CP at 98-99.

**3. Motion To Vacate; September 28, 2011 Order**

On August 5, 2011, Mr. Gronquist filed a motion to vacate the trial court’s December 18, 2009 Order under Civil Rule (CR) 60(b)(4). CP 19-96. Mr. Gronquist argued the order must be vacated because evidence obtained from discovery conducted in a federal civil rights case

demonstrated that the video surveillance previously requested was not preserved, and the court's decision to dismiss his PRA claim regarding the Department's withholding of its prison surveillance videos was based upon fraud perpetrated by the Department and its counsel. CP 25-30. On September 28, 2011, the trial court entered an Order denying Mr. Gronquist's motion to vacate while affirming the Department's exemption for surveillance videos. CP 11-12. Mr. Gronquist then filed a premature notice of appeal on October 28, 2011. However, he failed to have his issue certified by the trial court because he still had one claim pending. CP 8; *see* CP 98-99.

#### **4. Motion To Amend; February 27, 2012 Order**

On January 31, 2012, Mr. Gronquist requested leave from the trial court to file a second amended complaint. CP 475-79. Mr. Gronquist's second amended complaint attempted to add facts to his already dismissed PRA claims and he added an article I, section 5 "facial" challenge to the Department's actions in this matter. CP 468-74. On February 27, 2012, the superior court denied Mr. Gronquist's request for leave to file an amended complaint as untimely and dismissed the sole remaining article I, section 5 claim with prejudice because Mr. Gronquist stated in his memorandum that his claim was moot. CP 459-60; CP 475-77.

## 5. Court Of Appeals' Decision

The Court of Appeals affirmed the superior court decisions. Relevant to Mr. Gronquist's petition for review, the appellate court found RCW 42.56.565(1) barred review of the PRA penalties awarded for the inadvertently withheld one page because the trial court found there was no bad faith. *Gronquist v. DOC*, Court of Appeals Case No. 42774-5-II, Part Published Opinion at 6-9 (Appendix 1). It also found RCW 42.56.240(1) provides an exemption for prison surveillance recordings finding the record showed the recordings were specific intelligence information and specific investigative records, consistent with Division I's holding in *Fischer v. Wash. State Dep't of Corr.*, 160 Wn. App. 722, 727-28, 254 P.3d 824, *review denied*, 172 Wn.2d 1001, 257 P.3d 666 (2011). *Gronquist*, at 9-13.

The record also supported the superior court's ruling that there were no identifiable records matching Gronquist's request for "undocumented alien workers" because the request had been for nonexistent, or unidentifiable, records. *Gronquist*, at 13-15. Lastly, Mr. Gronquist's article 1, section 5 claims were either abandoned or raised for the first time on appeal and therefore were not properly before the appellate court and were dismissed. *Gronquist*, at 17-19.

#### IV. REASONS WHY REVIEW SHOULD BE DENIED

##### A. **The Court Of Appeals Application Of RCW 42.56.565(1)'s Prohibition Of PRA Penalties To A Prison Inmate Serving A Criminal Sentence Absent A Showing Of Bad Faith Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court Of Appeals**

The Court of Appeals correctly applied RCW 42.56.565(1)'s bar against inmates receiving penalties under the PRA unless the court finds the agency acted in "bad faith" in denying inspection or copying of a public record. Mr. Gronquist does not directly address this determination. Instead, he attempts to elude the subject and argues RCW 42.56.565(1) was applied retroactively while conflicting with this Court's decision in *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004).  
Petition, at 12-14.

However, Mr. Gronquist's argument is meritless. The appellate court's decision does not conflict with *Yousoufian* because *Yousoufian* does not apply. Additionally, the court did not apply the statute retroactively because the record clearly shows his case did not reach a final judgment prior July 22, 2011, as required by RCW 42.56.565. Therefore, the court properly determined his penalty challenge was barred because the superior court found that the Department did not act in bad faith when it inadvertently withheld one page during disclosure.

RCW 42.56.565 expressly states that “[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.” RCW 42.56.565(1). The legislature further specified that the section “applies to all actions brought under 42.56.550 in which a final judgment has not been entered as of July 22, 2011.” RCW 42.56.565 (as amended by Laws of 2011, ch. 300, § 2).

The court determined the legislature’s use of the term “final judgment” was broad and meant a “judgment that ends all litigation, including appellate review, leaving nothing for the court to do but to execute the judgment.” *Gronquist*, at 8. Mr. Gronquist’s claims were not decided by a final judgment prior to the statute going into effect<sup>1</sup>. The superior court’s was correct in finding the withholding was not done in bad faith precluded review of superior court’s penalty determination because Mr. Gronquist was not entitled to any amount of PRA penalties.

---

<sup>1</sup> A final judgment was entered on April 25, 2012; Judge Wood signed an order finalizing dismissal of Mr. Gronquist’s last remaining claim while dismissing Mr. Gronquist’s motion for leave to amend his complaint. CP 448. Although the trial court issued orders on Mr. Gronquist’s PRA claims in December 2009 and January 2011, the trial court’s April 2012 modification to its February 2012 order was the final appealable judgment in this case because it disposed of the final remaining claim from Mr. Gronquist’s First Amended Complaint. *See* CP 444-45; CP 448; CP 323-24.

*Gronquist*, at 9. Therefore, the Court of Appeals' decision does not present a conflict with any Supreme Court or Court of Appeals' decisions within the meaning of RAP 13.4(b)(1) and (2).

**B. The Court of Appeals Determination That “Undocumented Alien Workers” records asked for nonexistent, Unidentifiable Records under RCW 42.56.080 Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court of Appeals**

The Court of Appeals correctly determined Mr. Gronquist's request for “undocumented alien records” in the Department's Class II Industries program did not seek identifiable records. Mr. Gronquist argues the Department did not adequately search for records. *Petition*, at 14-15. However, the Court of Appeals informed Mr. Gronquist his attempt to raise this issue on appeal for the first time was improper and would not be addressed. *Gronquist*, at 15.

Instead, the Court correctly determined the record showed the requested records did not exist. *Gronquist*, at 13-15. The PRA does not require the agency to research or explain its 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). An agency has no duty to create or produce a record that is nonexistent. *West v. Washington State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020, 272 P.3d 850 (2012); *see also Limstrom v. Ladenburg*,

136 Wn.2d 595, 604, 963 P.2d 869 (1998) (the PRA does not provide “a right to citizens to indiscriminately sift through an agency’s files in search of records or information which cannot be reasonably identified or ascribed to the agency”).

The record clearly established the records did not exist in the form requested because the Department did not identify offenders by citizenship, nor is offender citizenship part of the Correctional Industries employment process. CP 248. Mr. Gronquist cannot cite to anything in the record to refute this fact. *See* Petition, at 15-16. Instead, he continues to maintain the Department should have researched its records to respond to his request. Petition, at 16. This is not sufficient to refute the superior court’s factual finding that there were no identifiable records as requested. Therefore, the Court of Appeals’ decision does not present a conflict with any Supreme Court or Court of Appeals’ decisions within the meaning of RAP 13.4(b)(1) and (2).

**C. The Court Of Appeals’ Determination That Prison Video Surveillance Videos Are Exempt From Disclosure Under RCW 42.56.240(1) When The Videos Are Found To Be Specific Intelligence Information And The Nondisclosure Of The Videos Is Essential To Effective Law Enforcement Neither Conflicts With Any Decision Of This Court Nor A Decision By The Court Of Appeals**

The Court of Appeals correctly determined Mr. Gronquist’s request for prison surveillance videos were exempt under RCW

42.56.240(1). Mr. Gronquist argues that the court's decision conflicts with *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005) prohibition of "general" exemptions. Petition, at 17. However, as stated by the Court of Appeals, *Prison Legal News* is not controlling. *Gronquist*, at 11 n.14. Unlike in *Prison Legal News*, the Department met its burden in showing that the nondisclosure of prison surveillance videos was "essential to effective law enforcement." *Id.* Therefore, Mr. Gronquist's reliance on *Prison Legal News* is unpersuasive.

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). The record contains ample evidence that prison video surveillance recordings meet this exception.

Mr. Gronquist did not contend the Department was not a law enforcement agency. Additionally, the record provided ample evidence that providing inmates with access to recordings of the prison's surveillance videos would allow prisoners to exploit weaknesses in its surveillance system. The Court looked to Division One's holding that

“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, *review denied*, 172 Wn.2d 1001, 257 P.3d 666 (2011). The record was consistent with the ruling in *Fischer* and there was no error in concluding that the surveillance video recordings were exempt under RCW 42.56.240(1). Therefore, the Court of Appeals’ decision does not present a conflict with any Supreme Court or Court of Appeals’ decisions within the meaning of RAP 13.4(b)(1) and (2).

**D. The Court Of Appeals Decision Dismissing Mr. Gronquist’s Article I, Section 5 Claims Because He Abandoned Them In The Superior Court Or Attempted To Raise Them For The First Time On Appeal Does Not Raise A Significant Question Of Law Under The Constitution**

The Court of Appeals correctly determined Mr. Gronquist’s article I, section 5 claims were abandoned in the superior court prior to appeal and/or were raised for the first time on appeal. Mr. Gronquist argues his case presents an issue of first impression. Petition, at 19. However, he does not contest the Court of Appeals’ determination that he failed to preserve or even raise these issues in the trial court. Petition, at 19-20. Moreover, he does not contest the Court of Appeals’ determination that his claims are moot even if he had properly preserved them. Petition, at 19-

20. Therefore, the Court of Appeals properly declined to address issues that were moot, abandoned, or raised for the first time on appeal and Mr. Gronquist has not raised a significant question of law under the Constitution.

#### V. CONCLUSION

The Court of Appeals' unanimous decision affirming the superior court's dismissal of Mr. Gronquist's claims is carefully reasoned, entirely consistent with the Public Records Act, and correctly interprets and applies statutory and case law. None of the criteria for accepting review in RAP 13.4(b) are satisfied. Therefore, this Court should deny Mr. Gronquist's petition for review.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February,  
2014.

ROBERT W. FERGUSON  
Attorney General

*C. B. ... #44049 for:*

BRIAN J. CONSIDINE, WSBA #39517  
Assistant Attorney General  
Corrections Division OID #91025  
P.O. Box 40116  
Olympia, WA 98504-0116  
(360) 586-1445  
BrianC1@atg.wa.gov

**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by \_\_\_\_\_

TO:

DEREK E GRONQUIST DOC #943857  
COYOTE RIDGE CORRECTIONS CENTER  
PO BOX 769  
CONNELL WA 99326-0769

EXECUTED this 4<sup>th</sup> day of February, 2014, at Olympia,

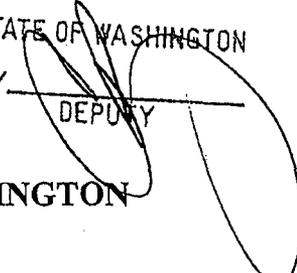
Washington.

Katrina Toal  
KATRINA TOAL

## **APPENDIX 1**

FILED  
COURT OF APPEALS  
DIVISION II

2013 OCT 29 AM 9:46

STATE OF WASHINGTON  
BY   
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEREK E. GRONQUIST,

No. 42774-5-II

(consolidated with)

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF CORRECTIONS,

Respondents.

No. 43500-4-II

DEREK E. GRONQUIST,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF CORRECTIONS,

Respondents

PART PUBLISHED OPINION

HUNT, J. — Derek E. Gronquist appeals several superior court orders and findings entered in his Public Records Act (PRA)<sup>1</sup> 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

<sup>1</sup> Chapter 42.56 RCW.

No. 42774-5-II (consolidated with No. 43500-4-II)

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.<sup>2</sup>

## 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<sup>3</sup> [ . . . ];
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

---

<sup>2</sup> 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.

<sup>3</sup> Neither Gronquist's request nor the record explains what "DOC's Class II Industries program" encompasses.

No. 42774-5-II (consolidated with No. 43500-4-II)

[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.<sup>4</sup>

---

<sup>4</sup> The record on appeal neither includes nor explains DOC’s mail rejection policy.

No. 42774-5-II (consolidated with No. 43500-4-II)

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

No. 42774-5-II (consolidated with No. 43500-4-II)

surveillance video tapes from disclosure under RCW 42.56.240(1).<sup>5</sup> 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

---

<sup>5</sup> 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.

No. 42774-5-II (consolidated with No. 43500-4-II)

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."<sup>6</sup> Suppl. CP at 477.

Gronquist appeals the superior court's (1) December 18, 2009 findings and penalty order<sup>7</sup>; (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;

---

<sup>6</sup> 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.

<sup>7</sup> 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).

No. 42774-5-II (consolidated with No. 43500-4-II)

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.<sup>8</sup>

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).<sup>9</sup> 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.

---

<sup>8</sup> 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).

<sup>9</sup> 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.

No. 42774-5-II (consolidated with No. 43500-4-II)

(Emphasis added).<sup>10</sup> 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),

---

<sup>10</sup> *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”).

No. 42774-5-II (consolidated with No. 43500-4-II)

*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).

No. 42774-5-II (consolidated with No. 43500-4-II)

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,"<sup>11</sup> 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,"<sup>12</sup> 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"<sup>13</sup> as follows:

---

<sup>11</sup> RCW 42.56.240(1).

<sup>12</sup> CP at 290.

<sup>13</sup> CP at 290.

No. 42774-5-II (consolidated with No. 43500-4-II)

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.<sup>14</sup>

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

---

<sup>14</sup> 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."

No. 42774-5-II (consolidated with No. 43500-4-II)

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

No. 42774-5-II (consolidated with No. 43500-4-II)

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<sup>15</sup> 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”<sup>16</sup> 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

---

<sup>15</sup> 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.

<sup>16</sup> CP at 252.

No. 42774-5-II (consolidated with No. 43500-4-II)

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.<sup>17</sup> 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

---

<sup>17</sup> 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).

No. 42774-5-II (consolidated with No. 43500-4-II)

classification was not part of its employment process.<sup>18</sup> 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.

---

<sup>18</sup> 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).

No. 42774-5-II (consolidated with No. 43500-4-II)

#### 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,

No. 42774-5-II (consolidated with No. 43500-4-II)

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).<sup>19</sup> 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."<sup>20</sup> Suppl. CP at 476, 477. The record

---

<sup>19</sup> 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).

<sup>20</sup> 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.

No. 42774-5-II (consolidated with No. 43500-4-II)

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),<sup>21</sup> 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,

---

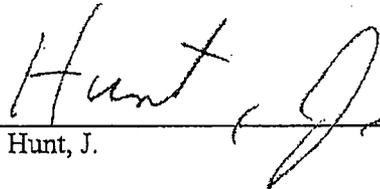
<sup>21</sup> Moreover, Gronquist's argument—that RCW 72.09.530 is unconstitutionally overbroad—is not an "error" that was "manifest" in any proceeding below; rather, it is a challenge to the constitutionality of the statute itself and not an error committed by the superior court. See *State v. Grimes*, 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.

No. 42774-5-II (consolidated with No. 43500-4-II)

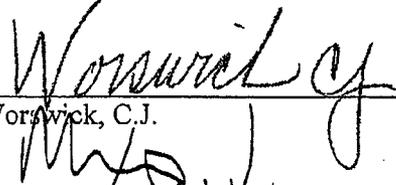
673 P.2d 189 (1983) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). An appeal is moot where it presents “purely academic”<sup>22</sup> questions and where “the court cannot provide the basic relief originally sought, or can no longer provide effective relief.” *IBF, LLC v. 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.

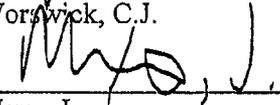
We affirm.

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.

<sup>22</sup> *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)).

## OFFICE RECEPTIONIST, CLERK

---

**From:** Toal, Katrina (ATG) <KatrinaT@ATG.WA.GOV>  
**Sent:** Tuesday, February 04, 2014 1:45 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Please file in Gronquist v. DOC  
**Attachments:** Answer-CertPetition.pdf

Answer to Petition for Review

- Gronquist v. DOC
- 89790-5
- Brian J. Considine
- (360) 586-1445
- WSBA #39517
- BrianC1@atg.wa.gov

Thank you.

**Katrina Toal**  
**Legal Assistant for Brian Considine**  
**Corrections Division**  
**PO Box 40116**  
**Olympia, WA 98504-0116**  
**(360) 586-5154**  
**MS: 40116**