66151-5

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No. 66151-5-I

COURT OF APPEALS OF WASHINGTON STATE
DIVISION ONE

ALLAN PARMELEE
Appellant - Plaintiff

vs

LISA HOWE, et al
Defendants - Appellees

REPLY BRIEF OF APPELLANT

Allan Parmelee
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I - INTRODUCTION

Allan Parmelee, a public records act ("PRA", RCW 42.56) records requester and incarcerated journalist and political activist was sued by Franklin County, overturning a trial court ruling that RCW 42.56.080 and RCW 42.56.550(1) prohibited an injunction under RCW 42.56.540 based on the agency's "trash talk" of a records requester without a statutory exemption to any specific record. Franklin County v. Parmelee, 162 Wn. App. 289, 253 P.3d 1131 (2011). This court granted review to determine if a new "balancing of equities" rule allows arbitrary records denials contrary to the PRA and if RCW 42.56.565 may be applied retroactively, is overly vague and broad and if it infringes on protected first Amendment rights. Id, _ Wn.2d _, 263 P.3d 252 (2011).

II - ASSIGNMENTS OF ERROR:

A. Assignments Of Error On Review

1. Did The Court Of Appeals Err By Reversing The Trial Court's Order Granting Parmelee's CR-12(f) Motion Striking Franklin County's "Trash Talk" About Him Because RCW 42.56.080 Prohibits Identity Of Records Requestor From Being Considered And RCW 42.56.550(1) Requires A Specific Statutory Exemption Applied To Specific Withheld Records Within The Four Corners Of The Records Per Koenig v. City of Des Moines, 158 Wn.2d 173 (2006). Where The Court Of Appeals Created An Equity Balancing Exception For Non-Disclosure?

2. Did The Court Of Appeals Err In Concluding The Mid-Appeal Enactment Of RCW 42.56.565 May Apply Retroactively While Denying Supplemental Briefing And Reconsideration On Its Applicability And Constitutionality?

B. Issues Pertaining To Assignments Of Error:

1. The Court of Appeals Erred In Creating A PRA Exemption Ignoring Statutory Construction, Limits And Requirements To Not Consider The Identity And "Trash Talk" About A Records Requestor And An Agency Need Not Provide The Fullest Assistance To Records Requestors Required By RCW 42.56.080 & .100. (Assignment Of Error Nos. 1 & 2).

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2. The Court of Appeals Erred In Concluding That An Agency Need Not Cite To A Specific Statutory PRA Exemption Nor Specific Records As Required By RCW 42.56.550(1) And May "Trash Talk" A Records Requestor Contrary To RCW 42.56.080 & .100 To Obtain An Injunction Under RCW 42.56.540. (Assignment of Error Nos 1).

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3. The Court of Appeals Erred In Concluding The Mid-Appeal Enactment Of RCW 42.56.565 Applies Retroactively And RCW 42.56.070 RCW 42.56.100, and RCW 42.56.550(1)-(3) Standards Disappear When Applied To Disfavored Records Requestors. (Assignment of Error Nos. 1 & 2).

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4. The Court of Appeals Erred In Denying Supplemental Briefing And Reconsideration Of The Non-Retroactivity, Overbreadth, Vagueness, Equal Protection And First Amendment Grounds That RCW 42.56.565 Is Unconstitutional And Cannot Apply Here. (Assignment of Error No. 2) Pg. 15

5. Parmelee Should Be Awarded fees, penalties And Costs. Pg. 20

III. STATEMENT OF THE CASE:

Allan Parmelee is a politically active incarcerated journalist and

litigator for the betterment of all. His subjects generally include topics about government waste, jail and prison conditions and the legal rights being infringed upon of the disinfranchised, poor, alienated and unpopular government agencies aggressively seek to stop. DeLong v. Parmelee, 157 Wn. App. 119, 132, 236 P.3d 936 (2010) rev'd for reconsideration, 171 Wn.2d 1004, 248 P.3d 1042 (2011), declared moot, Wn. App. , P.3d , WL 5429090 *4-8 (Nov. 9, 2011) again before Supreme Ct. # 86819-1; Parmelee v. O'Neal, 145 Wn. App. 223, 229, 186 P.3d 1094 (2008), rev'd in part, 168 Wn.2d 515, 229 P.3d 723 (2010); King County v. Parmelee, 162 Wn. App. 337, 342-350, 254 P.3d 927 (2011), before Supreme Ct. # 86658-9.

Parmelee has angered State agencies by writing truthful and candid articles about them, including books such as "How To Win Prison Disciplinary Hearings," "How Good Was Your Lawyer; Ineffective Assistance of Counsel vs. Legal Malpractice" as well as for national publications including "Prison Legal News", "Prison Living Magazine" and even legal book reviews for the American Bar Association's Law Practice Journal. Id; VR-15, 22. For subject matter, background and human interest components of Parmelee's journalistic and legal writing, he frequently requests public records and has successfully litigated agency denials of those records. (e.g., Parmelee v. Porter, Mason Co. # 06-2-00520-5; Parmelee v. Clarke, Thurston Co. # 05-2-0317-3; Parmelee v. Bellevue Police Dept, King Co. # 06-2-22701-8 SEA; Burt v. DOC, 168 Wn.2d 828, 231 P.3d 1911 (2010); Abbott v. DOC, 2011 WL 1631722 (Div. 3, 2011)).

In 2008, Parmelee began inquiring about illegal drug dealing and physical abuses of prisoners by Franklin County jail guards [which has since been confirmed and published by mainstream media] revealed to Parmelee by witnesses and victims. It was also reported that Franklin County Prosecuting Attorney's office was dismissing criminal charges against jail prisoners to shut them up and avoid public scrutiny if all could be forgotten. VR-15-16.

Parmelee made a total of 81 seperate PRA requests, all in 2008, relating to:

1. Names, gender, age, race, job title, pay rate, training records and photographs to visually identify the correct accused from the innocent;
2. Incident records of complaints in any way involving Franklin County staff in their professional capacity;
3. Records of use-of-force incidents;
4. Video records of jail areas where staff used force on prisoners; and
5. Jail policies.

Franklin County provided only a staff name roster, then sought an injunction against further disclosure to avoid public scrutiny, transparency and embarrassment by publicizing the truth gleaned from their own records. Id, CP-64-69, 49-60. Failing entirely to cite to or rely on any statutory exemptions as applied to any specific records. (CP-61-63, CP-40-41 (Appendix-A hereto)). Instead, they claim that "trash talk" against a records requestor in a pre-emptive attack against Parmelee who might "inconvenience or embarass" them per RCW 42.56.550(3), should be enjoined per RCW 42.56.540 as an independent exemption. CP-64-69, 61-63.

The permanent injunction was initially granted without a statutory exemption and any notice or service to Parmelee. After reading about the injunction in the newspaper, Parmelee sought reconsideration and to set aside and per CR-12(f) strike Franklin County's irrelevant, scandalous, impertinent and scandalous "trash talk" about him based on RCW 42.56.080 and .550(1) and RCW 4.28.080(15) requiring service of a complaint and summons personally. The trial court granted the CR-12(f) motion based on RCW 42.56.080 and .550(1) on July 1, 2008, CP-49-63, VR-13-25. (See Attachment-A hereto).

Franklin County sought reconsideration, CP-20-39, Parmelee opposed. CP-10. On February 11, 2009 the court correctly denied Franklin County's motion to reconsider striking their "trash talk" about Parmelee per

CR-12(f) and RCW 42.56.080. CP-9.

Franklin County sought discretionary review, CP-40, of the trial court order, CP-113, which was granted and subsequently only briefed on the single issue of if a court is an "agency" as a means of avoiding applicability of RCW 42.56.080 to agency actions requiring the agency to not consider a records requestor's identity as per RCW 42.56.100 by providing the fullest assistance to records requestors to create a means to circumvent the PRA's intent and statutory language.

During the appeal, the legislature enacted RCW 42.56.565 (2009) (see Attachment-E hereto). Pamelee filed a motion on December 28, 2010, and a letter on February 8, 2011 to the Court of Appeals asking for additional briefing and applicability of RCW 42.56.565 to this case. He sought to brief its unconstitutionality, non-retroactivity, and if the four part tests under Turner v Safley, 482 U.S. 78, 89-90 (1987) would need to be applied to injunctions under this statute to avoid exaggerated agency claim such as this court identified in Prison Legal News v. D.O.C., 154 Wn.2d 628, 638-39, 115 P.3d 316 (2005) ("some of the claims [by the DOC] appear questionable on their face" to avoid disclosure of public records) and Prison Legal News v. Lehman, 397 F.3d 692, 699-20 (9th Cir. 2005) (The DOC offered four penological goals which it claims justifies the ban on PLN like they did in previous cases, "[W]e rejected each contention in those cases" and we do so again here). The request for additional briefing was denied on February 24, 2011 by the Court of Appeals.

On June 21, 2011, the Appellate Court granted both requested and unrequested relief for Franklin County creating an equity balancing approach for an independent exemption, and unbriefed, RCW 42.56.565 may apply, in a published decision. (Attachment-B hereto). The court appears to permit an endless stream of "trash talk" about a records requestor to support an injunction under RCW 42.56.540 and/or RCW 42.56.565, without regard

to RCW 42.56.030, .080, .100, .210, and .550(1)-(3) as Franklin County sought, based on a new exemption defined by the court as a "balancing of equities." (Attachment - B).

Parmelee sought reconsideration, which was denied on July 26, 2011. (Attachment - C). This court granted review on November 21, 2011.

IV - ARGUMENT:

1 THE COURT OF APPEALS RULING CREATING A NEW EQUITY BALANCING PRA EXEMPTION CONFLICTS WITH DAWSON, PAWS, KOENIG AND YAKIMA REQUIRING SPECIFIC EXEMPTIONS BE APPLIED TO SPECIFIC RECORDS, NOT "TRASH TALK" AS FRANKLIN COUNTY SOUGHT TO DO.

Despite the Public Records Act's plain and unambiguous language urging fullest government transparency, RCW 42.56.030, without regard to who the records requestor is or what "trash talk" an agency may drag up about him or her, RCW 42.56.080, requiring an agency provide the fullest assistance to all records requestors, RCW 42.56.100, and even if it causes embarassment and inconvenience, to only rely on specific statutory exemptions as applicable to specific records sought, RCW 42.56.550(1)-(3), may be ignored if the agency dislikes the records requestor based on a "balancing of equities" exemption. (Ord. at 5). This approach has been rejected in prior cases and creates chaos in what and how records may now be withheld based on an agency's animosity for the records requestor and the embarassment of having their evils revealed to the public. RP-15-16, 22, 24, CP-49-60.

In Dawson v. Daly, 120 Wn.2d 782, 798, 845 P.2d 995 (1993) this same Court

defined any balancing test in the PRA is applying privacy rights under RCW 42.17.255 (now RCW 42.56.050) as limited only to, if the public's interest was harmed by disclosure of specific, not any records as Franklin County seeks, more than it was served, then the interest was not reasonable and thus not legitimate. Id at 797-800. Franklin County says that because the court does not specifically exclude equity balancing, the contradiction remains to be decided as the Court of Appeals eventually did here. (Answ. To Pet For Rev, pg. 4) The Dawson court recognized that the PRA does not allow any balancing of an individuals' privacy interest against the public interest, but it does contemplate some balancing of the public's interest in disclosure against the public's interest in "efficient administration of government." Id at 798.

Likewise in Progressive Animal Welfare Soc'y v. University of Washington (PAWS), 125 Wn.2d 243, 257, 884 P.2d 592 (1995) this court rejected any notion that RCW 42.17.330 (now RCW 42.56.540) is an independent basis for an injunction without specific statutory exemptions elsewhere, applicable to specific public records. This includes exemptions within the PRA itself, and other statutes. This court wrote that "[t]he Public Records Act begins with a mandate of full disclosure of public records; that mandate is then limited only by the precise, specific, and limited exemptions which the Act provides." Seattle Times v. Serko, 170 Wn.2d 581, 596, 243 P.3d 919 (2010), citing, PAWS, 125 Wn.2d at 596.

In RCW 42.56.550(3), the PRA specifically permits records requests to "cause inconvenience or embarrassment" to subjects of PRA requests. Police Guild v. Liquor Control Bd, 112 Wn.2d 30, 38-39, 769 P.2d 283 (1989) (citing former version of the PRA, there is no right to privacy of public events and may cause inconvenience or embarrassment because misconduct is of public concern. The occupation of the persons is irrelevant of whom records are requested about.).

Contrary to Franklin County's and the Appellate Court's ruling, RCW 42.56.540 cannot provide an independent substantive basis for an injunction absent

a specific other statutory exemption, applicable to specific public records precluding disclosure. Yakima v. Yakima Herald-Republic, 170 Wn.2d 775, 783, 246 P.3d 768 (2011), citing PAWS, 125 Wn.2d at 257-58. "Equity balancing" is not a statutory exemption.

RCW 42.56.080 prohibits what Franklin County seeks that the Court of Appeals granted, allowing an agency to "trash talk" an unfavorable records requestor.

> "Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to ANY person.... Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the requests...."
>
> RCW 42.56.080 (formerly, RCW 42.17.270) (emphasis added)

Zink v. City of Mesa, 140 Wn. App. 328, 341-43, 166 P.3d 738 (2007) (disparate treatment of records requestors is prohibited); Koenig v. City of Des Moines, 158 Wn.2d at 184-85 (in dicta, the court should not look beyond the four corners of the records at issue to determine if statutory exemption applies for withholding). Also, RCW 42.56.100 requires that an agency take affirmative steps "...to provide the fullest assistance to inquirers and the most timely possible action on requests for information." (formerly, RCW 42.17.290); WAC 44-14-04003(4) & (6); RCW 42.56.520; Violante v. King County Fire Dist., 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002) (Agency bound by original records production time estimate).

The Court of Appeals' creating of the equity balancing exemption available for an injunction under RCW 42.56.540 is contrary to the Supreme Court's prior rulings in PAWS, Sercko and Yakima Herald-Republic, as well as the PRA's clear and unambiguous statutory language. Soter v. Cowles Publg., 162 Wn.2d 716, 755, n.18, 174 P.3d 60 (2007). This would make superflous RCW 42.56.030, .080, .100, .210, .520 and .550(1)-(3), resulting in endless inconsistent and absurd results. Id.; Koenig, 158 Wn.2d at 181. Nowhere has the legislature enacted an "equity balancing" exemption to negate other portions of the PRA or withhold records.

This Franklin County decision is now the second of four recent PRA decisions involving Pramela's PRA requests, in a published decision that suggests PAWS, Lindeman v. Kelso School Dist., 162 Wn.2d 196, 201-02, 172 P.3d 329 (2007) (PRA intent and construction), Dawson, Soter and other decisions simply cease to exist or have any meaning, enabeling lower courts to pick-n-choose what out of the PRA best fits an undefined equitable powers doctrine to deny an agency's critics public records while granting their friends unfettered access. Los Angeles Police Dept. v. United Reporting, 528 U.S. 32, 47-48, 120 S.Ct. 483 (1999) (Justice Stevens, dissenting) (making public records only to an agency's friends, while refusing them to their critics, triggers first amendment and equal protection violation problems). Franklin County's decision is not supported by authority and it directly conflicts with the rules articulated by this court consistently for the past sixteen years, requiring reversal. e.g. Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010)

2. THE COURT OF APPEALS FAILED TO CONSIDER THEIR CONSTRAINTS TO READ UNAMBIGUOUS STATUTORY CONSTRUCTION AND LANGUAGE OF RCW 42.56.080 AND RCW 42.56.100 PERMITTING UNLIMITED "TRASH TALK" AGAINST RECORDS REQUESTORS TO ENJOIN RELEASE.

The Franklin County decision fails to remain within its statutory constraints specifically authorized by the legislature under the PRA. Following Franklin County's suggestion that courts, not agencies, may abandon the constraints of RCW 42.56.030, .080, .100, and .550(1)-(3) by permitting endless trash talk about a records requestor by an agency it asks a court to rely on to enjoin disclosure under RCW 42.56.540, seeks to turn the PRA inside out to selectively and arbitrarily fit a mold of every agency's imagined creation.

As this court recognized in PAWS, the Washington legislature did not intend for courts to wield such broad and equitable discretion to enjoin disclosure of public

records that are not covered by a specific statutory exemption, without regard to what an agency might imagine about a records requestor. The legislature made it clear in this regard in response to the Supreme Court's 1986 decision in In Re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986) rev'd in part, Hearst v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978) in Laws 1987, Ch. 403, §1. In the Rosier case the trial court enjoined disclosures for names and addresses of about 156,000 Snohomish County public utility customers. Id at 608. The trial court concluded that "disclosure could have life threatening implications ... such as law enforcement officials and victims of domestic abuse, who have legitimate reasons for wanting to maintain their anonymity." Id. Although the supreme court overruled the injunction, it simultaneously held that the public disclosure statute provided "a general personal privacy exemption when disclosure of the pertinent records would involve an unreasonable invasion of privacy." Id at 609.

The year after Rosier was decided, the legislature amended the respective public disclosure statute to overturn the case. See PAWS, 125 Wn.2d at 259. This court acknowledged the significance of the legislatures response as follows:

"The legislatures response to our opinion in Rosier makes clear that it does not want judges any more than agencies to be wielding broad and malleable exemptions. The legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions that would be created by treating section .330 [now section .540] as a source of substantive exemptions.

... If section .330 were a source of broad exemptions for personal privacy and vital government interests, it would render the carefully crafted exemptions of RCW 42.17.310 superfluous. A trial court or appellate court reviewing de novo could simply declare records covered by personal privacy or vital governmental interests without ever having to invoke or construe the exemptions of RCW 42.17.310. We will not interpret statutes

in a manner that renders portions of the statute superfluous."
Id at 259-60

This is exactly what the Franklin County decision does, what this court said it could not do in PAWS, at 259-60, discussing its Rosier decision.

Creating an equity balancing exemption is not authorized by the legislature and it renders the foundation of the PRA superfluous. The Court of Appeals decision is not authorized, and the trial court's order was correct in granting Parmele's CR-12(f) motion based on RCW 42.56.030, .080, .100 and .550(1)-(3). Allowing arbitrary exemptions, especially based on "trash talk" of an unpopular records requestor is an absurd result. It is the legislature's province, not the courts, to add equity principle exemptions if it so saw fit to do so.

3. THE APPELLATE COURT ERRED BY CONCLUDING RCW 42.56.565 MAY APPLY RETROACTIVELY, BECAUSE IT REVOKES PRIOR VESTED RIGHTS TO BOTH PUBLIC RECORDS REQUESTS AND FREE SPEECH.

When Parmele realized that RCW 42.56.565 had been newly enacted while the underlying appeal was pending, he asked the court twice for supplemental briefing, and to determine if also Turner v. Safley, 482 U.S. 78, 89-90 (1987) four part legitimacy tests applied to screen out exaggerated agency claims as is common even with Turner. The appellate court denied without explaination both of Parmele's requests and his motion to reconsider (Attachment-C hereto). The Court of Appeals reasoned however the new statute would apply retroactively on remand, claiming it was only procedural, not substantive. (Ord., pgs 3-7).

The Court of Appeals erred because like RCW 42.56.550(3), the new RCW 42.56.565 (Attachment-E hereto) is not a new procedure, but it revokes significant prior rights including RCW 42.56.030, .050,

.080, .100, .210, .520, 550(1)-(3). The new statute also penalizes by permitting an injunction for public records to rely on protected free speech and association without limiting itself at all to properly proscribeable speech or conduct such as "true threats". State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) ("true threats" analysis within first amendment protected context of felony harassment); Sheehan v. Gregoire, 272 F. Supp. 2d 1135 (W.D. Wash. 2003) (declaring Washington's public records internet posting statutes unconstitutional on first amendment grounds because it blocks free speech). The new PRA statute enables speech targeting at RCW 42.56.565(2)(a), (b), (c) ("statements" or "purpose") and enables an agency to now claim or simply re-classify previously authorized "inconvenience or embarrassment" in RCW 42.56.550(3) now as "harassment" and "threats" to agency goals or "intimidation" (but allowed in RCW 10.14.020 defining lawful harassment, Zink v. City of Mesa, 140 Wn. App. 328, 343-339, 166 P.3d 738 (2007) (issuing 175 PRA requests and threatening to sue is not harassment)). It permits subjective speculation to form the basis "but not limited to" any perceived slight, not even requiring "true threats", but anything an agency seeks to trash talk up to form the basis for a new injunction. e.g. DeLong v. Parmelee, 157 Wn. App. 119, 236 P.3d 936 (2010); King County v. Parmelee, 162 Wn. App. 337, 342-50, 254 P.3d 927 (2011). The lower court's decision is contrary to non-retroactivity presumptions of new statutes.

RCW 42.56.565 cannot properly be retroactively applied because it was not the specific legislature's intent, and it revokes prior vested rights contrary to holdings in Dragonslayer v. Gambling Commn, 139 Wn. App. 433, 448, 161 P.3d 428 (2007) and 1000 Virginia Ltd. Partnership v. Vertecs, 158 Wn.2d 566, 584-87, 146 P.3d 423 (2006). It also revokes or at least allows adverse injunctions based on protected constitutional rights and relies on "...but not limited to..." in RCW 42.56.565(1)(c) and (2) to include any subjective speculation including "may," "would likely" and free speech of "statements" or "purpose" and "types of records" sought or number of requests even made.

RCW 42.56.565 should be held non-retroactive because the state created right to obtain public records and violation penalties for non-compliance, this amounts to a state created right protected by due process, e.g. Burt v. DOC, 168 Wn.2d 828, 231 P.3d 191 (2010) (If a requiced party under CR-19, it is a right protected by due process). In Dragonslayer, 139 Wn. App. at 448, this is considered a vested right created by the PRA, consistent with Adcox v. Children's Orthopedic Hosp., 125 Wn.2d 15, 30, 864 P.2d 921 (1993), precluding retroactivity. The Dragonslayer court held that a new PRA exemption was non-retroactive because it invalidated prior vested rights for a records requestor to receive the records prior to the new statute's enactment, absent a statutory exemption under RCW 42.56.550(1) and Progressive Animal Welfare Soc'y v. University of Washington (PAWS), 125 Wn.2d at 251-52, and RCW 42.56.030, 080 & 100.

Like RCW 42.56.565 here, in Dragonslayer the Court recognized that the legislature did not intentionally make the new PRA exemption Bill retroactive. Id at 448-49. As a result the Court held that a state created a vested right right existing to obtain the requested records under the law at the time prior to the statutory changes, just like Parmelee here.

Courts are supposed to disfavor retroactive application of a statute, and may only apply an amendment retroactively when one of three factors exist:

(1) The legislature specifically stated it to apply retroactively;

(2) The amendment is corative or clarifies or technically corrects ambiguous statutory language; or

(3) The amendment is remedial in nature.

In Re Det. of Elmmore, 162 Wn.2d 27, 35-36, 186 P.3d 1285 (2007) (citation omitted). Because RCW 42.56.565 is not a "procedural" change by using the same summary procedure as in RCW 42.56.550(3), and does not meet any of the above criteria, "had the legislature intended a retroactive effect, there would have been no need for an emergency clause." Id at 36.

Without an intended operation of the existing injunction statute, RCW 42.56.540 is not being clarified with the enactment of RCW 42.56.565 to correct ambiguities

in the pre-existing scheme, the new self-contained entirely independent of other exemptions and PAWS, 125 Wn.2d at 251-52 statutory exemption requirement, fails retroactive application. In King County v. Parmelee, 162 Wn. App. at 354, citing DeLong v. Parmelee, 157 Wn. App. at 163, in dicta, that the DeLong court already decided that the PRA creates no vested rights and thus none exist to protect. This would fail to consider for example the right to be named a party to an injunction relating to ones records requests due process protects in Burt v. DOC, 168 Wn.2d at 832-841, and Los Angeles Police v. United Reporting, 528 U.S. at 40 (State could decide to change public records laws and eliminate them entirely, removing the vested right); cf, Doe v. Reed, U.S. , 130 S.ct. 2811, 177 L.Ed.2d 493 (2010) (open public records revealing voter signature ballots, implicates protected rights, but doesn't chill them by disclosure). The DeLong, King County and Franklin County decisions fail to recognize the common law right to public records recognized by Washington Legal Fund v. U.S. Sentencing Commn., 17 F.3d 1446, 1451-52 (D.C. Cir. 1994).

Finally, RCW 42.56.565 is not remedial in nature because it does not relate to a practice, procedure or remedy, not affecting any substantive vested right, Dragonslayer, 139 Wn. App. at 449. Because the new statute penalizes a broad range of new conduct and speech previously allowed such as: "other requests by the record requestors," "the types [or topics inquired about] of records" or "the number of records sought" as an arbitrary figure, and "but not limited to"... "...statements... by the requestor" and "purpose for the requests" creates a broad new range of penalty factors implicating protected first amendment conduct or speech. Even if overturned on appeal, the records requestor [or his non-prisoner attorney (such as in Appendix -D hereto), family member, medical professional or other non-prisoner associate, RCW 42.56.565(3)(b), still penalizes those stricken with this broad poison pen under RCW 42.56.565(4), for merely being in the shadows of RCW 42.56.565 even if wrongfully done. Implicit in the Dragonslayer ruling is the notion that it is the initial PRA request constituting the "triggering event" for the later-enacted statute to apply retroactively. e.g. State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (a retroactive statute is one that applies to a "triggering event" that happened

...

before the effective date of the statute). Here, all Parmelee's PRA requests pre-dated the effectiveness of the statute, requiring reversal.

4. THE COURT OF APPEALS ERRED IN DENYING PARMELEE'S MOTION TO RECONSIDER THAT RCW 42.56.565 IS UNCONSTITUTIONAL ON EQUAL PROTECTION, VAGUENESS, OVERBREADTH AND FIRST AMENDMENT GROUNDS.

(i) RCW 42.56.565 Permits Unequal Discrimination Of The Same Records To Deny Some Records Requestors, Including Requests From Non-Prisoners, Lawyers, Doctors, Family or Business Associates, Violating Equal-Protection

According to The Florida Star v. B.J.F., 491 U.S. 524, 535, 109 S.Ct. 2603 (1989) if the government places information in the public domain or make it available to some, it must be presumed that the information is of significant interest to all and the public interests are served by its release to all. While the appellate court here denied Parmelee's motion to reconsider and for briefing on this issue, the King County v. Parmelee, 162 Wn. App. at 358-360 has wrongly decided that RCW 42.56.565 passes equal protection muster and only applies to prisoners the statute at RCW 42.56.565(3)(b) and Appendix-D hereto disclaims. The statute violates the equal protection rights of prisoners and non-prisoners [based on protected first amendment protected associations] (eg. Appendix-D hereto) unequally, allowing most prisoners and all unassociated non-prisoners get the same records others alleged "unfriendly to the agency by the agency" are selectively denied the same records. This violates the Washington State Constitution, Article I, §12 and the United States Constitution, Amendment Fourteen's prohibition against discrimination.

Contrary to the King County, 162 Wn. App. at 358-360 decision, RCW 42.56.565 does not bar by category "as prisoners", only, public records. It is selectively allowed to be applied to only unpopular or unfriendly prisoners and their.

non-prisoner associations, and is not a politically or catagorically neutral restriction such as King County's reliance on Fiarcatano v. Johnson, 521 F.3d 298, 304-05 (4th Cir. 2008) does. Id at 360, n.61. This is also erroneous.

The application of RCW 42.56.565 does not stop, nor even define "frivolous PRA requests" as the King County court grasps from this air it does. A rational relationship test requires more than a blind fishing expidition for any exaggerated excuse to base an unequal restriction.

A fundamental right exists under the PRA through common law to government records such as held in Washington Ford vs. U.S. Sentencing Comm'n., 17 F.3d at 1451-52. It's also an implied right. e.g., Alpine Indust. v. Cowles Pub., 114 Wn. App. 371, 57 P.3d 1178 (2002) (implied right of libel-slander action based on now-former RCW 9.58.010). In Burt v. DOC, 168 Wn.2d 828, 833-42, 231 P.3d 191 (2010) this court held due process existed under CR-19 to protect our PRA rights from wrongful injunctions. Also, because RCW 42.56.565 penalizes fundamental rights, it essentially removes them by relying on for an injunction "...but not limited to..." prior speech ("statements" or "purpose"), prior conduct ("prior requests"), speech and associations ("type of records sought," "number of records sought" and persons associated with such as attorneys, medical professionals, employers or family - .565(3)(b)). Therefore, it is error to apply the "rational relationship" test as the King County court did, requiring a "strict scrutiny test." Clark v. Jeter, 488 U.S. 456, 461, 108 S.Ct. 1910 (1988), but see, Johnson v. Calif. DOC., 543 U.S. 499, 509-15, 125 S.Ct. 1141 (2005). This requires Franklin County to submit admissable proof that the statute is necessary to serve a "compelling state interest" by a least restrictive means. Clark, 488 U.S. at 461; also see, Sheehan v. Gregoire, 272 F.Supp. 2d 1135, 1143-1145 (W.D.Wash. 2003) (State statute prohibiting posting public records on internet to harass public officials otherwise available to the public, fails the state's interest of the highest order); Los Angeles Police v. United Reporting, 528 U.S. 32, 120 S.Ct. 483 (1999) (distinguishing equal restrictions on public records disclosure).

Because RCW 42.56.565 is not a statute that can equally be applied without significantly inconsistent reasons for its results and is not a prisoner-only bar

to public records, it violates equal protection rights. Because it enables targeting of "unfriendly" while allowing the agency's "friends" the same records based on unlimited subjective criteria, it fails equal protection scrutiny tests.

(ii) Because RCW 42.56.565 And The Existing Decisions Relying On It Demonstrate Overbreadth, Vagueness And First Amendment Retribution, It Must Be Declared Unconstitutional On Due Process And First Amendment Grounds.

The cases so far relying on RCW 42.56.565 aptly illustrate that it is facially unconstitutional on overbreadth, vagueness and first amendment grounds while lacking any means to properly narrow it (e.g. King County v. Parmelee, 162 Wn. App. at 341-358, on review #86658-9; DeLong v. Parmelee, 157 Wn. App. at 132-135, on review #86819-1). Parmelee contends that RCW 42.56.565 is unconstitutional under the analysis used in Sheehan v. Gregoire, 272 F. Supp 2d 1135 (W.D. Wash, 2003); Procunier v Martinez, 416 U.S. 396, 415-420, 94 S.Ct. 1800 (1974) void in part on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874 (1989) and failing to restrict only "true threats" under Sheehan and State v. Kilburn, 151 Wn.2d. 36, 84 P.3d 1215 (2004).

While RCW 42.56.565 enables an injunction be issued based on a wide unlimited variety of constitutionally protected conduct, associations and speech even protected under the first amendment of prisoners, Procunier v Martinez, 416 U.S. at 415-420 (overturning, under first amendment rules prohibiting prisoners from unduly complaining, magnification of grievances, expression of inflamatory, political, racial, religious or other views and matter deemed defamatory or otherwise inappropriate under the First Amendment) allows anything whatsoever to form a basis for adverse treatment defined as "retaliation" in Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir 2005).

The new statute essentially punishes any subjective "trash-talk" allegation by an agency hostile to the unfriendly records requestor based on any thing or nothing, and "not limited to" as follows:

.565(1)(c)(i) Where made to harass [but see RCW 10.14.020 and Zink v. City of Mesa, 140 Wn.App. 328, 343-44, 166 P.3d 738 (2007) (Issuing 175 PRA requests is "lawful" and thus cannot be "harassment")] or intimidate [but see RCW 9A.36.070 (unlawful coercion) and Virginia v. Black, 538 U.S. 343, 359-60, 363-66 (2003) (distinguishing lawful types of intimidation in first Amendment context)];

.565(1)(c)(ii) & (iii) "would likely threaten" fails to prohibit real, reasonable and "true threats," but permits subjective speculation also inconsistent with Sheehan and Kilburn, with endless conclusory justifications that the first Amendment protects prisoner's freedoms to read, learn and exchange ideas [including about government through PRA requests]. Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005), citing, Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990), citing Turner v. Safley, 482 U.S. 78, 89-90 (1987);

.565(1)(c)(iv) "may assist criminal activity" is so subjective and allows limitless speculation even the death penalty has failed to deter the crime of murder (according to www.USDOJ.GOV/SENTENCING/...) and is prohibited by Bartnicki v. Vopper, 532 U.S. 514, 527-30, 121 S.Ct. 1753 (2001) (first amendment protects obtaining and publicizing lawfully obtained personal information of others, even if others may use it unlawfully); Florida Star v. B.J.F., 491 U.S. 524, 533-35, 109 S.Ct. 2603 (1989) (information available by State to public domain is "presumed" to be of significant public interest and is first amendment protected by those who request or publish it.).

.565(2) "...but not limited to..." cannot be reconciled with any constraints or even relevance definitions under Evidence Rules 401 and 404(b), including:

.565(2)(a) "other requests by the requestor" including from other agencies since the PRA was established as done in both DeLong and King County, an activity based form of punitive censorship arbitrarily defined;

.565(2)(b) "The type of record or records sought" is an arbitrary and subjective form of topic and speech form of censorship;

.565(2)(c) "Statements [from years back in any form not even needing a PRA nexus or claimed association with any specific records requests or requestors

protected first amendment rights or expression even to non-agency parties] by the records requestor concerning the [subjectively interpreted] purpose of the request," as a subjective intent without a mens rea requirement, another form of speech censorship.

.565(2)(d) "would likely harm any person or vital government interest" where the term "harm" and "would likely" lacks any objective criteria for first amendment prohibitions or reliance for an injunction.

.565(2)(e) "Seeks a significant and burdensom number of documents" is an arbitrary undefinable baseline criteria referenced in dicta in Zink, 140 Wn.App. at 333-39.

.565(2)(f) "The impact of disclosure" such as held in Prison Legal News v. DOC, 154 Wn.2d 628, 638-39, 115 P.3d 316 (2005) where the agency fought disclosure because it might reduce the unnecessary prisoner deaths, the statute here would withhold corrective measure records disclosure.

.565(2)(g) "The deterrence of criminal activity" is redundant with .565(1)(c)(iv), and is another speculation based restriction comparable with outlawing vehicles to deter drunk driving or speeding also triggering first amendment association and speech problems such as under Reno v. ACLU, 521 U.S. 844, 884-85, 117 S.Ct. 2329 (1997).

The new statute fails each of the six legitimacy tests found in Sheehan v. Gregoire, 272 F.Supp.2d at 1140-1149, and State v. Kilburn, 151 Wn.2d at 42-50. It fails the first test by failing to proscribe or rely on only true threats, including fighting words, incitements to imminent lawless action, and classes of lewd and obscene speech. Sheehan v. Gregoire, at 1141-1143, citing Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S.Ct. 1827 (1969). Because RCW 42.56.565 hints at no objective standard whatsoever, it cannot survive First Amendment scrutiny. Id.

It fails the second test because .565 essentially punishes conduct and speech and speech, while making the same records available to others, demonstrates RCW 42.56.565 serves no state interest of the highest order through selective injunctions. Sheehan v. Gregoire, at 1143-45, citing, Florida Star v. B.J.F., 491 U.S. at 533; Bartnicki v. Vopper, 532 U.S. at 527.

It fails the third test because RCW 42.56.565 promotes a content-based restriction on free speech or activities, and is thus presumptively invalid. Sheehan v. Gregoire, at 1145-1146, citing, R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538 (1992).

RCW 42.56.565 fails the fourth test because it does not serve a compelling State interest because it is a content based restriction on protected free speech that cannot be narrowly tailored to serve any compelling interest because the same speech would be permitted under circumstances incidental to another lawful activity. Sheehan v. Gregoire, 272 F Supp. 2d at 1146-1147, citing, The Florida Star v. B.J.F., 491 U.S. at 533.

RCW 42.56.565 fails the fifth test because it lacks any means to readily susceptible to a narrowing construction by the state courts and its deterrent effect on legitimate expression is both real and substantial. Sheehan v. Gregoire, 272 F Supp. 2d at 1147-48, citing, Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908 (1973).

RCW 42.56.565 fails the sixth void-for-vagueness test because persons of common intelligence must necessarily guess at the statute's meaning and conduct or speech that may be relied upon to trigger a record's denial - application of RCW 42.56.565 for an injunction. Sheehan v. Gregoire, 272 F. Supp. 2d at 1148-49, citing, Broadrick, 413 U.S. at 607; Reno v. ACLU, 521 U.S. at 865. The statute should be declared unconstitutional.

5. IF HAVING PREVAILED, COSTS, EXPENSES AND FEES SHOULD BE AWARDED.

Parmelee seeks any and all costs, fees and expenses, as well as an order for penalties on remand, if having prevailing on any issue in this case. Yakima v. Yakima Herald-Republic, 170 Wn. 2d at 784.

V - CONCLUSION

For these reasons and the record, Mr. Parnolee respectfully asks this court to overturn the trial courts decision and grant Parnolee appellate fees and costs on appeal.

Respectfully submitted on July 25, 2012.

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STATE OF WASHINGTON
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CERTIFICATE OF SERVICE

I, hereby certify that in accordance with RAP 18.5 and DOC practice and policy, a copy of this pleading was served on the court and all required parties via U.S. mail on or before the date below.

Signed at Monroe WA 98272, on 07/25/2012 Allen Parnolee