



No. 35469-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LAURA MATHIEU, et al.,

Respondents,

v.

ALLAN PARMELEE,

Appellant,

v.

KAREN BRUSON, et al.,

Respondents.

REPLY BRIEF OF APPELLANT

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SUMMARY OF REPLY

In response to Appellant's opening brief, the DOC Respondents (hereafter "DOC") argue (1) that disclosure of Ms. Mathieu's official DOC badge photo would violate her right to privacy, (2) that it is impossible to determine whether the other records at issue in this case contain exempt information since they are not part of the record, (3) that DOC and reviewing courts should be allowed to consider the criminal history and behavior of one who requests public records in deciding whether or not the records are exempt from disclosure, and (4) that DOC should not be required to pay Mr. Parmelee's attorney fees because it was not DOC that initiated this action.

As argued below, neither DOC nor Respondent Laura Mathieu satisfied their burdens to prove that the records Mr. Parmelee requested were exempt from disclosure and that production of the records would substantially and irreparably damage Ms. Mathieu or a vital government function. Without such proof, it was error for the trial court to enter an injunction and deny Mr. Parmelee's motion to dismiss. Moreover, DOC's request that it be permitted to deny a public records request based on the requestor's criminal history and prison behavior is not supported by any authority and is in direct conflict with numerous statutory and judicial

statements requiring broad disclosure of public records and narrow construction of exemptions.

Finally, while DOC technically may not have filed the initial petition seeking to prevent Mr. Parmelee from receiving his requested records, it was the agency, not Ms. Mathieu, that performed virtually all of the work necessary to prosecute the action and obtain the injunction. Under these circumstances, the Public Records Act's ("PRA's") attorney fee mandate, which must be liberally construed, warrants an award of attorney fees against DOC.

ARGUMENT

A. Respondents Failed to Prove the Elements Necessary to Support the Trial Court's Injunction.

Before a trial court may enjoin the disclosure of public records under RCW 42.56.540, the party or parties seeking to prevent disclosure must prove two things: (1) that the records are exempt from disclosure pursuant to a specific statutory exemption, Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 744, 958 P.2d 260 (1998), and (2) that disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.56.540. DOC and Ms. Mathieu failed to prove these elements at the

trial court level and further failed establish them for purposes of *de novo* review by this Court. Therefore, this Court should reverse the trial court's rulings and grant Mr. Parmelee's motion to dismiss.

There are six types of public records at issue in this case: (1) photographs, (2) performance reviews, (3) compensation records, (4) critical employment records, (5) administrative grievances and internal investigation records, and (6) staff training records. CP 41-42. For the reasons discussed below, the trial court erred in its ruling with respect to each category.

1. Ms. Mathieu's Official Government ID Photograph Does Not Contain Intimate, Personal Information and Is Not Exempt from Disclosure.

According to DOC, the trial court properly enjoined the release of Ms. Mathieu's official DOC photograph because such release would violate Ms. Mathieu's right to privacy. Br. of Resp. at 19-25. Although neither DOC nor Ms. Mathieu cited any specific privacy exemption to the court below, DOC now asserts that disclosure of Ms. Mathieu's official photograph is precluded by RCW 42.56.230(2).

The statute on which DOC relies exempts from public disclosure "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." RCW 42.56.230(2). For purposes of the

Public Records Act, a person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050.

"The right of privacy is commonly understood to pertain only to the intimate details of one's personal and private life." Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 38, 769 P.2d 283 (1989) (citations omitted). For guidance in defining the nature of this right, the Washington Supreme Court has pointed to the commentary to the Restatement (Second) of Torts § 652D:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 136, 580 P.2d 246 (1978).¹

¹ When Hearst was decided, the legislature had not yet codified the definition of privacy now found at RCW 42.56.050. However, "[P]rivacy as used in [RCW 42.56.050] is intended to have the same meaning as the definition given that word by the Supreme Court in Hearst v. Hoppe, 90 Wn.2d 123, 135 (1978)." Laws of 1987, ch. 403, § 1).

A public employee's official photograph, displayed on a government ID badge, does not constitute an intimate detail of one's personal and private life. It certainly is not the type of sensitive, personal information described in the Restatement comment referenced by the Supreme Court in Hearst, such as information about sexual relations, family quarrels, and humiliating diseases. To the contrary, the information revealed by a public employee's head shot on her government ID badge is decidedly public: It is information that the employee reveals to colleagues, friends, and strangers on a daily basis. It is an image that could legally be captured on film by any member of the public or the media while the employee is walking down the street. An official government photograph, seen by numerous people on a daily basis, is simply not the type of information whose disclosure courts consider to be "highly offensive to a reasonable person."

The PRA has specific provisions listing what type of employment information is exempt from public disclosure. See RCW 42.56.250. The list includes: employment applications, resumes, employee residential addresses and telephone numbers, e-mail addresses, Social Security numbers, and emergency contact information. RCW 42.56.250(2) and (3). The fact that the legislature chose not to include ID photographs in this list suggests that it did not intend to exempt such information from disclosure.

See Washington State Republican Party v. Washington State Pub.

Disclosure Comm'n, 141 Wn.2d 245, 280-81, 4 P.3d 808 (2000) (refusing to read an implied exemption into the Public Disclosure Act, noting that “[w]here a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies”) (citation omitted).

It is well established and often repeated that the PRA “is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed.” Amren v. Kalama; 131 Wn.2d 25, 31, 929 P.2d 389 (1997); accord RCW 42.56.030; King County v. Sheehan, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (acknowledging the “‘thrice-repeated’ legislative mandate that exemptions under the public records act are to be narrowly construed”). Further, the legislature has instructed that “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). Given the mandate that courts construe public records exemptions narrowly, a public employee’s government ID photo is not exempt from disclosure, as it does not reveal intimate, private information. Rather, it contains information that is readily disclosed to members of the public on a daily basis.

Finally, Ms. Mathieu did not submit any declaration or other evidence to demonstrate how she would be “substantially and irreparably damaged” by the disclosure of an ID photo that she displays to the public every day she works. See RCW 42.56.540. Since neither DOC nor Ms. Mathieu proved that a statutory exemption applies to official government photographs or that Ms. Mathieu would be substantially and irreparably damaged by the disclosure of such a photograph, the trial court erred in enjoining disclosure.

2. The Trial Court Wrongly Enjoined Disclosure of Ms. Mathieu’s Performance Reviews and Critical Employment Records.

The trial court enjoined disclosure of Ms. Mathieu’s performance reviews and critical employment records without finding that any specific exemption applied to such records. CP 22-25; CP 104-06. Although employment records, including performance reviews may be exempt from disclosure under certain circumstances, the lower court erred in prohibiting their disclosure here.

As noted above, a person’s right to privacy is violated “only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. Courts have held that the public does not have a legitimate interest in routine performance evaluations that do not discuss

specific instances of misconduct or public job performance. See, e.g., Dawson v. Daily, 120 Wn.2d 782, 800, 845 P.2d 995 (1993), overruled on other grounds by Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994). However, “not all the information contained in personnel evaluations and personnel records . . . is privileged; information about public, on-duty job performances should be disclosed.” Ollie v. Highland Sch. Dist. No. 203, 50 Wn. App. 639, 645, 749 P.2d 757 (1988) (quoted in Dawson, 120 Wn.2d at 795).

A case from this division affirms that employment records are not automatically exempt from public disclosure. In Limstrom v. Ladenburg, an attorney requested to inspect documents in a prosecutor’s personnel file concerning any specific instances of misconduct. 85 Wn. App. 524, 533, 933 P.2d 1055 (1997), rev’d on other grounds, 136 Wn.2d 595 (1998). The prosecutor’s office denied the request and the trial court upheld the denial. On appeal, this Court reversed, holding that “[t]he disclosure of the details of [an employee’s] misconduct, while in the performance of his public duties, is not highly offensive.” Id. (quoting Dawson, 120 Wn.2d at 796). This Court further held that “there is no doubt that the misconduct of a prosecutor in the performance of her duties is a matter of legitimate public concern.” Id., 85 Wn. App. at 533-35.

Here, the trial court erred in enjoining the disclosure of Ms. Mathieu's performance reviews and critical employment records. First, such records are not exempt to the extent that they contain information concerning specific incidents of misconduct or public job performance. Moreover, Ms. Mathieu failed to offer any evidence that disclosure of these records would cause her "substantial and irreparable damage," as required by RCW 42.56.540.

On appeal, DOC concedes that since the trial court did not examine the records at issue, and since they are not in the record, there is no way of knowing whether or not they contained information that is exempt from disclosure. Br. of Resp. at 27-28 ("[I]t is unclear whether the actual records prepared for disclosure by DOC contained such exempt materials."); *id.* at 30 ("Regarding the court's enjoinder of the remaining records, the application of these statutory exemptions is difficult to determine where the personnel records are not part of the court file."). DOC proposes to correct the trial court's error by having this Court review the records under seal. Br. of Resp. at 30. DOC has not moved to supplement the record on appeal. Moreover, review of the records is not necessary for a determination of the merits: As Ms. Mathieu failed to prove that disclosure of her personnel records would cause her substantial

and irreparable damage, she did not satisfy her burden under RCW 42.56.540 and thus the trial court erred in issuing an injunction.

3. The Compensation Records Should be Fully Disclosed.

Without citing any specific statutory exemption, the trial court enjoined the disclosure of Ms. Mathieu's compensation records, except for information related to her pay grade and pay scale. CP 24. This ruling was contrary to this Court's authority.

In Tacoma Pub. Library v. Woessner, 90 Wn. App. 205, 951 P.2d 357 (1998), this Court held that "release of employee names, salaries, publicly funded fringe benefits, and vacation and sick leave pay is not 'highly offensive.'" Id., 90 Wn. App. at 222. Thus, information about Ms. Mathieu's compensation, including fringe benefits and vacation and sick leave pay, is not exempt from disclosure. In addition, Ms. Mathieu failed to demonstrate that disclosure of such information would cause her substantial and irreparable damage. For these reasons, the trial court erred in enjoining disclosure of all compensation information other than Ms. Mathieu's pay grade and pay scale.

4. Administrative Grievances and Investigation Records Are Not Exempt in this Case and Should Be Disclosed.

DOC argues that RCW 42.56.240(1) may apply to the administrative grievances and investigative records requested by Mr.

Parmelee. Br. of Resp. at 27-28 n.12. That statute exempts the following types of information from public disclosure:

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.

As noted in Appellant's Opening Brief, this exemption generally does not exempt records pertaining to investigation of personnel matters. See Columbian Publ'g Co. v. Vancouver, 36 Wn. App. 25, 30-31, 671 P.2d 280 (1983). Moreover, it does not allow DOC to withhold records pertaining to staff discipline. Prison Legal News, Inc. v. Dep't of Corrections, 154 Wn.2d at 636-44.

The "essential to effective law enforcement" prong of this exemption does not apply unless the records pertain to an agency's investigation of illegal conduct, subject to a fine or prison term. Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 796, 791 P.2d 526 (1990). Neither DOC nor Ms. Mathieu alleged that any of the records Mr. Parmelee requested pertained in any way to illegal conduct by Ms. Mathieu. Moreover, the fact that DOC itself was willing to produce the records to Mr. Parmelee prior to Ms. Mathieu filing this action demonstrates that nondisclosure was *not* necessary for effective law enforcement. See

Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 37, 769 P.2d 283 (1989) (“The agency's decision to voluntarily turn over these records, made as it was by the law enforcement agency which itself prepared the records, convinces us in this case that the nondisclosure of the records is not essential to effective law enforcement.”).

Finally, neither DOC nor Ms. Mathieu submitted any evidence to demonstrate that disclosure of the administrative grievances or investigation records would “substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” Without such proof, it was error for the trial court to grant an injunction. RCW 42.56.540.

5. Ms. Mathieu’s Training Records Should Be Disclosed Without Limitation.

In its final injunction order, the trial court ordered DOC to disclose Ms. Mathieu’s training records, but “only if the release of those records will not have an impact on Department of Correction’s ability to function appropriately in a law enforcement capacity.” CP 24. In its briefing below, DOC did not submit any evidence and did not make any argument that disclosure of Ms. Mathieu’s training records would substantially and irreparably damage vital governmental functions. Moreover, it did not argue that any statutory exemptions applied to the training records sought

by Mr. Parmelee. Without such proof, it was error for the trial court to limit the scope of disclosure of such records.

B. The Court Should Reject DOC’s Invitation to Create a New Judicial “Convict Exemption” to the Public Records Act that Has Not Been Adopted By the Legislature.

Having failed to prove that any specific statutory exemption applies to the records at issue, and that disclosure of such records would cause substantial and irreparable harm, DOC asks this Court to create new law and craft a special rule that would allow public agencies and courts to consider the criminal history and behavior of a public records requestor when deciding whether or not to disclose certain records. Br. of Resp. at 30-38. This is an audacious request, one that flies in the face of the legislative and judicial mandates governing interpretation of the PRA.

In considering DOC’s request for broader power to withhold public records, it is crucial to keep in mind the numerous legislative and judicial statements mandating the opposite approach. The Supreme Court has declared the PRA to be a “strongly worded mandate for broad disclosure of public records,” and thus “it is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed.” Amren, 131 Wn.2d at 31. The Act itself – in three separate places – explicitly mandates liberal construction of the disclosure provisions and narrow construction of the exemptions. See RCW

42.17.010; RCW 42.17.920; RCW 42.56.030; King County v. Sheehan, 114 Wn. App. 325, 338, 57 P.3d 307 (2002). The PRA further instructs that “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

The legislature has explicitly provided that agencies may not distinguish among persons requesting records. RCW 42.56.080. Decisions regarding public records requests “must be made without regard to the identity of the requesting party or the purpose of the request.” Dawson, 120 Wn.2d at 797. In amending the Public Records Act in 1987, the legislature made clear its intent:

The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records.

Spokane Police Guild, 112 Wn.2d at 41 n.26 (quoting Laws of 1987, ch. 403, § 1, p. 1546).

An instructive case is Koenig v. City of Des Moines, 158 Wn.2d 173, 142 P.3d 162 (2006). In that case, the City of Des Moines sought to withhold police records pertaining to the sexual abuse of a child because

the child's name was identified in the request. Thus, disclosure of the records would necessarily reveal the identity of a child victim of sexual assault, information that is exempt from disclosure under the PRA. The Supreme Court rejected the City's argument, noting the absence of "statutory language or case law to support the notion that [a court] may look beyond the four corners of the records at issue to determine whether they were properly withheld." Id., 158 Wn.2d at 183. The Court explained:

We are not oblivious to the prospect of an individual or entity engaging in a 'fishing expedition' and speculating about victims' identities in filing public record requests. These hypothetical concerns, however, are properly directed to the legislature and do not absolve us of the responsibility to follow the plain language of the act. Former RCW 42.17.31901 clearly defines the information it exempts from disclosure, and, as the Court of Appeals correctly held, we may not rewrite [it] or construe it in a manner contrary to its unambiguous text.

Id. at 184 (internal quotation marks and citation omitted).

Similarly here, there is nothing in the PRA or relevant case law that would allow DOC or this court to go beyond the four corners of the records at issue in determining whether those records are exempt from disclosure. To the extent DOC believes it should be allowed to base its disclosure decisions on a requester's criminal history or conduct in prison, it may request such authority from the legislature. However, unless and

until the legislature grants such authority, this Court may not broaden the exemptions provided in the PRA as DOC requests, as such a ruling would violate the requirement that the Court construe PRA exemptions narrowly.

Another case that repudiates an agency's attempt to withhold public records based on concerns regarding the requester's purpose is King County v. Sheehan, cited above. In that case, two citizens submitted public records requests to local police agencies, seeking the full names, job titles, and pay scales of every law enforcement officer and attorney employed by the agency. King County, 114 Wn. App. at 332. The King County Sheriff denied most of the request, refusing to provide the names of its officers. The sheriff claimed the information was exempt under former RCW 42.56.230(2) and RCW 42.56.240(1), the same statutes relied upon by DOC in this appeal. Of particular concern to the County was that the requesters operated "controversial internet web sites that [were] highly critical of police, and that [one of the requesters], at least, [had] previously posted identifying information regarding King County police officers, including their home addresses, on his web site." Id. at 333. The trial court granted the County's motion to enjoin disclosure in part, stating, "Under the circumstances of this case and based on defendant William Sheehan's statements regarding his intended use of the

information, the Court must balance the interests of disclosure with the interests in effective law enforcement.” Id. at 334.

On appeal, the County argued, in part, that nondisclosure was essential because if officers “know that their residential addresses can easily be obtained by any individual who has a list of the names of all police officers employed by the County, they will constantly fear for their own safety and the safety of their families.” Id. at 339-40. While sympathetic to the County’s concerns, the court reversed, stating:

The County has long had a policy of routinely releasing the names, ranks, and pay scales of its police officers to legitimate news media, upon request. We can only conclude that the requests of Sheehan and Rosenstein were denied because of who these men are – both operate controversial websites that are critical to police, and Sheehan, at least, has heretofore published home addresses of police officers on his web site. Indeed, the trial court’s order reflects that the decision to require the County to release only the surnames of its police officers was based in part on “William Sheehan’s statements regarding his intended use of the information,” as well as “balanc[ing] the interests of disclosure with the interests in effective law enforcement.” But the act expressly states that “[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request[.]” Therefore, Sheehan’s intended use of the information cannot be a basis for denying disclosure. To conclude otherwise would be to allow agencies to deny access to public records to its most vocal critics, while supplying the same information to its friends.

Id. at 341.

The issues in this case are strikingly similar to the issues in Sheehan: In both cases, the public agency did not want to disclose certain information about public employees because it feared that the requester would use the information in a way that might subject the employees to harassment. In Sheehan, Division 1 ruled that the requester's intended use of the information could not be used as a basis to deny disclosure, as the Public Records Act did not allow for withholding records on that basis. This Court should rule the same here.

It is important to note that if Ms. Mathieu remains concerned about how her ID photo or other information might be used once disclosed, the legislature has provided remedies to address those concerns. See, e.g., RCW 4.24.680-700 (making it illegal to publish personal information of a correctional officer on the internet and providing for injunctive relief and damages); RCW 10.14.080 (authorizing a protective order to prevent unlawful harassment). As the court observed in Sheehan, individuals' concerns about unlawful use of public records are appropriately addressed through statutes like these, "rather than by enacting exemptions that would erode the broad mandate of the [PRA] for broad public disclosure of

public records.” Sheehan, 114 Wn. App. at 348.²

DOC cites Sappenfield v. Dep’t of Corrections, 127 Wn. App. 83, 110 P.3d 808 (2005), for the proposition that prison safety remains a priority, even in the context of public disclosure. Br. of Resp. at 32. Sappenfield did not in any way address the issue presented here: whether a public agency or a court may consider a requester’s criminal background or prison behavior in determining whether certain records are exempt from disclosure under the PRA. Rather, Sappenfield merely held that a prison could require a prisoner to purchase copies of public records requested by him, rather than making the records available for in-person inspection. The court ruled that such a procedure was consistent with the PRA requirement that agencies adopt reasonable rules to maximize public access to records, but also to protect the records in their care from potential damage or disorganization, as well as to prevent excessive interference with essential agency functions. Id., 127 Wn. App. at 89-90. Although Sappenfield provides DOC with some leeway in determining the *manner* of disclosing public records, it provides no authority whatsoever for expanding DOC’s power to deny disclosure in total.

² Even if it were proper to consider a requester’s potential use of public records in deciding whether or not to disclose the records, there is not one piece of evidence in the record here that Mr. Parmelee had ever unlawfully harassed Ms. Mathieu or intended to do so in the future.

DOC also cites Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to support its request for broader authority to deny prisoner requests for public records. Br. of Resp. at 36-37. DOC has not cited – and Appellant is not aware of – any case holding that public records requests to DOC are subject to the limitations set forth in Turner.

Mr. Parmelee does not dispute that under Turner, courts generally defer to prison administrators' judgment in matters affecting institutional security. However, the Turner standard is not applicable to all prisoner claims. See, e.g., Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (refusing to apply the Turner standard to prisoners' Eighth Amendment claims). The reason Turner applies to some prisoner claims but not others is that some laws, such as the Eighth Amendment, specifically contemplate application in the prison context. Courts presume that such laws already account for the security concerns inherent in such settings. See id.

The Public Records Act contemplates application in the prison setting and accounts for the security concerns inherent in that setting. See, e.g., RCW 42.56.240 (exempting certain information held by penology agencies if nondisclosure is necessary for effective law enforcement or to protect any person's life, safety, or property); RCW 42.56.420(2) (exempting certain records whose disclosure "would have a substantial

likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility or any individual's safety"). Since the legislature has already accounted for prison security concerns in the context of the PRA, the Turner standard does not apply.

DOC's request for broader authority to consider requestors' criminal history and prison behavior in determining the applicability of PRA exemptions is unsupported by authority and directly violates the PRA's policy of broad disclosure. The request should be denied.

C. Mr. Parmelee Did Not Abandon His Assignment of Error Regarding the Lower Court's Refusal to Grant His Motion to Dismiss and for Costs and Statutory Penalties.

DOC claims that Mr. Parmelee failed to present any argument pertaining to his Assignment of Error No. 3, and that the Court should therefore disregard this assignment of error. Br. of Resp. at 39. DOC's argument is without merit. Mr. Parmelee argued in his opening brief that the statutory exemptions to disclosure cited by the trial court do not apply to the records at issue in this case. Br. of Appellant at 15-21. He also argued that parties seeking to prevent disclosure of public records must prove that a statutory exemption applies to the records. Id. at 14. Since the Respondents failed to prove an element necessary to support their request for injunctive relief, the trial court should have dismissed Ms.

Mathieu's petition. Id. at 26-27. Mr. Parmelee also presented arguments supporting his request for fees, costs and penalties. Id. at 24-25.

D. Mr. Parmelee is Entitled to Attorney Fees and Statutory Penalties if He Prevails in this Matter.

DOC argues that it should not be required to pay Mr. Parmelee's attorney fees for this appeal, should he prevail, because the original action was not initiated by DOC. Br. of Resp. at 43-44. DOC further argues that it should not have to pay statutory penalties for wrongfully withholding records from Mr. Parmelee because it was merely complying with a court order precluding disclosure. Id. These arguments are misplaced.

A public agency may be required to pay a requester's reasonable attorney fees in an action where a third party sues to enjoin disclosure, even when the agency did not initiate the lawsuit. See Doe I v. Washington State Patrol, 80 Wn. App. 296, 908 P.2d 214 (1996). This is not true in all cases. In Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998), several Indian tribes sued to enjoin disclosure of records held by the Washington State Gambling Commission. The trial court denied the injunction and the tribes appealed. The Supreme Court upheld the trial court ruling and affirmed that the individual who had originally requested the records was entitled to receive them under the PRA. Despite the fact that the records requester prevailed

in the action, the Court held that he was not entitled to recover attorney fees from the Gambling Commission because he had prevailed against the tribes, not the agency. Id., 135 Wn.2d at 757. Similarly, in Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 129 Wn. App. 832, 120 P.3d 616 (2005), the Court of Appeals denied an award of fees to a public records requester (The Seattle Times) who succeeded in large part in opposing an injunction sought by a number of Bellevue school teachers.

This case is distinguishable from Confederated Tribes and Bellevue John Does. In those cases, the public agencies did not actively litigate to prevent disclosure of the requested records. In Confederated Tribes, “[t]he tribes resisted disclosure; but the agency – the Gambling Commission – did not. The requester of the records was denied an award of attorney fees because he ‘prevailed against the Tribes, not against the agency.’” Bellevue John Does 1-11, 129 Wn. App. at 864 (quoting Confederated Tribes, 135 Wn.2d at 756-57). In Bellevue John Does, [t]he record confirm[ed] that the school districts [the agencies that maintained the public records at issue] did not oppose the Times’ disclosure request in court.” Id., 129 Wn. App. at 866.

In this case, however, DOC has played an extremely active role in opposing Mr. Parmelee’s public records request. DOC filed the only substantive briefing and the only evidence in support of Ms. Mathieu’s

petition for an injunction. DOC filed at least two briefs asking the trial court to grant the injunction. CP 117-22; CP 313-21. DOC also filed the only brief opposing Mr. Parmelee's motion to dismiss the injunction petition. CP 125-31. DOC has filed the only brief opposing Mr. Parmelee's appeal. DOC was the only party to file affidavits in support of the injunction. CP 323-48. Such affidavits are necessary under the PRA injunction statute. RCW 42.56.540. Thus, without DOC's active support and prosecution of this case, it is unlikely that the trial court would have issued an injunction. DOC's role in this case has been vastly different than the more hands-off roles played by the public agencies in Confederated Tribes and Bellevue John Does.

The PRA requires agencies to provide their "fullest assistance" to individuals who request records. RCW 42.56.100. In Doe I, where the Court of Appeals ordered an agency to pay attorney fees to a requester who successfully opposed a third party's injunction request, the court criticized the agency for preferring the rights of the third-party over the rights of the records requestor. Doe I, 80 Wn. App. at 303. Here, DOC did everything it could to help Ms. Mathieu obtain an injunction and prevent Mr. Parmelee's access to the records he requested. After filing the initial petition, Ms. Mathieu's involvement in this case has been minimal.

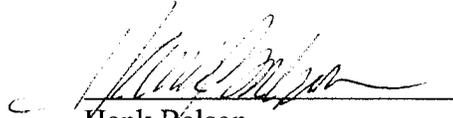
Like the rest of the PRA, the attorney fee provision must be construed liberally in order to promote the Act's policy of disclosure. Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d 677, 683, 790 P.2d 604 (1990) RCW 42.56.030; RCW 42.17.010. The purpose of the PRA attorney fee provision is "to encourage broad disclosure and to deter agencies from improperly denying access to public records." Confederated Tribes, 135 Wn.2d at 757 (citing Lindberg v. Kitsap County, 133 Wn.2d 729, 746, 948 P.2d 805 (1997)). If the Court allows DOC to avoid paying attorney fees in this case, the result will be that public agencies wishing to deny a public disclosure request will simply present their cases through third parties under RCW 42.56.540. The agencies will hire the lawyers, create the record and make the arguments, and then, if the court denies the injunction, walk away without having to pay fees. This result directly contradicts the PRA's explicit intent to hold agencies accountable for their actions in wrongfully preventing public disclosure.

CONCLUSION

For all of the reasons set forth above, this Court should grant Mr. Parmelee's appeal, dissolve the trial court's injunction, order that Ms. Mathieu's petition be dismissed, and order DOC to pay Mr. Parmelee's attorney fees for this appeal.

Respectfully submitted this 29th day of October, 2007.

PUBLIC INTEREST LAW GROUP, PLLC

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LAURA MATHIEU, et al.

Respondents,

vs.

ALLAN PARMELEE,

Appellant

vs.

KAREN BRUNSON, et al.

Respondents.

CERTIFICATE OF SERVICE

I certify that on this date I caused to be mailed by first class mail,
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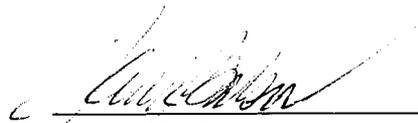
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Dated this 29th day of October, 2007

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

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