

No. 79856-7

COA - 36933-8-II

SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF CORRECTIONS, Appellee,

v.

ALLAN PARMELEE, Appellant.

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BRIEF OF APPELLANT ALLAN PARMELEE

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor
No. 06-2-01406-2

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred in entering an order on January 19, 2007 when it granting the permanent injunction in accordance with RCW 42.56.540, based upon the Court's erroneous anticipation of the intended use of the requested documents.

2. The trial court erred in entering an order on January 29, 2007 when it denied Mr. Parmelee's motion for reconsideration based upon errors both in law and fact.

2. Issues Pertaining to Assignments of Error.

1. Can the anticipated usage of documents obtained from an agency under the Public Records Act create an exemption to disclosure?

2. Is the remedy for unlawful or tortious use of documents brought through the PRA or another remedy?

3. If Mr. Parmelee is the prevailing party on this appeal is he entitled to attorney's fees and costs from the Department of Corrections?

B. STATEMENT OF THE CASE

Mr. Parmelee is presently incarcerated under the jurisdiction of the Washington Department of Corrections ("DOC"). Mr. Parmelee has

asked DOC for various records under the Public Records Act ("PRA"), RCW 42.56 et seq., including photographs of various staff members.

DOC has a policy which governs PRA requests. CP 132-36. This policy has no restrictions on release of documents except if inspection or copying would disrupt or interfere with operations and functions of the DOC. It is also clear that nondisclosure is only permitted per statutory exceptions.

The photographs requested are part of an officer's official badge, worn at work and often in the public. CP 82-83. Some of the facilities also put out a newspaper, available in the lobby of the prison to any visitors. These newspapers have photographs and articles about various correctional officers, often referring to them by name. CP 83.

The Department of Corrections provides various news agencies and the public with press releases. These releases often have photographs of various DOC employees. CP 86-121. DOC has also provided inmates staff photographs. CP 122-31. However, when providing documents to Mr. Parmelee in discovery, these same photographs were redacted. .

Mr. Parmelee had indicated to DOC officials that he wished to use these photographs for various purposes, including identification of possible parties to a lawsuit and to publish several brochures which

identify correctional officials who condone homosexual behavior by inmates in prison. CP 63, 195-96. To make his point, Mr. Parmelee labeled some of these officials sexual predators.¹

DOC filed for an injunction in Thurston County Superior Court under RCW 42.56.540. CP 3-63. DOC asked the trial court to enjoin Mr. Parmelee's receipt of these records based upon his anticipated usage. The State included irrelevant and incorrect materials to try to inflame the passions of the trier of fact. *Id.* Mr. Parmelee pointed out to the trial court their irrelevant, untrue and inflammatory nature. CP 80-81. After briefing, the trial court granted the injunction and issued an order granted the requested relief. CP 213-15.

The trial court held, in its factual conclusions, that Mr. Parmelee was incarcerated, that he intended to label all DOC employees as "sexual predators" and put their pictures in a public way and that he has requested 2,525 photographs. VRP 4-6. The trial court also ruled that the public records sought are not hidden or embarrassing or being covered up but that the intended usage would be embarrassing and that the intent to state DOC employees are "sexual predators" had no basis in fact. It was

¹From the two proposed brochures that Mr. Parmelee provided DOC officials, only 10 were labeled "sexual predators" for condoning homosexual behavior in prison.

admitted that in another context, the records would be obtainable “in some other context.” VRP 8. The court finally ruled that the requests were not made to gather information about governmental functions, which is the purpose of the Public Records Act, and thus producing the documents would not be in the public interest.

The conclusions of law stated that being a DOC employee meant that they should not be under “this type” of scrutiny or publicity and that it is the circumstances of the request and requestor which permits non-disclosure. It further stated prior case law on this issue, *King County v. Sheehan*, 114 Wn. App. 325, 342, 57 P.3d 307 (2002), was distinguished because the trial court was sure how Mr. Parmelee would use the information as opposed to how Sheehan might potentially have used the information.

The trial court then stated that the information sought violated the individual’s right to privacy as defined by RCW 42.56.050. The final ruling permitted RCW 42.56.540 to be used as an exemption in and of itself.

Respondent moved for reconsideration based on errors in law and fact. CP 216-22. Inclusive in this motion was evidence of Mr. Parmelee’s difficulty identifying staff who had been harassing him early in the

morning and intentionally not being identifiable. CP 233-242. The trial court denied in a letter opinion. CP 223-24. A timely appeal followed. CP 225-30.

C. SUMMARY OF ARGUMENT

Appellant, Mr. Parmelee, will show that a requestor's proposed use of documents obtained from a state agency cannot be the justification to deny those records. First, he shows that the trial court's use of RCW 42.56.540 to provide a statutory exemption to disclosure violated the prior decisions of this Court. Next, Mr. Parmelee will show that proposed usage cannot, in and of itself, create a privacy right based upon RCW 42.56.050. Then, it will be shown that DOC used the wrong mechanism to seek relief. Finally, it will be shown that the trial court's statement of facts was in error.

D. ARGUMENT

1. Standard Of Review.

Judicial review of any agency action shall be de novo. RCW 42.56.550(3). “[T]he appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence.” Thus, this Court is not bound by the trial court's findings. *Progressive Animal Welfare Soc'y v. Univ. of*

Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (“*PAWS I*”) (citation omitted).

2. The PRA Standard Of Review Requires Deference To The Requestor In The Interests Of Open Government.

This Court has made it quite clear that the Public Records Act is “a strongly worded mandate for broad disclosure of public records.” *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). As such, its disclosure provisions are liberally construed; its exemptions are “precise, specific, and limited.” *PAWS I*, 125 Wn.2d at 258. The agency withholding the records bears the burden of proving that withheld documents fit within one of the statutory exemptions. RCW 42.56.550(1). The PRA provides that an agency may request that a court review documents prior to disclosure. RCW 42.56.540.

3. RCW 42.56.540 Does Not By Itself Provide A Statutory Exemption To Disclosure Based On Privacy And Photographs Are Not Exempt.

In 1987, in response to this Court’s decision in *In re Request of Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), the Washington Legislature passed an amendment to the PDA by passing RCW 42.17.255 (now RCW 42.56.050). The purpose of the new section was stated by the Washington Legislature as follows:

The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court in *Rosier*. 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. Further, to avoid unnecessary confusion, "privacy" as used in RCW 42.17.255 (42.56.050) is intended to have 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.

This Court agreed and subsequently explicitly ruled that RCW 42.56.540 is "a procedural provision which allows a superior court to enjoin the release of specific records if they fall within specific exemptions found elsewhere in the Act." *PAWS I*, 125 Wn.2d at 257 (citing *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-37, 769 P.2d 283 (1989)). In *PAWS I*, this Court stated the following:

Our brief and peripheral discussion of section .330 was contingent on the trial court finding on remand that some of the documents did not fall within the scope of the work product exemption. In any event, any implication that section .330 creates an independent exemption for vital governmental interests is directly at odds with the Legislature's thrice-repeated demand that exemptions be narrowly construed. RCW 42.17.010(11); RCW 42.17.251; RCW 42.17.920. Further, such an interpretation, whether in dicta or not, replicates precisely the error of *Rosier* and ignores the legislative response to *Rosier*.

PAWS I, 125 Wn.2d at 261 n.7; citing *Rosier*, 105 Wn.2d 606.

4. Employees Of DOC Are Not Entitled To Privacy On Documents Which The Trial Court Acknowledges Are Not In And Of Themselves Private.

The Legislature defined the right to privacy in terms of the PRA in RCW 42.56.050:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or 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.

As the 1987 enactment required, we look to *Hearst* for instruction on what a violation of the right of privacy is. *Hearst*, 90 Wn.2d 123. *Hearst* looks to the Restatement when it stated the following:

The most applicable privacy right would appear to be that expressed in tort law. Tort liability for invasions of privacy by public disclosure of private facts is set forth in Restatement (Second) of Torts 652D, at 383 (1977): "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public."

Id. at 135. The privacy exemption "applies to personal information that employees would not normally share with strangers." *Sheehan I*, 114 Wn. App. at 342 (citing *Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993)).

The application of the present facts to the two prong “privacy test” fails quickly on the first prong. This Court has stated that the right of privacy applies only to the “intimate details of one's personal and private life” and does not encompass actions taken in public and observed by strangers. *Id.* at 796. Nothing in the photographs of the faces of employees is an intimate detail. It is not personal information that the employees do not share with strangers whenever they venture into the public. As was pointed out to the trial court, employees wear their badges at work and individuals, whether free or incarcerated, view these badges with the photos every day.

5. The Identity Of The Requestor, And The Proposed Usage Is Irrelevant To How Requests Must Be Handled.

Nor may the courts balance the privacy interest of the individual against the interest of the public for disclosure. *Dawson*, 120 Wn.2d at 795 (citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990)). The Public Records Act explicitly prohibits agencies from making decisions on releases of documents based upon whom the requestor is or what their stated purpose is. RCW 42.56.080 states in pertinent part:

Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.

To withhold documents from Mr. Parmelee because of his stated purpose violates this statute. The only question which can be asked is whether or not there is an appropriate exemption to prohibit disclosure -- which there is not. Thus the requested records must be disclosed to comport with the holding in *Sheehan I*, which this Court must approve.

In *Sheehan I*, Sheehan had asked the King County Sheriff's Office ("KCSO") to provide the names, job titles and pay rates of officers and attorneys in their department. He had a website critical of police. Just as in this case, KCSO filed for an injunction against Mr. Sheehan. Another individual, who also had a website critical of police, was permitted to intervene. Sheehan had put the home addresses of officers on his website. *Id.* at 333.

KCSO withheld this information from the plaintiffs, justifying it using the language of former RCW 42.17.310(1)(b) (now RCW 42.56.540) because it "would allow access to additional information regarding individual employees that is both highly offensive and not of

legitimate concern to the public.” There was also a claimed exemption based upon the former RCW 42.17.310(1)(d) because “release of the list will hinder effective law enforcement because it will make identifying information beyond just the names of officers accessible.”

KCSO also asserted that suspected violators of criminal law could use the list of names to obtain officers' home addresses from other sources. The suspected violators could then take pictures of the officers leaving their homes, and use the photographs to spot undercover officers that they might encounter while engaging in criminal behavior. Second, KCSO argued that nondisclosure was also essential to officers who do not work undercover because, if they knew that their residential addresses could 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. These arguments did not wash because the information simply was not private.

As the *Sheehan I* Court stated:

[T]he County admits that it regularly releases the names of its officers, including undercover officers, to the legitimate news media and, indeed, to anyone else who requests them in connection with specific incidents. Officers who are not operating undercover disclose their own names each day, on the name tags that they wear on their uniforms, on the tickets and citations that they issue, to suspects whom they interrogate, to witnesses whom they

interview, and on the public record when they testify in open court - even undercover police officers use their real names when testifying in open court.

Id. at 340. DOC employees release “their faces” every day. Individuals employed by the Department of Corrections are easily identifiable in the towns and cities where they live. All DOC employees must wear photo identification while at work, just like the inmates. A person’s face is public information and is simply not protected.

In apparent response to *Sheehan I*, the Washington Legislature passed RCW 4.24.680-700. The statute prohibited publishing on a website personal information which was defined as follows:

Personal information” means a peace officer's, corrections person's, justice's, judge's, commissioner's, public defender's, or prosecutor's home address, home telephone number, pager number, social security number, home e-mail address, directions to the person's home, or photographs of the person's home or vehicle.

RCW 4.24.680(f).² This law was quickly challenged on constitutional grounds and overturned. *Sheehan v. Gregoire*, 272 F.Supp.2d 1135 (2003) (“*Sheehan II*”).

²What is not included are names and photographs of the person in question. As the *Sheehan I* court stated, “[w]e observe that if our legislature had intended the names of police officers to be exempt from disclosure under the public records act, it is unlikely that it would have enacted these new statutes.” *Sheehan I*, 114 Wn. App. at 349.

6. The Proper Remedy For Slanderous Speech Is A Tort Action, Not The Public Records Act.

Plaintiffs have claimed that Mr. Parmelee has intended to make slanderous or libelous statements against DOC employees.³ But he didn't. Both brochures were mailed to DOC officials. The PRA is simply the improper remedy because Mr. Parmelee could just as easily choose not to publish the brochures. It is the act of doing the publishing which, if indeed it was libelous or slanderous, would create the injury sounding in tort.⁴

The Department of Corrections could have brought an action for slander or libel. Our statutory scheme even gives special rules how to plead these causes of action. RCW 4.26.120. Mr. Parmelee was not required to show that his allegations were true in this case because the requestor and the proposed usage was simply irrelevant to the agency – this is a Public Records Act case.

³Of course, Plaintiff provides no rebuttal showing the allegations made by Mr. Parmelee in his proposed brochure are factually untrue.

⁴Mr. Parmelee disagrees with the trial court's findings regarding the truth of his allegations. First, because it was irrelevant to his request. And second, because Mr. Parmelee made the statements in the brochures based upon his experience as a prisoner in the Washington Department of Corrections including the observation of the treatment of other prisoners.

It is also important to note that DOC must meet an extremely high standard to prevent his publishing any documents obtained from a state agency. The United States Supreme Court has expressly ruled that once truthful information about a matter of public interest is obtained, then the government cannot prevent its publication without a very compelling governmental interest. See *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1145, 51 L.Ed.2d 355 (1977). As Justice White said:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Cox Broadcasting Corp. v. Cohn; 420 U.S. 469, 495, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Such prior restraint is not permitted because Mr. Parmelee is entitled to the documents he has requested through the Public Records Act. He is entitled to use them as long as he wants until legal action says otherwise. However, if DOC is asserting Mr. Parmelee's allegations are libelous or slanderous, it must be on these grounds that an injunction is sought, rather than the PRA. By using the PRA, DOC has avoided the higher standard required to show slander or libel of a governmental official.

The standard of libel or slander to which Mr. Parmelee would be held requires a two-part test. As this Court has stated:

In essence, we find two pertinent variables: (1) the importance of the position held, and (2) the nexus between that position and the allegedly defamatory information - specifically, how closely the defamatory material bears upon fitness for office.

Clawson v. Longview Pub. Co., 91 Wn.2d 408, 417, 589 P.2d 1223 (1979). Even for non-elected governmental officials, there is a higher degree of scrutiny accorded them as opposed to private persons.

Public employees are involved in the business of the public and cannot expect the same degree of protection of their privacy as it relates to their work as those employed in the nonpublic sector. They do not place their personal lives before the public to the extent elected officials must under the rationale in *Gertz*, but, even relatively low level public employees must, nonetheless, expect a degree of public interest in the performance of their duties.

Id. at 416; citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Applying this test to the officials involved and the allegations clearly shows that it is strictly about job performance. Thus, if the individuals believe that Mr. Parmelee, if he should publish any materials (which he has not yet done), defame or slander them, they must prove actual malice.

7. The Trial Court's Findings Of Fact Are Incorrect On The Record Before This Court.

The trial court was incorrect when it claimed the information presented was not in the public interest. The trial court focused on potential embarrassment to public servants, and ignored Mr. Parmelee's assertions that his publication served a vital public interest by informing the public about conditions existing in state prisons. Prison societies are closed, comprising both inmates and staff. The general public is not often exposed to the conditions that exist within prisons. Consequently, problems can exist for years without remedy due to the difficulty of the public obtaining information about the problems. Often, the only means for exposing problems in prisons occurs when inmates take steps to publicize conditions.⁵ Obviously, inmates are limited by their incarceration in their ability to successfully publicize their concerns. Thus, the time required for an action to correct a problem in prison societies can be extremely long. Facilitating inmate attempts to obtain

⁵Prison Legal News is a prime example of such action by inmates. This publication was started by two inmates for the purpose of raising legal issues affecting prisoners. These issues of course include issues of prison conditions. *Prison Legal News v. Lehman*, 397 F.3d 692, 696 (9th Cir. 2005). Needless to say, such inquiries have not always been treated with favor by DOC. See e.g. *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628.

public information would serve the public by mitigating some of the difficulties inmates face in publicizing issues of public importance.

Rape in prison has long been a problem. And it is complicated by the high rate of HIV in prison. The high HIV rate in prison also is a problem for homosexual acts. Thus, these are critical health concerns of prison societies. And yet the federal government only passed the Prison Rape Elimination Act in 2003. 42 U.S.C. §15601 et seq. It was only in 1999 that custodial assault was made a felony. RCW 9A.44.160. Prison employees directly supervise inmates, and they have a custodial duty not only to inmates, but to the general public. All state employees can and should be subjected to scrutiny regarding their official duties. Thus observations about officials' actions and behavior, no matter what the label, is all about job performance.

Mr. Parmelee has already pointed out that he made no blanket allegations. Each individual was named in his sample brochures for particularized actions or responsibilities. For example, Secretary Harold Clarke was merely listed as the head of the department and the person to contact. Simply put, the trial court got it wrong. Mr. Parmelee has never had the intention to label all DOC employees as "sexual predators." His labels were based on his personal observations of specific individuals'

behavior as it related directly to the job function these individuals' perform on behalf of the State.

Therefore, the requested documents reflected his intention to gather information related to the various individuals' governmental functions. This information is in the public interest.

Additionally, in his motion for reconsideration, Mr. Parmelee also stated another valid use for the documents requested. This was to assist in the identification of various DOC staff who were engaged in tortious acts against Mr. Parmelee for litigation purposes.

8. Mr. Parmelee Is Entitled To Attorney's Fees And Costs Both Statutorily And Equitably.

RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. Under the Public Records Act, individual who prevails against the agency is entitled to all costs, including reasonable attorney's fees. RCW 42.56.550(4). This Court has determined the PRA authorizes attorney fees and costs on appeal. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

Our courts have also granted costs and attorney's fees based on equitable considerations. See *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998) (*en Banc*). As this Court has said, "[t]he

applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. *Id.* at 758; citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 118 S. Ct. 856 (1998); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987).

The rationale for this equitable remedy lies with the issue of damages.

Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. *Seattle Fire Fighters*, 48 Wn. App. at 138. Because DOC brought this action alleging not libel or slander but under the Public Records Act, Mr. Parmelee is entitled to equitable attorney's fees and costs.

E. CONCLUSION

For the reasons stated above, Mr. Parmelee respectfully asks this Court to overturn the decision of the trial court and order the documents be produced. It is also requested that this case then be remanded back to the trial court for computation of the penalties permitted under the PRA for withholding the documents.

DATED this 5th day of July.

Respectfully submitted,



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