

TABLE OF CONTENTS

INTRODUCTION.....1

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

STATEMENT OF THE CASE.....3

 1. Substantive facts.....3

 2. Procedural facts.....11

ARGUMENT.....12

 I. THE PUBLIC RECORDS ACT CLEARLY AND EMPHATICALLY REQUIRES AGENCIES TO PERMIT FREE INSPECTION OF NON-EXEMPT RECORDS REGARDLESS OF THE IDENTITY OF THE REQUESTER.....15

 A. The PRA vests "any person" with the right to inspect public records.....15

 B. Inspection of public records must be permitted upon the premises of the agency.....20

 C. Fees can not be charged for the inspection of public records.....21

 D. Fees may only be charged when a person requests photocopies or to use agency equipment to photocopy records.....22

 E. The records requested are not exempt from disclosure.....25

 F. The statute authorizing agency rules to safeguard records does not permit rules prohibiting inspection of public records.....26

G. <u>DOC failed to conduct an objectively reasonable search for responsive records</u>	29
H. <u>DOC failed to identify each record withheld from inspection</u>	33
I. <u>DOC's destruction of grievance records following a request violates the PRA</u>	34
J. <u>Division Three's endorsement of DOC's policy is erroneous and should not be followed</u>	35
K. <u>The majority of Appellants claims fell within the Sappenfield and DOC policy exceptions</u>	40
II. THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS ENJOINS THIS COURT FROM FOLLOWING THE SAPPENFIELD OPINION OR AFFIRMING DOC'S POLICY.....	42
III. COLLATERAL ESTOPPEL PROHIBITS RELITIGATION OF THE VALIDITY OF DOC'S POLICY DENYING PRISONERS FREE INSPECTION OF PUBLIC RECORDS.....	45
A. <u>Collateral estoppel enjoins relitigation of the validity of DOC's rule</u>	45
1. <u>Identical issues</u>	45
2. <u>Final judgment on the merits</u>	48
3. <u>DOC was a party in the prior case</u>	48
4. <u>Collateral estoppel does not work an injustice</u>	48

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Turner v. Safely, 482 U.S. 78,
96 L.Ed.2d 64, 107 S.Ct. 2254 (1987).....36-38

WASHINGTON STATE SUPREME COURT

Brouillet v. Cowles Publishing Co.,
114 Wn.2d 788, 719 P.2d 526 (1990).....19, 37

Fritz v. Gorton,
83 Wn.2d 275, 517 P.2d 911 (1974).....12, 43

Hearst Corp v. Hoppe,
90 Wn.2d 123, 580 P.2d 246 (1978).....12, 18, 19
28, 29

In re Juvenile Director,
87 Wn.2d 232, 552 P.2d 163 (1996).....42

In re Rosier,
105 Wn.2d 606, 717 P.2d 1353 (1986).....13, 25

Oliver v. Harborview Medical Center,
94 Wn.2d 559, 618 P.2d 76 (1980).....19-20

Pearce v. Dulien Steel Products, Inc.,
14 Wn.2d 132, 127 P.2d 271 (1942).....24

Police Guild v. Liquor Control Board,
112 Wn.2d 30, 769 P.2d 283 (1989).....20

Prison Legal News v. Department of Corrections,
154 Wn.2d 628, 115 P.3d 316 (2005).....39

Progressive Animal Welfare Society v. UW,
125 Wn.2d 243, 884 P.2d 592 (1994)....13, 14, 33
36, 38-39

Ski Acres v. Kittitas County,
118 Wn.2d 852, 827 P.2d 1000 (1992).....23

<u>Spokane County Health Dist. v. Brocket,</u> 120 Wn.2d 140, 839 P.2d 324 (1992).....	16
<u>STAHL v. Delicor of Puget Sound,</u> 148 Wn.2d 876, 34 P.3d 259 (2003).....	16
<u>State v. Clark,</u> 129 Wn.2d 805, 920 P.2d 187 (1996).....	16
<u>State v. Pope,</u> 100 Wn.2d 624, 999 P.2d 51 (2000).....	15
<u>State v. Rains,</u> 87 Wn.2d 626, 555 P.2d 1368 (1976).....	17
<u>Thompson v. Department of Licensing,</u> 138 Wn.2d 783, 982 P.2d 601 (1999).....	45, 48-50
<u>United States v. Deaconess Medical Center,</u> 140 Wn.2d 104, 994 P.2d 830 (2000).....	45
<u>Washington Public Ports v. Department of Revenue,</u> 148 Wn.2d 637, 62 P.3d 462 (2002).....	28
<u>Yousoufian v. Office of Ron Sims,</u> 165 Wn.2d 439, 200 P.3d 232 (2009).....	29, 30

WASHINGTON COURT OF APPEALS

<u>ACLU v. Blaine School Dist. No. 503,</u> 96 Wn.App. 688, 937 P.2d 1176 (1997).....	27
<u>Citizens v. Department of Corrections,</u> 117 Wn.App. 411, 72 P.3d 206 (2003).....	26
<u>Dunlap v. Wild,</u> 22 Wn.App. 583, 591 P.2d 834 (1979).....	48
<u>King County v. Sheehan,</u> 114 Wn.App. 325, 57 P.3d 307 (2002).....	17-18
<u>Sappenfield v. Department of Corrections,</u> 127 Wn.App. 83, 110 P.3d 808 (2005).....	35-36 38, 41

<u>SATSOP Valley Homeowners v. N.W. Rock,</u> 126 Wn.App. 536, 108 P.3d 1247 (2005).....	50
<u>State v. Halsten,</u> 108 Wn.App. 759, 33 P.3d 751 (2001).....	42
<u>Yacobellis v. Bellingham,</u> 55 Wn.App. 706, 780 P.2d 272 (1989).....	35

STATUTES AND COURT RULES

RCW 9A.72.120.....	35
RCW 40.16.010.....	35
RCW 40.16.020.....	35
RCW 42.17.020(3).....	16
RCW 42.56.....	12, 36
RCW 42.56.010.....	16
RCW 42.56.030.....	15, 22
RCW 42.56.040(1).....	23
RCW 42.56.070.....	14
RCW 42.56.070(1).....	23, 25, 27
RCW 42.56.070(3), (4)(b), (5) & (7).....	23
RCW 42.56.080.....	14, 15, 17, 23
RCW 42.56.090.....	20-21, 23
RCW 42.56.100.....	26-27, 34
RCW 42.56.120.....	21, 22, 23
RCW 42.56.130.....	22
RCW 42.56.210(2).....	23
RCW 42.56.210(3).....	33

RCW 42.56.230.....	23
RCW 42.56.250.....	23
RCW 42.56.530.....	23
RCW 42.56.550.....	14
RCW 42.56.550(1).....	14, 23, 26
RCW 42.56.550(3).....	14, 37
RCW 42.56.550(4).....	23
RCW 42.56.560.....	23
RCW 62A.2-513.....	24

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004).....	15
<u>Campbell v. Department of Justice,</u> 164 F.3d 20 (D.C.Cir. 1998).....	29
Laws of Washington 1987, ch. 403 § 1.....	17, 25
Public Inspection of State Municipal Executive Documents, 45 Fordham Law Review 1105 (1977).....	13
Overview of Public Records, Washington Attorney General's Office.....	18
WAC 44-14-03005.....	34
WAC 44-14-040003(9).....	29
WAC 44-14-04005(2).....	21
WAC 44-14-04006.....	34
<u>Walker v. Sumner,</u> 917 F.2d 382 (9th Cir. 1990).....	38
<u>Warsoldier v. Woodford,</u> 418 F.3d 989 (9th Cir. 2005).....	37

INTRODUCTION

Appellants are Washington state prisoners who submitted several Public Records Act requests to the Department of Corrections (DOC). DOC denied inspection of the records pursuant to an administrative rule prohibiting "incarcerated offenders" inspection of public records. Appellant Gronquist and DOC have previously litigated the validity of that rule. The prior court held that DOC's refusal to permit free inspection of requested documents violated the Public Records Act.

The trial court in the present case refused to apply collateral estoppel to bar DOC's relitigation of the same issue; denied Appellants motion to compel inspection of the records; and granted summary judgment to the DOC. Appellants request this Court to reverse the trial court and remand for entry of an order compelling free inspection of the records along with an award of costs and sanctions.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Appellants' motion to show cause.

2. The trial court erred in granting summary judgment to the Respondent.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Public Records Act violated by DOC's refusal to permit free inspection of non-exempt public records based upon an administrative rule prohibiting prisoners inspection of public records?

2. Did DOC violate the Public Records Act by refusing to search for, identify and preserve requested public records?

3. Whether a portion of the public records requested fell within the Central or Health Care file exceptions to DOC's policy thereby requiring free inspection of those records even if DOC's rule does not violate the Public Records Act?

4. Does collateral estoppel bar relitigation of DOC's rule prohibiting prisoners free inspection of public records when DOC did not appeal an adverse prior judgment on that issue and an appellate court in an unrelated case reached a different conclusion?

STATEMENT OF THE CASE

1. Substantive facts. For 29 years following enactment of Washington's Public Records Act, DOC permitted prisoners to inspect public records upon request. CP 47, 116 & 282-283. DOC's procedure at that time protected the integrity of public records and permitted inmates to inspect records at prison facilities without cost or interference with agency functions:

The review of documents shall not exceed 30 minutes and will be scheduled during normal working hours. During the review, the Public Disclosure Officer/Coordinator shall maintain visual contact and supervise the person reviewing the record to prevent removal, altering, or insertion of documents, and under no circumstances shall leave the Department of Corrections records unattended. The Coordinator/Officer may explain or clarify data for the reviewer.

CP 283.

On January 17, 2000, Representative Ballasiotes introduced House Bill (HB) 2458 to the 56th Washington Legislature. CP 118-119. The Bill's title was "AN ACT Relating to public records requests from incarcerated individuals", and proposed the following amendment to the Public Records Act:

An agency shall not make public records available to an individual incarcerated in a federal, state, or local correctional facility, including such a facility located outside of the state of Washington or operated by a private contractor. Nothing in this subsection prevents an incarcerated individual from exercising his or her constitutionally protected rights, including the right to obtain exculpatory evidence in a criminal prosecution.

Id.

HB 2458 failed to become law. Cf. Id., and Laws of 2000. On June 20, 2001, DOC amended its public records policy to provide:

Incarcerated offenders shall not be permitted to inspect public records except for:

1. Their own central file; and
2. Their own health care records ...

CP 109 § III(E).

For public records falling outside of the two policy exceptions, DOC's amended procedure denied free, on-site inspection of records and conditioned any disclosure upon the payment of a fee for photocopies of the records. CP 71. Once purchased, photocopied records would be sent to the inmate through the United States Postal Service and DOC's Mail-Room censors. CP 81, 85, 104, 148, 261 & 263.

On October 21, 2001, appellant Derek Gronquist submitted a public records request to DOC requesting to inspect records that were not contained in his Central or Health Care files. CP 142-143. DOC responded by denying inspection of the records and conditioned disclosure upon the payment of a fee for photocopies of the records. CP 147, 150. Mr. Gronquist then filed a lawsuit. CP 121-125. DOC defended the lawsuit upon the ground that it "did not erroneously deny public records", because "DOC Policy 280.510 establishes a process for DOC to respond to requests for public records" and "[i]n order for Mr. Gronquist to receive copies of the records, the DOC required payment." CP 161, 163-165. The superior court found that DOC's conduct violated the Public Records Act, and entered an order compelling free inspection of the records. CP 200, 206-207. Neither party appealed that judgment. CP 71.

On October 27, 2001, Appellant Gronquist submitted another public records request to DOC requesting inspection of "[a]ny and all documents alleging, investigating or finding retaliatory

acts by [Airway Heights Corrections Center] (AHCC) officials against inmates for the exercise of established rights" CP 74.¹ DOC responded by claiming the request was "broad in nature" and requested clarification of "time frames and specific incidents." CP 76. Written clarification was provided on November 23, 2001. CP 78-79. On December 20, 2001, Mr. Gronquist met with AHCC Public Disclosure Coordinator James Key to discuss the request. CP 67. Gronquist provided additional clarification of his request, and stressed that he "only wanted to inspect the records requested, and neither wanted the agency to provide photocopies of the records [n]or to use agency equipment to photocopy the records." CP 67-68. He expressed the belief that "[t]he Public [Records] Act, not [DOC] policy, controls on this point." CP 79. Mr. Key "acknowledged [Gronquist's] position, but [stated he] would follow DOC policy rather than the statutory provisions of the [Public Records

¹ This request and the two following requests are the ones at issue in this lawsuit.

Act]." CP 68. On January 7, 2002, Mr. Key sent Gronquist a letter acknowledging that meeting and stating: "No further clarification is needed in regards to your request" CP 81.

That letter also asserted:

Due to the size and scope of this request . . . I will need an additional 90 days from the date of this letter to locate the information that you have requested. You will be responsible for paying \$.20 a copy for each document and paying the necessary postage to send the documents to you per DOC policy.

Id.

On April 24, 2002, Mr. Key sent another letter claiming that DOC was not in possession of records going back to 1992, and that it would take an additional 20 working days to gather records "due to the large volume of the request."

CP 83. On May 29, 2002, Mr. Key notified

Gronquist that 70 pages of records had been located, and demanded \$16.95 for photocopies of the records and mailing charges. CP 85.

Mr. Key conditioned disclosure of only 70 pages of records with the claim:

These documents are being provided with the understanding that when I requested clarification of the request, on November 13, 2001, you refused to provide any additional clarification to assist in my search for responsive documents in your letter dated November 23, 2001.

Id.

Mr. Gronquist protested the payment of a fee to inspect the records and questioned the sufficiency of a seven-month search that yielded only 70 pages of documents. CP 87-88. No response was made to that letter. CP 69. On September 19, 2002, Mr. Gronquist requested AHCC Superintendent Maggie Miller-Stout to intervene and order a new search for responsive records. CP 90-91. On October 1, 2002, a subordinate of Mr. Key's responded for Superintendent Miller-Stout, claiming that Gronquist's "failure to pay per RCW 42.17.260² and WAC 137-08-110 is the result of [his] failure to obtain the records since May 2002." CP 93. On October 4, 2002, Mr. Gronquist sent another letter to Superintendent Miller-Stout protesting that response and threatening to file a lawsuit. CP 95-96. No response was made to that letter. CP 69 § 2.

² The Public Records Act was a subdivision of the Public Disclosure Act, codified at RCW 42.17. It was recodified into its own chapter at RCW 42.56., et seq. RCW 42.56.001.

A portion of the records sought under Mr. Gronquist's October 27, 2001, public record request was for inmate grievance records. CP 67 & 79. Through separate litigation, Mr. Gronquist discovered that DOC had a silent practice of refusing to search for, identify and disclosing inmate grievance records prior to April 27, 2006. CP 72, 211-212. On February 27, 2002, DOC destroyed all inmate grievance records filed between May and December, 1995. CP 242 & 244. Between February 17, and May 19, 2006, DOC destroyed all inmate grievance records filed in 1996, 1997, 1998 and 1999. CP 246, 248-253.

On January 18, 2005, appellant Gronquist submitted another public records request to DOC requesting to inspect 15 categories of public records. CP 98-100. Some of the records requested were contained in Mr. Gronquist's Central and Medical files. Id., ¶¶ 1-5 & 8-10. DOC received that request on January 26, 2005. CP 102-104. On the same day, DOC refused to search for, identify or disclose any records pursuant to DOC Policy 280.510 because Mr.

Gronquist had "made it clear that [he] desire[d] inspection of these public records and do not desire any photocopies." CP 103.

On February 7, 2005, appellant Byron Mustard submitted a public records request to DOC requesting to inspect records from his inmate trust account created between March 2002 through August 2003, and September 2004, as well as training records from all AHCC officials who handled his trust account on the specified dates. CP 258. Mr. Mustard sought these records because unidentified AHCC officials had made unauthorized withdrawals from his trust account and he wanted to identify the person(s) responsible. CP 255-256 ¶ 2. DOC responded to that request on February 17, 2005, stating: "per policy, the documents will not be available for inspection." CP 260-261. DOC further stated that "[d]espite this, AHCC staff will search existing records to see if any records include information of the nature you request." Id. On March 4, 2005, DOC notified Mr. Mustard that 93 pages of documentation had been located, and demanded \$22.45 for photocopies of the records and mailing

charges. CP 263-265.

2. Procedural facts. Appellants filed a pro se complaint in the Thurston County Superior Court on October 5, 2006. CP 1 & 6-12. Assistant Attorney General of Washington Peter W. Berney appeared as counsel for DOC on November 1, 2006. CP 1. An answer was filed on November 21, 2006. CP 1 & 13-18. Proof of service was filed on January 22, 2007. CP 1. On August 8, 2008, DOC filed a motion for summary judgment. CP 1 & 19-44. Appellants filed a motion to show cause on August 22, 2009. CP 1 & 45-265. A response to summary judgment was filed on August 28, 2008. CP 266-286. DOC filed a response to Appellants motion to show cause and reply in support of summary judgment on September 3, 2008. CP 287-319. Appellants reply in support of motion to show cause was filed on September 25, 2008. CP 320-326.

On December 12, 2008, the Honorable Chris Wickham granted partial summary judgment to DOC. CP 334. A formal order granting partial summary judgment was entered on April 21, 2009. CP 334-335. Appellants filed a memorandum in support

of remaining show cause claims on July 30, 2009. CP 336-339. On August 5, 2009, DOC filed a response to Appellants memorandum in support of remaining show cause claims. CP 340-367. On August 7, 2009, the Honorable Anne Hirsch entered an order denying the motion to show cause and dismissing this action with prejudice. CP 368-369. Notice of appeal was filed on August 20, 2009. CP 370-371. An amended notice of appeal was filed on September 1, 2009. CP 372-377.

ARGUMENT

The Public Records Act (PRA) is characterized as a "strongly worded mandate for broad disclosure of public records." Hearst Corp. v Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); see RCW 42.56. et seq. Born in the era of Watergate, the PRA evolved against a backdrop of "popular discontent with the unresponsiveness of government in dealing with the felt social needs of the people." Fritz v. Gorton, 83 Wn.2d 275, 281, 517 P.2d 911 (1974). Established by public initiative over the objections of reluctant governmental agencies, the PRA passed with an

"extraordinary broad range of citizen support."
In re Rosier, 105 Wn.2d 606, 618-619, 717 P.2d
1353 (1986)(Anderson, J., concurring and
dissenting in part). The PRA is the only public
disclosure statute established directly by the
electorate, and is the most liberal (in terms
of disclosure) and punitive (in terms of sanctions
for its violation) public disclosure law in the
nation. Comment, Public Inspection of State
and Municipal Executive Documents, 45 Fordham
L. Rev. 1105, 1107, 1138 (1977). The Supreme
Court has observed:

"the [PRA's intent] was nothing less than
the preservation of the most central tenets
of representative government, namely the
sovereignty of the people and the
accountability to the people of public
officials and institutions. Without tools
such as the Public Records Act, government
of the people, by the people, for the people,
risks becoming government of the people,
by the bureaucrats, for the special interest.
In the famous words of James Madison, "A
popular government, without popular
information, or the means of acquiring it,
is but a prologue to a farce or a tragedy;
or perhaps both.

Progressive Animal Welfare Society (PAWS) v.
University of Washington, 125 Wn.2d 243, 251,
884 P.2d 592 (1994).

To serve these interests, the PRA vests "any person" with the right to inspect public records. RCW 42.56.070, 42.56.080. The only limitation upon the full enjoyment of this right is when the record requested is exempt from disclosure by statute. RCW 42.56.070. When an agency refuses to permit inspection of public records, the requester may maintain an action to compel disclosure and penalize the agency. RCW 42.56.550. The court conducts de novo review of the agency's actions "tak[ing] into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to the public official or others." RCW 42.56.550(3). The burden of proof rests upon the agency to establish that its withholding is based upon a statute exempting or prohibiting disclosure. RCW 42.56.550(1). When, as here, the superior court record consists of only written material, appellate review is de novo. PAWS, 125 Wn.2d at 252-253.

I. THE PUBLIC RECORDS ACT CLEARLY AND EMPHATICALLY REQUIRES AGENCIES TO PERMIT FREE INSPECTION OF NON-EXEMPT RECORDS REGARDLESS OF THE IDENTITY OF THE REQUESTER

A. The PRA vests "any person" with the right to inspect public records. RCW 42.56.080

commands:

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.

(Emphasis added).

This provision must be liberally construed "to promote full access to public records." RCW 42.56.030. Every word of the statute's unambiguous provisions must be given force. State v. Pope, 100 Wn.2d 624, 627, 999 P.2d 51 (2000).

RCW 42.56.080 begins with the PRA's core requirement: "Public records shall be available for inspection" "Inspection" means a "careful examination of something, such as goods (to determine their fitness for purchase) or items produced in response to a discovery request (to determine their relevance to a lawsuit)." Black's Law Dictionary at 812 (8th ed. 2004). Inspection must be made "promptly available to any person." The statute's use of the word

"shall", "mandates that officials perform these duties." Spokane County Health Dist. v. Brocket, 120 Wn.2d 140, 149, 839 P.2d 324 (1992). That duty is to make public records available for any person's inspection upon request.

Appellants are clearly "any person". RCW 42.17.020(3)(defining "person" to include an "individual");³ STAHL v. Delicor of Puget Sound, 148 Wn.2d 876, 884-885, 34 P.3d 259 (2003) (defining "any" as "every and all"). Any doubt about the PRA's application to prisoners is belied by the Legislature's refusal to pass HB 2458 into law. State v. Clark, 129 Wn.2d 805, 812-813, 920 P.2d 187 (1996)(Legislature's failure to pass bill indicates its intent upon the issue).

Contrary to the clear and mandatory requirements of RCW 42.56.080, DOC has established a policy asserting:

Incarcerated offenders shall not be permitted to inspect public records except for:

1. Their own central file; and
2. Their own health care records ...

³ The Public Records Act incorporates the definitions set forth in RCW 42.17.020. RCW 42.56.010.

CP 109 § III(E).

"It is well settled that agency rules and regulations cannot amend or change legislative enactments." State v. Rains, 87 Wn.2d 626, 631, 555 P.2d 1368 (1976). DOC's policy does exactly that. It overrules the central right granted "every person" under the PRA: to inspect public records upon request. It vitiates the agency's statutory duty to make public records available for inspection. DOC's policy does this by singling out and discriminating against prisoners. Such discrimination is prohibited by the PRA:

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.

RCW 42.56.080.

The Legislature's intent for this prohibition is clear:

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."

Laws of 1987, ch. 403 § 1; see King County v.

Sheehan, 114 Wn.App. 325, 341, 57 P.3d 307 (2002)(agencies can not deny inspection of public records based upon the identity of a requester, "[t]o conclude otherwise would be to allow agencies to deny access to . . . its most vocal critics, while supplying the same information to its friends."); Washington Attorney General's Office, Overview of Public Records at 10 (declaring: "[a] decision to permit inspection cannot be based on the identity of the requestor")(quoted in Sheehan, 114 Wn.App. at 341 n.4.

DOC's discriminatory policy violates these prohibitions because it distinguishes between "incarcerated offenders" and every other person requesting public records - and denies inspection of records upon that basis.

The Supreme Court has squarely held that agency rules may not limit the PRA's requirements. In Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978), the King County Assessor claimed an administrative rule vested him with a public trust authorizing the withholding of records in the absence of a statutory exemption. Hearst,

90 Wn.2d at 129. The Court disagreed, holding the PRA "establishes a positive duty to disclose public records unless they fall within the specific exemptions":

The assessor, in essence, contends that the act leaves interpretation and enforcement of its provisions to the very persons it was designed to regulate. . . . We again reject this approach; leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.

Hearst, at 130-131.

Brouillett v. Cowles Publishing Co., 114 Wn.2d 788, 791 P.2d 526 (1990), prohibited courts from considering agency rules purporting to limit the PRA. In that case, the Superintendent of Public Instruction asserted an agency regulation "merits deference" to his denial of records. Rejecting this claim, the Court held that "[o]ur unanimous decision in Hearst precludes granting deference to this regulation":

We cannot defer to the state board of education's rule and must, therefore, decide for ourselves whether the act exempts these records from disclosure.

Brouillett, 114 Wn.2d at 794.

In Oliver v. Harborview Medical Center, 94 Wn.2d 559, 618 P.2d 76 (1980), a hospital

withheld records pursuant to an administrative policy prohibiting disclosure. Despite the fact that the hospital changed its policy and disclosed the records, the Court granted review because it opined that guidance was necessary because the hospital had not recognized the right to inspect the records so future violations were possible. Oliver, 94 Wn.2d at 564; see also Police Guild v. Liquor Control Board, 112 Wn.2d 30, 40, 769 P.2d 283 (1989)(agency pledge of confidentiality cannot exempt records).

The superior court in this case deferred to DOC's policy, refused to require DOC to prove that inspection was exempt by statute, and failed to decide for itself whether the exemptions of the PRA authorized DOC's refusal to permit free inspection of the records. CP 334-335 & 368-369. The court was prohibited from engaging in such a shallow analysis by Hearst, Brouillet, Oliver and the doctrine of stare decisis.

B. Inspection of public records must be permitted upon the premises of the agency. RCW 42.56.090 requires that:

Public records shall be available for inspection and copying during the customary office hours of the agency, . . . [p]rovided, [t]hat if the entity does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency, . . . agree on a different time.

The clear purpose of this provision is to require inspection of public records upon the premises of the agency possessing them. See WAC 44-14-04005(2)(listing "[t]ime, place and conditions for inspection" as "in a conference room or other office area" of the agency). DOC's policy violates this statute because it prohibits inspection of records at agency facilities during customary office hours.

C. Fees can not be charged for the inspection of public records. RCW 42.56.120 declares:

No fee shall be charged for the inspection of public records.

DOC's policy violates this statute because it conditions inspection of public records upon the purchase of photocopies of records. CP 81, 85, 104, 148, 261 & 263. DOC's conduct violates RCW 42.56.120 even if the Court finds the

"incarcerated offender" rule permissible. If DOC's procedure for inmate inspection of public records is limited to only mailing photocopies of records to the inmate, DOC must assume the costs incurred in that procedure. Any contrary holding would subvert the clear command of RCW 42.56.120: "No fee shall be charged for the inspection of public records."

D. Fees may only be charged when a person requests photocopies or to use agency equipment to photocopy records. RCW 42.56.120 is titled "Charges for copying", and provides:

No fee shall be charged for the inspection of public records. No fee shall be charged for locating public documents and making them available for copying. A reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment . . . to copy public records, which charges shall not exceed the amount necessary to reimburse the agency . . . for its actual costs directly incident to such copying. Agency charges for photocopies shall be imposed in accordance with the actual per page cost or other costs established and published by the agency.

This statute must be read *in pari materia* with other provisions of the PRA. RCW 42.56.030 & 42.56.130. Those statutes use the phrases "inspection and copying" or "inspect or copy"

to define the scope of access to public records. RCW 42.56.040(1); 42.56.070(1), (3), (4)(b), (5) & (7); 42.56.080.-090; 42.56.210(2); 42.56.230-.250; 42.56.530; 42.56.550(1) & (4); and 42.56.560. Use of "and" or "or" in the statutory scheme means that requesters have the right to inspect, copy, or inspect and copy public records. Ski Acres v. Kittitas County, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992)(defining "and" or "or"). In other words, public record requesters have the right to choose which form of disclosure they desire.

Viewed from this perspective, RCW 42.56.120 authorizes agencies to impose fees for photocopies only when photocopies of records are requested. Permitting agencies to condition PRA inspection upon the purchase of photocopies subverts the first sentence of the statute: "No fee shall be charged for the inspection of public records." This is precisely how the statute was found to operate in the parties' prior adjudication:

From the statutory scheme I have seen the fee charged for public disclosure of documents allows a charge for copying when the copies are requested. There's been none requested. I don't think there's been a satisfactory showing that the fees, the \$300 fee was required. Therefore, I feel that the agency didn't respond as they statutorily are supposed to.

CP 201; see also CP 87 & 92 (DOC's attorney conceding that no fee can be charged for the inspection of public records).

Even if we assume that agencies had the right to convert public records into agency chattel, the purchaser of photocopies still possesses the right to inspect those copies prior to paying for them. See RCW 62A.2-513 (declaring that a "buyer has a right before payment or acceptance to inspect [goods] at any reasonable place and time and in any reasonable manner."); Pearce v. Dulien Steel Products, Inc., 14 Wn.2d 132, 136, 127 P.2d 271 (1942)(stating that a purchasers "inspection right" "has been recognized and applied in the decisions of [the Washington State Supreme Court] . . ." since 1914).

The statute only permits fees when photocopies or use of agency equipment to photocopy records is requested. The trial court

erred by failing to adhere to the central purpose of the PRA: free inspection of public records.

E. The records requested are not exempt from disclosure. The only exception to the PRA's broad inspection requirement is when a record is exempt from disclosure by statute:

Each agency . . . shall make available for public **inspection** and copying **all public records**, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1) (emphasis added).

Emphasis upon a purely statutory exemption limitation came following In re Rosier, 105 Wn.2d 606 (1986), where the Court read a non-statutory "general privacy" exemption into the PRA. The Legislature rejected this interpretation and amended the PRA to its purely statutory exemption form. Laws of 1987, ch. 403. The Legislature's intent for this amendment commands: "agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide records." *Id.*, at § 1.

DOC has never claimed the records requested were exempt by statute. CP 85, 93, 103, 260-261 & 263-265. Absent a claim of statutory exemption, DOC has not meet its burden of proof. RCW 42.56.550(1)("The burden of proof shall be on the agency to establish that its refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure" (Emphasis added); Citizens v. Department of Corrections, 117 Wn.App. 411, 431, 72 P.3d 206 (Div. II 2003)(holding DOC "clearly violated" PRA by withholding records without claiming a statutory exemption).

Because DOC has never claimed that any of the records Appellants requested were exempt from disclosure by statute, this Court must reverse the trial court and require free inspection of the records.

F. The statute authorizing agency rules to safeguard records does not permit rules prohibiting inspection of public records. RCW 42.56.100 is titled "Protection of public records- Public access", and provides:

Agencies shall adopt reasonable rules and regulations, . . . consonant with the intent of this chapter to provide full access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency . . . Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

RCW 42.56.070(1) permits "other statutes" to exempt inspection "of specific information or records." RCW 42.56.100 is not a statute exempting disclosure. It only directs agencies to establish rules to safeguard records and prevent excessive interference to essential agency functions. If the statute was construed to authorize agency rules limiting disclosure, any agency could avoid the PRA's requirements by claiming that compliance interferes with agency functions, or the best method to protect records is to prohibit all access to them. The PRA does not permit such absurd interpretations. Cf. ACLU v. Blaine School Dist. No. 503, 96 Wn.App. 688, 693, 937 P.2d 1176 (1997)(noting "[t]he [PRA's] mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its

purpose."); Hearst., 90 Wn.2d at 131-132 (rejecting agency rule prohibiting inspection based upon "the cost and excessive disruption to the [agency]. . .").

Even if DOC possessed such power, its policy does not comply with the statutory requirement to be "consonant with the intent of [the PRA] to provide full access to public records" and is therefore invalid. Washington Public Ports Association v. Department of Revenue, 148 Wn.2d 637, 646, 62 P.3d 462 (2002)(agency rule that does not comply with statutory requirements is invalid). DOC's policy only permits limited access to public records. Access to that limited form of disclosure is conditioned upon the wealth of the requester. The rule is levied against a class of people who are often indigent and have been stripped of any ability to earn wages. Conditioning the enjoyment of a right upon the wealth of a citizen is incongruous with the very fiber of the PRA and representative government. It leaves state government accountable only to the wealthy.

Even if we assume that DOC's policy is permissible, the rule only prohibits inspection of records. CP 109 § III(E). It does not relieve DOC from the duty to search for, identify and safeguard requested records.

G. DOC failed to conduct an objectively reasonable search for responsive records. The PRA requires agencies to "conduct an objectively reasonable search for responsive records." WAC 44.14.040003(9). When the sufficiency of a search is challenged, the agency must prove "that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information." Campbell v. Department of Justice, 164 F.3d 20, 27 (D.C.Cir. 1998).⁴ Only one Washington case has addressed the sufficiency of a search, Yousoufian v. Office of Ron Sims, 165 Wn.2d 439, 200 P.3d 232 (2009). That case,

⁴ Interpretations of the federal Freedom of Information Act are persuasive in the absence of state law on point, conditioned upon the observation that the PRA "is more severe than the Federal act in many areas." Hearst, 90 Wn.2d at 128-129.

however, only addressed the penalty to impose for an inadequate search. It did not address the question presented here: whether a new or complete search should be compelled.

DOC's search effort fails any test. DOC denied appellant Gronquist's January 18, 2005, request on the same day it was received. CP 102-104. All of the voluminous records sought under requests 1 through 13, and 15 were met with a single statement: they "will not be made available for inspection." Id.

Mr. Gronquist's October 27, 2001, request was met with DOC's protest that it was "broad in nature" and requested limiting clarification.⁵ CP 76. Oral and written clarification was provided to DOC's satisfaction. CP 67-68 & 78-79. Four months later, DOC indicated that it was only searching records at AHCC rather than a DOC-wide search. CP 83. Seven months after

⁵ DOC's request for clarification sought information that only it possessed, i.e., "specific incidents". The Supreme Court has held that such requests are improper. See Yousoufian, supra.

receiving the request, DOC stated that it had located 70 pages of responsive documents. CP 85. The seventy page amount was justified with the statement:

These documents are being provided with the understanding that when I requested clarification of the request, on November 13, 2001, you refused to provide any additional clarification to assist in my search for responsive documents in your letter dated November 23, 2001.

Id. See also CP 87-88, 90-91 & 95-96 (Gronquist's protests that clarification was provided and amount of records located was deficient).

A portion of the records sought under the October 27, 2001, request was for inmate grievance records. CP 74 (requesting "[a]ny and all documents alleging, investigating or finding retaliatory acts by AHCC officials . . . including . . . grievances"); CP 78-79 (clarifying that DOC should "begin [its] search with grievance records"). DOC's practice at the time of this search was to categorically refuse to search through grievance records pursuant to a PRA request (without informing the requester of this practice). CP 72 & 211-212. Evidence of this practice establishes the inadequacy of

DOC's search.

DOC initially conceded that a failure to locate requested records would violate the PRA, regardless of its policy denying inspection:

Importantly, had DOC personnel responded the same way in the case at bar, there would still have been a violation, even under [Policy 280.510(III)(E)], because the agency had abdicated its statutory responsibility to identify and collect documents in accordance with the Act before requesting payment of a fee.

CP 330.

When the adequacy of DOC's search was presented to the superior court for decision, DOC suggested that it did not, and would not, conduct a search for responsive records:

As Plaintiff's emphatically stated they only wanted to inspect the documents they requested, and were refusing to pay for copies, and since they were not allowed to inspect the documents requested, Defendant does not see the point of nevertheless going ahead and searching for and identifying each record withheld as Plaintiff's contend.

CP 343-344.

Despite these concessions, the superior court refused to compel a search for responsive records. CP 368-369. That ruling is contrary to the law, evidence, and DOC's admissions. It should be reversed.

H. DOC failed to identify each record withheld from inspection. RCW 42.56.210(3)

requires:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

The Supreme Court has interpreted this statute to require agencies to identify each record withheld from inspection:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and create an adequate record for a reviewing court, an agency's response to a requestor must include specific means of identifying any individual records which are being withheld in their entirety.

PAWS, 125 Wn.2d at 271.

Failure to identify withheld records is a "silent withholding", "clearly and emphatically prohibit[ed] by the PRA." PAWS at 270-271. DOC failed to identify any of the records withheld from Mr. Gronquist's inspection. CP 85 & 103.

Despite the requirements of RCW 42.56.210(3) and the Supreme Court's opinion in PAWS, the

superior court sustained DOC's failure to identify withheld records. CP 368-369. That judgment should be reversed.

I. DOC's destruction of grievance records following a request violates the PRA. The PRA prohibits agencies from destroying records responsive to a PRA request:

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . may not destroy or erase the record until the request is resolved.

RCW 42.56.100.

A request is resolved "when a requester has inspected all the requested records . . . or cancels the request." WAC 44-14-04006. The Washington Attorney General has emphasized:

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public record request has been made for that record. Additional requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved.

WAC 44-14-03005.

DOC received Mr. Gronquist's request for grievance records on November 8, 2001. CP 76. At that time, DOC possessed all grievance records

created after mid-1995. CP 242. On February 27, 2002, DOC destroyed all grievance records created between May and December of 1995. CP 244. Between February 17 and May 19, 2006, DOC destroyed all grievances filed in 1996, 1997, 1998 and 1999. CP 246 & 248-253.

As stated in section G above, DOC refused to search these records for responsive documents prior to their destruction. Destruction of records following a request violates the PRA and requires imposition of statutory penalties.⁶ Yacobellis v. Bellingham, 55 Wn.App. 706, 710, 715-716, 780 P.2d 272 (1989). The superior court erred in refusing to impose penalties for DOC's post-request destruction of grievance records.

J. Division Three's endorsement of DOC's policy is erroneous and should not be followed.

DOC's only excuse for its conduct is that a panel from Division Three of the Court of Appeals agreed with its policy in an unrelated case. CP 24-25. See Sappenfield v. Department of Corrections,

⁶ Unlawful destruction of public records is also a crime. RCW 40.16.010, 40.16.020 & 9A.72.120.

127 Wn.App. 83, 110 P.3d 808 (2005). That opinion is erroneous and should not be followed.⁷

The PRA creates purely statutory rights, and enforcement of its provisions sound in an action at law, not equity. RCW 42.56.; PAWS, 125 Wn.2d at 257-260 (rejecting equitable interpretation of PRA and holding the controlling law is "the precise, specific, and limited [statutory] exceptions which the act provides."). The Sappenfield court recognized that the statutory provisions of the PRA were opposite of its opinion. Sappenfield, 127 Wn.App. at 88. Despite this observation, Division Three applied a rule of equity articulated by the United States Supreme Court in Turner v. Safely, 482 U.S. 78 (1987), to relieve DOC from the PRA's requirements. This was error.

Turner involved a First Amendment challenge to a state prison's censorship of inmate-to-inmate mail. The Court applied a common law doctrine of federal deference to state independence to establish a "hands-off" approach for review of

⁷ The Sappenfield opinion did not exist at the time of Appellants PRA requests or DOC's denials thereof.

constitutional violations occurring in state prisons. Citing principles of federalism and comity, the Court created a test to determine when federal deference would be abandoned. Turner, 482 U.S. at 85. Turner's equitable rule, however, does not apply to actions at law. Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005)(holding Turner does not apply to the Religious Land Use and Institutionalized Persons Act). In addition, federalist concerns are simply not implicated by state courts reviewing the conduct of state agencies pursuant to state statutes.

The PRA and Washington State Supreme Court both prohibit judicial deference to state agencies. RCW 42.56.550(3)(requiring "de novo" review); Brouillet, 114 Wn.2d at 794 (prohibiting deference to agencies: "[courts] must . . . decide for [them]selves whether the [PRA] exempts [] records from disclosure."). Stare decisis and the unambiguous mandate of the PRA prohibit any deference to DOC or its policy.

Even if Turner could apply to the PRA, the decision requires application of a four-part

test, based upon the facts and evidence of each case, to determine whether deference will be granted. Turner, at 89-92; Walker v. Sumner, 917 F.2d 382, 385-387 (9th Cir. 1990)(summary judgment based upon conclusory assertions without explanation or factual support is improper under Turner). Neither the Sappenfield court nor the superior court in this case employed Turner's test.⁸ Sappenfield, supra; CP 334-335 & 368-369. Instead, both courts merely cited DOC's policy and abdicated to it. Id. "Deference does not mean abdication." Walker, 917 F.2d at 385.

Division Three based its holding upon DOC's alleged "essential function" to restrain criminal offenders. Sappenfield, 127 Wn.App. at 89. The Supreme Court, however, has directly held that the PRA contains "no general vital governmental functions exemption" PAWS,

⁸ Turner requires analysis of (1) Whether there is a valid, rational connection between the prison regulation and the governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact accommodation of the constitutional right will have on prison resources; and (4) the absence of alternative means of exercising the right. Turner, at 89 & 90.

Wn.2d at 257-260; see also Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 324-325, 115 P.2d 316 (2005)(rejecting DOC's attempt to define every record it possesses as exempt from disclosure). DOC's responsibility to confine prisoners does not relieve it from the duty to permit inspection of public records. If that was the case, the PRA would contain an exemption for that purpose. The fact that the Legislature rejected HB 2458 demonstrates that DOC's responsibility to confine prisoners does not trump its duty to permit free inspection of public records to prisoners.

Sappenfield fails to question how DOC was able to safeguard public records during the 29 years it permitted prisoners free inspection, but was suddenly unable to do so upon the death of HB 2458. The opinion assumes, without evidence, that prisoners are more likely to damage public records than other types of requesters. There is not even an allegation, much less than evidence, that DOC believes either Appellant poses any threat to the integrity of public records. The evidence before the Court is to

the contrary. CP 70-71. The decision also assumes that DOC has no ability to safeguard records; an incompetence so acute that the only answer is to prohibit all inspection.

Sappenfield is an aberration upon the landscape of Washington law. It is based upon an inapplicable doctrine of federal deference to state independence; is contrary to the vigorous requirements of the PRA; conflicts with multiple state Supreme Court decisions; passes HB 2458 into law by judicial opinion; and has no basis in logic, reason, or common sense. It should not be followed.

K. The majority of Appellants claims fall within the Sappenfield and DOC policy exceptions.

The superior court's judgment must be reversed even if this Court agrees with DOC's policy or the Sappenfield opinion, because the majority of records Appellants requested fell within the Sappenfield or DOC policy exceptions.

DOC Policy 280.510(III)(E) permits prisoners to inspect records contained in their Central and Health Care files. CP 109. There is no statute, regulation, or policy defining what

types of records are contained in a Central File. DOC's attorney has suggested that Central Files contain "general information about each offender including housing assignments, programming, infraction history, sentence related information, etc." CP 22 n.1. Sappenfield was not as limiting. It held prisoners could inspect records concerning themselves. 127 Wn.App. at 90.

Appellant Mustard requested inspection of records from his inmate trust account. CP 250. These are clearly records pertaining to Mr. Mustard, and, according to DOC's attorney, are the type of records contained in a Central File.

Appellant Gronquist's January 18, 2005, request sought: (1) written communications concerning himself or his behavior; (2) job waiting lists that he was on; (3) kites (written requests) he submitted to DOC requesting a job; (4) his own DOC industrial training records; (5) his own medical evaluations; (6) his DOC employment records; and (7) his own behavior log entries. CP 98-100 ¶¶ 1-5 & 8-10. These are clearly records contained in Mr. Gronquist's Central and Health Care files under Counsel's

proffered definition.

We do not know what types of records are responsive to Mr. Gronquist's October 27, 2001, request, or where they are located, because DOC failed to conduct a complete search and failed to identify the 70 pages of records it did locate. See sections G & H, supra. What is known is that Mr. Gronquist believed many of these records were his own. CP 87.

Appellants are entitled to an order compelling free inspection of all records that fall within the policy or Sappenfield exceptions.

II. THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS ENJOINS THIS COURT FROM FOLLOWING THE SAPPENFIELD OPINION OR AFFIRMING DOC'S POLICY

The constitutional doctrine of separation of powers enjoins courts from exercising legislative powers. In re Juvenile Director, 87 Wn.2d 232, 240-247, 552 P.2d 163 (1996). "The drafting of a statute is a legislative, not judicial, function." State v. Halsten, 108 Wn.App. 759, 764, 33 P.3d 751 (2001). Separation of powers principles are particularly acute when provisions of the PRA are at issue:

[I]t is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate in enacting initiatives . . . unless the errors in judgment clearly contravene state or federal constitutional provisions.

Fritz v. Gorton, 83 Wn.2d at 287.

In affirming the constitutionality of the PRA, the Supreme Court held that the judiciary was enjoined by the separation of powers doctrine from altering any element of the statutory scheme:

Initiative 276, as we have noted, was created by the people for the expressed purpose of fostering openness in their government.

. . .

The removal of any one element would conceivably leave a loophole area for exploitation by self-serving special interests.

. . .

It may well be that application and enforcement of the section will have negative, as well as affirmative social results. In any event, it is not for this court to substitute its judgment in matters of social or political policy for those of the people and the society it serves.

Fritz, 83 Wn.2d at 300, 309-310.

Out of disagreement with the public policy and requirements of the PRA, DOC lobbied for HB 2458 to relieve itself of the PRA's requirement

to disclose public records to prisoners. CP 118-119. When the Legislature refused to pass HB 2458 into law, DOC implemented the Bill's provisions through the amendment of its public records policy. CP 109 § III(E). Several years later, DOC manipulated a panel from Division Three to sustain its amended policy and unwittingly pass HB 2458 into law by judicial opinion. Sappenfield, supra. Such conduct usurps the Legislature's decision to reject HB 2458 and violates the separation of powers doctrine.

As discussed above, DOC's policy and the Sappenfield opinion contravene or violate almost every statutory requirement of the PRA. To sustain DOC's policy or join with the Sappenfield opinion, this Court would have to pass a bill that was considered and rejected by the Legislature - repealing and amending the PRA to suit to desires of DOC. While this Court possesses considerable power, it does not possess legislative power. The Court should decline DOC's invitation to alter, amend or overrule the PRA's requirements. The statutory scheme must be enforced as written by the Legislature and People of the State of Washington.

III. COLLATERAL ESTOPPEL PROHIBITS
RELITIGATION OF THE VALIDITY OF
DOC'S POLICY DENYING PRISONERS FREE
INSPECTION OF PUBLIC RECORDS

A. Collateral estoppel enjoins relitigation of the validity of DOC's rule. Collateral estoppel "prevent[s] the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal." United States v. Deaconess Medical Center, 140 Wn.2d 104, 110, 994 P.2d 830 (2000)(citations omitted). The doctrine applies where: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine will not work an injustice. Thompson v. Department of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999).

1. Identical issues. The issue in the prior adjudication and this case are the same: DOC refusing to permit a prisoner inspection

of public records under Policy 280.510(III)(E), and conditioning disclosure upon the purchase of photocopies of the records. The prior trial court inquired into the precise nature of the dispute:

THE COURT: [To Mr. Gronquist] So I understand, in your mind for the state to properly comply with your request of disclosure, what in your mind is disclosure? What would they need to do to meet that without providing you the copies?

MR. GRONQUIST: They need to present them to me. It used to be the practice in the past where Mr. Key would either present them to me, either personally sit down and let me inspect them or he'd forward them to my counselor and my counselor would sit down with me and inspect them.

. . .

THE COURT: I see. What you want to know is where are they, where are they and when can I go look at them?

MR. GRONQUIST: Yes. I just want the agency to make them available for my inspection.

THE COURT: Then later if the copies are requested, you're not disputing that there would be a required fee to reimburse them the cost of the copying should you want copies of any particular document only after you inspect them?

MR. GRONQUIST: Exactly. After I inspect them, if I identify certain documents that I would want a copy of, then usually what would happen is we would mark them with a sticker or with a Post-it note and they forward them on to their secretary, who photocopies them, and I pay them for the photocopies, and then they send them to

me.

. . .

THE COURT: Is this the first time you had this type of a response?

MR. GRONQUIST: I get this response a lot.

THE COURT: For the copy fee? .

MR. GRONQUIST: Yes. What happened is several years back DOC went to the legislature and asked for a bill that would prohibit prisoners from utilizing the Public [Records] Act, and that legislation failed, and after that the DOC came in and formulated a policy which excluded us from inspecting public records, and its pretty clear that a state agency cannot usurp a statutory requirement to an inspection through their policy. Ever since they've formulated this policy they've taken this position. They won't disclose public records to prisoners at all. They will only require them to pay for photocopies, and I believe that is again a clear violation of the Public [Records] Act, which requires inspection. It says that you can't be charged a fee for inspection.

. . .

THE COURT: [To Assistant Attorney General Cook, is your understanding that the agency routinely as a matter of policy does not provide disclosure to inmates absent a fee upfront?

MS. COOK: The agency under [former] 42.17.300 may charge a -- a reasonable charge may be imposed for providing copies of public records.

THE COURT: But he didn't want copies. He wanted disclosure.

MS. COOK: There is no fee for inspection of documents under the statute clearly.

CP 78-81 & 92.

Based upon these arguments, the Court entered an order compelling inspection, "on the ground that [DOC] cannot charge a fee for locating, compiling and disclosing public records. . ."
CP 206. The issue is identical.

2. Final judgment on the merits. A final judgment on the merits was entered in the prior adjudication. CP 206-207. DOC did not appeal that judgment. CP 71.

3. DOC was a party in the prior case.
DOC was the defendant in the prior adjudication. CP 121-122. While appellant Gronquist was the Plaintiff, Mr. Mustard may assert collateral estoppel against DOC. Dunlap v. Wild, 22 Wn.App. 583, 589, 591 P.2d 834 (Div. II 1979).

4. Collateral estoppel does not work an injustice. Collateral estoppel works no injustice when "the parties to the earlier proceeding received a full and fair hearing on the issue in question." Thompson, 138 Wn.2d at 796. DOC has not disputed that it received a full and fair hearing in the prior adjudication. CP 329-332. Nevertheless, DOC has cried injustice

because it convinced Division Three to reach a different result in Sappenfield, supra. Id. Even if we assume that Sappenfield reached the correct result, collateral estoppel still applies.

In Thompson v. Department of Licensing, 138 Wn.2d 783 (1999), the Department of Licensing (DOL) litigated and lost an issue regarding the validity of breath-test warnings given to a suspected drunk driver. Subsequently, the Supreme Court issued an opinion in a separate case which demonstrated that Thompson's judgment was erroneous. DOL then sought to suspend Thompson's drivers license upon the previously adjudicated breath test results. Thompson asserted collateral estoppel. DOL claimed an injustice because the prior judgment was erroneous, as demonstrated by the new Supreme Court opinion. The Court agreed that its recent opinion revealed the prior adjudication to be erroneous. Despite that fact, the Court held that DOL's failure to appeal the previous judgment **required** application of collateral estoppel and it was no injustice to do so. Thompson, at 799. The Court noted that this rule has remained consistent for almost

a century, when it first proclaimed:

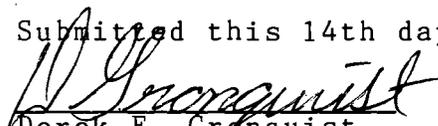
It may be that the court was in error in its ruling on the demurrer. We think that it was. This would undoubtedly have subjected the judgment to reversal on appeal, or to reversal by some other form of direct attack, but it does not subject it to a collateral attack. So long as it stands of record unreversed, it is conclusive as against the parties thereto or in privity therewith, as to all matters litigated therein.

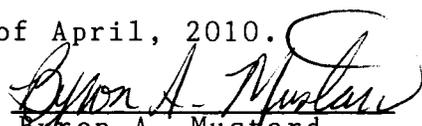
Id., (quoting Kinsey v. Duteau, 126 Wash. 330, 218 P. 236 (1923)); see also SATSOP Valley Homeowners v. N.W. Rock, 126 Wn.App. 536, 543, 108 P.3d 1247 (Div. II 2005), holding:

Where parties fail to appeal, a subsequent change in the law can have no effect on the conclusiveness of an earlier case. Otherwise, no judgment would ever be final. The trial court properly imposed the collateral estoppel bar.

DOC is bound by the prior adjudication it chose not to appeal. Appellants should not have to relitigate the same issue **ad infinitum** with every public records request they submit to DOC. The lower court erred in failing to apply collateral estoppel, and should be reversed.

Submitted this 14th day of April, 2010.


Derek E. Gronquist
#943857 A-A-302
Wash. State Penn.
1313 N. 13th Ave.
Walla Walla, WA 99362


Byron A. Mustard
1313 9th St. #B
Wenatchee, WA 98801

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury that on this day I deposited a properly addressed envelope with postage affixed in the United States Mail, containing: Appellants Amended Opening Brief. Said envelope(s) was directed to:

Andrea Vingo
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

Court of Appeals, Division Two
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Dated this 19th day of April, 2010.


Byron A. Mustard
1313 9th St. Apt. B
Wenatchee, WA 98801

BY _____
DEPUTY

STATE OF WASHINGTON

10 APR 22 PM 1:19

FILED
COURT OF APPEALS
DIVISION TWO