

FILED
COURT OF APPEALS

10 JUN 21 AM 9:53

STATE OF WASHINGTON

BY *ju*
DEPUTY

No. 39651-3-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DEREK E. GRONQUIST;
BYRON A. MUSTARD,
Appellants/Plaintiffs,

v.

DEPARTMENT OF CORRECTIONS,
Respondent/Defendant.

REPLY BRIEF

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

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

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT DECISIONS

Brouillett v. Cowles Publishing Co.,
114 Wn.2d 788, 791 P.2d 526 (1990).....3, 7

Burt v. Department of Corrections,
___ Wn.2d ___, ___ P.3d ___ (#80998-4 5/13/10)...1

Fritz v. Gorton,
83 Wn.2d 275, 517 P.2d 911 (1974).....7

Hearst Corp. v. Hoppe,
90 Wn.2d 123, 580 P.2d 246 (1978).....3, 7

PAWS v. University of Washington,
125 Wn.2d 243, 884 P.2d 592 (1994).....4-5, 7

Prison Legal News v. Department of Corrections,
154 Wn.2d 628, 115 P.3d 316 (2005).....1-2

Thompson v. Department of Licensing,
138 Wn.2d 783, 982 P.2d 601 (1999).....8-10

WASHINGTON COURT OF APPEALS OPINIONS

O'Neill v. City of Shoreline,
145 Wn.App. 913, 187 P.3d 822 (2008).....12

Sappenfield v. Department of Corrections,
127 Wn.App. 83, 110 P.3d 808 (2005).....2, 3, 6, 8

SATSOP Valley Homeowners v. N.W. Rock,
126 Wn.App. 536, 108 P.3d 1247 (2005).....8, 10

STATUTES

RCW 42.56.070(1).....2, 3

RCW 52.56.100.....3, 5

RCW 42.56.550(1).....2

Justice Sanders recently observed:

To begin, although [the public record requester] is an inmate at a state institution, and he seeks information about his guards, he is entitled to the same rights under the Public Records Act, chapter 42.56 RCW, as any other person. By the same token, his prisoner status does not excuse noncompliance by the Department of Corrections [] with its duties under that act . . .

Burt v. Department of Corrections, ___ Wn.2d

___ (No. 80998-4 filed May 13, 2010).

This statement succinctly answers the question before this Court: Whether rights and duties mandated by the Public Records Act (PRA) can be abrogated by administrative policy simply because of a citizens status as a prisoner. The answer to that question is unequivocally no. See Appellants Amended Opening Brief (Opening Brief) at 15-20.

This reasoning has been followed by the full Court. In Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 115 P.3d 316 (2005), The Department of Corrections (DOC) argued that it was permissible to withhold public records from a prisoner based upon perceived dangers to staff and inmates. Prison Legal News, 154 Wn.2d at 638. The Court rejected this argument,

holding:

whether disclosure of such [records] could have potentially negative effects within the prison, is not the issue. The issue under the plain language of the relevant statute is whether it is [exempt from disclosure] . . .

Prison Legal News, at 639-640. Based upon this determination, the Court narrowly examined only the PRA's statutory exemptions to determine if records could be withheld. Id., at 640-644.

In our case, DOC does not dispute that it is an agency subject to the PRA's requirements; that the records sought are public records; or that the records are not exempt by any statute. See Brief of Respondent; CP 85, 93, 102-104, 263-265. These verities entitle Appellants to relief. RCW 42.56.070(1); RCW 42.56.550(1).

Despite these concessions, DOC requests this Court to ignore the mandatory terms of the PRA and binding Supreme Court precedents to authorize its refusal to permit free inspection of non-exempt public records. The only authority cited for this proposition is Sappenfield v. Department of Corrections, 127 Wn.App. 83, 110 P.3d 808 (Div. III 2005). Brief of Respondent, passim. This argument must fail.

First, the Sappenfield opinion is not a statute exempting disclosure. As such, it can not authorize DOC's refusal to permit inspection of public records. RCW 42.56.070(1); Opening Brief (Opening Brief) at 25-26.

Second, the Sappenfield court deferred to DOC's policy purporting to prohibit free inspection of non-exempt public records. Sappenfield, 127 Wn.App. at 88-89. The Supreme Court, however, has unanimously held that such agency rules are invalid as a matter of law, Hearst Corp. v. Hoppe, 90 Wn.2d 123, 129-131, 580 P.2d 246 (1978), and has prohibited courts from even considering such rules in PRA actions. Brouillett v. Cowles Publishing Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990). See Opening Brief at 18-20.

Third, the Supreme Court has directly rejected the premise upon which Sappenfield is based. The Sappenfield court accepted DOC's assertion that RCW 42.56.100's directive to create reasonable rules to protect the integrity of records and prevent excessive interference with essential agency functions permitted its expansive

prohibition on prisoners rights to inspect agency records. Sappenfield, 127 Wn.App. at 89.

In PAWS v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1994), the University argued that a provision of the PRA authorizing courts to enjoin disclosure of any public record that "would substantially or irreparably damage vital governmental functions" authorized its withholding of public records. PAWS, 125 Wn.2d at 257. The Court rejected this argument, noting that the provision

is simply an injunction statute. It is a procedural provision which allows a superior court to enjoin the release of specific public records if they fall within specific exemptions found elsewhere in the Act. Stated another way, [the statute] governs access to a remedy, not a substantive basis for that remedy."

PAWS, at 257-258 (emphasis theirs).

Speaking directly to the issue of whether courts could construe procedural provisions of the PRA to authorize the withholding of records, that Court held:

Nor does it make sense to imagine the Legislature believed judges would be better custodians of [self-created] open-ended exemptions because they lack the self-interest of agencies. The Legislature's response to our opinion in Rosier makes clear that it does not want judges any more

than agencies to be wielding broad and malleable exemptions. The Legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions that would be created by treating [the injunction statute] as a source of substantive exemptions.

PAWS, at 259-260.

For the same reasons, RCW 42.56.100 only authorizes rules to safeguard records and prevent excessive interference with essential agency functions. It is not -- and cannot be construed to be -- a statute authorizing agencies or courts to create their own exemptions.

Fourth, DOC's route citation of Sappenfield asks this Court to ignore not only the law; but the facts, evidence, and history of this dispute. That history has factual predicates distinct to this case that were not before the Sappenfield court.

The genesis of this dispute began on January 17, 2000, when Representative Ballasiotes introduced House Bill 2458 for the DOC. See Opening Brief at 3-4. That Bill sought to exclude prisoners from the record inspection provisions of the PRA. CP 118-119. When HB 2458 failed to become law, DOC amended its public records

policy to include HB 2458's prohibition. CP 109 § III(E). DOC and Appellant Gronquist then litigated the validity of that policy. CP 121-125. The superior court held that DOC's refusal to permit free on-site inspection of non-exempt public records violated the PRA. CP 200, 206-207. DOC did not appeal that judgment. CP 71. DOC, nevertheless, continued to enforce its policy. CP 68, 81, 85, 93, 103 & 263-265. Several years later DOC re-litigated the matter with then prisoner Brandt Sappenfield. In that case -- and for the first time -- DOC convinced a panel of Division Three to sustain its policy and unwittingly pass HB 2458 into law by judicial opinion. Sappenfield, 127 Wn.App. 83 (2005).

These facts establish a clear violation of the separation of powers doctrine. See Opening Brief at 42-44. DOC refused to accept the Legislature's rejection of HB 2458. It then engaged in the impermissible act of creating these powers for itself by administrative policy. DOC then misled Division Three into sustaining its rule and unwittingly pass it into law by

judicial opinion. These actions are prohibited by the above referenced Supreme Court opinions and violate the separation of powers doctrine. See Fritz v. Gorton, 83 Wn.2d 275, 283-287, 517 P.2d 911 (1974)(separation of powers doctrine prohibits courts from altering any element of the PRA unless its provisions "clearly contravene state or federal constitutional provisions."); Hearst, 90 Wn.2d at 129-131 (agencies lack the authority to create limitations or exemptions to the PRA).

DOC claims this conduct does not violate separation of powers principles because the Sappenfield court simply engaged in a permissible act of statutory construction. Brief of Respondent at 8-9. This position, once again, asks the court to ignore the history of this dispute. More importantly, DOC and the Sappenfield court were prohibited from engaging in such acts by the unanimous Supreme Court opinions in PAWS, Hearst, and Brouillett, supra. Agencies simply cannot amend or change legislative enactments, and courts cannot alter unambiguous statutes under the guise of judicial construction.

There is absolutely no ambiguity in the PRA's requirements. Cf. Opening Brief at 12-26. The Sappenfield court expressly noted that the PRA's requirements were opposite of its position. Sappenfield, 127 Wn.App. at 88. Its holding is merely a court substituting its views on matters of public policy for that of the Legislature. See Sappenfield, at 87 (altering PRA's burden of proof from 'statutory exemption' to "'specific reason' disclosure is denied."). The power to alter the PRA's requirements rests exclusively with the Legislature.

DOC also claims it is not bound by the previous superior court judgment against it. Brief of Respondent at 9-14. Specifically, DOC asserts that any "contrary ruling by a Superior Court is superseded by the Court of Appeals' holding in Sappenfield." Brief of Respondent at 9. Both this Court and the Supreme Court have rejected this position. See SATSOP Valley Homeowners v. N.W. Rock, 126 Wn.App. 536, 543, 108 P.3d 1247 (2005) (subsequent court decision has "no effect on the conclusiveness of an earlier case."); Thompson v. Department of Licensing,

138 Wn.2d 783, 790, 982 P.2d 601 (1999)(requiring application of collateral estoppel where new appellate opinion revealed the erroneousess of previous adjudication). Collateral estoppel clearly applies.

DOC contends that if collateral estoppel applies the issue in the prior adjudication and this case are not the same, and that application of the doctrine will work an injustice. Brief of Respondent at 10-14.

The public records request in the previous action specifically sought on-site inspection of records. CP 142. DOC refused to permit free inspection of the records and conditioned disclosure upon the purchase of photocopies. CP 146-147 & 149-150. The complaint alleged that such conduct constituted a denial of the public records request in violation of the PRA. CP 124 ¶ 5.2. DOC defended the lawsuit on the ground that "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 Court made a

detailed inquiry into the free on-site inspection versus purchase of photocopy issue. CP 78-81 & 92. Based upon these facts, the court entered an order compelling on-site inspection "on the ground that [DOC] cannot charge a fee for locating, compiling and disclosing public records." CP 206 (emphasis added). DOC seeks to distinguish these facts by pointing to dicta from the court's oral reasoning. Brief of Respondent at 11. However, the facts, evidence, and written order is what controls, not dicta. The issues are identical.

DOC also cries injustice, espousing: "the current legal standard under Sappenfield precludes the application of collateral estoppel." Brief of Respondent at 13. This is clearly not the law. Both this Court and the Supreme Court require application of collateral estoppel in this context and hold that there is no injustice in doing so. See Opening Brief at 48-50 (citing Thompson and SATSOP Valley Homeowners, supra).

Even if this Court reaches the unlikely conclusion that DOC's policy and Sappenfield are lawful, Appellants must still be granted

relief. DOC concedes that neither its policy nor the Sappenfield opinion relieve it of the PRA's requirements to search for, collect, and identify requested records:

Importantly, had Department personnel responded [by refusing to search for, collect and identify requested documents], there would still have been a violation, even under Sappenfield, because the agency had abdicated its statutory responsibility to identify and collect the documents in accordance with the Act before requesting payment of a fee.

Brief of Respondent at 12 (emphasis added).

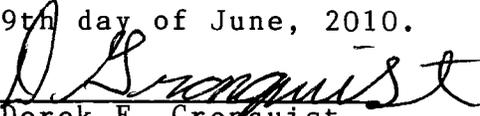
This is precisely how DOC responded to both of Mr. Gronquist's requests; summarily denying them without searching for, compiling, or identifying records. See CP 85, 93, 102-104; & Opening Brief at 29-34. Because DOC concedes that such conduct violate the PRA, this case must be reversed.

DOC also does not dispute that it violated the PRA by destroying requested public records, Opening Brief at 34-35, or that the majority of records Appellants sought fell within the policy and Sappenfield exceptions. Opening Brief at 40-42. Because the destruction of requested records requires imposition of statutory

penalties, O'Neill v. City of Shoreline, 145 Wn.App. 913, 936 n.64, 187 P.3d 822 (2008) (penalty required for destruction of record "from the date of the request through the date the supreme court denied review of the matter." (quoting Yacobellis v. Bellingham, 55 Wn.App. 706, 710, 715-716, 780 P.2d 272 (1989)), this case must be reversed and remanded for imposition of penalties. Likewise, this Court should require DOC to permit free inspection of every record falling within the Central and Health Care file exceptions to DOC's policy and the 'records pertaining to themselves' exception authorized under Sappenfield.

Finally, DOC's response contains false and misleading statements of fact. Those statements are identified in Appellants Motion for Sanctions and are incorporated herein by reference. Appellants alert the Court to those fabrications to ensure a proper determination of this case upon its merits.

Submitted this 9th day of June, 2010.


Derek E. Grozquist
#943857 A-A-302
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Byron A. Mustard

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

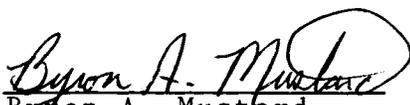
DECLARATION OF SERVICE

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

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

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

Dated this 14 day of June, 2010.


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

BY _____
DEPUTY

STATE OF WASHINGTON

10 JUN 21 AM 9:53

FILED
COURT OF APPEALS