

COURT OF APPEALS  
DIVISION II

11 APR 26 PM 12:03

No. 41198-9-II

STATE OF WASHINGTON  
BY   
DEPUTY

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

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FREEDOM FOUNDATION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

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APPELLANT'S REPLY BRIEF

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Michael J. Reitz, WSBA No. 36159  
Freedom Foundation  
2403 Pacific Ave. SE  
Olympia, WA 98501  
Phone: (360) 956-3482  
Fax: (360) 352-1874  
Email: mreitz@effwa.org

Attorney for Appellant

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## I. INTRODUCTION

On August 30, 2009, the state-operated ferry vessel M/V *Wenatchee* collided into its landing dock in Seattle. Seven members of the *Wenatchee* crew, all employees of Washington State Ferries, underwent post-accident drug and alcohol tests. The Freedom Foundation (formerly the Evergreen Freedom Foundation) seeks public records related to the drug and alcohol testing of those state employees. Respondent WSDOT produced records but redacted portions of ten separate documents.

On appeal, WSDOT concedes that its redactions were overbroad and has provided new copies of the records, unredacting significant portions of the previously-withheld information. Brief of Respondent, pp. 5-7. The unredacted information deals with the testing circumstances and methodology: names of employees, date and time of testing, the type of testing specimen provided, etc. WSDOT correctly notes that the Foundation is entitled to per-day penalties and costs upon remand as the agency withheld information that should have been provided.

The issue now before this Court is whether WSDOT can continue to withhold the drug and alcohol test *results* of public employees. The Public Records Act (PRA) allows agencies to withhold records if an exemption exists in the PRA or some "other statute." RCW 42.56.070(1). The agency continues to cite a federal regulation, 49 C.F.R. § 40.321, as

the basis for withholding test results. Without a parallel basis in federal statute, administrative regulations cannot serve as “other statute” exemptions that would prohibit disclosure of public records. Additionally, federal administrative regulations only preempt state law in cases of express preemption, which is not the case here.

One additional issue is whether the Foundation is entitled to costs and attorney fees on appeal. WSDOT suggests that the Foundation should not recover any of its costs if this Court determines that the test results are exempt. This is incorrect. Regardless of the Court’s ruling on the test results issue, the Foundation has won disclosure of improperly-withheld information. As a result, the Foundation is a prevailing party and is entitled to a recovery of costs on appeal under RCW 42.56.550(4). The Washington State Supreme Court has stated emphatically that to permit agencies to avoid attorney fees by disclosing documents after the plaintiff has been forced to file a lawsuit would undercut the policy behind the Public Records Act. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

## II. ARGUMENT

### A. The Federal Regulation Cited by WSDOT is Not a Valid Exemption to the Public Records Act's Broad Mandate for Disclosure.

The Public Records Act is clear. Unless a specific exemption exempts or prohibits disclosure, public agencies must provide public records upon request. RCW 42.56.070(1). The exemption must be found in the PRA or other statute. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010). The PRA must be “liberally construed and its exemptions narrowly construed” to ensure that the public’s interest in disclosure is protected. RCW 42.56.030; *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 590, 243 P.3d 919 (2010).

#### 1. A Federal Regulation that Exempts Records from Disclosure Must have a Specific Basis in Statute.

WSDOT asserts a federal regulation, 49 C.F.R. § 40.321, as the basis for redacting the drug and alcohol test results of public employees who were responsible for a state-operated ferry vessel that ran into its landing dock. The question, then, is whether this regulation can be treated as an “other statute” exemption under RCW 42.56.070(1).

The Washington Supreme Court reviewed the issue of whether a federal statute and its related administrative regulation could serve as an “other statute” exemption in *Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010). The law

before the Supreme Court was the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801-6809, which requires financial institutions to respect the privacy of their customers. Congress included explicit confidentiality mandates in the GLBA and directed the Federal Trade Commission (FTC) to adopt rules implementing the law.

The Supreme Court noted that the GLBA and the FTC rule were to be construed as superseding a state law only to the extent of an inconsistency. *Ameriquest*, 170 Wn.2d at 439. The court also noted that it has frequently incorporated state statutes into the PRA. Thus, the court stated: “We see no reason why federal law should be treated differently. We conclude that the GLBA (together with the FTC rule enforcing it) is an ‘other statute.’ RCW 42.56.070(1).” *Id.*

The FTC rule is recognized as a PRA exemption given its basis in statute—it is to be read “together” with the GLBA, which specifically prohibits disclosure of certain information. *Id.* This is also demonstrated in the Supreme Court’s discussion of the regulatory scheme: its discussion of the FTC rule couples each administrative regulation with the specific statutory mandate in the GLBA. *Id.* at 424-26.

The Supreme Court’s decision in *Ameriquest* with regard to federal regulations stands in contrast to the federal regulation cited by WSDOT this case.

The confidentiality provision found at 49 C.F.R. § 40.321 was adopted by the U.S. Department of Transportation pursuant to the Omnibus Transportation Employee Testing Act of 1991, Pub.L. 102-143, 105 Stat. 917 (Oct. 28, 1991) (OTETA). As previously argued by the Appellant, 49 C.F.R. § 40.321 is inconsistent with its underlying statute. In enacting OTETA, Congress directed the U.S. Secretary of Transportation to “provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees . . . .” 49 U.S.C. § 5331(d)(7).

WSDOT argues that the parenthetical clause “except information about alcohol or a controlled substance” does not qualify “test results” but only qualifies “medical information.” Brief of Respondent at 15. This ignores the fact that the two phrases are joined by “and”—which conveys a conjunctive meaning and suggests that the parenthetical phrase modifies both terms. A review of the plain language of OTETA indicates that Congress wished to protect the confidentiality of test results and medical information if unrelated to alcohol or a controlled substance. But if alcohol or a controlled substance were discovered, mandating confidentiality would hinder the prosecution of violations of federal law or policy, not to mention the ability of an employer to appropriately discipline an employee in violation of the law.

Thus, unlike the federal rule reviewed in *Ameriquest*, 49 C.F.R. § 40.321 is not consistent with its underlying statute.

**2. WSDOT Rejects OTETA as a Statutory Basis for 49 C.F.R. § 40.321.**

Regardless of whether 49 C.F.R. § 40.321 is consistent with its underlying statute, WSDOT rejects OTETA as the statutory basis for the U.S. Coast Guard's regulation of chemical testing of marine employees. WSDOT states: "[A]nalysis of the USDOT's statutory authority to adopt is misplaced, because it is the adoption of this regulation by the USCG that applies to the WSF as a marine employer." Brief of Respondent at 12.<sup>1</sup> Rather than relying on OTETA, WSDOT instead cites the Coast Guard's independent statutory authority to prescribe regulations to promote maritime safety and the fact that the Coast Guard chooses to incorporate the U.S. Department of Transportation's testing regulations.

The parties both agree that the Coast Guard has authority over marine employers such as the Washington State Ferries. However, nothing in Coast Guard statutes cited by WSDOT prohibits the release of drug or alcohol test results of a state employee. In fact, WSDOT admits "drug and alcohol testing procedures are not specifically prescribed in the USCG's

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<sup>1</sup> See also Brief of Respondent at 17 ("the USCG does not rely on OTETA as the source for its rule making authority to regulate employees' drug and alcohol use" and "OTETA does not apply to the USCG or amend any USCG statutes.").

statues [sic] requiring such testing . . . .” Brief of Respondent at 18. Likewise, Congress did not mandate confidentiality of the test results of marine employees. Thus, WSDOT severs 49 C.F.R. § 40.321 from OTETA without showing an independent statutory basis to prohibit the release of public employee test results.<sup>2</sup>

The holding in *Ameriquest* suggests that a federal regulation will only serve as an exemption to the PRA when read together with the underlying statute.

The Supreme Court offered a similar statement in *Progressive Animal Welfare Soc. v. University of Washington (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1994). An animal rights group sought a University of Washington researcher’s unfunded grant proposal involving the use of animals in scientific research. The university argued that federal policy—specifically administrative regulations that addressed the Freedom of Information Act’s (FOIA) commercial and personal privacy information exemptions—would preempt the PRA. The Supreme Court rejected this argument. Without a statutory basis, said the court, “any federal agency

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<sup>2</sup> WSDOT objects to the Freedom Foundation citing a Coast Guard regulation which distinguishes USDOT’s testing procedures for drug tests and alcohol tests. 46 C.F.R. § 16.500(a)(2). While the Foundation admitted this regulation was not raised below, it is appropriate given the *de novo* review in PRA cases to note pertinent authority for the first time on appeal. See *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (statute pertinent to substantive issues may be considered for the first time on appeal); *State v. Fagalde*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975) (“the court may consider any statute applicable to the substantive issues before the trial court, even though the statute was not cited.”).

which promulgated regulations purporting to bind state agencies would be acting ultra vires.” *PAWS II*, 125 Wn.2d at 266 n.11.

Without a specific statutory basis, 49 C.F.R. § 40.321 cannot serve as an “other statute” exemption as provided in RCW 42.56.070(1), and WSDOT should not continue withholding the drug and alcohol test results of public employees.

**B. 49 C.F.R. § 40.321 Does Not Preempt the Public Records Act.**

WSDOT argues that 49 C.F.R. § 40.321 may preempt the PRA, thereby allowing the agency to avoid disclosure of the records sought.

Federal preemption can occur in one of three ways: express preemption, where Congress passes a statute that expressly preempts state law; field preemption, where local law regulates conduct in an area Congress intended to exclusively occupy; or conflict preemption, where state law conflicts with federal law due to impossibility of compliance with state and federal law. *City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 661, 667, 41 P.3d 1169 (2002).

Courts have repeatedly emphasized that “there is a strong presumption against finding preemption in an ambiguous case . . . .” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993). The burden of proof is on the

party claiming preemption, and state laws are “not superseded by federal law unless that is the clear and manifest purpose of Congress.” *Id.*

The question here is whether a USDOT regulation, incorporated into Coast Guard procedures, can preempt the PRA’s clear mandate to disclose public records.

Federal regulations can have the same preemptive effect as federal statutes. *Berger v. Personal Products, Inc.*, 115 Wn.2d 267, 270, 797 P.2d 1148 (1990). However, “regulations must not be ‘unreasonable, unauthorized, or inconsistent with’ the underlying statute . . .” *Fidelity Federal Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154, 102 S.Ct. 3014 (1982) (*quoting Ridgway v. Ridgway*, 454 U.S. 46, 57, 102 S.Ct. 49 (1981)). Additionally, Washington courts have given federal regulations preemptive effect only when express preemption exists. “While we have recognized some cases where federal regulations preempt state statutes, those cases involve express preemption.” *PAWS II*, 125 Wn.2d at 266 n.11. Thus, unless 49 C.F.R. § 40.321 is rooted in a statute where Congress expressly preempts state law, the regulation cannot be given preemptive effect over the PRA.

This case does not involve an instance of express preemption. The Omnibus Transportation Employee Testing Act contains a preemptive clause which prohibits state and local governments from adopting “a law,

regulation, standard, or order that is inconsistent with regulations prescribed under this section.” 49 U.S.C. § 5331(f)(1).

In enacting OTETA, Congress did not expressly preclude state regulation or occupy the field of regulation. Rather, state and local governments were merely prohibited from adopting laws or rules that are “inconsistent” with the Act. *Id.* The U.S. Court of Appeals for the Ninth Circuit, interpreting an identical (but separately codified) OTETA preemption clause, stated emphatically: “There is no express federal preemption by the statute. On the contrary. The statute contains a preemption clause expressly limited to ‘inconsistent’ state law[.]” *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1132 (9th Cir. 2003). Additionally, as discussed above, 49 C.F.R. § 40.321 is inconsistent with its underlying statute.

More importantly, WSDOT disavows OTETA as the statutory basis for the Coast Guard’s regulation of chemical testing of marine employees. So regardless of the intent of Congress in adopting OTETA, OTETA is not applicable when analyzing the preemptive effect of 49 C.F.R. § 40.321.

While WSDOT cites the Coast Guard’s independent regulatory authority over maritime safety, it cites no preemptive clause in Coast

Guard statutes or regulations that would prohibit states from disclosing details of public employee conduct.

The Supreme Court's decision in *Ameriquest* is relevant to this issue as well. The Ameriquest Mortgage Company had argued that the Gramm-Leach-Bliley Act preempted the PRA so completely that none of the information it had provided the attorney general could be disclosed in a records request. The court said this argument was "incorrect." *Ameriquest*, 170 Wn.2d at 439. Instead, based on the GLBA's conflict preemption clause the court held the GLBA would only preempt the PRA to the extent of an inconsistency. The PRA's other statute exemption "avoids any inconsistency and allows the federal regulation's privacy protections to supplement the PRA's exemptions." *Id.* Thus, the court found no preemption of state law.

In sum, WSDOT cannot show that 49 C.F.R. § 40.321 preempts the broad mandate for disclosure under the Public Records Act. The agency must overcome a "strong presumption" against preemption. *Washington State Physicians*, 122 Wn.2d at 327. Federal regulations are only given preemptive effect when they "involve express preemption," which does not exist in this case. *PAWS II*, 125 Wn.2d at 266 n.11. Notwithstanding the USDOT's confidentiality regulation, the underlying federal statute does not prohibit a state from regulating its own public

employees. 49 U.S.C. § 5331. Moreover, the plain language of OTETA exempts information about alcohol and controlled substances from any confidentiality policy. 49 U.S.C. § 5331(d)(7). And even if OTETA prohibited release of test results, WSDOT explicitly disavows OTETA's application to the testing procedures at issue in this case. Without a statutory basis manifesting the clear intent of Congress to supersede state law, 49 C.F.R. § 40.321 does not preempt the PRA.

**C. Costs and Attorney Fees Should be Awarded on Appeal as the Freedom Foundation is a Prevailing Party.**

On September 30, 2010, about two weeks after the Freedom Foundation filed its Notice of Appeal in this case, WSDOT supplied new copies of the records it had originally redacted. The agency supplied information about the identities of tested employees, the circumstances of testing, and the testing methodologies employed. The agency continues to withhold the actual test *results* of the *Wenatchee* crew.<sup>3</sup> WSDOT concedes on appeal that portions of its redactions were overbroad and correctly notes that the trial court should award penalties and costs upon remand.<sup>4</sup>

However, despite its admission that it wrongfully withheld information, WSDOT incorrectly argues that costs and fees incurred in this appeal should not be awarded unless this Court finds that the

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<sup>3</sup> Brief of Respondent, Appendices A and B.

<sup>4</sup> Brief of Respondent, pp. 25-27.

information the agency continues to withhold should be produced. To put its argument a different way, WSDOT suggests that the Foundation should recover no costs on appeal unless it convinces the Court that *all* of WSDOT's redactions were improper.

Such a ruling would frustrate the purpose of the Public Records Act by allowing public agencies to wrongfully withhold records, require the requester to bear the expense of suing and taking a case up on appeal, only to have the agency avoid a cost award by "voluntarily" providing records after litigation is initiated.

A party who prevails against an agency in a PRA action shall be awarded "all costs" incurred with such legal action, including reasonable attorney fees. RCW 42.56.550(4). An award of costs is mandatory given the PRA's admonition that costs "shall" be awarded to a prevailing party. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). Attorney fees on appeal are also recoverable under the PRA. *PAWS II*, 125 Wn.2d at 271.

Permitting a liberal recovery of costs is consistent with the PRA's policy goal of "making it financially feasible for private citizens to enforce the public's right to access public records." *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503*, 95 Wn.App. 106, 115, 975 P.2d 536 (1999). Strict enforcement of the award provision is

intended to “discourage improper denial of public records.” *Amren*, 131 Wn.2d at 37. A good faith reliance on an exemption does not exonerate an agency that mistakenly relies upon that exemption from an assessment of attorney fees for untimely disclosure of requested information. *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, 156 Wn.App. 110, 118, 231 P.3d 219 (2010).

Whether a requester is a “prevailing party” is a “legal question of whether the records should have been disclosed on request.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). If an agency withheld records later determined to be nonexempt, the agency acted wrongfully. *Sanders v. State*, 169 Wn.2d 827, 850, 240 P.3d 120 (2010). A party can also prevail if the agency violates the procedural requirements of the PRA. *Id.* at 848.

A party who wins disclosure of some, but not all, information sought is nonetheless deemed the “prevailing party” for purposes of awarding attorney fees and costs under the statute. *See Dawson v. Daly*, 120 Wn.2d 782, 800, 845 P.2d 995 (1993) and *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998).

Courts have discretion to apportion an award of costs and fees when a requester wins a partial disclosure. *Sanders*, 169 Wn.2d at 867. There are a variety of apportionment methods courts can employ. One

method is to determine the number of issues upon which the requester prevailed. *Id.* at 870. Another method is to review the number of responsive records and determine the percentage of records that were wrongfully withheld. *Id.* at 865.

Respondent WSDOT correctly concedes that portions of its redactions were overbroad. Thus, for purposes of this action the Freedom Foundation is a prevailing party and is entitled to penalties and costs—regardless of this Court’s ruling on the remaining issue of whether the actual test results are exempt.

Under either apportionment method, the Freedom Foundation should be entitled to a significant portion of its costs. Reviewing the disputed issues, the Foundation objected to WSDOT’s decision to withhold the results of drug and alcohol testing. Additionally, in its very first objection to WSDOT’s records denial the Foundation asserted that the agency’s redactions were overbroad and that it could not withhold testing information: i.e., employee identities, signatures of tested employees, testing circumstances, the name of the testing laboratory, testing methodology, and the date and time when testing occurred. CP 32, 38. While WSDOT continues to withhold test *results*, the agency now concedes that it improperly redacted testing *information*.

As an alternative method to apportion costs, a linear measurement of the original redactions and the unredacted copies also shows that the Foundation won disclosure of a significant portion of the information sought. *See* Brief of Respondent, Appendices A and B. Based on a simple measurement, the records originally provided by WSDOT (App. A) contain approximately 528 centimeters of redactions that the agency justified under 49 C.F.R. § 40.321. The unredacted copies WSDOT later provided (App. B) contain only 27.8 centimeters of redactions related to 49 C.F.R. § 40.321. Thus, WSDOT supplied 95 percent of the information originally withheld.

WSDOT argues that the Foundation is not entitled to costs on appeal for the portions of records the agency now admits were wrongfully withheld. Such a position undermines the PRA's broad mandate for disclosure and should be rejected.

Courts strictly warn against allowing an agency to avoid fees through strategic disclosure after a wrongful denial. "State agencies may not resist disclosure of public records until a suit is filed and then avoid paying fees and penalties by disclosing them voluntarily thereafter." *Kitsap County*, 156 Wn.App. at 118. *See also Spokane Research*, 155 Wn.2d at 104 ("[P]ermitting an agency to avoid attorney fees by

disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act.”).

This Court should not endorse a practice where agencies seek to avoid costs and attorney fees on appeal by withholding records until after a requester has gone through the expense of initiating an appeal. The effect of WSDOT’s argument is to deny costs to a requester unless the requester prevails on *all* issues on appeal. The appropriate question in determining attorney fees on appeal is not when the agency voluntarily disclosed records, as WSDOT suggests, but “whether the records should have been disclosed on request.” *Spokane Research*, 155 Wn.2d at 103. Regardless of this Court’s holding on the test results issue, the Freedom Foundation has won disclosure of significant portions of the information it sought. Thus, the Foundation is a prevailing party, and should be awarded its costs and fees on appeal.

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### III. CONCLUSION

Based on the foregoing reasons, the Court should reverse the trial court's order denying the Freedom Foundation's Motion for Summary Judgment, award costs and fees on appeal, and remand to assess additional costs and penalties.

RESPECTFULLY SUBMITTED this 25th day of April, 2011.

A handwritten signature in black ink, appearing to read "Michael J. Reitz". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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Michael J. Reitz, WSBA No. 36195  
Attorney for Appellant

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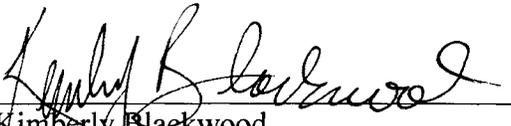
CERTIFICATE OF  
SERVICE

I certify that on April 25, 2011, I served a copy of the foregoing  
Reply Brief of Appellant by first class mail, postage prepaid, on the  
following:

L. Scott Lockwood  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40113  
Olympia, WA 98504-0113  
Attorney for Respondent

Douglas D. Shaftel  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40113  
Olympia, WA 98504-0113  
Attorney for Respondent

DATED this April 25, 2011.

  
\_\_\_\_\_  
Kimberly Blackwood  
Paralegal  
Freedom Foundation