

**FILED**

**JUL 25 2011**

**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_**

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE

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NO. 29590-7-III

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GASTON CORNU-LABAT,

Respondent/Plaintiff,

v.

HOSPITAL DIST. #2 GRANT COUNTY,  
d/b/a QUINCY VALLEY HOSPITAL

Appellant/Defendant.

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BRIEF OF RESPONDENT

---

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## I. INTRODUCTION

This appeal concerns a citizen's request for documents and information pursuant to the Public Records Act, a statute guaranteeing access to information unless one of the narrowly construed exemptions apply. The Appellant, QVMC, asks this Court to turn public records law on its head to "liberally construe" any one of three statutory exemptions in its favor. QVMC's argument is contrary to well-established law. The Appellant is also mistaken about the application of the exemptions it asserts. QVMC's *own* evidence demonstrates that it did not comply with the clear terms of any of the exemptions claimed. QVMC's appeal should be dismissed.

## II. STATEMENT OF THE CASE

### A. Dr. Gaston Cornu-Labat Asked QVMC for Public Records Related to False Allegations Levied Against Him

Dr. Gaston Cornu-Labat was hired as a physician by the Quincy Valley Medical Center ("QVMC") in Quincy, Washington in 2007. CP 30 (Declaration of Gaston Cornu-Labat dated 6/3/10 ("Cornu-Labat Dec.")). He was employed at QVMC from 2007 to 2010 and entrusted to serve in leadership roles at the hospital, including as the chief of medical staff and interim chief executive in the absence of hospital CEO Mehdi Merred. *Id.*

At QVMC, Dr. Cornu-Labat challenged the administration and staff on key issues, including safety and personnel practices. CP 50-58 (Letter from Cornu-Labat to Merred). When Merred returned from his absence, Dr. Cornu-Labat's relationship with administration and staff became increasingly difficult. On the evening of July 23, 2009, Dr. Cornu-Labat was engaged in conversation with a QVMC nurse. During the course of their conversation, the nurse stated to Dr. Cornu-Labat that she felt "uncomfortable" with his demeanor. CP 31. Surprised by the comment, Dr. Cornu-Labat immediately concluded the conversation, and reported the incident the following day to the office of CEO Mehdi Merred. *Id.* Cornu-Labat requested that QVMC promptly investigate the incident. *Id.*; CP 42 (letter from Merred and Vance to Cornu-Labat)

Merred conducted an informal investigation along with the vice chief of the medical staff, Dr. Mark Vance. CP 207-08 (Declaration of Mark Vance MD dated 5/26/10 ("Vance Dec.")). On July 24 – the day immediately following the incident – Merred and Vance met with Dr. Cornu-Labat. *Id.*; CP 31 (Cornu-Labat Dec.). The nurse claimed she felt "uncomfortable" because Dr. Cornu-Labat appeared intoxicated and

was allegedly aggressive and impatient during their conversation. CP 31. But after speaking with Cornu-Labat and several other witnesses, Merred and Vance determined there was no evidence of wrongdoing and ended the “investigation” the same day they had begun it. CP 207-08.

Dr. Cornu-Labat was confused by the nurse’s allegations and filed a public records request with QVMC seeking documents related to Merred’s investigation and any other investigation of his conduct. CP 31; *see also* CP 36 (Request for Public Records dated 7/29/09). Merred responded to the request immediately and refused to disclose any documents relating to his investigation. CP 39 (Email from Merred to Cornu-Labat). Merred relied upon RCW 42.56.250, an unrelated Public Records Act exemption that applies to investigations of discriminatory employment practices. *Id.*

Dr. Cornu-Labat was asked to meet again with Merred and Vance on August 4, 2009. CP 31; 209. Merred was beginning a second investigation of Cornu-Labat and also requested the participation of Anthony Gonzalez, a QVMC board commissioner in charge of personnel issues. CP 201-06 (Declaration of Anthony Gonzalez dated 5/26/10 (“Gonzalez Dec.”)). Gonzalez stated that he was asked to participate

“because I was a State Patrol officer for eighteen years and have an investigatory background.” *Id.* at 202.

At the beginning of the meeting with Merred, Vance, and Gonzalez, Cornu-Labat was presented with a letter signed by Merred and Vance, stating that the charges levied against him were dismissed. CP 31; 208. The letter acknowledged that the investigation was initiated in response to Cornu-Labat’s request and stated that Merred and Vance were “unable to find sufficient evidence to support the allegations[.]” CP 42.

Cornu-Labat was informed that the second investigation focused on allegations about Dr. Cornu-Labat’s vacation schedule, personal hygiene, and time he spent working on outside projects. CP 32. According to Vance and Gonzalez, other issues regarded Cornu-Labat’s tardiness, lengthy telephone calls, failing to take patients’ vital signs, and intimidating hospital staff. CP 202; 209. The charges against Cornu-Labat were submitted to Merred and Vance. CP 208. Vance stated: “Merred and I received complaints from several persons[.]” *Id.* At the August 4 meeting, Cornu-Labat requested that Merred, Vance, and Gonzalez explain the basis of the charges against him. CP 31-32 (Cornu-Labat Dec.). They refused to do so. *Id.*

On August 6, 2009, two days after the meeting with Merred, Vance, and Gonzalez, Dr. Cornu-Labat received a second letter from Merred again clearing him of all charges. CP 88. Merred, however, requested that Dr. Cornu-Labat agree to psychological examinations conducted by a provider of Merred's choosing. *Id.* Uncomfortable with the professionalism of the physician service Merred chose for the evaluation, Dr. Cornu-Labat sought independent psychiatric analysis. He provided QVMC with the results of numerous psychological and psychiatric evaluations, all of which concluded that he was fit to practice medicine and demonstrated no symptoms of any other concern. CP 32. QVMC nonetheless insisted that Dr. Cornu-Labat take medical leave and ultimately terminated him. *Id.*

After receiving the August 6 letter from Merred that cleared him of charges, Dr. Cornu-Labat made a second request for public records seeking copies of all writings relating to Merred's investigations. CP 33, 47 (Request for Public Records sent 8/11/09). QVMC did not respond to the request. CP 33. Cornu-Labat submitted a third request for public records on August 26, 2009. *Id.* He again requested QVMC disclose

records related to any investigation of him and contested the application of the exemption QVMC asserted. CP 50.

QVMC responded to the request but refused to produce any records related to the investigations. CP 33. Dr. Cornu-Labat understood that QVMC was now relying on an alternative statutory exemption that related to “quality assurance and peer review[.]” *Id.*

QVMC has adopted a quality improvement (QI) program known as the Organizational Quality Plan. CP 31; 253-67. The plan was established to coordinate and integrate all quality and performance improvement activities, ensure patient care is safe, effective, efficient, and equitable, and focus on areas that significantly impact critical work processes. *See* CP 254. Under the plan, the QVMC board authorized a specialized committee, the Quality Improvement Committee (QIC), to manage the QI program. CP 256.

According to the organizational plan, the “QIC is comprised of multidisciplinary staff and leadership personnel” and is tasked with several responsibilities, including: providing a framework for organization performance; reviewing quality management memos; overseeing staff education and training; assuring adequate resource allocation; and

identifying trends and opportunities for improvement projects. CP 256. The QIC reports activities to the QVMC board on a regular schedule. CP 255, 56. When an incident is referred to the QIC, it is submitted to the QIC on an established form. CP 31. QVMC properly conceded to the trial court that the Quality Improvement Committee was “not relevant” to the investigations of Cornu-Labat. CP 272 (QVMC’s Opposition to Plaintiff’s Motion for Summary Judgment).

Cornu-Labat submitted a fourth and final request for records on January 5, 2010. CP 50-58. Through counsel, QVMC refused and blithely asserted that the records requested are “health care information and are exempt from disclosure.” CP 61 (Letter from Merred to Cornu-Labat). No citation to authority was provided or additional explanation offered. *Id.* QVMC refused to disclose records relating to either inquiry of Dr. Cornu-Labat until the subject lawsuit was commenced. *See* CP 34. During litigation, QVMC disclosed some of the records sought by Dr. Cornu-Labat which QVMC had previously claimed were exempt. CP 128-130 (Letter to Washington Physicians Help Program).

B. QVMC Disciplinary Procedures

QVMC adopted bylaws that define the procedures the hospital follows when disciplinary issues arise. CP 148-56 (QVMC Bylaws Article VIII). Any member of the medical staff, the president of the medical staff, or the hospital administrator may request “corrective action” when a staff member is behaving disruptively. CP 148. A request for corrective action must be in writing. *Id.* When action is requested, the president of the medical staff is required to make a report of the investigation to the medical staff. *Id.* Prior to the president’s report, the staff member against whom corrective action has been requested meets with medical staff. *Id.* According to the bylaws, the accused “shall have an opportunity for an interview with the Medical Staff.” *Id.* A record of the interview must be made by the medical staff. *Id.*

Under the bylaws, the medical staff may take limited actions on a request for corrective action. Staff may “reject, modify, or approve” the request for corrective action,” CP 148, but decisions regarding the status or exercise of privileges must be made by the QVMC board. CP 151 (QVMC Bylaws Article IX). When “action must be taken immediately in the best interest of patient care in the hospital,” the president of the

medical staff, hospital administrator, or medical staff may recommend suspension, but the final decision rests with the board. CP 149, 151. There is no provision in the bylaws authorizing the QVMC board to delegate its authority in this regard. CP 148-56. The steps set forth in the disciplinary procedures were not followed by Merred in his “investigation” of Dr. Cornu-Labat.

QVMC also adopted a “disruptive behavior” policy. CP 285-87. Disruptive behavior is defined to include verbal or physical attacks, inappropriate comments in patient records, intimidating colleagues, and refusing to perform staff assignments. CP 286. The policy authorizes the hospital administrator and chief of medical staff to investigate allegations of disruptive behavior and establishes a lengthy warning procedure that includes interventions, a final warning, and a follow-up to the final warning before a summary suspension is authorized. CP 287. As with Article VIII of the bylaws, the disruptive behavior policy does not give the administrator and chief of staff the authority to revoke staff membership and privileges. *Id.* The QVMC board is vested with authority to “take action to revoke the individual’s membership and privileges.” *Id.* The disruptive behavior policy was also not followed.

C. Confidentiality at QVMC

When Dr. Cornu-Labat began his employment as a physician at QVMC, he signed a contract agreeing to maintain the confidentiality of “patient medical and financial information, records and data.” CP 194 (Confidentiality Statement). He also agreed to a provision stating that he would not disclose any information related to “QI [quality improvement], Peer Review, or Credentialing activities” and that he would report any disclosure requests to “the Administrator or his/her designee immediately.” *Id.*

D. Harm to Dr. Cornu-Labat

Dr. Cornu-Labat does not understand why, after dismissing all charges against him, QVMC demanded he undergo psychological screening and ultimately terminated him. CP 34. Cornu-Labat filed numerous requests under the Public Records Act to better understand who provided information against him and the basis of any allegations of wrongdoing.

Dr. Cornu-Labat has been harmed by QVMC’s refusal to identify details regarding allegations made against him. QVMC executives made inaccurate comments to the media about Cornu-Labat’s termination and

local newspapers ran incomplete stories on the incidents. CP 64-86. Dr. Cornu-Labat has been unable to respond about what transpired other than to issue a general denial that he ever did anything wrong. CP 33. He is also struggling financially and unable to obtain employment as a physician. His family has since temporarily relocated to Argentina.

Cornu-Labat brought suit under the Public Records Act to compel QVMC to disclose information explaining the basis – if any – of QVMC’s conduct. He filed the action in Grant County Superior Court on March 8, 2010, CP 1-8, and moved for summary judgment. CP 15-29. Dr. Cornu-Labat’s motion was granted on September 7, 2010. CP 367-77 (Court’s Decision). The court ruled that the exemptions claimed by QVMC did not apply because both investigations were conducted by “ad hoc investigative teams which included non-physicians.” CP 375. In order to come within the exemption, “especially when narrowly construed -- the peer review committee must be regularly constituted, and must consist only of the professional peers of the member being reviewed.” *Id.* The facts clearly demonstrated that neither committee was a regularly constituted committee or consisted of Dr. Cornu-Labat’s peers.

The court awarded Dr. Cornu-Labat's attorneys' fees and costs and ordered a penalty of \$10 per day from August 1, 2009 through entry of judgment. CP 376. QVMC appealed the court's decision. CP 609-15.

### III. ARGUMENT

#### A. Standard of Review

Under the Public Records Act, judicial review of agency actions is conducted de novo. RCW 42.56.550(3). An appellate court stands in the same position as the trial court when the record before the trial court consists entirely of documentary evidence, affidavits and memoranda of law. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011); *see also, Int'l Bhd. Of Elec. Workers, Local Union No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000) (Summary judgment decisions are reviewed de novo).

#### B. The Public Records Act is Liberally Construed in Favor of Disclosure and Exemptions to Disclosure are Narrowly Construed

The Public Records Act “*shall* be liberally construed and its exemptions narrowly construed” to promote public policy and “to assure that the public interest will be fully protected.” RCW 42.56.030 (emphasis added). The Legislature stated that “[c]ourts shall take into

account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment[.]” RCW 42.56.550(3). The statute is a “strongly worded mandate for broad disclosure of public records.” *Progressive Animal Welfare Soc. v. University of Washington*, 114 Wn.2d 677, 790 P.2d 604 (1990). While the mandate requiring disclosure is to be “liberally construed,” courts are equally clear in holding that the statutory exemptions “are to be narrowly construed.” *Amren v. City of Kalama*, 131 Wn.2d. 25, 31, 929 P.2d 389 (1997).

QVMC asks this Court to turn public records law on its head and “liberally construct” several exemptions despite the plain intent of the Legislature stating otherwise. App. Br. at 19. QVMC argues that RCW 4.24.250, 70.44.062(1), and 70.41.200 should be liberally construed because the “common law” did not entitle a physician to review records of investigations.<sup>1</sup> *Id.* But a hospital’s practices under the common law do not preempt or supplant the clearly stated language of the Legislature: the Public Records Act “shall be liberally construed and its exemptions

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<sup>1</sup> RCW 4.24.250 and RCW 70.41.200 are incorporated into the Public Records Act. See RCW 42.56.360(1)(c). QVMC relies upon the “other statute” exemption contained in the Public Records Act to justify application of RCW 70.44.062(1). App. Br. at 30 citing RCW 42.56.070(1).

narrowly construed[.]” RCW 42.56.030. To the extent any conflict exists between the Public Records Act “and any other act,” the Legislature stated that “the provisions of this chapter shall govern.” *Id.*

QVMC mistakenly relies upon *Morgan v. Peacehealth, Inc.*, 101 Wn. App. 750, 14 P.3d 773 (2000), and *Colwell v. Good Samaritan Community Health Care*, 153 Wn. App. 911, 225 P.3d 294 (2009) to support the claim that RCW 4.24.250, 70.44.062(1), and 70.41.200 should be construed liberally. Neither case provides any support for construing RCW 4.24.250, 70.44.062(1), or 70.41.200 liberally. None of the statutes cited by QVMC were mentioned in *Morgan* or *Colwell* and the Public Records Act was not at issue – or even referenced – in either proceeding. RCW 4.24.250, 70.44.062(1), or 70.41.200 are to be construed narrowly. *See* RCW 42.56.030.

C. RCW 4.24.250(1) has No Application to Dr. Cornu-Labat’s Records Requests

QVMC’s opening brief relies chiefly on RCW 4.24.250(1) to justify the withholding of records, Opening Brief of Appellant (App. Br.) at 19-27, but the statutory language in RCW 4.24.250(1) does not apply to

Dr. Cornu-Labat's records requests.<sup>2</sup> QVMC's brief selectively edits the law and cites only to excerpts of RCW 4.24.250(1). App. Br. at 19-20.

The statute provides in full:

Any healthcare provider as defined in RCW 7.70.020(1) and (2) who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. The proceedings, reports, and written

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<sup>2</sup> QVMC's emphasis on the trial judge's 'conclusive' ruling is peculiar since the standard of review is *de novo*. See App. Br. at 19-20. QVMC properly acknowledges on the previous page of its brief that the lower court's decision is reviewed *de novo*. App. Br. at 17-18.

records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020(1) and (2).

RCW 4.24.250(1).

**1. Merred's investigative committees were not "regularly constituted."**

RCW 4.24.250 is "to be strictly construed and limited to its purposes." *Coburn v. Seda*, 101 Wn.2d 270, 276, 677 P.2d 173 (1984). The statute "provides immunity from civil liability to health care providers who file charges or present evidence against another member of the profession in connection with a competency review" and makes privileged records from "quality review committee proceedings[.]" *Anderson v. Breda*, 103 Wn.2d 901, 904-05, 700 P.2d 737 (1985).

*Anderson* indicates how narrowly RCW 4.24.250 is to be construed. The statute is "only appropriate when two components are present[:]" it is "only applicable if the information sought has been generated in a regularly constituted committee or board of the hospital

whose duty it is to review and evaluate the quality of patient care or the competency and qualifications of members of the profession” and then “only the proceedings, reports and written records of such regularly constituted committees are immune from discovery.” 103 Wn.2d at 905-06. If a decision “is made by an administrator or entity other than a peer review committee, the records of that entity or individual are discoverable to the extent they do not contain the record of a quality review committee.” *Id.* at 907-08.

The information requested by Dr. Cornu-Labat was not generated by a “regularly constituted committee” under RCW 4.24.250(1). Two people investigated allegations of Dr. Cornu-Labat’s intoxication on July 23, 2009: Hospital CEO Mehdi Merred and, at Merred’s request, Mark Vance, vice-chief of the QVMC medical staff. CP 207-08. Merred formed the “committee” the morning after Dr. Cornu-Labat self-reported the incident with a QVMC nurse. CP 31; 42. Dr. Cornu-Labat was contacted the *same* day the committee was formed, July 24, and met with Merred and Vance to discuss the nurse’s allegations. CP 31; 208. The only other individuals Merred and Vance discussed the incident with were contacted on July 24. *Id.* The “investigation” lasted for one day only. *Id.*

QVMC does not allege that Merred and Vance ever conducted an inquiry (of any kind) on any previous occasion. Merred requested that Anthony Gonzalez, QVMC board commissioner responsible for personnel issues, join the second investigation for a narrow and limited purpose. Gonzalez states that he was asked to join “because I was a State Patrol officer for eighteen years and have an investigatory background.” CP 202. Gonzalez makes no allegation that he had ever participated in any QVMC inquiry or investigation on a previous occasion. *See* CP 201-06. Neither investigation was conducted by a “regularly constituted committee.”

QVMC’s failure to offer proof that Merred and Vance regularly meet as a committee is fatal to the claim that RCW 4.24.250(1) has any bearing on Cornu-Labat’s requests under the Public Records Act. Evidence demonstrates instead that both committees were formed *ad hoc* by the hospital CEO for a narrow and limited purpose: to investigate Dr. Cornu-Labat on personnel, not medical quality, issues. The trial court reached a similar conclusion in holding RCW 4.24.250 inapplicable: both investigations “were conducted by *ad hoc* investigative teams[.]” CP 375 (emphasis in original).

Courts applying RCW 4.24.250 stringently uphold the requirement that a committee be “regularly constituted.” *See Coburn*, 101 Wn.2d at 277-78 (Remand to find whether committee was “regularly constituted”); *Anderson*, 103 Wn.2d at 908 (Vacating trial court order for failing to establish existence of a regularly constituted quality review committee); *Adcox v. Children’s Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 864 P.2d 921 (1993) (Internal investigation documents created by hospital administrators are not protected under statute); *Lowy v. PeaceHealth*, 159 Wn. App. 715, 722, 247 P.3d 7 (2011) (Documents sought “were not created specifically for the quality assurance committee, are maintained external to committee files, and are undisputedly relevant and discoverable.”). QVMC’s investigations do not meet the plain requirements of RCW 4.24.250 and fall instead within the above-cited line of cases holding the statute inapplicable.

QVMC claims that the QVMC medical staff is “undoubtedly” a regularly constituted committee, but acknowledges that *neither* of Merred’s investigations was conducted *by* the medical staff. App. Br. at 24 (emphasis added). QVMC argues instead that the medical staff delegated whatever investigative responsibility it purportedly possessed to

Merred and Vance pursuant to the hospital's disruptive behavior policy. *Id.* But RCW 4.24.250(1), strictly construed, makes no provision for any regularly constituted committee – as a matter of internal *policy* – to delegate investigative authority to a hospital administrator. To the contrary, where actions are taken by an administrator, courts hold the statute inapplicable. *See Anderson*, 103 Wn.2d at 907 (Records are not protected by the statute and are thus discoverable if decisions are made “by an administrator or entity other than a peer review committee”).

Even assuming that the medical staff *could* be deemed “regularly constituted” under RCW 4.24.250, other evidence in the record demonstrates that the exemption has no application here. RCW 4.24.250 applies only where a health care provider “files charges or presents evidence against another member of their profession...*before* a regularly constituted review committee...or *before* a regularly constituted committee or board of a hospital...” RCW 4.24.250(1) (emphasis added).

Neither of the investigations resulted from any person filing charges to a “regularly constituted committee.” The initial investigation was reported *to* Merred by Cornu-Labat. CP 31; 42. The second investigation arose out of complaints that were received by Merred and

Vance personally. CP 208 (Vance Dec.). QVMC does not allege that the medical staff or any other “regularly constituted committee” received the complaints filed against Cornu-Labat. Instead, Merred and Vance presented the content of the charges and evidence they received to the medical staff. CP 208-09. RCW 4.24.250(1) applies only where the complainant files charges or presents evidence against a colleague “before a regularly constituted committee.” RCW 4.24.250 is to be strictly construed. RCW 42.56.030; *Coburn*, 101 Wn.2d at 276. No complainant filed charges or presented evidence against a colleague before a regularly constituted committee. QVMC did not comply with the statute.

**2. Merred’s investigations were not conducted by a peer review committee.**

The Public Records Act exempts “[i]nformation and documents created specifically...by a peer review committee under RCW 4.24.250.” RCW 42.56.360(1)(c). QVMC makes no reference to RCW 42.56.360(1)(c) in its brief and – incorrectly – relies upon RCW 42.56.380, the Public Records Act exemption protecting certain information relating to agriculture and livestock. *See* App. Br. at 26. Dr. Cornu-Labat is not a cow and the statute relied upon by QVMC does not apply. The proper statute does not apply either, because non-physician

administrator Merred and board commissioner Gonzalez are not part of QVMC's peer review committee.

The plain language of RCW 42.56.360(1)(c) limits its reach only to a peer review committee. When interpreting a statute, courts look first to the plain language. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction." *Id.* The plain language of RCW 42.56.360(1)(c) exempts information and documents created "by a *peer* review committee under RCW 4.24.250." (emphasis added). The exemption applies only to information and documents created "specifically" by "a peer review committee[.]" See RCW 42.56.360(1)(c). The Legislature plainly limited the application of the Public Records Act exemption, stating that it applies "specifically" to committees consisting of a health care provider's peers.<sup>3</sup>

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<sup>3</sup> To determine the plain meaning of an undefined term courts look to the dictionary and glean the legislative intent from the words of the statute itself. *HomeStreet, Inc.*, 166 Wn.2d at 451-52 (internal quotes omitted). There is no ambiguity to "peer" which is defined as a "person who is of equal status, rank or character with another." Black's Law Dictionary 1167 (8<sup>th</sup> ed. 2004). In the context of RCW 4.24.250, which applies to "[a]ny health care provider" filing charges "against another member of their profession[.]" the term "peers" clearly refers to "health care providers." That "peers" makes reference to "health care providers" is reinforced in case law construing RCW 4.24.250 as discussed below.

Neither committee investigating Dr. Cornu-Labat consisted of his “peers.” Merred is not a physician or even a healthcare provider, but instead, is an administrator and the CEO of the hospital. CP 282. Anthony Gonzalez is a QVMC commissioner and former State Patrol officer, not a healthcare provider. CP 202. The only health care provider participating in either investigation was Mark Vance. CP 207-09. Vance asserts that both investigations were “peer review,” but admits that he was the only member of the medical staff participating in either investigation. *Id.* Simply asserting that the investigations were “peer review” does not make it so. Neither committee consisted of Dr. Cornu-Labat’s peers, and where decisions are made “by an administrator or entity other than a peer review committee[,]” courts hold RCW 4.24.250 inapplicable. *Anderson*, 103 Wn.2d at 907.

The legislative purpose underlying the enactment of RCW 4.24.250 was to protect peer investigations:

The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review. The immunity from discovery of committee review embraces this goal of medical staff candor in apprising their peers to improve the quality of in-hospital medical

practice at the costs of impairing malpractice plaintiffs access to evidence revealing the competency of a hospital's staff.

*Anderson*, 103 Wn.2d at 905 *citing Coburn*, 101 Wn.2d at 275. Stating it more succinctly: the “purpose of this statute is to keep peer review studies, discussion, and deliberations confidential.” 103 Wn.2d at 907; *see also Adcox v. Children’s Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 32 n.7, 864 P.2d 921 (1993) (Hospital failed to argue “its peer review committee” constituted “‘a regularly constituted review committee’ for purposes of RCW 4.24.250”). Only one member of the medical staff was invited to participate in the investigations of Cornu-Labat. CP 31; 208. Neither committee consisted of his peers.

QVMC argues that RCW 4.24.250 “contemplates that people other than physicians will be involved in the process including people delegated the responsibility to investigate the allegations[,]” App. Br. at 25, but the statute’s plain language applies only to the “proceedings, reports, and written records of such committees...or investigator *of* such a committee or board.” RCW 4.24.250(1) (emphasis added). While the statute suggests that a regularly constituted committee may appoint an investigator, it does not state that the statute has any application to

whomever a hospital administrator elects to include in an ad hoc investigation when no regularly constituted committee is involved whatsoever. “When construing statutory provisions, ‘related statutes should be considered in relation to each other and whenever possible harmonized.’” *State v. Alvarez*, 74 Wn. App. 250, 259, 872 P.2d 1123 (1994) quoting *State v. Walter*, 66 Wn. App. 862, 870, 833 P.2d 440 (1992). The Public Records Act exemption states clearly that the committee under RCW 4.24.250 must consist of a health care provider’s “peers.” RCW 42.56.360(1)(c). Courts construing RCW 4.24.250 hold similarly.

The trial court ruled that neither of Merred’s committees were consistent with the Public Records Act provision requiring that the “regularly constituted committee” consist “only of the professional peers of the member being reviewed.” CP 375. The court concluded that while the procedures “employed by QVMC may well have been ‘peer review’ in a broad sense, [it] was not the work of a ‘peer review committee under RCW 4.24.250’ expressly required for the exemption to apply.” *Id.* This Court should affirm the ruling that RCW 4.24.250 has no application here.

**3. RCW 4.24.250 does not apply to internal disciplinary procedures.**

QVMC argues that Merred's investigations were conducted pursuant to the disruptive physician policy and disciplinary procedures outlined in Article VIII of the QVMC's bylaws, App. Br. at 26, but RCW 4.24.250 has no application to QVMC's internal disciplinary procedures unless those procedures and their implementation are consistent with the terms of RCW 4.24.250.

RCW 4.24.250 was not enacted to apply to a hospital's internal disciplinary process. The scope is purposefully and expressly narrow:

The Legislature recognized that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review. The immunity from discovery of committee review embraces this goal of medical staff candor in apprising their peers to improve the quality of in-hospital medical practice at the costs of impairing malpractice plaintiffs access to evidence revealing the competency of a hospital's staff.

*Anderson*, 103 Wn.2d at 905 *citing Coburn*, 101 Wn.2d at 275. In each of the three Washington Supreme Court decisions construing RCW 4.24.250, the court was asked to respond to an aggrieved patient's discovery requests in a medical malpractice action. There was no patient bringing

allegations against Dr. Cornu-Labat. He simply requested documents generated by an ad hoc investigation of disruptive conduct. Neither authority nor logic support application of RCW 4.24.250(1) here.

QVMC's "disruptive behavior" policy is the "sole process for dealing with egregious incidents and disruptive behavior" and applies not merely to physicians, but also to nurses, dentists, naturopaths, and physician assistants. CP 285-87. Where disruptive behavior is alleged, the policy does not call for review by a regularly constituted committee. Instead, the policy authorizes a hospital administrator and the chief of staff to investigate in response to a specific allegation. CP 286. There is no policy provision stating that the hospital administrator and chief of staff regularly meet. The policy states only that the administrator and chief of staff are to *respond* when "potentially disruptive conduct" is reported. *Id.*

There is no policy provision which states, consistent with RCW 4.24.250(1), that the scope of an investigation of disruptive behavior includes evaluating "the competency and qualifications of members of the profession" or "the quality of patient care[.]" "Disruptive conduct" is defined specifically to include allegations regarding internal misconduct, such as verbal or physical attacks to fellow employees, writing

inappropriate comments in patient medical records, and refusing to accept staff assignments. CP 286. The disruptive behavior policy, both as it is defined and administered, does not fit within the narrow scope of RCW 4.24.250(1).

QVMC repeatedly invokes the application of Article VIII's disciplinary procedures in its bylaws, both during the investigations, CP 186-88, and in its brief, App. Br. at 26, but QVMC is unable to establish a connection between the disciplinary procedures outlined in Article VIII of the bylaws and the review procedures in RCW 4.24.250(1). *See* App. Br. at 19-27. There is no argument to demonstrate any consistency between the disciplinary procedure in the bylaws and the parameters of RCW 4.24.250(1). Even assuming QVMC is able to muster some plausible connection in its reply briefing, QVMC has already admitted that Article VIII's procedures were *not* followed. App. Br. at 27.

Article VIII of the bylaws authorizes the president of the medical staff to conduct an immediate investigation following a written request for corrective action. CP 148. Within fourteen days after the request for corrective action is made, the president "shall make a report of his investigation to the Medical Staff" but *prior* to the making of such a

report, “the member against whom corrective action has been requested shall have an opportunity for an interview with the Medical Staff.” *Id.* The Medical Staff is precluded from taking any action until interviewing the practitioner. *Id.* The Medical Staff did not interview Dr. Cornu-Labat prior to investigating him. QVMC failed to comply with Article VIII of its bylaws. QVMC is thus foreclosed from relying upon Article VIII to support the application of RCW 4.24.250(1) here.

D. RCW 70.44.062(1) Applies Only to Meetings, Proceedings, and Deliberations of the Board of Commissioners Relating to Clinical Privileges.

QVMC next relies upon RCW 70.44.062(1) to justify the refusal to disclose records, App. Br. at 28-31, but as with RCW 4.24.250, the statute is narrowly crafted and does not apply. It applies to hospital district commission meetings concerning clinical or staff privileges:

[a]ll meetings, proceedings, and deliberations of the board of commissioners, its staff or agents, concerning the granting, denial, revocation, restriction or other consideration of the status of the clinical or staff privileges of a physician...shall be confidential and may be conducted in executive session.

RCW 70.44.062(1).

The statute ensures the confidentiality of formal proceedings conducted by the governing body of a hospital district asked to consider a physician's clinical or staff privileges. *Id.* Neither investigation conducted by Merred was authorized by the QVMC board of commissioners. *See* App. Br. at 28-31. QVMC does not allege that the QVMC board of commissioners had any role in either investigation. *Id.* QVMC submitted no evidence demonstrating that the board was even apprised of Merred's investigations before they were initiated. *Id.*

QVMC relies on introductory definitions of "Board," "Administrator" and "Medical Staff" in its bylaws to support the odd claim that the medical staff and administrator are "staff or agents of the board of commissioners" within the meaning of RCW 70.44.062(1). App. Br. at 29. But general definitions of "Administrator" and "Medical Staff" merely acknowledge the board's authority to appoint the hospital administrator and medical staff. *See* CP 134-37; 141-43; 148-49 (QVMC Bylaws). The bylaws do not state that the hospital administrator and medical staff have any authority to render a decision to revoke a health care provider's clinical or staff privileges.

RCW 70.44.062(1) applies *only* to the “meetings, proceedings, and deliberations of the board of commissioners, its staff or agents, concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges or a physician.” The QVMC board did not appoint, instruct, or request Merred (or any other individual) to investigate Dr. Cornu-Labat. QVMC offers no evidence or even an allegation that the QVMC board ever met or deliberated prior to Merred’s investigations. App. Br. at 28-31. Neither committee arose out of a “meeting, proceeding or deliberation of the board of commissioners.” RCW 70.44.062(1). While Gonzalez, a board commissioner, was involved in the second investigation, he candidly acknowledges the narrow role he was requested to provide: “I was a State Patrol officer for eighteen years and have an investigatory background.” CP 202. Gonzalez makes no allegation that he was asked to participate in the investigation upon the express request of the board or that the board was in any way involved in the two investigations. *Id.* Strictly construed, the statute has no application to ad hoc investigations organized and conducted by a hospital administrator.

Additionally, RCW 70.44.062(1) applies only to meetings, proceedings, and deliberations of the board and authorizes the meetings, proceedings, and deliberations to be conducted “in executive session.” RCW 70.44.062(1). “Executive session” is a “meeting, usu. held in secret that only the members and invited nonmembers may attend.” Black’s Law Dictionary 1403 (8<sup>th</sup> ed. 2004). Intending that the exemption in RCW 70.44.062(1) would apply only to the official meetings, proceedings, and deliberations of the board of commissioners, the Legislature made clear that the board could meet, proceed, and deliberate in executive session. QVMC cannot claim that Merred, Vance, and Gonzalez were meeting in executive session because they were not a body with regularly-scheduled meetings to close to the public.

QVMC claims that the investigations “concern the potential revocation or restriction of the Plaintiff’s staff privileges[,]” App. Br. at 29, but evidence submitted by QVMC suggests otherwise. Vance and Gonzalez both describe the limited scope of the investigation to focus on “the behavior and/or conduct” of Dr. Cornu-Labat. CP 201; 207. Neither Gonzalez nor Vance claims either investigation concerned the “granting, denial, revocation, restriction or other consideration” of Dr. Cornu-Labat’s

clinical privileges. *See* CP 201-06; 207-13. Nor does Mehdi Merred. *See* CP 282-304 (Declaration of Mehdi Merred dated 6/25/10 (“Merred Dec.”)).

Merred, Vance, and Gonzalez did not even have the authority to grant, deny, revoke, or restrict Cornu-Labat’s clinical privileges. Under Article IX of QVMC’s bylaws – and consistent with RCW 70.44.062 – decisions affecting the status of the clinical or staff privileges are made by the QVMC board of commissioners.<sup>4</sup> CP 151-53. QVMC cites generally to its own bylaws and disruptive behavior policies, App. Br. at 29 *citing* CP 148-56; 285; 287, but only the summary suspension procedures in Article VIII authorize medical staff or an administrator to “summarily suspend all or any portion of the privileges of a member.” CP 149. The summary suspension procedure applies only “whenever action must be taken immediately in the best interest of patient care in the hospital[.]” *Id.* Even where a summary suspension is recommended – and such a recommendation was not made here – the decision is not final until made by the QVMC board. *Id.* Only the QVMC board has authority to make

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<sup>4</sup> QVMC’s vague claim that the investigations “concern the *potential* revocation or restriction of the Plaintiff’s staff privileges[.]” App. Br. at 29 (emphasis added), reinforces how limited a scope and what little authority Merred’s investigative committees actually possessed.

decisions regarding clinical or staff privileges. CP 151-56. The QVMC board had no role in Merred's investigations of Dr. Cornu-Labat. RCW 70.44.062(1) does not apply.

E. Information and Documents Relating to QVMC's Inquiries of Dr. Cornu-Labat were Not Created for and Collected by a Quality Improvement Committee

QVMC next relies on RCW 70.41.200(1) as yet another basis for withholding documents under the Public Records Act. App. Br. at 31-34. RCW 70.41.200(1) requires hospitals to "maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice." The statute exempts from public disclosure only "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee[.]" RCW 70.41.200(3).

Incredibly, QVMC relies upon this exemption after *conceding* to the trial court that the QVMC Quality Improvement Committee (QIC) was not involved in either investigation of Dr. Cornu-Labat: "For the QVMC Administrator, Mehdi Merred, to refer the allegations of intoxication and disruptive conduct to the QIC would have been inappropriate." CP 272.

“Indeed,” QVMC acknowledged, “it would have made little sense.” *Id.* Now, QVMC insists the provision not only applies, but also asks this Court to expand the plain language of RCW 70.41.200 to apply to “multiple” quality improvement committees, such as the QVMC medical staff. App. Br. at 31-34. There is neither authority supporting expansion of the statute nor evidence to support QVMC’s claim that it should apply here.

As with RCW 4.24.250, RCW 70.41.200(3) is interpreted narrowly. In *Lowy v. PeaceHealth*, 159 Wn. App. 715, 722, 247 P.3d 7 (2011), the court refused to allow a hospital to withhold internal records which were not “created specifically for the quality assurance committee” and were “maintained external to committee files and are [thus] indisputably relevant and discoverable.” *Lowy* specifically referenced the Supreme Court’s strict reading of RCW 4.24.250 in *Coburn* and *Anderson, supra*, to guide its interpretation of RCW 70.41.200(3): “the statute ‘may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings.’” 159 Wn. App. at 721 *quoting Coburn*, 101 Wn.2d at 277.

QVMC's QIC is comprised of "multidisciplinary medical staff and leadership personnel" and has been delegated a range of responsibilities that includes reviewing quality management memos, overseeing staff training, and identifying quality improvement projects. CP 255-56. Incidents are referred to the QIC by using a specific form. CP 31. The QIC is required to issue regular reports to the QVMC board. CP 255-56.

Neither of Merred's committees are the QIC. Merred did not include "multidisciplinary staff" or "leadership personnel." CP 256 (emphasis added). Dr. Vance was the *only* member of the staff that participated in the investigations and only *one* administrator participated (Merred). CP 207-09. Neither of the investigative committees assumed any of the roles outlined in QVMC's Organizational Quality Plan. Gonzalez, for instance, was asked to join the second investigation not because of any expertise in improving hospital quality review procedures, but because he was a "State Patrol officer." CP 202. The role of the committees was limited to investigating allegations about Dr. Cornu-Labat only. *Id.* QVMC does not allege that either committee met regularly or on any previous occasion or that either committee previously issued any report to the QVMC board as the plan requires a QIC to do. *See App. Br.*

at 31-34. QVMC also does not allege that any of the complaints against Dr. Cornu-Labat were referred to Merred or Vance on the prescribed form. *See App. Br. at 31-34.*

QVMC's argument that RCW 70.41.200(3) otherwise applies is astonishing since, as QVMC conceded to the court below, "The QIC on the other hand, does not specifically or even generally, address [disruptive] behavior. It is limited to overseeing improvements in clinical practices and facilitating communication." CP 272. "Thus," QVMC concluded, "*it is not relevant to the allegations leveled against Plaintiff.*" *Id.* (emphasis added).

QVMC now claims that RCW 70.41.200(3) contemplates "multiple" QICs at a hospital, App. Br. at 32, but cannot demonstrate that either of Merred's committees complied with the narrowly construed statutory framework applying to quality improvement committees. QVMC's assertion that there is "no question" that "the medical staff as a whole acts as a quality improvement committee[,]" App. Br. at 34, is inconsistent with QVMC's own organizational plan, the fact that the medical staff as a whole did not participate in the investigations, and the requirement that the QIC consist of "multidisciplinary staff *and* leadership

personnel.” CP 256 (emphasis added). More fundamentally, the medical staff as a whole did not participate in the investigations.

QVMC cites to a provision in the organizational quality plan titled “Medical Staff” which states: “Medical Staff is responsible for monitoring clinical care and evaluating the performance of individuals with clinical privileges” and that such “participation focuses on peer review and the review of clinical data[.]” App. Br. at 33 *citing* CP 257. The statement cited by QVMC is a wholly separate and distinct section of the organizational plan that *follows* the section describing the QIC. *See* CP 256-57. QVMC’s organizational plan clearly contemplates the QIC as a distinct entity from the medical staff as a whole.

Again seeking refuge in its bylaws, QVMC claims that the medical staff is responsible for the quality of medical care in a hospital, App. Br. at 34, but QVMC ignores that “quality improvement” for the purposes of the exemption in RCW 70.41.200(3) is not a generic phrase that references the broad mission of a hospital and its medical staff. “Quality improvement” is defined within RCW 70.41.200(1)(a) and QVMC’s own organizational plan to apply to a specific committee with specific functions. *See* CP 256. The statute does not apply.

F. Respondent's Employment Contract is Not Relevant to His Suit Brought under the Public Records Act

Dr. Cornu-Labat signed a confidentiality agreement with QVMC agreeing to maintain the confidentiality of patient medical and financial data. CP 194. The agreement also provided that Cornu-Labat would not disclose information related to "QI [quality improvement], Peer Review, or Credentialing activities" and would report disclosure requests to "the Administrator or his/her designee immediately." *Id.* QVMC's claim that Dr. Cornu-Labat is somehow breaching his confidentiality agreement suffers from several flaws. *See* App. Br. at 36-40.

First, the confidentiality agreement very clearly prohibits the disclosure of information by Dr. Cornu-Labat. CP 194. This case concerns Dr. Cornu-Labat's request that QVMC disclose records. There is nothing for Dr. Cornu-Labat to disclose because he is not in possession of the records he has requested under the Public Records Act.

Second, Dr. Cornu-Labat's records requests were made as a member of the public pursuant to Chapter 42.56 RCW. The confidentiality agreement does not usurp Dr. Cornu-Labat's right to access information and documents under the Public Records Act so long as the request does not conflict with terms of the agreement.

Third, the information and documents requested by Dr. Cornu-Labat do not concern patient medical and financial information and were not collected by QVMC's quality improvement committee as the confidentiality agreement provides. The allegations of wrongdoing concerned purportedly disruptive behavior by Dr. Cornu-Labat only. The confidentiality agreement Dr. Cornu-Labat signed has no bearing on Cornu-Labat's rights under the Public Records Act.

G. QVMC Waived All Exemptions by Publicly Filing the Requested Documents in Court

Where documents and information are requested pursuant to the Public Records Act, and the agency receiving the request refuses to comply with the request, but later discloses the requested records, the agency is deemed to have waived the right to claim such records are exempt. In *COGS v. King County Dep't of Public Safety*, 59 Wn. App. 856, 801 P.2d 1009 (1991) *abrogated on other grounds by Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005), a citizen's group requested records from King County and brought suit under the Public Records Act when the County refused to comply with the request. During settlement negotiations, the County disclosed records to the group but insisted the records were not subject to

disclosure. No settlement was reached and the suit continued. In the ruling on appeal, the court stated that the agency's disclosure of documents it believed were exempt raises the risk of violating a duty or an individual's right to privacy and thus, "when the Department disclosed the records in 1980 without having sought any declaratory relief, the Department waived its right to claim they were exempt." 59 Wn. App. at 865.

QVMC disclosed records responsive to Respondent's records request after Dr. Cornu-Labat brought suit to support QVMC's motion for summary judgment. CP 127-31. QVMC's motion was denied. CP 377. QVMC does not claim that it ever attempted to seal the at-issue records. QVMC cannot now insist on the importance of withholding the records Dr. Cornu-Labat requested after making some of those records available to any member of the public who is interested in obtaining them. QVMC waived its right to claim the records requested are exempt.

#### IV. CONCLUSION

Respondent respectfully requests this Court affirm the trial court's order requiring QVMC to disclose all documents and records responsive to Respondent's request. Respondent also requests that this Court grant

Respondent's costs and fees pursuant to RCW 42.56.550(4) and impose the maximum penalty against QVMC of \$100 per day.

DATED this 21<sup>st</sup> day of July, 2011.

Respectfully submitted,

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