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

No. 32436-2-III

GASTON CORNU-LABAT,

Respondent/Plaintiff,

v.

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

Appellant/Defendant.

BRIEF OF RESPONDENT

David S. Mann, WSBA # 21068
GENDLER & MANN, LLP
615 Second Ave., Suite 560
Seattle, WA 98104
(206) 621-8868
Attorneys for 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. Respondent, Dr. Cornu-Labat, is seeking records concerning two investigations of himself conducted by staff at the Quincy Valley Medical Center ("QVMC"). After the Grant County superior court initially ordered release of the requested records, QVMC appealed. The Washington Supreme Court, reversed the trial court's order and remanded with instructions that the trial court enter findings of fact regarding the applicability of two potential exemptions, RCW 4.24.250 and RCW 70.44.062. *Cornu-Labat v. Hospital District No. 2 Grant County*, 177 Wn.2d 221, 298 P.3d 741 (2013).

On remand, both parties moved for summary judgment arguing that there were no disputes of material fact, but taking different positions on the applicability of the two statutes. The trial court apparently misunderstood the Supreme Court's directive and failed to apply the law to the evidence before it. Because QVMC failed to meet its burden of proof to demonstrate that either RCW 4.24.250 or RCW 70.44.062 were

applicable the trial court erred. This Court should reverse and remand with clear direction that the trial court grant Dr. Cornu-Labat's motion for summary judgment.

II. ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of March 28, 2014 denying Cornu-Labat's Cross-Motion for Summary Judgment.

III. RESTATEMENT OF ISSUES

1. Does RCW 4.24.250(1) provide an exemption against disclosure of the records related to the first investigation when (1) a regularly constituted peer review committee or board of the hospital was not involved in the investigation; and (2) those conducting the investigation were not delegated with the authority to act as agents of a peer review committee?

2. Does RCW 70.44.062 provide an exemption against disclosure of the records related to the first investigation when the records are not minutes of a formal meeting of the board's staff or agents, but instead minutes of investigatory interviews?

3. Does RCW 4.24.250(1) provide an exemption against disclosure of the records related to the second investigation when the Medical Staff did not follow its adopted disciplinary procedures and was therefore not acting as a regularly constituted peer review committee, but instead an ad hoc committee?

IV. STATEMENT OF THE CASE

A. The Investigations and Public Records Requests

Dr. Gaston Cornu-Labat was hired as a physician by the Quincy Valley Medical Center ("QVMC") in Quincy, Washington in 2007. CP

669, ¶ 3. 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.* During this time period Dr. Cornu-Labat was charged with undertaking an in-depth assessment of hospital resources. He ultimately challenged the administration and staff on key issues, including safety and personnel practices. CP 689-697. A summary of Dr. Cornu-Labat's analysis and review of the hospital is contained in his November 12, 2010, declaration. CP 729-736.

After Mr. 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 with Dr. Cornu-Labat because he appeared intoxicated and was allegedly aggressive and impatient during their conversation. CP 669-670, ¶ 4. Surprised by the comment, Dr. Cornu-Labat immediately concluded the conversation and left the area. Dr. Cornu-Labat reported the incident the following day to Mr. Merred, the

hospital administrator. *Id.* Dr. Cornu-Labat requested that QVMC promptly investigate the incident. *Id.*; CP 681.

That same day, July 24, 2009, Mr. Merred, along with the vice chief of the medical staff, Dr. Mark Vance, conducted an informal investigation of the July 23, 2009, event. CP 612-616. After speaking with Dr. Cornu-Labat and several other witnesses, Merred and Vance determined there was no evidence of to support the allegations and ended the “investigation” the same day they had begun it – July 4, 2009. *Id.*, ¶¶ 4-5.

Dr. Cornu-Labat was asked to meet again with Mr. Merred and Dr. Vance on August 4, 2009. CP 670-71, ¶ 9. Mr. 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 201-206. 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 the beginning of the meeting with Mr. Merred, Mr. Gonzalez, and Dr. Vance, Dr. Cornu-Labat was presented with a letter signed by Mr. Merred and Dr. Vance, stating that the matter resulting in the July 24,

2009, investigation was dismissed. CP 671, ¶ 10; CP 681. 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[.]" *Id.*

During the August 4, 2009, meeting Dr. 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 670-71, ¶ 9. According to Dr. Vance, he and Mr. Merred had received complaints "from several persons" about issues including Dr. Cornu-Labat's tardiness, lengthy telephone calls, failing to take patients' vital signs, and intimidating hospital staff. Vance CP 613-14, ¶ 6; CP 201-206, ¶ 5. At the August 4 meeting, Cornu-Labat requested, but was not provided details of the complaints. CP 670-71, ¶ 9.

On August 6, 2009, two days after his meeting with Mr. Merred, Mr. Gonzales, and Dr. Vance, Dr. Cornu-Labat received a second letter from Mr. Merred again clearing him of all charges. CP 671, ¶ 11; CP 727. Mr. Merred and Dr. Vance, however, relieved Dr. Cornu-Labat of all duties until he had contacted and received a recommendation from Washington Physicians Health Program ("WPHP"). *Id.*

Uncomfortable with the professionalism of the WPHP, including their refusal to have his interview with WPHB taped, 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 671, ¶ 11. QVMC nonetheless insisted that Dr. Cornu-Labat take medical leave and ultimately terminated him. *Id.* Subsequently, Dr. Cornu-Labat was ordered by the Washington Department of Health Medical Quality Assurance Commission to undergo a psychiatric evaluation. In his November 17, 2011, report, Dr. Russell Vandenbelt yet again concluded:

There is no credible evidence in the record's file or in my examination of Dr. Cornu-Labat that supports a conclusion that he has any mental health condition, whatsoever, including Bipolar Disorder.

My review of the voluminous materials indicates that there are reasonable and plausible explanations for each of the cited concern, none of which involved mental health issues. *My review also indicates that, more probably than not, the hospital is beset with significant political issues that intertwined with if not influenced the complaints against Dr. Cornu Labat.*

CP 753-57. Dr. Vandenberg also concurred with Dr. Cornu-Labat's reluctance to proceed with an interview with WPHP:

My review of the documents provided also raised significant concerns about due process issues. Having conducted a number of court ordered CR 35 examinations in the State of Washington, I am aware that individuals being evaluated have the right to both tape record the interview and have someone accompany them to witness the proceeding. While these procedures are not allowed during the psychiatric evaluation of a Labor in Industries claimant in the State of Washington, the situation of a potentially impaired physician facing possible legal sanctions seems closer to the first example than the second. It is understandable that Dr. Cornu-Labat was quite wary about participating in a process that potentially held grave consequences for him. It is therefore not surprising that he would want to have documentation of what he was asked and how he responded. In the interest of fairness, it was reasonable for him to request that a presumably neutral evaluating party review information from or have contact with persons on "both sides" of the issue at hand. *Givin that there is virtually no substance to the claims made against Dr. Cornu-Labat, his concerns were especially understandable.*

Id. (emphasis added).

B. Public Records Requests

On July 29, 2009, Dr. Cornu-Labat filed a public records request with QVMC seeking documents related to the July 24, 2009, investigation as well as any other investigation of his conduct. CP 670, ¶7; CP 675-76. Mr. Merred responded to the request immediately and refused to disclose any documents relating to his investigation. CP 670, ¶8; 678-79. Mr. Merred relied upon RCW 42.56.250, an unrelated Public Records Act exemption that applies to investigations of discriminatory employment practices. *Id.*

After receiving the August 6, 2009, letter clearing him of all charges, Dr. Cornu-Labat, through counsel, made a second request for public records seeking copies of all records relating to the two investigations. CP 672, ¶ 14; CP 684. QVMC did not respond to the request. CP 672, ¶ 15.

Dr. Cornu-Labat submitted a third request for public records on August 26, 2009. CP 672, ¶ 16; CP 686-87. He again requested QVMC disclose records related to any investigation of him and contested the application of the exemption QVMC asserted. *Id.* QVMC responded to the August 26, 2009, records request but refused to produce any records

related to the investigations. CP 672, ¶ 17.

Cornu-Labat submitted a fourth and final request for records on January 5, 2010. CP 672, ¶ 18; CP 689-697. QVMC, through counsel, refused to produce the requested documents asserting that the records requested were “health care information and are exempt from disclosure.” CP 699-701. 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.

C. QVMC Medical Staff Disciplinary Procedures

QVMC has adopted Bylaws of the Medical Staff (“Bylaws”). CP 740-747. Article VIII of the Bylaws defines the “Disciplinary Procedures” the hospital follows when corrective action is necessary. 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 744-746. *Id.* 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 Article VIII procedures, the Medical Staff may take limited actions on a request for corrective action. Medical Staff may only “reject, modify, or approve” the request for corrective action.” Decisions regarding the status or exercise of privileges must be made by the QVMC board. 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. There is no provision in the bylaws authorizing the QVMC board to delegate its authority in this regard.

QVMC has also adopted a “disruptive behavior policy.” CP 749-751. Disruptive behavior is defined to include verbal or physical attacks, inappropriate comments in patient records, intimidating colleagues, and refusing to perform staff assignments. *Id.* The disruptive behavior 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. *Id.* 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.*

D. Procedural History

Dr. Cornu-Labat filed this action on March 8, 2010. CP 4-8.

After both parties moved for summary judgment, the trial court granted Dr. Cornu-Labat’s motion on September 7, 2010. CP 355-365. The court subsequently denied QVMC’s motion for reconsideration and ordered the release of the requested documents, awarded Dr. Cornu-Labat’s attorneys’ fees and imposed a penalty for delay. CP 543-44.

The Supreme Court reversed the trial court in 2013. *Cornu-Labat v. Hospital District No. 2 Grant County*, 177 Wn.2d 221, 298 P.3d 741 (2013). The Court ruled that the trial court failed to adequately determine whether RCW 4.24.250 applied and failed to address whether RCW 70.44.062 applied. *Id.* at 234, 239.

On remand QVMC moved for summary judgment. CP 556-635.

Dr. Cornu-Labat filed a cross-motion for summary judgment. CP 643-665. The trial court denied both motions. CP 413-417, CP 418-420. This appeal follows.

V. 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. Burden of Proof

The Public Records Act is “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). It “requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994). The PRA explicitly

declares its disclosure provisions “shall be liberally construed and its exemptions narrowly construed.” RCW 42.56.030. “The requested documents are exempt from disclosure only if they fall under one of the specific, narrowly construed exemptions.” *Cornu-Labat v. Hospital District No. 2 Grant County*, 177 Wn.2d at 229.

The agency withholding the public records bears the burden of proof to show the applicability of a statute that exempts or prohibits disclosure. *Harley H. Hoppe & Associates, Inc. v. King Cnty.*, 162 Wash. App. 40, 53-55, 255 P.3d 819, 825 *review denied*, 172 Wash. 2d 1019, 262 P.3d 64 (2011). Thus is it QVMC’s burden to prove that the requested records fall within one of the narrow exemptions.

C. 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).

D. Exemptions at Issue After the Supreme Court’s Remand

The Supreme Court remanded for trial court to issue findings of fact regarding the applicability of two potential exemptions: RCW 4.24.250 and RCW 70.44.062.

1. RCW 4.24.250

At the outset, it is important to recognize that RCW 4.24.250 is premised on providing protection for health care providers making “good faith” complaints against another member of their profession in front of a regularly constituted committee or board. RCW 4.24.250 provides an exemption from disclosure as follows:

- (1) Any health care 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.... ***The proceedings, reports, and written 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).

(emphasis added).

In order for RCW 4.24.250 to apply, the investigation must be formal and not informal or ad hoc. *Adcox v. Children's Ortopedic Hosp.*

& Med. Ctr., 123 Wn.2d 15, 31, 864 P.2d 921 (1993). “Instead, RCW 4.24.250 is applicable only if the committee in questions is ‘a regularly constituted committee or board of [the] hospital whose duty it is to review and evaluate the quality of patient care.’” *Cornu-Labat*, 177 Wn.2d at 233 (internal quotations omitted). On remand, the question before this Court is whether “the QVMC officials that investigated Dr. Cornu-Labat were acting as agents of a regularly constituted committee (the medical staff) under RCW 4.4.250 or as an ad hoc investigative team.” *Cornu-Labat*, 177 Wn.2d at 234. Specifically, the Court remanded:

for determination of whether a regularly constituted peer review committee was involved in the Cornu-Labat investigation but note that this committee may include nonphysicians. The trial court should consider the hospital’s bylaws and internal regulations in making this determination. *See Coburn*, 101 Wash.2d at 278, 677 P.2d 173. If there is sufficient evidence Dr. Vance, Mr. Merred, and Mr. Gonzalez were acting as agents of “a regularly constituted review committee or board of a ... hospital whose duty it is to evaluate the competency and qualifications of members of the profession,” then the records created specifically for, and collected and maintained by that committee, are exempt.

Cornu-Labat, 177 Wn.2d at 234-235.

Thus, under *Cornu-Labat*, RCW 4.24.250 is applicable only where “a regularly constituted peer committee or board of [the] hospital,” “was involved in” the investigation; and (2) those conducting the investigation were acting as agents of the peer review committee. 177 Wn.2d at 234-235.

2. RCW 70.44.062

RCW 70.44.062(1) provides:

All 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 or other health care provider as that term is defined in RCW 7.70.020, if such other providers at the discretion of the district’s commissioners are considered for such privileges, shall be confidential and may be conducted in executive session: PROVIDED, That the final action of the board as to the denial, revocation, or restriction of clinical or staff privileges of a physician or other health care provider as defined in RCW 7.70.020 shall be done in public session.

While the Supreme Court rejected plaintiff’s argument that RCW 70.44.062(1) was applicable only to meetings and not writings produced

during those meetings, *Cornu-Labat*, 177 Wn.2d at 237-238, the Court also rejected QVMC's argument that RCW 70.44.062(1) provides a "blanket exemption" for all documents related to the Cornu-Labat investigation because "the investigation was conducted by 'staff or agents' of the board." Instead, the Court limited the potential applicability of RCW 70.44.062(1) by finding that "the language indicates the statute does not contemplate the confidentiality of anything less than a formal meeting of the board, its staff or agents, and the PRA exemption protects only the official account of such a meeting." 177 Wn.2d at 239.

For remand, the Supreme Court instructed:

Because the trial court did not address RCW 70.44.062(1) in its letter opinion, factual issues remain. It is unclear if any of the withheld records embody a formal meeting of the board's staff or agents concerning the status of Dr. Cornu-Labat's clinical privileges. Rather, it appears a number of the withheld records were generated during the general investigation into Dr. Cornu-Labat's alleged misconduct. While the investigation may have ultimately led to the redaction of Dr. Cornu-Labat's privileges, not every record generated during the investigation will qualify for the exemption in RCW 70.44.062(1). Upon remand, only the minutes of a formal meeting of the board's staff or agents that concerned the status of

Dr. Cornu-Labat's clinical privileges may be withheld under RCW 70.44.062(1).

177 Wn.2d at 239.

Thus, under *Cornu-Labat*, the exemption in RCW 70.44.062(1) applies only where two components are met: (1) the records are "the minutes of a formal meeting of the board's staff or agents that concerned the status of Dr. Cornu-Labat's clinical privileges; and (2) and are not records "generated during the general investigation into Dr. Cornu-Labat's alleged misconduct." *Id.*

E. QVMC Failed to Demonstrate that the Records Related to the First Investigation are Exempt from Disclosure

1. RCW 4.24.250

Applying RCW 4.24.250 to the records of the first investigation requires the Court to address whether the records were (1) records of "a regularly constituted peer committee or board of [the] hospital," that "was involved in" the investigation; and (2) those conducting the investigation were acting as agents of the peer review committee. 177 Wn.2d at 234-235. In other words, were Mr. Merred and Dr. Vance "acting as agents of a regularly constituted committee (the medical staff) under RCW 4.4.250 or as an ad hoc investigative team." *Cornu-Labat*, 177 Wn.2d at 234.

With respect to the first investigation, there are no disputes of material fact, neither test is met.

First, assuming for the sake of argument that the “Medical Staff,” *when it follows* the Article VIII Disciplinary Procedures in taking corrective action, might be a “regularly constituted peer review committee,” this does not mean that QVMC has met its burden of demonstrating RCW 4.24.250 exempts records related to the first investigation. QVMC must first demonstrate that the investigation *was* conducted under Article VIII *and* that the Medical Staff was actually involved in the investigation and authorized Mr. Merred and Dr. Vance to perform the first investigation.

Here, other than simply asserting that they followed the Article VIII Disciplinary Procedures, QVMC offers no evidence to support this assertion. First, in order to invoke the Article VIII Disciplinary Procedures, there “shall” first be a written request. CP 744, Section 1(1). Here, there was no written request. Dr. Cornu-Labat simply notified Mr. Merred of the incident that had occurred on July 23, 2009. Thus, the jurisdiction of the Article VIII Disciplinary Procedures, and therefore the Medical Staff, was never invoked.

Second, even if there *had* been a written request for an investigation made prior to July 24, 2009, the Article VIII Disciplinary Procedures require that the President provide a report to the Medical Staff within 14 days of the written request. More importantly, the Procedures also require that *prior* to that report being prepared the member against whom corrective action has been requested must be provided an opportunity for an interview by the Medical Staff. CP 744, Section 1(3). Here, neither of these required actions occurred. While Mr. Merred and Dr. Vance interviewed Dr. Cornu-Labat, he was not provided an opportunity to be interviewed by the Medical Staff as part of the first investigation.

Rather than follow the Article VIII Disciplinary Procedures, it appear instead that Mr. Merred and Dr. Vance were following QVMC's separate "disruptive behavior policy." For example, unlike the Article VIII Disciplinary Procedures, the disruptive behavior policy *does* allow for investigations to be conducted by the Chief of Staff in consultation with the Administrator. CP 749-750. This is the process that was followed for the first investigation. Similarly, unlike the Article VIII Disciplinary Procedures, the disruptive behavior policy also does not

require the Chief of Staff and Administrator to meet with or inform the Medical Staff. Again, this is consistent with the process that took place for the first investigation. And finally unlike the Article VIII procedures, the disruptive behavior policy expressly authorizes a referral to the Washington Physicians Health Program – precisely the remedy imposed on Dr. Cornu-Labat. There should be no dispute -- the actions of Mr. Merred and Dr. Vance during the first investigation were more consistent with the disruptive behavior policy than the Article VIII procedures.

But as the Supreme Court recognized, the disruptive behavior policy “does not require participation of a regularly constituted committee.” *Cornu-Labat*, 177 Wn.2d at 234. Because the first investigation was conducted under the disruptive behavior policy and not the Article VIII Disciplinary Procedures, RCW 4.24.250 is not applicable.

Second, QVMC has not demonstrated, and cannot demonstrate, that the “Medical Staff” was *involved* in first investigation as a “regularly constituted peer review committee.” To the contrary, only two people investigated allegations of Dr. Cornu-Labat’s intoxication on July 23, 2009: hospital administrator Mr. Merred and Dr. Vance, vice-chief of the QVMC medical staff. CP 636-37, ¶ 3; CP 613, ¶ 4. Dr. Cornu-Labat

reported this incident to Mr. Merred on July 23, 2009. The very next day, on July 24, 2009, Mr. Merred and Vance interviewed four persons along with Dr. Cornu-Labat. The “investigation” lasted for one day only. *Id.* There is no evidence that the Medical Staff (other than Dr. Vance and Dr. Cornu-Labat) were even aware of the first investigation. *See, e.g.*, CP 602-605 and CP 607-610. (making no mention of first investigation). Because the Medical Staff was not involved in the first investigation, RCW 4.24.250 does not exempt materials related to the first investigation from disclosure.

Finally, there is also no evidence that the Medical Staff authorized Mr. Merred or Dr. Vance to conduct their first investigation, or that they were acting as authorized agents for the Medical Staff. Indeed, there is no authority in the Bylaws allowing for a delegation of the Medical Staff’s responsibility to make corrective action decisions. While the Bylaws Article VIII Disciplinary Procedures authorize the President of the Medical Staff to conduct an investigation after receipt of a written complaint where “corrective action could be a reduction or suspension of clinical privileges,” they do not authorize the President to take any action. CP 744-746, Section 1(1)-(7). Decisions to “reject, modify, or approve

the request for corrective action” are specifically decisions that must be made by the Medical Staff. *Id.* Section 1(5).

Because the Medical Staff was not involved in the first investigation, had no authority to delegate its responsibility, and did not delegate its responsibility to Mr. Merred and Dr. Vance, QVMC is cannot rely upon Article VIII to support the application of RCW 4.24.250(1). QVMC failed to meet its burden of proof. The trial court erred in failing to grant Dr. Cornu-Labat’s cross-motion for summary judgment.

2. RCW 70.44.062(1)

Applying RCW 7.44.062(1) to the records from the first investigation requires the Court to determine whether the records (1) are “the minutes of a formal meeting of the board’s staff or agents that concerned the status of Dr. Cornu-Labat’s clinical privileges; and (2) not “generated during the general investigation into Dr. Cornu-Labat’s alleged misconduct.” *Cornu-Labat*, 177 Wn.2d at 239. QVMC cannot demonstrate that either test was satisfied with respect to the records from the first investigation.

At the outset, it is irrelevant that “formal minutes were kept... .” QVMC’s Opening Brief at 34-35. Simply because formal minutes were

kept does not mean that those minutes are exempt from disclosure. The test is whether the meetings themselves meet the requirements of the statute. According to the plain language of the statute, only “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...” are exempt. RCW 70.44.062(1). Thus, in order to be exempt, the meetings and minutes would actually have to contain discussion amongst the Board, staff, or agents concerning Dr. Cornu-Labat’s privileges. As the Supreme Court carefully pointed out, the language in RCW 70.44.062 “indicates that the statute does not contemplate the confidentiality of anything less than a formal meeting *of the board, its staff or agents*, and the PRA exemption protects only the official account of such meetings.” *Cornu-Labat*, 177 Wn.2d at 239 (emphasis added).

There is no evidence that any of the meetings concerned any activity other than witness interviews. Indeed, QVMC readily admits the records it is seeking to withhold related to the first investigation are minutes of the investigation interviews. QVMC’s Opening Brief at 31.

Minutes of investigation interview, even “formal” minutes, are not the same as “meetings, proceedings, and deliberations of the board of commissioners, its staff or agents” RCW 70.44.062(1). The Supreme Court fully recognized the difference between formal meetings of the board’s staff or agents and investigations, including interviews:

It is unclear if any of the withheld records embody a formal meeting of the board’s staff or agents concerning the status of Dr. Cornu-Labat’s clinical privileges. Rather, it appears a number of the withheld records were generated during the general investigation into Dr. Cornu-Labat’s alleged misconduct.

Cornu-Labat, 177 Wn.2d at 239.

Because the requested documents, by QVCM’s admission appear only to be minutes of investigation interviews involving third-parties, and not minutes of formal discussions between the Board’s staff or agents concerning the status of Dr. Cornu-Labat’s clinical privileges, RCW 70.42.062(1) does not apply and the minutes from the first investigation are not exempt from disclosure under the PRA.

There are no material facts in dispute. Neither RCW 4.24.250 nor RCW 70.42.062(1) provide an exemption against disclosure of all records related to the first investigation. QVMC failed to meet its burden of proof.

The trial court erred in failing to grant Dr. Cornu-Labat's cross-motion for summary judgment.

F. The Records Related to the Second Investigation are not Exempt from Disclosure

QVMC relies solely on RCW 4.24.250 to protect against disclosure of records from the second investigation. Again, the questions before this Court are whether the records of the second investigation were records of "a regularly constituted peer committee or board of [the] hospital," that "was involved in" the investigation; and (2) those conducting the investigation were acting as agents of the peer review committee. 177 Wn.2d at 234-235. In other words, assuming the Medical Staff did authorize an investigation by Mr. Merred, Mr. Gonzales, and Dr. Vance, was the Medical Staff acting as a regularly constituted committee, under RCW 4.24.250(1) or in an ad hoc manner? *Cornu-Labat*, 177 Wn.2d at 234.

In deciding whether the "Medical Staff" was involved in the investigation as a regular constituted committee, the Supreme Court specifically invited the trial court to consider the hospital's bylaws and internal regulations. *Cornu-Labat*, 177 Wn.2d at 235. The Court also invited the trial court to determine whether the investigation was

conducted pursuant to Article VIII which requires the participation of regularly constituted peer review committee or the disruptive behavior policy which does not. *Id.* at 234.

At the outset, it is important to recognize that at no time until litigation was filed did QVMC ever invoke or claim that the either investigation was authorized by a regularly constituted peer review committee. Despite written request for documents under the PRA, QVMC never sought to invoke the protections of RCW 4.24.250. It is also important to recognize the irony of QVMC's post hoc rationale invoking RCW 4.24.250. As discussed above, the rationale behind the statute is to protect those making good faith reports against fellow professionals. But here, because of politics at play and the building tension between the hospital administration and Dr. Cornu-Labat leading up to the investigations it is entirely reasonable that Dr. Cornu-Labat would demand to know the complaints that were made against him and whether they were made in good faith or out of politics. *See CP 753-57.*

Here, while it appears that the Medical Staff may have met and authorized Mr. Merred, Dr. Vance and Mr. Gonzalez to conduct the second investigation, the first critical test under RCW 4.24.250 is not

satisfied. In authorizing the investigation the Medical Staff was not acting as “a regularly constituted review committee or board of a ... hospital whose duty it is to evaluate the competency and qualifications of members of the profession.” Instead, because the Medical Staff was *not* following the Article VIII procedures, it was acting as an ad hoc committee.

While QVMC claims this investigation was conducted pursuant to the Article VIII Disciplinary Procedures, it clearly was not. Again, in order to invoke the Article VIII Procedures, there must have been a written request. “All requests for corrective action shall be in writing, and shall be supported by reference to the specific activities or conduct which constitutes the grounds for the request.” *Id.*, Section 1(1). Here, there is no evidence that there was a written request for corrective action. Thus, the jurisdiction of the Medical Staff Disciplinary Procedures was never invoked.

But even if there *had* been valid and specific written request, the Procedures mandate that the President provide a report to the Medical Staff within 14 days of the written request. There is no evidence that a report was ever prepared or presented to the Medical Staff.

More importantly, the procedures also require that *prior* to that report being prepared “the member against whom corrective action has been requested shall have an opportunity for an interview with the Medical Staff.” *Id.*, Section 1(3). But here, and just as with the first investigation, this requirement was not met. While Mr. Merred, Dr. Vance, and Mr. Gonzales interviewed Dr. Cornu-Labat, he was not provided an opportunity to be interviewed by the Medical Staff as part of the second investigation – a deprivation of Dr. Cornu-Labat’s rights under Article VIII and a fatal flaw the QVMC’s process.

Instead, even if the Medical Staff did authorize the investigation, as with the first investigation, the second investigation was far more akin to the investigation authorized by the disruptive behavior policy – including, but not limited to, failing to provide Dr. Cornu-Labat an interview with the Medical Staff and the ultimate resolution of referring Dr. Cornu-Labat to the Washington Physician’s Health Program. CP 749-751.

Again, because the second investigation did not comply with the Article VIII Disciplinary Procedures, the Court should find that the Medical Staff was acting in an ad hoc manner in authorizing the second

investigation. QVMC failed to meet its burden to demonstrate that RCW 4.24.250 applies and that the records are exempt from disclosure.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's denial of Dr. Cornu-Labat's cross-motion for summary judgment and remand with instruction that, based on the evidence before the court, the court should find as follows:

(1) RCW 4.24.250 is not applicable and does not exempt from disclosure records related to the first investigation of Dr. Cornu-Labat because a regularly constituted peer review committee was not involved in the investigation and did not authorize Mr. Merred or Dr. Vance to conduct the investigation.

(2) RCW 70.44.062(1) is not applicable and does not exempt from disclosure records related to the first investigation of Dr. Cornu-Labat because the records are not minutes of formal meetings of the Board's staff or agents, but instead minutes of investigatory interviews.

(3) RCW 4.24.250 is not applicable and does not exempt from disclosure records related to the second investigation of Dr. Cornu-Labat because the Medical Staff was not following the Article VIII process and

thus was not acting as a regularly constituted peer review committee but instead as an ad hoc committee.

The Court should order disclosure of the requested documents; assign a penalty of \$100.00 per day from the date of Dr. Cornu-Labat's request; and order payment of attorney's fees and costs for this will violation of the Public Records Act.

DATED this 10th day of November, 2014.

Respectfully submitted,

GENDLER & MANN, LLP

By:



David S. Mann
WSBA No. 21068
Attorneys for Respondent

DECLARATION OF SERVICE

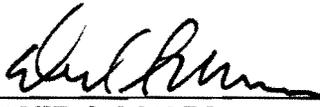
STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, DAVID S. MANN, under penalty of perjury under the laws of the State of Washington, declare that on the date and in the manner indicated below, I caused this Brief of Respondent to be served on:

Jerome A. Aiken
Meyer, Fluegge & Tenney, P.S.
230 South Second Street
P.O. Box 22680
Yakima, WA 98907-2680
(Attorneys for Defendant)

By U.S. Mail
 By Electronic Mail

DATED this 10th Day of November, 2014, at Seattle, Washington.



DAVID S. MANN