

NO. 79608-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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MICHAEL LIVINGSTON,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

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ANSWER TO AMICI BY DEPARTMENT OF CORRECTIONS

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## I. INTRODUCTION

The Department of Corrections answers the arguments submitted by Amici Curiae in this case, American Civil Liberties Union of Washington and the Washington Coalition for Open Government. The Department has argued that this Court should affirm the decisions of the Court of Appeals and the Superior Court because the Department complied fully with the Public Records Act when it gathered the documents requested by Mr. Livingston and sent them to him at the institution where he had transferred. The Department also argues that Mr. Livingston had other available legal avenues, not raised in this case, if he wished to challenge the rejection of his mail as contraband.

In response, Amici argue that the Department lacks the authority to reject in the prison mailroom an inmate's requested records not claimed as exempt by the sending agency under the Public Records Act. They also argue that denial of the non-exempt records constitutes unlawful censorship, even though Mr. Livingston brought his claim exclusively under the Public Records Act. Finally, Amici argue that Mr. Livingston's action was properly brought under the Public Records Act because the Act allows him to challenge the alleged unlawful censorship of documents never claimed by the sending agency as exempt.

The arguments of Amici fail for three reasons: 1) the Department's authority to screen and reject mail for contraband is well-established under state statutory and administrative law, as well as Federal constitutional law; 2) the Public Records Act does not affect this separate well-established authority and process; and 3) Amici raise challenges to the Department's actions that are not before this Court.

## II. ARGUMENT IN RESPONSE TO AMICI

### A. THE ARGUMENTS OF AMICI IGNORE CLEARLY ESTABLISHED STATUTORY, ADMINISTRATIVE, AND CONSTITUTIONAL AUTHORITY VESTED IN THE DEPARTMENT TO INTERCEPT AND REJECT CONTRABAND BEFORE IT IS GIVEN TO THE INMATE.

Although Amici cite to RCW 72.09.530 (Amici Br. at 9), they still argue the Department has no statutory authority to deny inmates access to public records that are considered contraband in a prison setting. Amici then claim the Department relied only on a policy it created to arbitrarily deny Mr. Livingston the records he sought. Amicus Br. at 6. However, Department Policy 450.100 was not created in a vacuum. The Legislature enacted RCW 72.09.010 which reads in pertinent part:

**72.09.010 Legislative intent.** It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives.

(1) The system should ensure the public safety. The system should be designed and managed to provide the

maximum feasible safety for the persons and property of the general public, the staff, and the inmates.

Consistent with this concern, the Legislature also enacted RCW 72.09.530, prohibiting the receipt or possession of contraband by inmates.

It reads in pertinent part:

**72.09.530 Prohibition on receipt or possession of contraband--Rules.** The secretary shall, in consultation with the attorney general, adopt by rule a uniform policy that prohibits receipt or possession of anything that is determined to be contraband. The rule shall provide consistent maximum protection of legitimate penological interests, including prison security and order and deterrence of criminal activity. The rule shall protect the legitimate interests of the public and inmates in the exchange of ideas. The secretary shall establish a method of reviewing all incoming and outgoing material consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband.

(Emphasis added.)

Recognizing that the daily operation of prisons is better left to prison administrators, the Legislature gave the Department Secretary the authority to promulgate WAC 137-48-040 *et. seq.*, and Department Policy 450.100. Amici claim that this policy “eviscerates the guarantees of the legislatively enacted Public Records Act with one blow.” Amici Br. at 6. However, they do not ask the opposite question. Did the Legislature intend to eviscerate the Department’s legislatively enacted mandate to operate safe and secure prisons when it enacted the Public Records Act?

In other words, the position of Mr. Livingston and Amici is that if a document is requested by an inmate under the Act, regardless of its threat to the orderly operation of a prison, staff is powerless to stop it and it must be allowed into the prison.

The arguments of Mr. Livingston and Amici would not even be colorable but for the fact that the Department is the only public agency subject to the Public Records Act, along with county and city jails, that incarcerates individuals who can make public records requests. Records requests made by non-incarcerated individuals are treated the same as requests by incarcerated individuals: they are processed by the Department's public records staff, as was done here, and mailed to or picked up by the requestor. When the requestor is not incarcerated, he does not have his mail screened for contraband. If the requestor is an inmate, he is subject to all of the rules and regulations of prison life, one of which is that all of his mail is screened.<sup>1</sup> Mailroom staff conducts an analysis of every piece of mail to see if it is contraband, not to see if an exemption to public disclosure applies. Therefore, the Department, unlike any other public agency, has a responsibility to comply with the Public

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<sup>1</sup> The Department's authority in this regard is long-standing and well-recognized. See *State v. Hawkins*, 70 Wn.2d 697, 704, 425 P.2d 390 (1967); *State v. Copeland*, 15 Wn. App. 374, 378, 549 P.2d 26 (1976) (citing WAC 275-96, authorizing screening of incoming mail by the Department of Social and Health Services, then charged with the operation and management of adult prison facilities).

Records Act and a responsibility to review all mail in order to operate safe and secure prisons.

According to the arguments of Mr. Livingston's and Amici, an inmate making a public records request to a county for documents concerning the private residence of a prison superintendent, the Department could not intervene when it arrived at the prison mailroom.<sup>2</sup> Although there may be no exemption under the Public Records Act to deny disclosure for such information, there would be legitimate reasons that the document would not be allowed into the prison where the requestor was incarcerated. According to Amici, if the Department mailroom staff rejects the mail, the county would be liable for what Amici describe as a "denial of access" or "non-delivery." Amici Br. at 7.

Amici argues the Department must abdicate their statutory authority to screen mail for contraband and allow the inmate to have this information because it was requested pursuant to the Public Records Act. None of the cases cited by Amici stand for this proposition. They cite *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415

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<sup>2</sup> Also, an inmate could request all documents from a county tax assessor's office regarding the homes of individuals who were witnesses or victims in his criminal trial. An inmate pedophile could make a request of another state agency for documents published by the agency showing pictures of children. Even if another agency inadvertently discloses exempt material to a prison inmate in response to a public records request, the Department, under the arguments of Livingston and Amici, could not intercept it.

(2006), for the proposition that, in other settings, an agency's knowledge that its communications have not been received gives rise to a duty to renew efforts to deliver the message. Amici Br. at 6-7. However, that case did not involve an inmate who made a public records request that was intercepted in a prison mailroom; it involved a taxpayer claiming inadequate notice of a tax sale of his property.

Here, the Department had two separate statutory obligations. One, like all other public agencies, is to comply with the Public Records Act. The Department did that here when it processed Mr. Livingston's records request and mailed it to him without claiming any exemptions. The other obligation, one not shared with most other public agencies, is to screen all material coming into its prisons for contraband. That is one of the realities of prison life and the PRA does not require abdication of that responsibility. As a matter of fact, Mr. Livingston could request the same training records now, and since he is no longer incarcerated, his mail would not be screened and he would receive the documents he could not have in prison. DOC has complied with both of its statutory obligations in this case.

**B. MR. LIVINGSTON CANNOT TRANSFORM EXEMPTIONS NEVER ASSERTED BY AN AGENCY IN RESPONSE TO HIS PUBLIC RECORDS REQUEST INTO CLAIMS OF UNLAWFUL PRISON CENSORSHIP NEVER ALLEGED IN THIS SUIT.**

Amici cites the statutory provisions restricting governmental agencies from distinguishing amongst requestors. They also cite the statutory provision restricting agencies from requiring requestors to state the purpose of their request. From these authorities, Amici argue that Mr. Livingston's status as an inmate does not affect his ability to make public disclosure requests. The Department agrees. Amici also argue his inmate status does affect his ability to receive the public records he requests. The Department disagrees. Amici Br. at 8 (citing RCW 42.56.080). Prison officials retain the authority to reject an inmate's incoming mail, even if it contains documents supplied by any agency in response to a public records request. This presents no conflict between the Public Records Act and the Department's legislatively authorized system for restricting the flow of contraband into the facility.

Amici argue that incoming mail containing public disclosure documents triggers a special duty on the part of the Department to provide inmates access to such documents even though the Department considered the document to be contraband under RCW 72.09.530, WAC 137-48-040, and Department Policy 450.100. Amici Br. at 9. In such instances,

however, the point of the Department's intervention at the mailroom is to prevent access from occurring, including documents determined to be non-exempt by the sending agency, stemming from legislative, administrative, and constitutional authority that Amici admit is "broad but not unbounded." Amici Br. at 10.<sup>3</sup>

Amici mischaracterize the Department's position as a resolution to a conflict between the Public Records Act and RCW 72.09.530, as if the Department argued one statute trumped the other. Amici at 9 ("DOC suggests . . . that this statute overrides the PRA in the non-delivery of public records."). On the contrary, the Department argued these statutes do not conflict; one does not trump the other. As argued in the Department's supplemental briefing, each statute has its own independent directives, enforcement mechanisms, and remedies. Dept's Supp. Br. at 13. The Department's authority to reject mail is not an affirmative defense in response to a public records suit, nor is it an exemption to public disclosure. The Public Records Act was neither intended nor written to address allegations of unlawful prison censorship occurring in the prison mailroom or in its policies.

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<sup>3</sup> See *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S. Ct. 1874, 1879, 104 L. Ed. 2d 459 (1989) ([T]his Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.").

The aim of the Public Records Act is to govern a public agency's disclosure of requested records for inspection and copying, including the definition of a public record, the determination of which records are exempt from disclosure, and the making available of records for inspection and copying. The Department's "broad authority" to screen and reject mail cannot be litigated in a case where the plaintiff's only claim is that the agency cited an exemption that did not apply or that it delayed in responding to the request. *See* RCW 42.56.550; CP 2-12.

Non-disclosure did not occur here. The Department timely responded to Mr. Livingston's request. The requested records were gathered, no exemptions were asserted, and the records were sent to Mr. Livingston at his new facility. The documents' arrival at the mailroom of Mr. Livingston's facility triggered a different set of laws, including RCW 72.09.530, not encompassed within the Public Records Act and never intended to be.

The arguments of Amici overlook the plainly different functions of the Public Records Act when contrasted with the prison's screening of mail. On the one hand, they argue that an inmate should have access to all non-exempt public records because the Act does not distinguish amongst requestors, nor does it require the requestor's purpose for the request be disclosed. Amici Br. at 8-9. On the other hand, they assert that Mr.

Livingston should have received the documents because the Department's alleged censorship is not justified. Amici Br. at 10. Amici transform on appeal the show cause motion in superior court as a constitutional challenge to the Department's authority to screen and reject mail never brought in the superior court. Amici Br. at 11-13. New issues may not be raised for the first time on appeal by amici curiae. *Gallo v. Labor and Industries*, 155 Wn.2d 470, 495 n. 12, 120 P.3d 564 (2005). Amici presents arguments of prior restraint and abridgment of free speech brought in violation of the First Amendment. Mr. Livingston did not bring such a challenge or a cause of action.

**C. MR. LIVINGSTON DOES NOT HAVE THE CHOICE OF REMEDIES TO ALLEGE VIOLATIONS OF THE CIVIL RIGHTS ACT IN AN ACTION BROUGHT EXCLUSIVELY UNDER THE PUBLIC RECORDS ACT.**

Amici misstate that pursuing a civil rights claim challenging a restriction placed upon Mr. Livingston's custody was merely one *alternative* Mr. Livingston had to pursue his claim, and his choice was to pursue this litigation under Public Records Act. This argument implies that Mr. Livingston could pick and choose the method of litigating that was the most advantageous to him in terms of timing, burdens, and remedies. However, because there is no asserted violation of any provision of the Public Records Act, the authority of the Department to

intercept incoming mail can only be litigated under the Civil Rights Act, 42 U.S.C. § 1983. Additionally, if the elements were met for any other statutory remedy, such as the Uniform Declaratory Judgments Act, perhaps a cause of action could have been stated for a different remedy. *See* Dept. Supp. Br. at 17-18.<sup>4</sup>

A Petition for Order to Show Cause under RCW 42.56.550<sup>5</sup> (*see* CP 2-12) is not interchangeable with a claim under 42 U.S.C. § 1983. The two are specific causes of action with specific procedures and remedies. Utilizing the Public Records Act by pursuing the expedited process of RCW 42.56.550 is only available when challenging an agency's compliance with the Act. It simply does not provide Mr. Livingston the relief he seeks here: to require prison mailroom staff to bypass their procedures if documents received are in response to a public records request.

Mr. Livingston chose to pursue a cause of action that provided expedited relief, putting the burden on the Department of Corrections, when no provision of the Public Records Act was violated. Amici even

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<sup>4</sup> Under the Prison Litigation Reform Act (PLRA), a federal constitutional challenge to conditions of prison confinement may only be brought once the prisoner has exhausted available grievances. Here, for example, Amici raises challenges to the policy as a prior restraint, allegedly violative of the First Amendment. Under the PLRA, a litigant, or his amici, cannot raise such a challenge as a side argument to an appeal, without having given the agency the opportunity to correct the alleged deficiency through the established grievance process. 42 U.S.C. § 1997e(a); 18 U.S.C. § 3626(h).

<sup>5</sup> Formerly RCW 42.17.340.

argue that this was an appropriate choice in order to benefit from the Act's remedy provisions which include attorney fees and daily fines. Amici Br. at 16-17.

The Department agrees with Amici that a cause of action under the Public Records Act is distinctly different from a cause of action challenging a condition of confinement under 42 U.S.C. § 1983, and distinctly different from any claim under the Administrative Procedures Act. Amici Br. at 16-17. A claim that a prison mailroom improperly rejected inmate mail is one that allows for discovery, jury trial, and limitations recognized by Amici. It is true that there are limitations on conditions of confinement cases brought by inmates by the federal Prison Litigation Reform Act. *See* 42 U.S.C. § 1997e(a). The PLRA's purpose for restrictions on inmate challenges to conditions of confinement is the recognition that courts do not oversee the running of correctional institutions, and restrictions placed on prison inmates are not to be disturbed unless contrary to law. *See* 18 U.S.C. § 3626(a). There is no conflict between the Public Records Act and the authority of the Department to regulate all mail to prison inmates. *See* Supp. Br. at 10-13.

Amici properly recognizes that a prevailing party in an Administrative Procedures Act lawsuit may be entitled to attorney fees under a higher standard than under the Public Records Act. The APA is

not applicable here. RCW 34.05.030(1)(c) (excluding the APA from application to the Department regarding “persons who are in their custody”). And it is true that neither the Civil Rights Act nor the APA allow daily penalties for noncompliance. These distinctions exist because of the expectation that agencies comply with the specific provisions of the Public Records Act in responding to public records requests. The Department agrees that there are significant differences in claims brought under the Public Records Act and the Civil Rights Act. However, it does not follow that Mr. Livingston’s desire to shortcut the process due the Department -- by characterizing his cause of action as one under the Public Records Act -- would be appropriate to take advantage of quick relief, fines, and attorney fees when no statutory violation occurred.

Finally, Amici also agree with the Department that proof on the merits is different for each of the different causes of action. When challenging a rejection of any mail, whether it is a newspaper, a response to a public disclosure request, or a legal pleading, the inmate has the burden of establishing a violation of his constitutional rights. Amici Br. at 17. In an APA action, a plaintiff has the burden of establishing a violation of RCW 34.05.570(3). However, Amici then argues that “[u]nder the PRA, a plaintiff prevails if the agency cannot satisfy its burden to show a statutory basis for withholding the public records”. Amici Br. at 17. That

statement assumes that the agency withheld the records. That did not occur here because the Department properly responded to Mr. Livingston's public records request, and there is no citation to any provision of the Act that was violated. Mr. Livingston's only remedy for alleged unconstitutional condition of his prison confinement is to state a cause of action under 42 U.S.C. § 1983. If Mr. Livingston's mail was improperly rejected, then mailroom staff violated his civil rights, not his statutory rights under the Public Records Act. The Department did not violate the Public Records Act. Mr. Livingston cannot create a cause of action under the Act where one does not exist.

### III. CONCLUSION

The Department responded to Appellant's request here in a timely manner and did not claim any exemptions from disclosure. Mr. Livingston's only claimed violation of the Public Records Act is the rejection of his incoming mail by prison mailroom staff. As this rejection is consistent with the Department's statutory authority and duty not

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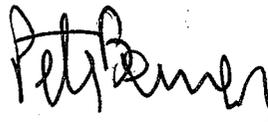
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challenged in this proceeding, the Department respectfully requests that this Court affirm the ruling of Thurston County Superior Court and of the Court of Appeals.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of November, 2007.

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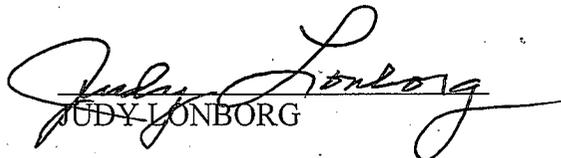
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 13<sup>th</sup> day of November, 2007, at Olympia, Washington.

  
JUDY LONBORG