

SUPREME COURT OF THE STATE OF WASHINGTON

ERIC BURT, GARY EDWARDS, SHERRY HARTFORD,
JoANN IRWIN, JOHN MOORE, CLIFFORD PEASE, DAVID
SNELL, HAROLD SNIVELY, ALAN WALTER, DUSTIN
WEST, PAUL-DAVID WINTERS, CHERI STERLIN,
LAURA COLEMAN, CHARLES CROW, RICHARD
"JASON" MORGAN, *Respondents,*

v.

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS, *Respondent,*

ALLAN PARMALEE, *Petitioner.*

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

The mission, membership, and interest of the Washington Coalition for Open Government (“WCOG”) in this case are set forth more fully in WCOG’s *Motion for Leave to File Brief of Amicus Curiae* filed herewith. WCOG has a legitimate interest in assuring that the Court is adequately informed about the impact that this case may have on the ability of all record requesters to obtain information about government under the Public Records Act, Chapter 42.56 RCW (“PRA”). WCOG is concerned that perceived abuses of the PRA by prison inmates have tempted the Department of Corrections (“DOC”) to take legal positions that are contrary to the PRA and ultimately destructive to the goals of open, accountable government.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the parties’ briefs.

III. ARGUMENT

The PRA “is a strongly worded mandate for broad disclosure of public records.” *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The PRA is not a tool for government agencies

or other parties opposing the disclosure of records information to suppress public access to records in one-sided proceedings.

Regardless of whether an action under the PRA is filed by a requester, agency, or third party resisting disclosure, judicial review under the PRA is always triggered by a particular request for records. Unless the person who has requested records is a party there is no real controversy and nothing for a court to adjudicate. Indeed, as this Court recently observed, a case in which the requester does not wish to participate is moot. *Soter v. Cowles Pub'g. Co.*, 162 Wn.2d 716, 753 n.16, 174 P.3d 60 (2007).

The question of whether Parmelee should have been allowed to “intervene” in an action to block his own request for records is irrelevant. There was absolutely no reason for the trial court to proceed with judicial review of Parmelee’s request for records when Parmelee himself was not a party. Such a one-side proceeding makes a mockery of the adversarial system of justice. The only purpose of the case brought by the DOC employees was to obtain a court order, binding upon Parmelee, to prevent him from obtaining the records he requested. The suggestion that such a case could proceed without Parmelee is absurd.

Nonetheless, the Court of Appeals concluded that Parmelee was not an indispensable party under CR 19(a). *Burt v. Dept. of Corrections*, 141 Wn. App. 573, 579-80, 170 P.3d 608 (2007). This conclusion was entirely based on the observation that (i) a requester does not have the burden of proof under the PRA, and (ii) that Parmelee’s “interests as a member of the public were easily apparent to the trial court.” *Id.* The Court of Appeals cited no authority for its assumption that a party who lacks the burden of proof is not a necessary party.¹ If this flimsy, result-driven analysis were correct, neither the tortfeasor in an action for personal injuries nor the defendant in a criminal case would be indispensable parties.

Burt conflicts with a number of PRA cases that recognize the distinct roles of the requester and the agency in an action for judicial review under the PRA. One of the earliest PRA cases recognized that no justiciable controversy can even exist without the active participation of the requester. *City of Everett v. Van Dyke*, 18 Wn. App. 704, 571 P.2d 952 (1977). In that case the

¹ The only CR 19 case cited in *Burt* was *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007). That case upheld a trial court’s ruling that the Puyallup Tribe was an indispensable party to a lawsuit challenging the legality of an agreement between the Department of Revenue and the Tribe. *Matheson*, 139 Wn. App. at 627.

requester (Van Dyke) sought access to the personnel file of a former city employee. Upon the completion of *in camera* review, Van Dyke was permitted to take the requested records from the courtroom. *Van Dyke*, 18 Wn. App. at 705. The City appealed, but Van Dyke neither appeared in the appeal nor filed a brief. The Court of Appeals refused to hear the merits of the case, noting that “At no stage was this case presented in a ‘genuinely adversary’ manner.” *Van Dyke*, 18 Wn. App. at 705-06.

Without mentioning *Van Dyke*, the *Burt* court relied on the naïve assumption that DOC would adequately represent the interests in favor of disclosure. *Burt*, 141 Wn. App. 580. As *Van Dyke* recognized, the agency does *not* represent the public interest in disclosure, and there is no genuine adversarial proceeding before the court unless the requester actively participates.

Almost three decades ago this Court recognized that agencies that possess public records do not and cannot represent the interests of the public in the disclosure of those records. In *Hearst, supra*, an agency argued that it had discretion to determine what records should be disclosed. *Hearst*, 90 Wn.2d at 129. This Court disagreed:

The assessor, in essence, contends that the act leaves interpretation and enforcement of its requirements to the very persons it was designed to regulate. We ... reject this approach; leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.

Hearst, 90 Wn.2d at 135 (citations omitted). The assumption in *Burt* that an agency can be an effective advocate for the disclosure of its own records must be rejected in light of *Hearst*.

Recently, in *Soter*, this Court held that an agency may seek judicial review under RCW 42.56.540. *Soter*, 162 Wn.2d at 755-56. Addressing arguments that an agency should not be permitted to sue a requester, the Court noted that the participation of the requester would determine whether judicial review actually occurred:

[A] public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency's action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public record.

Soter, 162 Wn.2d at 753 n.16. Under *Soter*, there can be no judicial review of Parmelee's requests for records unless Parmelee is made a party and he is willing to litigate the disclosure issues.

Taken together, these cases show that the requester is an indispensable party to any action for judicial review under the

PRA. The requester’s right to receive specific requested records is the subject matter of any action for judicial review under the PRA regardless of whether an action is brought by the requester, an agency or a third party resisting disclosure. Without the requester, there is nothing to adjudicate.

DOC is clearly aware that *Burt* conflicts with *Soter* and *Everett*, but continues to ignore those cases. In another pending case involving Parmelee, the trial court allowed an action brought by DOC employees against DOC to proceed without making Parmelee a party.² On appeal, WCOG’s amicus brief made substantially the same argument — citing *Everett*, *Hearst*, and *Soter* — as set forth above.³ DOC’s brief in response to WCOG completely ignored the issue, and did not cite *Everett*, *Hearst*, or *Soter*.⁴ More than two months later DOC had another opportunity to address these cases in its *Supplemental Brief of [DOC]* (“*Supp. Br. DOC*”). But it did not do so.

² *DeLong v. Department of Corrections*, Court of Appeals Div. II, No. 35561-2-II. The *DeLong* case was consolidated into *Mathieu v. Parmelee*, Court of Appeals Div. II, No. 35469-1-II. As of the date of this brief, a decision in that case is pending.

³ *Brief of Amicus Curiae [WCOG]* (July 8, 2008), Court of Appeals Div. II, No. 35469-1-II.

⁴ *Response of [DOC] to Amici Curiae Briefs* (July 22, 2008), Court of Appeals Div. II, No. 35469-1-II.

Instead, DOC continues to argue that the holding in *Burt* is supported by the language of RCW 42.56.540. *Response of [DOC] to Petition for Discretionary Review* (“*Response of DOC*”) at 12-13; *Supp. Br. DOC* at 13. DOC asserts that RCW 42.56.540 is “silent as to what role, if any, the requestor of the record must play in the enjoinder action.” *Response of DOC* at 13. That section of the PRA provides:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. **An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.** However, this option does not exist where the agency is required by law to provide such notice. (Emphases added).

RCW 42.56.540. This statute does not authorize an action to enjoin the disclosure of records that no one has actually requested. Rather, the statute expressly contemplates that a particular person has made a request for particular records. This is shown by the

language highlighted above, which is omitted from DOC's briefs.

Brief of Respondent [DOC] at 16-17; *Response of DOC* at 13.

DOC argues that "If a requester were considered indispensable, then a person with a legitimate right to an injunction under RCW 42.56.540 could be left with no remedy in a scenario where a records requester could not be joined." *Supp. Br. DOC* at 13. DOC does not explain how this bizarre scenario could ever arise. No one has the right to an injunction under RCW 42.56.540 unless and until someone makes a request for records, and that person must be named as a party. The question of whether the requester wishes to engage in a court battle is another matter. *See Soter*, 162 Wn.2d at 753 n.16.

Finally, DOC argues that "If the Legislature intended the requestor to be a mandatory party in an action under RCW 42.56.540, it could have said so." *Supp. Br. DOC* at 13. But the statute obviously assumes that the requester will be a party to any action for judicial review, and that the requester will actually participate. "It is immaterial who hauls whom into court, because the requester who prevails in any court action over the release of public records is entitled to attorney fees." *Soter*, 162 Wn.2d at 751-52 (quoting *Soter*, 131 Wn. App. at 907). The fact that the

PRA does not explicitly state that a controversy must exist, or that indispensable parties must be joined, does not authorize a court to ignore the most basic principles of civil procedure.

In sum, there is no authority, intelligible legal theory, or practical reason to allow an action for judicial review under the PRA in which the requester is not a party. This Court should reverse the decision of the Court of Appeals, and hold that the requester is an indispensable party to any action for judicial review under the PRA.

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RESPECTFULLY SUBMITTED this 16th day of December, 2008.



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of December, 2008, a true and correct copy of this document was served on each of the parties below as follows:

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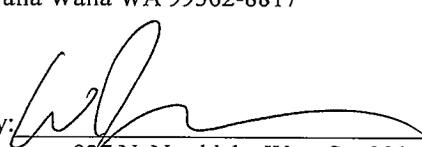
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