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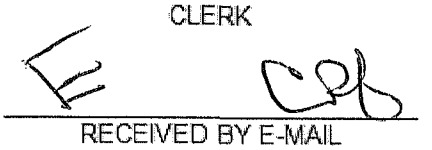

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NO. 87656-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RESIDENT ACTION COUNCIL,

Respondent,

v.

SEATTLE HOUSING AUTHORITY,

Appellant.

**ANSWER TO AMICUS CURIAE BRIEFS OF
COLUMBIA LEGAL SERVICES AND
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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INTRODUCTION

Amici Columbia Legal Services ("CLS") and Washington Coalition for Open Government ("WCOG") share RAC's fundamental misunderstanding of this matter. Grievance-hearing decisions are created, redacted, and made available to the public pursuant to 24 C.F.R. § 966.57(a), not the PRA. The unredacted decisions are categorically exempt. The redacted decisions are publically available under the C.F.R. The PRA was the vehicle for requesting the documents redacted and available under the C.F.R. But neither amici addresses the C.F.R. This Court should reverse and hold that SHA's redactions complied with the C.F.R., without determining whether the redactions comply with the PRA.

CLS focuses almost exclusively on the PRA, arguing that SHA had to create less-redacted records for RAC. The PRA's plain language provides otherwise. And CLS has no answer to a great deal of common law providing that an agency has no duty to create an otherwise non-existent record to satisfy a PRA request.

WCOG focuses on electronic production and injunctive relief, but adds little, having wholly failed to address SHA's arguments. Repeating what RAC has already argued is not helpful or proper.

This Court should reverse.

FACTS AMICI IGNORE OR MISAPPREHEND

SHA clients adversely affected by SHA's acts (or failures to act) are entitled to an informal grievance hearing. CP 124-25, 146. Pursuant to 24 C.F.R. § 966.57(a), SHA places a copy of the grievance-hearing decision in the client's confidential file. CP 146, 148. The trial court correctly found that the grievance-hearing decisions in tenant files are categorically exempt; *i.e.*, not subject to redaction. CP 169. RAC agrees. CP 18; BR 19.

Also pursuant to 24 C.F.R. § 966.57(a), SHA maintains a copy of the grievance-hearing decisions, "with all names and identifying references deleted," on file in a central location. CP 146, 148; 24 C.F.R. § 966.57(a). No HUD regulation defines "all names and identifying references." 24 C.F.R. § 966.57(a); RP 22-23. These redacted copies are available for inspection. 24 C.F.R. § 966.57(a).

The following critical facts are undisputed:

- Prior to RAC's PRA request, SHA redacted the grievance-hearing decisions at issue under 24 C.F.R. § 966.57(a), placing them in a central file;
- SHA gave RAC the previously redacted grievance-hearing decisions in response to RAC's PRA request; and
- SHA made no new redactions in response to RAC's PRA request and has never redacted a grievance-hearing decision pursuant to any PRA provision.

RESPONSE ARGUMENT

A. Neither amici addresses SHA's primary argument – that it properly redacted the grievance-hearing decisions under 24 C.F.R. § 966.57(a).

SHA's primary argument on appeal is that it properly redacted the grievance-hearing decisions in compliance with 24 C.F.R. § 966.57(a), requiring it to delete "all names and identifying references." RAC's primary response is that 24 C.F.R. § 966.57(a) does not preempt the PRA. BR 13-18. SHA never raised preemption. Neither amici addresses RAC's misguided response.

RAC agrees that the C.F.R.s do not define "all names and identifying references." BR 23. RAC argues that "all names" does not literally mean all names, and fails to discuss "identifying references" other than to summarily conclude that some of SHA's redactions were improper under the C.F.R. BR 19-20. WCOG joins these unsupported and unpersuasive arguments, but adds nothing. WCOG 6. CLS does not weigh in.

Like RAC, the amici begin with a dissertation on the PRA, arguing that it has a broad-disclosure policy. WCOG 3-4, CLS 3-5. SHA agrees and has never argued otherwise. Amici miss the point – there is no basis for using PRA policy to interpret an unambiguous federal regulation with no similar policy. BA 18-19,

Reply 6; 24 C.F.R. § 966.50. The trial court should have looked first to the C.F.R.'s plain language and then to applicable HUD regulations, if any. ***Life Care Ctrs. of Am., Inc. v. Dep't of Soc. & Health Servs.***, 162 Wn. App. 370, 375, 254 P.3d 919 (2011).

In short, this Court should reverse, holding that SHA properly deleted all names and identifying references from the grievance-hearing decisions pursuant to 24 C.F.R. § 966.57(a). This Court need not address the PRA issues the amici address.

B. The PRA does not require SHA to redact categorically exempt grievance-hearing decisions to create a non-existent document for RAC. *Compare* BA 19-25, Reply 10-14 *with* CLS 5-12.

Determining whether SHA properly redacted the grievance-hearing decisions should begin and end with 24 C.F.R. § 966.57(a)'s plain language. In an abundance of caution, however, SHA argued that the PRA redaction provision – RCW 42.56.210(1) – does not apply to categorically exempt grievance-hearing decisions and that the PRA does not require public agencies to create otherwise nonexistent documents. BA 19-25; Reply 10-14. CLS focuses almost exclusively on this point, arguing that under the PRA, SHA must create new documents for RAC by redacting the categorically exempt grievance-hearing decisions in confidential

tenant files. CLS 5-12. CLS focuses almost exclusively on this point. CLS 5-12.

The trial court correctly found that the unredacted grievance-hearing decisions in client files are categorically exempt under RCW 42.56.230(1). CP 169. RAC did not appeal that finding, virtually conceding the point at trial (CP 18) and stating on appeal that it "has always conceded that" RCW 42.56.230(1) applies. BR 30. RAC did not respond to SHA's argument on this point. *Compare* BA 22-24 *with* BR 29-30. CLS plainly cannot challenge an issue that RAC has conceded.

The trial court also correctly found that redacted grievance-hearing decisions are not categorically exempt. CP 169. This is readily apparent under the C.F.R., but is irrelevant, where SHA released those records pursuant to RAC's PRA request.

The trial court erred in going a step further, ordering SHA to create new, less-redacted grievance-hearing decisions for RAC. CP 171. SHA could do so only by redacting the categorically exempt decisions in confidential client files. CP 95-96, 171. That SHA cannot do, for two reasons: (1) categorically exempt files are not subject to redaction under RCW 42.56.210(1); and (2) SHA is not required to create new documents specifically for RAC.

RCW 42.56.230 enumerates seven categories of "personal information" that is exempt from public inspection. The first category applies here, exempting from disclosure the "[p]ersonal information in any files maintained for . . . clients of public institutions . . . or welfare recipients." RCW 42.56.230(1). There is no dispute that SHA's clients fit within this category.

Unlike other personal-information exemptions, subsection (1) does not limit exempt personal information to information whose disclosure would violate the "right to privacy." *Compare* RCW 42.56.230(1) *with* §§ (3) & (4) (respectively pertaining to files maintained for employees, appointees of elected officials of any government agency, and to information required of a tax payer in connection with the collection of a tax). Without this limiting language, subsection (1) plainly exempts all personal information of government-institution clients, regardless of whether the disclosure of such information "would violate personal privacy." RCW 42.56.210(1).

Based on this distinction, the appellate court previously held that subsection (1) creates a "broader protection from public disclosure," than is created in the subsections including the privacy-

right language, and provides those persons falling under subsection (1) "heightened protection":

> For public disclosure purposes, the legislature has drawn an express distinction between clients of public institutions, such as public school students, and persons involved in running our public institutions, such as public employees and elected or appointed officials. . . . By omitting from subsection (1)(a) the last clause of subsection (1)(b), "to the extent that disclosure would violate their right to privacy," the legislature thus created broader protection from public disclosure for clients of government institutions, such as students.
>
> . . .
>
> We further note that subsection (1)(a) reflects the legislature's decision to provide heightened protection to a specific, narrow class of persons distinct from those discussed in other PDA exemptions. Unlike the other PDA exemptions, subsection (1)(a) applies to information related to persons in public schools, patients and clients of public institutions or public health agencies, and welfare recipients. . . . Because of the nature of these agencies, their clients, and the services they provide, much of the personal information gathered in administering these programs relates to a *specific individual's typically confidential needs or evaluation* rather than to the general administration of government by those acting on behalf of our government.

Lindeman v. Kelso Sch. Dist. No. 458, 127 Wn. App. 526, 534-35, 111 P.3d 1235 (2005) (emphasis in original), *rev'd on other grounds*, 162 Wn.2d 196, 172 P.3d 929 (2007); BA 20-21; Reply 11-12.

RCW 42.56.210(1) provides an exception to some PRA exemptions:

> Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

While the exemptions in RCWs 42.56.230(3)(a) and 84.40.020 remain absolute, other exempt documents must be produced if they can be redacted to delete "information, the disclosure of which would *violate personal privacy or vital governmental interests*." RCW 42.56.210 (emphasis added).

The PRA redaction rule does not apply to § .230(1), which exempts all personal information belonging to clients of public agencies, regardless of whether disclosing it "would violate personal privacy or vital governmental interests." *Compare* RCW 42.56.210(1) *with* § .230(1). Again, the absence of the privacy-right language in subsection (1) indicates that it is a broader exemption providing greater protection than the PRA exemptions containing the privacy-right language. ***Lindeman***, 127 Wn. App. at 534-35.

CLS argues that the PRA redaction rule applies to § .230(1), where it exempts only "[p]ersonal information in any files maintained for . . . clients of public institutions," not whole "files."

CLS 5-6. SHA has never suggested that every document in any client file is exempt. RCW 42.56.230(1). The issue is whether specific documents in the client file – here the redacted grievance-hearing decisions – are exempt because they contain "[p]ersonal information." RCW 42.56.230(1). They undoubtedly are, under the statute's plain language.

CLS argues that the redaction rule must apply to personal information exempt under § .230(1), where the rule lists only two "instances in which a government agency is not required to redact exempt information" – information described in RCW 42.56.230(3)(a), and confidential income data exempt under RCW 84.40.020. RCW 42.56.210(1); CLS 7. CLS relies on the canon of statutory construction that the "[e]xpression of one thing in a statute implies exclusion of others . . . ." CLS 7 (citing ***State v. Kelley***, 168 Wn.2d 72, 83, 226 P.3d 773 (2010)). CLS ignores, however, that RCW 42.56.210(1) also provides that the exemptions listed in the PRA are "inapplicable," only if the following protected information can be deleted: "information, the disclosure of which would violate personal privacy or vital governmental interests." CLS's argument impermissibly reads this limitation out of RCW 42.56.210(1) and/or

impermissibly reads a personal-privacy limitation into RCW 42.56.230(1).

The same canon of statutory construction CLS relies upon further undoes its argument. Again, the privacy-right language in the PRA redaction rule (§ .210(1)) is present in only some exemptions. *Compare* RCW 42.56.230(1) *with* §§ (3) *and* (4). CLS's argument that the redaction rule nonetheless applies to all exemptions plainly ignores the Legislature's clear choice to limit only some exemptions to personal information the disclosure of which would violate a privacy right, leaving other exemptions broader and more protective. ***Kelley***, 168 Wn.2d at 83

CLS next argues that SHA must redact grievance-hearing decisions under the PRA to "serve[] 'vital governmental interests.'" CLS 8. CLS confuses the inquiry under RCW 42.56.210(1). *Id.* The question is not whether redaction "serves" vital government interests, but whether disclosing the personal information would violate them. RCW 42.56.210(1).

CLS also conflates "personal privacy" and "vital governmental interests," stating that "[m]aintaining the confidentiality of personal information is the 'vital governmental interest' [*sic*] underlying the § .230(1) exemption." CLS 10. This

attempted end run is unpersuasive. These two different terms do not mean the same thing. ***Farmers Ins. Exch. v. Dietz***, 121 Wn. App. 97, 103, 87 P.3d 769 (2004).

CLS argues that under SHA's proposed interpretation, the redaction rule is too narrowly limited to exemptions referencing "personal privacy." CLS 11-12. Any other reading defies the Legislature's intent, clearly expressed by limiting some exemptions to personal information the disclosure of which would violate a privacy right, and keeping other exemptions broader and more protective. The Court should not look past the statute's plain language, which unambiguously states the legislative intent.

CLS argues that accepting SHA's argument will significantly undercut the public's ability to "monitor the workings of its government." CLS 12-14. CLS misstates SHA's argument as follows: "government agencies are not required to disclose redacted documents contained within individual files." CLS 12. SHA said no such thing.

SHA produced redacted grievance-hearing decisions maintained in a central location for public dissemination. The unredacted grievance-hearing decisions in confidential client files cannot be redacted and disclosed pursuant to the PRA. CLS's

argument not only misunderstands the crucial facts underlying this matter, but ignores that SHA produced the redacted grievance-hearing decisions. CLS's parade of horribles goes nowhere.

And even a cursory review of the redacted grievance-hearing decisions SHA produced debunks CLS's claim that RAC cannot "measure" hearing-officer "performance." CLS 13; CP 50-85. SHA redacted names and identifying references, as is required under 24 C.F.R. § 966.57(a). These redactions do not affect the reader's ability to understand the decision made. CP 50-85. RAC does not need to know where the tenant lived or who witnessed the events to review whether the hearing officer acted rationally.

Finally, CLS does not address SHA's second argument on this point, that SHA "has 'no duty to create or produce a record that is nonexistent'" to fulfill a PRA request. BR 26 (quoting ***Bldg. Indus. Ass'n v. McCarthy***, 152 Wn. App. 720, 734, 218 P.3d 196 (2009)). SHA does not have the documents RAC seeks – a version of the grievance-hearing decisions that is less-redacted than the version SHA created, maintained, and made available to the public pursuant to 24 C.F.R. § 966.57(a). The parties agree that SHA does not have to create a document it did not have. BR 26.

C. The PRA does not require SHA to produce electronic documents for RAC. *Compare* BA 25-28 *and* Reply 14-15 *with* WCOG 6-10.

The trial court ordered SHA to provide RAC electronic copies based on two comments to WAC 44-14-050, a PRA model rule. WAC 44-14-00001; CP 170 (citing comments 44-14-05001 & -05002). The model rules and their comments are "advisory only" – they are not binding, create no legal duty, and are "permissive, not mandatory." WAC 44-14-00003; ***Mechling v. City of Monroe***, 152 Wn. App. 830, 850, 222 P.3d 808 (2009) (holding that that the model rule does not create an "express obligation" to provide documents electronically), *rev. denied*, 169 Wn.2d 1007 (2010).

WCOG spends a great deal of space complaining that SHA has the capacity to produce documents electronically, and speculating that SHA's failure to do so indicates an insidious attempt to dissuade PRA requests. WCOG 8. Like RAC, WCOG misses the point. BR 35; Reply 15; WCOG 7. SHA does not store the grievance-hearing decision electronically, but has never disagreed that it had the capacity to provide electronic copies. It did not do so, however, because RAC requested electronic documents "to minimize reproduction costs." CP 41, 95-96.

Providing electronic copies would have cost the same as providing hard copies. *Id.* WCOG does not address this point. WCOG 6-10.

D. The trial court erroneously awarded damages and injunctive relief. *Compare* BA 28-31; Reply 16-21 *with* WCOG 4-6, 10-12.

A party seeking an injunction must prove: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) actual or impending substantial harm. ***Kucera v. Dep't of Transp.***, 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000) (quoting ***Tyler Pipe Indus., Inc. v. Dep't of Revenue***, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). SHA carefully addressed each injunction item at length, demonstrating that each fails this test on at least one and usually two factors. BA 28-34; Reply 16-20. Although WCOG nominally addresses injunctive relief, it does not address SHA's arguments. WCOG 12. WCOG's unsupported assertion that injunctive relief was "proper" is as unhelpful is it is unpersuasive.

1. RAC was not "adversely affected" by the lack of published procedures for requesting documents. BA 30; Reply 16-17.

RAC plainly knew how to request SHA records, and does not claim otherwise. CP 28-32. The PRA states that an agency's failure to publish procedures does not "adversely affect[]" a

requesting party. RCW 42.56.040(2). Thus, RAC could not have been "adversely affected," so was not injured. ***Kucera***, 140 Wn.2d at 209. Neither amici addresses this point.

2. SHA was not required to explain its redactions or cite 24 C.F.R. § 966.57(a). *Compare* BA 30-31 *and* Reply 17-18 *with* WCOG 4-5.

WCOG complains that SHA failed to cite any applicable exemptions or explain its redactions. WCOG 4-5. WCOG does not address SHA's arguments on this point, or cite any applicable statutes or case-law. *Id.* Indeed, WCOG offers no argument, but quite literally just complains. *Id.*

RCW 42.56.070(2) requires an agency to publish a list of laws, "other than those listed in" the PRA, that "the agency *believes* exempts or prohibits disclosure." RCW 42.56.070(2) (emphasis added). SHA did not list 24 C.F.R. § 966.57(a), believing that the C.F.R. did not exempt documents, but created a publically-available document where none otherwise existed. CP 18, 169, 297. RAC did not respond to this argument. BR 40-42. Neither does WCOG. WCOG at 4-5.

HUD regulations do not require housing authorities to explain deletions made under 24 C.F.R. § 966.57(a). RCW 42.56.070(1) requires agencies to explain redactions "fully in

writing," but applies only to redactions made pursuant to the PRA. BA 33-34; Reply 19. Thus, RCW 42.56.070(1) does not apply here, where it is undisputed that SHA redacted the grievance-hearing decisions pursuant to 24 C.F.R. § 966.57(a), not pursuant to any PRA provision. RAC did not respond to this argument. BR 40-42. Neither does WCOG. WCOG 4-5.

3. SHA has no duty to adopt policies for implementing 24 C.F.R. § 966.57(a). BA 31-32; Reply 18-19.

The HUD regulations do not require SHA to "[e]stablish a policy and procedure for redacting grievance hearing decisions" under 24 C.F.R. § 966.57(a). CP 310. The PRA (which is inapplicable) plainly does not require SHA to establish policies to redact documents under the C.F.R., and apparently does not require public agencies to adopt policies for redaction under the PRA. RCW 42.56.070(1). Thus, RAC has no "right to such procedures. ***Locke v. Pac. Tel. & Tel. Co.***, 178 Wash. 47, 53, 33 P.2d 1077 (1934) (holding that there is no "right without a corresponding duty"). Injunctive relief is inappropriate. ***Kucera***, 140 Wn.2d at 209-10.

4. No HUD regulation requires SHA to explain deletions made pursuant to 24 C.F.R. § 966.57(a). *Compare* BA 32-34 *and* Reply 19 *with* WCOG 5-6.

WCOG argues that SHA's redactions were arbitrary, complaining that some grievance-hearing decisions have all names deleted, while others have only some names deleted. WCOG 5-6. As examples of alleged "overreaching," WCOG complains that SHA deleted the title of a newspaper article. *Id.* at 6.

Again, WCOG fails to address SHA's arguments on this point. Since the C.F.R. directs housing authorities to delete "all names," SHA did not err in occasionally deleting the names of witnesses or police officers. And a 30-second computer search of the newspaper-article title revealed the name of the client involved and other identifying information. BA 16-17 & n.7. RAC effectively admitted that this was proper. BR 24. Apparently, RAC and WCOG do not even agree on what constitutes "identifying information."

5. RAC had no legal right to electronic production. BA 34; Reply 20.

Again, RAC plainly had no legal *right* to receive any documents electronically. WAC 44-14-00003. Thus, injunctive relief is improper. ***Kucera***, 140 Wn.2d at 209-10. Again, WCOG does not respond.

6. Damages are also inappropriate for the same reasons that the injunctive relief is inappropriate. *Compare* BA 34-36 *and* Reply 20 *with* WCOG 10-11.

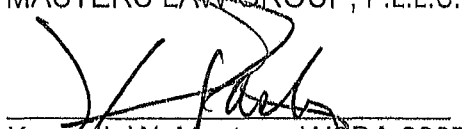
Damages are wholly inappropriate, where SHA gave RAC the only non-exempt documents it had – the previously redacted grievance-hearing decisions. RCW 42.56.550(4). SHA had no duty to make RAC a less-redacted version, so cannot be penalized for failing to do so. *Id.* WCOG does not address SHA's argument, instead asserting that damages are appropriate in light of SHA's "overzealous redactions" and attempts to "burden" RAC. WCOG 11. But damages are available only when a public agency denies access to the public records. RCW 42.56.550(4). Again, SHA gave RAC the documents it requested, and neither RAC nor the amici have shown that the redactions violated 24 C.F.R. § 966.57(a).

CONCLUSION

SHA properly redacted the grievance-hearing decisions under 24 C.F.R. § 966.57(a). The trial court erroneously applied PRA policy to those redactions, and erroneously awarded damages and injunctive relief based on inapplicable PRA provisions. This Court should reverse.

RESPECTFULLY SUBMITTED this 4th day of October, 2012.

MASTERS LAW GROUP, P.L.L.C.



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ANSWER TO AMICUS CURIAE BRIEFS OF COLUMBIA LEGAL SERVICES AND WASHINGTON COALITION FOR OPEN GOVERNMENT

Case: *RESIDENT ACTION COUNCIL v. SEATTLE HOUSING AUTHORITY*

Case Number: 87656-8

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