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SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE PATROL, et al

v.

JOHN DOE A, et al

REPLY BRIEF OF APPELLANTS DONNA AND JEFF ZINK

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Table of Contents

I.	RESPONSE	1
II.	RCW 4.08.040	4
III.	Error was Properly Assigned and Issues are Not Limited.....	4
IV.	The Requirements of Chapter 42.56 RCW Controls	7
V.	The Trial Court Used the Wrong Legal Standard.....	9
VI.	Response to Argument of Washington Association of Sheriffs and Police Chiefs 12	
	1. By Definition WASPC is a Public Agency	12
	2. Per Diem Penalties.....	15
VII.	PSEUDONYM USE is Not Proper Or Necessary	18
	3. Open Administration of Justice is a Vital Constitutional Safeguard.....	18
	4. Definition of a Court Record	19
VIII.	Conclusion.....	23
IX.	Certification of Service.....	1

TABLE OF AUTHORITIES

Washington State Supreme Court

<i>Allied Daily Newspapers v. Einkenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	21
<i>Ameriquest Mortg. Co. v. Office of Attorney Gen.</i> , 177 Wn.2d 467, 300 P.3d 799 (2013).....	11
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190 (2011)	7, 10
<i>Cowles Pub. Co. v. Murphy</i> , 96 Wn.2d 584, 637, P.2d 966 (1981)	22
<i>Gendler v. Batiste</i> , 174 Wn.2d 244, 274 P.3d 346 (2012).....	1
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	1
<i>Hundtofte v. Encarnacion</i> , 176 Wn.2d 1019, 297 P.3d 707 (2014)	18, 20, 23
<i>Mangham v. Gold Seal Chinchillas</i> , 69 Wn.2d 37, 416 P.2d 680 (1966)	4, 7
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009)	8
<i>Personal Restraint of Meyer</i> , 142 Wn.2d 608, 16 P.3d 563 (2001)	8
<i>Recall of Butler-Wall</i> , 162 Wn.2d 501, 173 P.3d 265 (2007)	6
<i>Resident Action Council v. Seattle Housing Authority</i> , 177 Wn.2d 417, 299 P.3d 651 (2013).....	7
<i>Rufer v. Abbott Labs.</i> 154 Wn.2d 530, 114 P.3d 1182 (2005).....	21
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	11, 22
<i>Seattle Times v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	20
<i>State v. Fortun</i> , 94 Wn.2d 754, 626 P.2d 504 (1980).....	5
<i>State v. Olsen</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	5
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011)	1

Washington State Court of Appeals

<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (Div. III, 2002).....	4
<i>Telford v. Thurston County Bd. of Comm'rs</i> , 95 Wn. App. 149, 974 P.2d 886, <i>review denied</i> , 138 Wn.2d 1015 (1999)	13, 15

<i>Welch Foods, Inc. v. Benton County</i> , 136 Wn. App. 314, 148 P.3d 1092 (Div. III, 2006)	7
<i>West v. Wash. Ass'n of County Officials</i> , 162 Wn. App. 120, 252 P.3d 406 (2011)	13

Revised Code of Washington

RCW 13.50.260(c)(1)(A)(B)	3
RCW 24.03	12
RCW 36.28A.010	12, 13, 14
RCW 36.28A.020	14
RCW 36.28A.030(2)	14
RCW 36.28A.040(4)	14
RCW 36.28A.050	14
RCW 36.28A.220	14
RCW 36.28A.390	14
RCW 4.08.040	4
RCW 42.17.330	8
RCW 42.56.010	13
RCW 42.56.010(1)	13
RCW 7.40	9
RCW 7.40.020	10
RCW 9.94A.030(32)	2
RCW 9A.36.080	14

Washington State Court Rules on Appeal (RAP)

RAP 10.3(a)(3)	5
----------------	---

Washington State Superior Court Civil Rules (CR)

CR 10(a)	2, 6, 20
CR 17(a)	2, 6, 20
CR 20(c)	4
CR 4(b)(1)(i)	2, 6, 20

CR 65	9
CR 65(b)	9
Washington State Court Rules of General Application (GR)	
GR 15	19
GR 31(c)(4)(i)(ii)	19
Washington State Constitution	
WA Const. Art 1 sec. 10	6
Washington State Session Laws	
Session Laws of 1992 c 139 § 7	9

I. RESPONSE

Our Washington State Legislature and well established Supreme Court decisions over the past two decades has made crystal clear, the “public’s records are to be open and must be available for public inspection and copying absent a clear exemption applicable to a specific record. Our Legislature recognized that a government in secrecy is not conducive to the existence of an open and free society. The PRA is commonly referred to as “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); *Yakima v. Yakima Herald–Republic*, 170 Wn.2d 775, 790, 246 P.3d 768 (2011). Its underlying policy is evidenced by RCW 42.56.030. *Gendler v. Batiste*, 174 Wn.2d 244,251, 274 P.3d 346 (2012). This Court has repeatedly mandated that:

[t]he PRA's intent is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. [Former] RCW 42.17.251 [(1992), recodified as RCW 42.56.030]. **Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.** In the famous words of James Madison,

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”

Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed.1910). PAWS, 125 Wn.2d at 251.

Gendler v. Batiste, 174 Wn.2d 244, ¶13, 274 P.3d 346 (2012)(emphasis added). The very strong words of the PRA have been repeatedly interpreted by this Court to mean exactly what they say; mandatory broad disclosure and very limited withholding of the “public’s

records.” None-the-less, despite extensive written¹ as well as oral² argument clearly outlining applicable statutes and case law concerning the courts authority to act, the trial court declared that Respondents had right to file court documents without identifying the parties in interest as required by CR 4(b)(1)(i), CR 10(a) and CR 17(a)(CP 956-957; 1538-1540), certify a classes of sex offenders under RCW 42.56.540 (CP 524-528; 529-533), and enjoining records under RCW 7.40.020 that is so broad it encompasses any and all records including future requests. (CP 943-945; 1541-1556; 1557-1560; (RP (April 3, 2014) 14:14-17:5; 24:1-25). The trial court abused its discretion in this cause of action, ignoring legislative mandates and established case law at every step of the proceedings; including but not limited to Temporary Restraining Order, Preliminary Injunction and Permanent Injunction to enjoin the “public records.”

The requested records concern criminal acts and convictions that have been designated as a “most serious offense” by our Legislature (RCW 9.94A.030(32)). Sex offenses are considered to be so heinous and of such great public import that the Court is prohibited from sealing the court records of sex offenders; even those of juveniles.

1 The Zinks provided extensive written argument clearly outlining the legal authority concerning enjoining public records pursuant to RCW 42.56.540 (CP 342-366; 1167-1186; 1205-1224), use of pseudonym to hide identity of party of interest (CP 1133-1146) as well as Class Action Certification of all Level I sex offenders (1243-1260; 1261-1277). See also Zinks answers to summons and complaints (CP 1084-1104; 1836-1856).

The Zinks provided evidence of the relevance and need for public knowledge of all Level I sex offenders (CP 367-392; 1187-1204; 1225-1242) including the death of a baby by Level I compliant sex offender Jose Aguilar (CP 378-379), article stating mother searched official public web site and determined Jose Aguilar was not a sex offender prior to allowing him into her home (CP 381); Level I compliant sex offender, Kenneth Krause, providing false information on his residency in Franklin County while living in Benton County (CP 383); the registration form of Kenneth Krause posted on-line by Zink (CP 385); article concerning sex offenders working in day cares (CP 387-388); article concerning sex offenders working in schools (CP 390); a copy of an SSOSA evaluation released pursuant to Koenig v. Thurston County, 175 Wn.2d 837, 287 P.3d 523. (2012)(CP 371-376); and a copy of the third party notification letter sent to registered sex offenders by WASPC (CP 392).

2 The Zinks provided oral argument against use of pseudonym without sealing the records (RP (April 3, 2014) 3:19-6:10); trial court determined Ishikawa does not apply (RP (April 3, 2014) 6:11-18; enjoining any and all records (including e-mails) and all current and future requests (RP (April 3, 2014) 7:6-22; 18:6-23:12); and Class Certification (RP (April 3, 2014) 37:13-40:24; 50:15-25). Ms. Zink requested telephonic participation for future hearings which was granted by the court (RP (April 3, 2014) 46:11-19). However, Ms. Zink was not allowed to provide oral argument telephonically (RP (May 2, 2014) 29:25-30:8).

A court shall enter a written order sealing an individual's juvenile court record pursuant to this subsection if:

(i) One of the offenses for which the court has entered a disposition is not at the time of commission of the offense:

(A) A most serious offense, as defined in RCW 9.94A.030;

(B) A sex offense under chapter 9A.44 RCW; or

(C) A drug offense, as defined in RCW 9.94A.030; and

(ii) The respondent has completed the terms and conditions of disposition, including affirmative conditions and financial obligations.

RCW 13.50.260(c)(1)(A)(B). Respondents ask this court to uphold the decisions made in this cause of action by the various trial judges involved because the Zinks did not cite to the record or provide appropriate argument with citation.

Respondent claim the Court must completely and utterly ignored all state statutes concerning criminals and sex offenders as well as the requirements of RCW 42.56.540 and read RCW 4.24.550 as a standalone statutory exemption for the sake of the mental and physical wellbeing of those convicted of sex offenses. Respondents ask this Court to uphold the declaratory determination of the trial court that RCW 4.24.550, a proactively statute enacted to require law enforcement to release sex offender records without need of a public record request, is an independent statute that allows convicted sex offenders right to secret any and all records identifying them as sex offenders from the people.

Respondents' arguments fail. A determination that RCW 4.24.550 is the exclusive means of access to the "public's" records is in opposition to clear and unequivocal statutes and laws enacted by our legislature as well as established case law. Exemption of record must be very narrowly construed, with very broad disclose the "public's records" to the public. RCW 42.56.030. RCW 4.24.550 is not a carefully constructed statutory scheme for release of any and all public records concerning sex offenders. RCW 4.24.550 is a proactive statute requiring law enforcement to release records without being asked.

II. RCW 4.08.040

In footnote 1 of their briefing,³ Respondent's object to the inclusion of Jeff Zink as a party. Ms. Zink was summoned into these proceedings as a "married woman" (CP 1007-1010; 1011-1024; 1641-1649). Donna Zink and Jeff Zink are married.

If the spouses or the domestic partners are sued together, either or both spouses or either or both domestic partners may defend, and if one spouse or one domestic partner neglects to defend, the other spouse or other domestic partner may defend for the nonacting spouse or nonacting domestic partner also. **Each spouse ... may defend in all cases in which he or she is interested, whether that spouse ... is sued with the other spouse ... or not.**

RCW 4.08.040 (emphasis added). *Mangham v. Gold Seal Chinchillas*, 69 Wn.2d 37, 416 P.2d 680 (1966)(discussing CR 20(c) and its application to married parties pursuant to RCW 4.08.040 finding [t]his rule is not to be considered as an abrogation of RCW 4.08.040 dealing with joinder of husband and wife. (*Id.* 40)). Pursuant to State Statute, Jeff Zink is and has been a party to this action since it was initiated by Respondents whether named or not.

III. ERROR WAS PROPERLY ASSIGNED AND ISSUES ARE NOT LIMITED

Respondents claim, without reference, that much of the Zinks seventy-six assignments of error, many with multiple subparts, have no argument or citation to the records. Citing to *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (Div. III, 2002). In *Milligan*, Division II determined that:

Although he reasserted at oral argument that the court could look only at the ruling, not at the underlying facts, **he cited no relevant authority** for this at

³ Brief of Respondents John Does page 4.

oral argument or in his brief. **A party waives an assignment of error not adequately argued in its brief.** *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990); RAP 10.3(a)(5).

(*Id.* 635)(emphasis added). The Zinks provided legal authority (see Brief of Appellants Donna and Jeff Zink - Table of Authorities pg. iii-v), argument as to how the legal authority applies to the issues on review (Table of Contents pg. i-ii) as well as assigning error with citation to the record (Zink briefing- Issues Pertaining to Assignment of Error pgs. 6-21). The Zinks clearly identified the legal issues upon which they request review in their assignment of errors (including legal issues), provided a list of issue presented for review and separate written argument on each of the issues before the Court in their briefing as well as in their Grounds for Direct Review. Appellants have clearly outlined that there are three questions before this court concerning the release of these public records. The use of pseudonym, class action certification pursuant to RCW 42.56.540, and the injunction of any and all records identifying Level I sex offenders; even future requests.

In *State v. Fortun*, 94 Wn.2d 754, 756, 626 P.2d 504 (1980), our Supreme Court opined that:

RAP 10.3(a)(3) requires an appellant's brief to contain a concise statement of each asserted trial court error, together with the issues pertaining to the assignments of error. In addition, RAP 10.3(a)(5) requires argument in support of the issues presented for review, together with citations to legal authority. In appealing the trial court's pretrial order of suppression . . . the State complied with RAP 10.3(a)(3) and (5). It did not, however, assign error to or argue the more basic and underlying order which dismissed the charge against respondent.

(*Id.* 756). See also Supreme Court decision in *State v. Olsen*, 126 Wn.2d 315, 893 P.2d 629 (1995) failure to assign error or argue underlying order precludes review. The Zinks have properly cited to both the record and legal authority for their arguments as well as

assigned error to the Order to Proceed in Pseudonym (CP 1811-1823; 1675-1684), Class Action Certification (CP 524-528; 529-533), Temporary Restraining Order (TRO)(CP856-858; 1081-1083), Preliminary Injunction (943-945; 1557-1560; 1541-1556), and Permanent Injunction (561-570). All of those actions were in violation of the PRA requirements pursuant to RCW 42.56.540 as each one used the wrong legal standard. Furthermore, the TRO order, Preliminary Injunction and Permanent Injunction were issued without a party of interest in violation of CR 4(b)(1)(i), CR 10(a), and CR 17(a), and are unconstitutional decisions (WA Const. Art 1 sec. 10).

In this cause of action all of the findings, conclusions or orders by the respective Superior Court justices making any particular legal determination are challenged for legal sufficiency, abuse of discretion, /or error of law, and constitutionality. (CP 1565-1640: *Brief of Appellants Jeff and Donna Zink*; pgs. 6-21 and 24; *Zink Statement of Grounds for Direct Review* pgs. 2-3). Respondents have properly identified that the Zinks request review of seventy-six (76) assignments of error, many with more than one legal question presented. (*Brief of Respondents John Does Section III Argument* pg. 4).

The Zinks specifically pointed to each section in the assignment of errors to which the argument pertained and provided legal authority for their arguments.

We have discretion to decide an issue a party fails to argue in its initial brief, especially where, as here, the party raised it below and addresses it in a reply brief. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

Recall of Butler-Wall, 162 Wn.2d 501, ¶24, 173 P.3d 265 (2007).

Preliminarily, we reject the County's argument that Welch waived its assignments of error by failing to properly reference the challenged findings of fact. RAP 10.3(a)(5). Welch provided legal authority and references in the argument section of its brief and provided the findings and conclusions in an appendix to its reply brief. Thus, the suggested RAP violation has not hindered our review.

Welch Foods, Inc. v. Benton County, 136 Wn. App. 314, ¶13, 148 P.3d 1092 (Div. III, 2006). The Zinks properly filed a request for review of the entire proceedings concerning the enjoining of these “public’s” records starting from Respondents filing summons and complaint without an identified party of interest, TRO, preliminary injunction, class action certification pursuant to RCW 42.56.540 as well as allowing use of pseudonym to obscure identity of parties in court records without properly sealing the court records using the Ishikawa factors

IV. THE REQUIREMENTS OF CHAPTER 42.56 RCW CONTROLS

Pursuant to well established case law, RCW 42.56.540 is the exclusive means for enjoining public records under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.d2 398, ¶12, fn. 2, 259 P.3d 190 (2011). Whether RCW 4.24.550 is an “other statute” exemption only answers one prong of RCW 42.56.540. Once WSP and WASPC notified third parties rather than claim exemption pursuant to RCW 4.24.550 the court is required to apply RCW 42.56.540 in enjoining public records.

RCW 42.56.540 requires that a record, subject to an exemption, must be enjoined by a party named in that specific record if: 1) **the record specifically pertains to that person**; 2) **the public has no interest in the record(s)**; and 3) actual injury to that person will occur. Furthermore any exemption must be applied to each requested record. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 299 P.3d 651 (2013).

If one of the PRA's exemptions applies, **a court can enjoin the release of a public record only if disclosure "would clearly not be in the public interest** and would substantially and irreparably damage any person, or . . . vital governmental functions." RCW 42.56.540; *Soter*, 162 Wn.2d at 757. Because we find that none of the PRA's exemptions apply, we need not consider this issue. However, we note that the public interest in disclosing the report is substantial. As an elected official, Judge Morgan is accountable to

the voters, and the voters are entitled to information regarding his job performance. **Even if the Stephson Report qualified for one of the exemptions, Judge Morgan has not shown that disclosure "would clearly not be in the public interest." To the contrary, the public has a substantial interest in disclosure of information related to an elected official's job performance.**

Morgan v. City of Federal Way, 166 Wn.2d 747, ¶13, 213 P.3d 596 (2009). As in the *Morgan* case, the records sought by Ms. Zink are of great public interest. *Personal Restraint of Meyer*, 142 Wn.2d 608, 621, 16 P.3d 563 (2001).

RCW clearly and unequivocally requires the person seeking to enjoin the records must be named in the record or the record must specifically pertain to that person. This was made abundantly clear by our legislature in 1992 when the language of RCW 42.17.330⁴ was changed to include those very words.

- a. **Sec. 7.** RCW 42.17.330 and 1975 1st ex.s. c 294 s 19 are each amended to read as follows:
- b. 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.

⁴ Recodified at RCW 42.56.540.

See Session Laws of 1992 c 139 § 7(emphasis not added). By including the requirement that the person wishing to enjoin a public records must be named in that specific record our legislature precluded class action certification to enjoin any and all of the “public’s” records under RCW 42.56.540.

V. THE TRIAL COURT USED THE WRONG LEGAL STANDARD

In granting Respondents request for injunctive relief the trial court exclusively relied on RCW 7.40 and CR 65.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicants attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

CR 65(b).

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears in the complaint at the commencement of

the action, or during the pendency thereof, by affidavit, that the defendant threatens, or is about to remove or dispose of his or her property with intent to defraud his or her creditors, a temporary injunction may be granted to restrain the removal or disposition of his or her property.

RCW 7.40.020. The legal authority allowing a court to enjoin public records is exclusively found at RCW 42.56.540.

RCW 42.56.540 specifically governs the court's power to enjoin the production of a record under the PRA. We have long recognized that where two statutes apply, the specific statute supersedes the more general statute. *Gen. Tel. Co. of the Nw., Inc. v. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). **Because RCW 42.56.540 is specific to injunctions against production under the PRA, it is the governing injunction statute in this case.**

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, ¶12, fn. 2, 259 P.3d 190 (2011)(emphasis added).

The plain language of RCW 42.56.540 allows "an agency or its representative or **a person who is named in the record or to whom the record specifically pertains**" to file a motion or affidavit asking the superior court to enjoin disclosure of a public record. (Emphasis added.) Therefore, it is clear that either agencies or persons named in the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction.

Soter v. Cowles Publ'g Co., 162 Wn.2d 716, ¶58, 174 P.3d 60 (2007). This Court has specified that

In order to prevail in a challenge to the production of records under the PRA, **a party must establish a specific exemption that bars production of the requested records.** RCW 42.56.070(1); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (PAWS II). As

noted, the PRA reflects a strong public policy favoring the disclosure and production of information, and exemptions are to be narrowly construed. RCW 42.56.030. Moreover, **a party opposing the production of public records must establish that production 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."** RCW 42.56.540; see *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 756-57, 174 P.3d 60 (2007).

Seattle Times Co. v. Serko, 170 Wn.2d 581, ¶18, 243 P.3d 919 (2010)(emphasis added).

As indicated above, the PRA contains exemptions that protect certain information or records from disclosure. «9» See RCW 42.56.070, .230-.480, .600-.610. **The exemptions are intended to "exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government."** *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Id.* at 612; RCW 42.56.540, .550(1); see also *Ames v. City of Fircrest*, 71 Wn. App. 284, 296, 857 P.2d 1083 (1993). Thus, if an agency is claiming an exemption, the agency bears the burden of proving it applies. RCW 42.56.550(1). **If it is another party, besides an agency, that is seeking to prevent disclosure, then that party must seek an injunction. RCW 42.56.540. In such a case, the party must prove (1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.** *Id.*; see *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007); see also *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 591, 243 P.3d 919 (2010).

Ameritrust Mortg. Co. v. Office of Attorney Gen., 177 Wn.2d 467, ¶35, 300 P.3d 799 (2013)(emphasis added)(see footnote nine below)

Including the "other statute" exemption that enables the GLBA's protections to control where applicable.

(*Id. fn. 9*). This Court has mandated over and over that RCW 42.56.540 is the controlling chapter giving a trial court the authority to enjoin the "public's" records whether it is a TRO, preliminary or permanent injunction and the trial court abused its discretion when it refused to apply RCW 42.56.540 in this cause of action. Furthermore, RCW 42.56.540 precludes certification of a class as only a person named in the requested record can request the record be enjoined.

VI. RESPONSE TO ARGUMENT OF WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

1. By Definition WASPC is a Public Agency

WASPC argues in their briefing to the Court that they are not a public agency because they are a non-profit organization tasked by the legislature to "create and maintain a statewide registered kidnapping and sex offender website (WASPC Brief pg. 1). WASPC claims that because they are organized under chapter 24.03 RCW as a non-profit organization and a combination of units of local government under RCW 36.28A.010 and their members, consisting of top personnel from Washington law enforcement agencies, are not employees and do not receive government employee benefits they are not a "public agency." First, if their members are top officials from Washington law enforcement agencies, their members are already paid government employees. A public agency is defined in Chapter 42.56 RCW as

"Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose

district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1). By definition WASPC is another local public agency. They were created by Legislative enactment in 1975 to oversee a variety of law enforcement programs.

The Washington association of sheriffs and police chiefs is hereby declared to be a combination of units of local government; PROVIDED, That such association shall not be considered an "employer" within the meaning of RCW *41.26.030(2) or **41.40.010(4); PROVIDED FURTHER, That no compensation received as an employee of the association shall be considered salary for purposes of the provisions of any retirement system created pursuant to the general laws of this state; PROVIDED FURTHER, That such association shall not qualify for inclusion under the unallocated two mills of the property tax of any political subdivision; PROVIDED FURTHER, That the association shall not have the authority to assess any excess levy or bond measure.

RCW 36.28A.010. Courts have mandated that to determine whether an agency is a public agency as defined by RCW 42.56.010, the Court must apply the Telford Test. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 161-166, 974 P.2d 886, review denied, 138 Wn.2d 1015 (1999).

In *Telford*, we applied a four-factor balancing test to hold that WACO was an "agency" for purposes of the campaign finance portions of the PRA. 95 Wn. App. at 162. The four factors used to evaluate an entity's status under the PRA are **(1) the entity's governmental function, (2) the entity's government funding, (3) government control over the entity, and (4) the entity's origin.** *Telford*, 95 Wn. App. at 162-63.

West v. Wash. Ass'n of County Officials, 162 Wn. App. 120, ¶11, 252 P.3d 406 (2011).

WASPC was created by by our legislature (RCW 36.28A.010). The function of WASPC is very broad and is found at Chapter 36.28 RCW (RCW 36.28A.010- RCW 36.28A.390).⁵ Although WASPC claims they are only tasked with duties pursuant to RCW 4.24.550, in fact, WASPC is tasked with many governmental duties concerning law enforcement throughout the State of Washington.

The Washington association of sheriffs and police chiefs may, upon request of a county's legislative authority, assist the county in developing and implementing its local law and justice plan. In doing so, the association consults with the office of financial management and the department of corrections. RCW 36.28A.020. All local law enforcement agencies report monthly to WASPC concerning all violations of RCW 9A.36.080 and any other crimes of bigotry or bias in such form and in such manner as prescribed by rules adopted by the association. RCW 36.28A.030(2); WASPC appoints, convenes, and manages the statewide jail booking and reporting system standards committee RCW 36.28A.040(4) as well as develops and amends the standards for the statewide jail booking and reporting system and for the information that must be contained within the system as needed. (*Id.* (4)(a)).

WASPC is tasked with applying for and distributing federal and state moneys for jail booking system (RCW 36.28A.050) and programs in graffiti and tagging abatement and reducing gang crime (RCW 36.28A.220). Some of WASPC other duties include, a statewide victim information and notification system, first responder mapping information system, firearms certification for law enforcement, missing persons, auto theft prevention, gang crimes, graffiti crimes, sobriety programs, and administration of several crime related grant programs.

⁵ There are other Statutes outlining the duties of WASPC. The Zink are only apply the duties found in Chapter 36.28A RCW.

WASPC statement that they are only to be considered a “public agency” in respects to the registered sex and kidnapping offender’s records is incorrect. WASPC was created by legislature to perform public duties. WASPC gets its funding from our legislature and state and federal grants which WASPC is in charge of distributing to law enforcement agencies across the state. Using the criteria set out in Telford, see above, WASPC meets all four criteria and WASPC is a public agency. When public dollars support activities by taxpayer-supported entities to which the legislature has assigned specific statutory duties, performance of these duties must be verifiable by members of the public. *West v. Wash. Ass’n of County Officials*, 162 Wn. App. 120, ¶20, 252 P.3d 406 (2011).

2. Per Diem Penalties

WASPC wrongly states that an agency cannot be held liable for per diem penalties pursuant to a court injunction. This assumption is incorrect.

Per Diem Penalties: We take this opportunity to clarify our holdings with regard to per diem penalties. The Court of Appeals implied that the agency can be spared per diem penalties if it initiates an action in superior court. *Soter*, 131 Wn. App. at 907. That reasoning does not coincide with our holding that once a court determines that a requester was entitled to inspect public records, the trial court is required to impose a penalty within the statutory range for each day records were withheld. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 189, 142 P.3d 162 (2006). The trial court may not reduce the penalty period, even if the requester could have filed suit against the agency sooner than it did. *Yousoufian*, 152 Wn.2d at 438. As amici explain, the advantage to going to court is that the agency can obtain quick judicial review, curbing, but not eliminating, the accumulation of the per diem penalties. Br. of Amici Schools Risk Mgmt. Pool at 18.

Soter v. Cowles, 162 Wn.2d 716, ¶63, 174 P.3d 60 (2007)(emphasis added). See also RCW 42.56.550(4). The court shall award penalties not to exceed one hundred dollars for each day a requester is denied the right to inspect or copy said public records.

WASPC argues that Ms. Zink has not been denied access to public records. WASPC had no duty to notify third parties. In doing so WASPC wrongfully delayed the release of records they knew were not exempt from disclosure by notifying convicted felons and providing them with Ms. Zink contact information despite any danger to Ms. Zink or her family.

And we agree with their analysis and technical reading of the statute, that there's frankly no identified exemption in the PRA, so how can we comply -- how can we not comply with the PRA? But the other half of my -- the other part of my clients say, We feel that there's something about a blanket disclosure of all this information about these level 1 offenders to someone like Ms. Zink, who has made it very clear that she plans on posting it on a public website." And it's kind of a scarlet letter, so to speak, that they're going to have to deal with.

And my clients recognize that -- or the group of my clients' members recognize that maybe that's not in the best interests of these people. So that's why WASPC is kind of in this position where we're arguing to you that, based upon the language of the statutes, we don't see how we can not give this information out. **But on the other hand, we see a problem with it and we hope the courts can help narrow that scope of that problem.** Now, there's a level under this.

If someone went out to each local agency and court and requested records regarding sex offenders, frankly, they could gather the majority of this information that is considered public record, that you could get from a courthouse. An individual person could go do that, could gather, and then post it on a website. And there's not a darn thing we can do about it. That's it. They have that access and they have a right to get those records. **But what really makes people uncomfortable here is that the State has gathered all this information, and put it into one place, and has asked my client, WASPC, to post it on a website.**

And the way -- the State Patrol gathers it and has it. And now, it's all in this single repository that people can go get it. Now, granted, that individual going to get that information from those individual court files might not get the full scope of information that we have access to, but they can certainly get the offenses, they can certainly get when, the names, information about that, and do effectively the same thing.

So what really people are uncomfortable -- is how this has come about. Now, my client specifically would love to see the blanket exemption that's being requested. Partly, you know, practically, they don't have the budget to deal with a bunch of different requests asking them to make this analysis. The other thing is, what the Plaintiffs are asking you to do is say that we've got to do an individual analysis here. Well, individual analysis on what?

If you've got someone that is from a different county, that is fearful of sex offenders in the next county, you're asking us as an agency to determine whether that is a reasonable fear and that, that was -- the information should be not disclosed to them because they're not in the same county. Well, what if they intend to travel to the same county? Making an individual determination on each basis doesn't work for those particular reasons and it's different than the community notifications that's been required, that the statute says, "You've got to make the analysis of when you're going to notify the community."

Is it something you think that this is enough risk where you've got to give a blanket notification? That's different than under the PRA. The PRA doesn't reference or give the exemption it's looking for here. And when you have to look at the PRA in such a broad scope to keep government open, I don't think you can read into it exemptions like they are asking for.

And I recognize I am speaking out of both sides of my mouth here and it's uncomfortable, but those are the issues that we want the Court to help address. And the more you narrow the scope of the proposed injunction, it's better until another court, the legislature makes a decision. And I've

also got to -- my client has to take some responsibility for this a little bit because they were involved in lobbying and creating the statute.

And so of course, there's these unintended consequences that we find ourselves dealing with right now. So with that being said, I'm going to close, Your Honor, saying that, technically, **we agree with Washington State Patrol's arguments, but practically, we recognize that there's a problem with what's being requested and how it's going to be disclosed. We need to limit that somehow.**

(RP (May 2, 2014) 18:18-22:6)(emphasis added). However, the Zinks agree that unless this Court is going to find that WASPC and WSP were acting in the worst bad faith in notifying third parties felons and instructing them to seek injunction to stop production of these records and award \$100 per diem penalties, then the matter should be remanded for penalty assessment.

VII. PSEUDONYM USE IS NOT PROPER OR NECESSARY

3. Open Administration of Justice is a Vital Constitutional Safeguard

Respondents argue *Ishikawa* is inapplicable to this cause of action because nothing in the court record is sealed or redacted and the public's ability to access the administration of justice is unfettered. (Does Brief at 21). Although the public would have the same access as the Zinks and the reviewing court, in that no one but the legal representatives and public agency involved know the identity of the parties, use of pseudonym to obscure the identity of a party to an action is sealing of court records. *Hundtofte v. Encarnacion*, 176 Wn.2d 1019, 297 P.3d 707 (2014). Redaction and sealing of court records must strictly adhere to use of the *Ishikawa* factors as well as enunciate findings and conclusions, in written form, outlining the specific reasons for allowing secrecy in our judicial system. Furthermore, the trial court was required to review each and every Plaintiff requesting to enjoin all compliant Level I sex offenders on an individual basis.

4. Definition of a Court Record

The definition of a “Court Record” includes, but is not limited to:

- i. Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and
- ii. Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding...

GR 31(c)(4)(i)(ii)(emphasis added). The summons, complaint, motions, memorandum, orders, judgment, SCOMIS indices, docket, declarations, and affidavits are part of the official records of the court proceedings making them court records as defined by GR 31(c)(4)(i). All of these records require application of GR 15 and the *Ishikawa Factors* prior to allowing use of pseudonym to hide the identity of all parties. To find otherwise is in direct opposition to this Court’s decision in *Hundtofte*. Further, in *Hundtofte* our Supreme Court determined that:

As a threshold matter, we note that the SCOMIS indices are a court record. GR 31 defines a “court record” as including “[a]ny index, calendar, docket, register of actions, official record of the proceedings and any information in a case management system created or prepared by the court that is related to a judicial proceeding.” GR 31(c)(4)(ii). **GR 15 governs the destruction, sealing, and redaction of court records, and it “applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.”** GR 15(a). **The SCOMIS indices are court records because they are both an “index” and “information in a case management system created or prepared by the court that is related to a judicial proceeding.”** GR 31(c)(4)(ii). A motion to redact the indices must be evaluated under GR

15. GR 15(c). The superior court properly treated the motion to redact the indices as a motion to redact a court record.

Hundtofte v. Encarnacion, 176 Wn.2d 1019, ¶8, 297 P.3d 707 (2014)(emphasis added). The SCOMIS index, docket and calendar in this cause of action has been redacted through use of pseudonym in violation of our constitution and legal authority. The trial court's decision that it was unnecessary to seal court records in these causes of action is unconstitutional (RP (April 3, 2014) 6:11-18).⁶

There is a large body of well-established of Washington case law concerning the issue of sealing court records and use of pseudonym to redact and obscure the identity of a party, including juveniles. In applying its discretion to close court records to access by the public, the Court is mandated by our Supreme Court to apply the Ishikawa Factors (*Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982)).

Respondents filed a summons (CR 4)(b)(1)(i)), complaint (CR 10(a)), as well as all motions, orders, and declarations in redacted form without identifying the true names of the parties in interest (CR 17(a)). The trial court refused to follow proper court procedure to determine whether each Respondent requesting to be representative of the "class" had right to hide his identity from the public pursuant to the Ishikawa factors. As such, no true party of interest has been identified as required by CR 17(a) and RCW 42.56.540.⁷ This is an erroneous application of our laws and state constitution and violates the Zinks' constitutional right to know the party summoning them into this cause of action.

⁶ Appellant Zinks were not joined prior to Judge Rietschel's order to allow the parties to proceed in pseudonym (CP 956-957) and can find no testimony concerning the sealing of the records in Cause #13-2-41107-5. It is therefore assumed that the Order signed allowing Does to proceed in pseudonym on December 30, 2013 was heard without oral arguments.

⁷ RCW 42.56.540 mandates that only a party specifically named in a specifically requested record or to whom a specifically identified record applies can petition a court for enjoinderment.

The outcome has consistently been the same in each and every case. A court must apply the *Ishikawa Factors* and provide written findings clearly showing compelling reasons for closure and secrecy of the courts records. *Rufer v. Abbott Labs.* 154 Wn.2d 530, 535, 114 P.3d 1182 (2005). In *Allied Daily Newspapers v. Einkenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) this court struck down the portion of SHB 2348 (Laws of 1992, ch. 188, § 9) which allowed the identity of child victims of sexual assault to be kept out of the public or the press during the trial and in court records because section 9 did not allow trial courts to comply with the *Ishikawa* guidelines. This Court found section 9 to be an unconstitutional violation of the open access to justice requirement of Const. art. 1, § 10 as it did not allow for the balancing standard to be applied on a case-by-case basis. (*Id.* 211-213).

In the present case, the competing interests are also compelling: to protect the child victim from further trauma and harm and to ensure the child's privacy as guaranteed under Const. art. 1, § 7. These interests on an individualized basis may be sufficient to warrant court closure. Section 9 of SHB 2348 does not permit such individualized determinations, is not in accordance with the *Ishikawa* guidelines, and is therefore unconstitutional.

(*Id.* 211). This Court has consistently found that the administration of justice done in secrecy erodes the trust in our judicial system and must be not be allowed except under the most unusual of circumstances. This mandate from this court has been consistent.

In keeping with our state constitution's mandate for open justice, court rules require a hearing *before* court records are sealed or redacted, and this procedure was not followed before entering the ex parte sealing order. GR 15(c)(1). ... The sealing of court records in this instance constituted a court closure to the extent it removed from public access documents marked as exhibits or admitted into open court. *Rufer*, 154 Wn.2d at 549. In order to make such a closure, the trial court was required to engage in an on-the-record analysis of the factors outlined in *Ishikawa* and to set forth findings

supporting a determination "that there is a compelling interest which overrides the public's right to the open administration of justice." *Id.* The June 9 order lacks any discussion of *Ishikawa*. Accordingly, it must be vacated. *Seattle Times Co. v. Serko*, 170 Wn.2d 581, ¶32, 243 P.3d 919 (2010)(emphasis added)(footnote omitted). None the less Respondents claim the trial court had the inherent authority given it in *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637, P.2d 966 (1981) to control their records and proceedings" and the trial court used its inherent authority to allow Plaintiffs to an action file in pseudonym because the very act of using their real names would cause the very harm they were seeking to prevent. (Brief of John Does pg. 20)

While our courts do have the inherent authority to control their records and proceedings that authority is derived in our Constitution, Statutes, and Court rules. The Court in *Cowles* refused to determine the extent of the courts "inherent authority" because the records at issue were not before them.

The common law presumption of openness of judicial records is subject to certain limitations, however. Courts have the inherent authority to control their records and proceedings. *NIXON v. WARNER COMMUNICATIONS, INC., SUPRA: IN RE SEALED AFFIDAVIT(S) TO SEARCH WARRANTS*, 600 F.2d 1256 (9th Cir. 1979). **We need not and do not attempt to determine the possible resolution of the extent of that inherent authority as to records not before us here.**

Cowles Pub. Co. v. Murphy, 96 Wn.2d 584, 588, 637, P.2d 966 (1981). In this cause of action the records before the court are any and all court records using pseudonym in place of the name of the true party.

Article I, section 10 of our constitution states that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10. The openness of our courts "is of utmost public importance" and helps "foster the public's understanding and trust in our judicial system." Dreiling

v. Jain, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). Thus, we must start with the presumption of openness when determining whether a court record may be sealed from the public. Rufer, 154 Wn.2d at 540. Any exception to this “vital constitutional safeguard” is appropriate only in the most unusual of circumstances. In re Del of D.F.F., 172 Wn.2d 37, 41, 256 P.3d 357 (2011). The party moving to override the presumption of openness and seal court records usually has the burden of proving the need to do so. Rufer, 154 Wn.2d at 540.

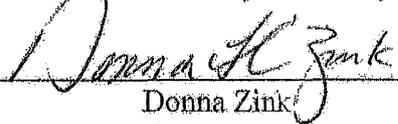
Hundtofte v. Encarnacion, 176 Wn.2d 1019, ¶9-10, 297 P.3d 707 (2014)(emphasis added).

Respondents claim that the simple fix is to remand back to the trial court for reconsideration of the Ishikawa Factors. This is costly to litigants and should not be allowed. If Respondents knew the Ishikawa Factors needed to be followed they should have followed them. Remanding the issue will only prolong the conclusion of this case and further delay release of the ‘public’s’ records.

VIII. CONCLUSION

For the reasons stated herein, the Zinks respectfully request this court to overturn the decision of the trial court on every finding, conclusion and order.

RESPECTFULLY SUBMITTED this 14th day of January 2015

By 

Donna Zink
Pro se

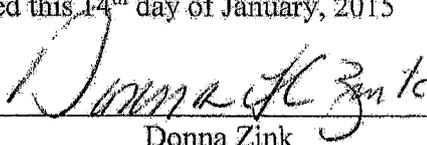
IX. CERTIFICATION OF SERVICE

I declare that on the 14th day of January, 2015, I did send a true and correct copy of appellant's "REPLY BRIEF OF APPELLANTS DONNA AND JEFF ZINK" via e-mail service to the following addresses as agreed upon by all parties to this matter:

- VANESSA T. HERNANDEZ @ vhernandez@aclu-wa.org;
- SARA A. DUNNE @ dunne@aclu-wa.org;
- DAVID B. EDWARDS @ dedwards@correronin.com;
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- JULIE PEREZ @ julie@smithalling.com.

Dated this 14th day of January, 2015

By



Donna Zink

Pro se

OFFICE RECEPTIONIST, CLERK

To: Donna Zink
Cc: 'Jeff Zink'; vhernandez@aclu-wa.org; dunne@aclu-wa.org; 'Edwards, David'; 'Fogg, Steven'; dpatterson@corrchronin.com; gpan@corrchronin.com; 'Williams, Shelley (ATG)'; 'CJDSeaEF@atg.wa.gov'; 'Jackson, Elizabeth (ATG)'; mmc@smithalling.com; 'Julie Perez'; ewixler@aclu-wa.org
Subject: RE: Reply Brief of Jeff and Donna Zink - Washington State Patrol et al v. John Doe A et al Cause #90413-8

Received 1-14-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Donna Zink [mailto:dzink@centurytel.net]
Sent: Wednesday, January 14, 2015 4:21 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Jeff Zink'; vhernandez@aclu-wa.org; dunne@aclu-wa.org; 'Edwards, David'; 'Fogg, Steven'; dpatterson@corrchronin.com; gpan@corrchronin.com; 'Williams, Shelley (ATG)'; 'CJDSeaEF@atg.wa.gov'; 'Jackson, Elizabeth (ATG)'; mmc@smithalling.com; 'Julie Perez'; ewixler@aclu-wa.org
Subject: RE: Reply Brief of Jeff and Donna Zink - Washington State Patrol et al v. John Doe A et al Cause #90413-8

To the Clerk of the Supreme Court:

Please find attached our Reply Briefing in Supreme Court Cause #90413-8 – Washington State Patrol et al v. John Doe A, et al.

The briefing is being submitted by

Donna Zink acting pro se
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Thank you

Donna L.C. Zink