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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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JOHN DOE A, et al.

Plaintiffs/Respondents,

vs.

WASHINGTON STATE PATROL, et al.

Defendants/Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jean Rietschel)

Case No. 13-2-41107-5 SEA

WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS
("WASPC") BRIEF IN RESPONSE

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 ORIGINAL

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. COUNTERSTATEMENT OF ISSUES ON REVIEW 3

III. STATEMENT OF THE CASE..... 4

 A. WASPC’S Organization 4

 B. The January 23, 2014 Public Records Request 4

IV. ARGUMENT 6

 A. Standard of Review..... 6

 B. WASPC Is Not A Washington State Agency, And
 Generally Not Subject To The Public Records Act 7

 C. WASPC’s Sex Offender Database Is Not Exempt From
 Disclosure Under The Public Records Act. 9

 D. The Trial Court Improperly Created a Three Part Test for
 Disclosure of Information Under the PRA 10

 E. The Requestor Is Not Entitled To A Monetary Award..... 12

 F. The Requestor Is Not Entitled To Fees Or Costs On
 Appeal. 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

<i>Andrews v. Wash. State Patrol</i> , ---Wn. App. ---, 334 P.3d 94 (2014)	13
<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008)	9
<i>Brouillet v. Cowles Pub'g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990)	10
<i>City of Lakewood v. Koenig</i> No. 89648-8 (Wa. Sup. Ct., December 11, 2014)	19
<i>Confederated Tribes of Chehalis Reservation v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998)	18
<i>DeLong v. Parmelee</i> , 157 Wn. App. 119, 236 P.3d 936 (2010)	9, 12
<i>Folsom v. Burger King</i> , 133 Wn.2d 658, 958 P.2d 301 (1998)	7
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	9
<i>Heg v. Alldredge</i> , 157 Wn.2d 154, 137 P.3d 9 (2012)	17
<i>Hobbs v. State</i> , ___ Wn. App. ___, 335 P.3d 1004 (2014)	14
<i>Martin v. Riverside School Dist. No. 416</i> , 180 Wn. App. 28, 329 P.3d 911 (2014)	9
<i>Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS II)</i> 125 Wn.2d 243, 884 P.2d 592 (1994)	7, 9, 10

<i>Residential Action Council v. Seattle Housing Authority,</i> 177 Wn.2d 417, 327 P.3d 600 (2013).....	8, 12
<i>Sanders v. State</i> 169 Wn.2d 827, 240 P.3d 120 (2010).....	16
<i>Seattle Fire Fighters Local 27 v. Hollister,</i> 48 Wn. App. 129, 737 P.2d 1302 (1987).....	18
<i>Soter v. Cowles,</i> 162 Wn.2d 716, 174 P.2d 60 (2007).....	6
<i>Spokane Police Guild v. Wash. State Liquor Control Bd.,</i> 112 Wn.2d 30, 769 P.2d 283 (1989).....	18
<i>Spokane Research & Def. Fund v. City of Spokane,</i> 99 Wn. App. 452, 994 P.2d 267 (2000).....	9
<i>State v. McDonald,</i> 138 Wn.2d 680, 981 P.2d 443 (1999).....	17
<i>Yakima Newspapers Inc. v. City of Yakima,</i> 77 Wn. App. 319, 890 P.2d 544 (1995).....	16
<i>Yakima Cnty. v. Yakima Herald-Republic</i> 170 Wn.2d 775, 246 P.3d 768 (2011).....	15, 16
<i>Yousoufian v. Office of Ron Sims</i> 152 Wn.2d 421, 98 P.3d 463 (2004).....	13

STATUTES

RCW 4.24.550	<i>passim</i>
RCW 4.24.550(5)(a).....	1, 8
RCW 4.24.550(9)	10
RCW 9A.44.130.....	8
RCW 24.03	4, 7
RCW 36.28A.010.....	4, 7
RCW 42.17.340(4).....	16

RCW 42.56	1, 4, 5
RCW 42.56.010(3)	8
RCW 42.56.030	9
RCW 42.56.070	6, 11
RCW 42.56.070(1)	9
RCW 42.56.520	13, 17
RCW 42.56.540	14
RCW 42.56.550	16
RCW 42.56.550(1)	14
RCW 42.56.550(3)	6
RCW 42.56.550(4)	15

OTHER AUTHORITIES

RAP 14.....	18
-------------	----

I. INTRODUCTION

At issue in this case is whether information maintained by the Washington Association of Sheriffs and Police Chiefs (“WASPC”) relating to sex offenders and kidnappers is a public record subject to disclosure under the Public Records Act (“PRA”) (chapter 42.56 RCW), or if it is exempt from disclosure under the Community Protection Act’s notification provisions (RCW 4.24.550).

WASPC is a Washington Nonprofit Association, not a state agency, which was tasked by the legislature to “create and maintain a statewide registered kidnapping and sex offender website.” RCW 4.24.550(5)(a). The website is created by compiling sex offender registration information statewide, which distinguishes between level I, level II, and level III sex offenders. The amount of information available to the public on the website differs for each offender depending on the offender’s level classification. Information relating to the release of information from the database for certain level I sex offenders is the subject of this litigation.

On January 23, 2014, WASPC received the public records request at issue from Ms. Zink. After determining the information requested was subject to public disclosure, WASPC notified affected level I sex offenders of its intent to disclose, unless a court order enjoined WASPC

from doing so. On February 27, 2014, a King County Superior Court Commissioner entered a Temporary Restraining Order (TRO) against WASPC. On May 15, 2014, the King County Superior Court enjoined WASPC from disclosing level I sex offender information in response to Ms. Zink's January 23, 2014 request. WASPC complied with the injunction.

WASPC submits this response to Requestor Donna Zink's Brief on Appeal. Ms. Zink maintains that the information requested is not exempt and should have been disclosed. Ms. Zink also asserts that she is entitled to monetary damages from the Washington State Patrol ("WSP") and WASPC, both because the information was not disclosed, and because interested third parties received notice of her records request. Ms. Zink is wrong. Ms. Zink is not entitled to monetary damages in the form of per diem penalties because both WSP and WASPC determined that the requested information was not exempt and prepared to release the information, until being enjoined from doing so. WASPC joins in WSP's opening brief on appeal insofar as it accurately sets forth the procedural history of this case and argues that the trial court erred by concluding the Community Protection Act creates an exemption to the PRA, delineating a three (3) part test for disclosure, and creating a broad permanent injunction that applies to other public record requestors.

II. COUNTERSTATEMENT OF ISSUES ON REVIEW

1. Did the trial court err in concluding that the Community Protection Act (RCW 4.24.550) is an exemption from disclosure under the PRA?

2. Did the trial court err in enjoining WASPC from disclosing public information requested on January 23, 2014 relating to level I sex and kidnapping offenders and creating a three (3) part test for disclosure of such information?

3. After receiving Ms. Zink's January 23, 2014 Public Records Request, WASPC determined that the information requested was subject to public disclosure under the Public Records Act. WASPC notified the subjects of the information sought that absent an injunction prohibiting disclosure, WASPC would release the information. Is the requestor entitled to per diem penalties when the information requested was to be disclosed but for an injunction prohibiting the disclosure?

4. Is the requestor entitled to damages because WASPC provided notice to interested third parties, even when the requestor failed to raise the alleged improper warning in the case below?

III. STATEMENT OF THE CASE

A. WASPC's Organization.

WASPC is a Washington Nonprofit Association organized under chapter 24.03 RCW. CP 505. Per RCW 36.28A.010, WASPC is a “combination of units of local government...” WASPC consists of members of executive and top management personnel from Washington State law enforcement, including sheriffs, police chiefs, Washington State Patrol, Washington Department of Corrections, and representatives from various federal agencies. *Id.* WASPC is governed by an Executive Board and administered by an Executive Director and staff. *Id.* Neither the Executive Director, nor the staff, are state or other government employees; they do not receive state or other government employment benefits. *Id.*

B. The January 23, 2014 Public Records Request.

On January 23, 2014, WASPC received a request pursuant to the PRA (chapter 42.56 RCW) from Donna Zink (Requestor), who resides in Mesa, Franklin County, Washington. CP 505. The Requestor sought copies of all sex offender registration forms for offenders whose last name begins with “A,” and all registered sex offender files for all sex offenders whose last name begins with “B.” *Id.*

WASPC determined the information requested was subject to disclosure under the PRA. WASPC was also aware of other ongoing

litigation in Benton and King Counties and orders in those cases restraining production of similar records to Ms. Zink. *Id.* In an abundance of caution, WASPC provided third party notice of the PRA request to various state agencies, including DOC, and level I sex offenders whose last names began with “A” and “B.” CP 505-06. This decision to notify third parties is consistent with WASPC’s determination that RCW 4.24.550 is not an exemption to the PRA. CP 87-93. The notice informed said parties that absent a court order restraining or enjoining WASPC, the responsive information would be released February 28, 2014. CP 505-06, 512.

On February 24, 2014, on behalf of various John Doe Plaintiffs, the American Civil Liberties Union (ACLU) filed an action against WASPC in King County Superior Court seeking class certification and declaratory injunctive relief on behalf of the John and Jane Doe level I Plaintiffs. CP 506. On February 27, 2014, a King County Commissioner entered a TRO enjoining the disclosure of level I offender information sought by Ms. Zink. CP 506, 514-16.

On April 3, 2014, WASPC produced the level II and level III offender information requested. CP 507. On April 18, 2014, the King County Superior Court entered an Order granting Doe Plaintiffs’ motions for class certification, preliminary injunction, and modifying the

preliminary injunction complaint. CP 524-533, 507. The trial court ultimately granted summary judgment and ordered an injunction on May 15, 2014 generally prohibiting disclosure of level I offender information. CP 561-70. The trial court specifically ordered:

- 1) Declaratory judgment is entered providing that level I sex offender registration records are exempt from disclosure under RCW 42.56.070 pursuant to RCW 4.24.550. RCW 4.24.550 provides the exclusive mechanism for public disclosure of sex offender registration records.
- 2) The WSP and WASPC shall not make a “blanket” or generalized production of sex offender records of Class members in response to Ms. Zink’s requests for public records (whether pending or made during the duration of this litigation (including any appeals)).
- 3) The WSP and WASPC may disclose “relevant and necessary” level I sex offender records in response to a request under RCW 4.24.550 by a member of the general public, after considering in good faith the offender’s risk classification, the places where the offender resides or is expected to be found, and the need of the requestor to protect individual and community safety.

CP 568-69. This appeal followed.

IV. ARGUMENT

A. Standard Of Review.

Appellate review of an agency’s compliance under the PRA is de novo. RCW 42.56.550(3); *Soter v. Cowles*, 162 Wn.2d 716, 731, 174 P.2d 60 (2007). Likewise, review of an order on summary judgment is de

novo; the reviewing court engages in the same inquiry as the trial court. *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Folsom v. Burger King*, 133 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. WASPC Is Not A Washington State Agency, And Generally Not Subject To The Public Records Act.

As a general matter, WASPC is not a Washington State Agency subject to the PRA as WASPC is a Washington Nonprofit Association organized under chapter 24.03 RCW. WASPC is “a combination of units of local government...” RCW 36.28A.010. WASPC members consist of top personnel of Washington law enforcement, but is governed by an Executive Board, and administrated by an Executive Director and administrative staff. WASPC’s employees are not Washington State or any other governmental employees. Neither the Executive Director, nor the staff, receive state or government employment benefits.

WASPC does not dispute that it is subject to the PRA for the disclosure of the sex offender database information sought by Ms. Zink. This limited application of the PRA to WASPC arises from the specific Legislative directive to WASPC contained in RCW 4.24.550 to:

... create and maintain a statewide registered kidnapping and sex offender web site, which shall be available to the public. The web site shall post all level III and level II registered sex offenders, level I registered sex offenders during the time they are out of compliance with registra-

tion requirements under RCW 9A.44.130, and all registered kidnapping offenders in the state of Washington.

RCW 4.24.550(5)(a). In other words, because the Legislature tasked WASPC to create, manage, and maintain sex and kidnapping offender information for the public, such information is necessarily public in nature and generally subject to disclosure.

For the purposes of the PRA, the legislative directive in RCW 4.24.550(5)(a) creates public information, but only for the information designated in the statute. “A ‘public record’ is defined broadly to include ‘any writing containing information relating to the conduct of government or [a government function]’ that is ‘prepared, owned, used, or retained’ by any state or local agency.” *Residential Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 605, 327 P.3d 600 (2013) (citing RCW 42.56.010(3)). Given the legislative mandate for WASPC to specifically maintain a defined public database, the sex offender information contained therein was determined by WASPC to constitute a public record.

In contrast, any other record maintained by WASPC is not generally a public record and not subject to disclosure under the PRA because WASPC is not a state agency. For example, unlike other state agencies where an employee’s disciplinary record may be disclosed

pursuant to a public records request,¹ WASPC employees are not “state” employees, are not paid by the state, and are not entitled to state benefits or retirement payments. Therefore, the PRA’s application to WASPC is limited to the sex and kidnapping offender information maintained by WASPC pursuant to statute.

C. WASPC’s Sex Offender Database Is Not Exempt From Disclosure Under The Public Records Act.

The PRA is a strongly worded mandate for production. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The court liberally construes the PRA for disclosure and narrowly construes the exemptions. RCW 42.56.030. State and local agencies are to make public records available for copying and inspection, unless the record falls within a specific exemption. RCW 42.56.070(1). “[A]gencies must parse individual records and must withhold only those portions which come under a specific exemption.” *Paws II*, 125 Wn.2d at 261. Portions which do not fall under a specific exemption must be disclosed. *Id.* The “other statutes” exemption is an exception to the redaction requirement. *Id.*

¹ See *DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010) (“Evaluations of public employees that contain specific instances of misconduct are subject to public disclosure.”) (citing *Spokane Research & Def. Fund v. City of Spokane*, 99 Wn. App. 452, 456, 994 P.2d 267 (2000)). See also *Martin v. Riverside School Dist. No. 416*, 180 Wn. App. 28, 329 P.3d 911 (2014) (citing *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008)).

The Community Protection Act does not constitute an “other statute” exemption to the PRA. The “other statutes” exemption “applies only to those exemptions explicitly identified in other statutes; its language does not allow a court to ‘imply exemptions but only allows specific exemptions to stand.’” *Paws II*, 125 Wn.2d at 262 (quoting *Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990)). The Community Protection Act is a specific instruction to law enforcement and WASPC on how to disseminate information about registered sex offenders. RCW 4.24.550. This proactive instruction contains no provision that exempts disclosure under the PRA. Instead, the Community Protection Act expressly states, “[n]othing in this section implies that information regarding” sex offenders and kidnapping offenders “is confidential except as may otherwise be provided by law.” RCW 4.24.550(9). No other law prohibits WASPC from disclosing the level I sex offenders’ information contained in the database. Nothing contained within the instruction to proactively disseminate information creates an “other statute” exemption. In doing so, the trial court improperly implied an exemption that was not expressly created.

D. The Trial Court Improperly Created A Three Part Test For Disclosure Of Information Under The PRA.

The trial court erred when it delineated a three (3) part test for disclosure of information under the PRA. Nowhere in the PRA does it

authorize the agency holding the record to determine whether the record requested by the requestor is sufficiently relevant to them to warrant production.

The trial court's order granting summary judgment and enjoining the release of the documents specifically ordered:

- 1) Declaratory judgment is entered providing that level I sex offender registration records are exempt from disclosure under RCW 42.56.070 pursuant to RCW 4.24.550. RCW 4.24.550 provides the exclusive mechanism for public disclosure of sex offender registration records.
- 2) The WSP and WASPC shall not make a "blanket" or generalized production of sex offender records of Class members in response to Ms. Zink's requests for public records (whether pending or made during the duration of this litigation (including any appeals)).
- 3) The WSP and WASPC may disclose "relevant and necessary" level I sex offender records in response to a request under RCW 4.24.550 by a member of the general public, after considering in good faith the offender's risk classification, the places where the offender resides or is expected to be found, and the need of the requestor to protect individual and community safety.

CP 568-69. The trial court effectively created a three (3) part test requiring WASPC to consider (1) the offender's risk classification, (2) the places where the offender resides or is expected to be found, and (3) the need of the requestor to protect individual and community safety. The PRA does not permit such examination. The PRA requires that public

records be made “available to ‘any person,’ upon request, unless the record falls within certain specific exemptions.” *DeLong*, 157 Wn. App. at 146. The trial court has created a requirement to not only consider the information within the requested record, but also the external factors such as the identity of the requestor, and the requestor’s need to protect individual and community safety. The PRA does not allow an agency to make such investigation into these external factors. The trial court has created a test with no guidance, and no authority. WASPC is instructed to consider an offender’s risk classification and location, but provided no guidance by statute or case law as to how to make that consideration. Not only is this improper under the PRA, but unfeasible in practice.

The PRA is a strongly worded mandate for board disclosure *Residential Action Council*, 117 Wn.2d at 605. Requiring a balancing test before release runs contrary to such a mandate. The trial court erred by instructing WASPC to apply its three factor test before allowing disclosure of public information.

E. The Requestor Is Not Entitled To A Monetary Award.

Ms. Zink requests this Court to either assess mandatory penalties against WASPC, or to remand to the trial court for assessment of penalties. Two theories are presented for such penalties: (1) the records have not been disclosed, and the court should assess mandatory penalties,

despite WASPC and the WSP's consistent position that the records are not exempt; and (2) that WASPC is liable for fees because it provided third parties with notice of her request, including the identity of the Requestor. Ms. Zink errs on both points.

The PRA's plain language does not authorize an award of daily penalties when an agency complies with a court order enjoining disclosure of public records, or when an agency provides third party notice as authorized under RCW 42.56.520. "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended." *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 427, 98 P.3d 463 (2004) (citation omitted) (internal quotation marks omitted). This Court "will not add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.* (citation omitted) (internal quotation marks omitted); *see, also, Andrews v. Wash. State Patrol*, ---Wn. App. ---, 334 P.3d 94 (2014) ("the PRA contains no provision requiring an agency to strictly comply with its estimated production dates.")

As an initial matter, Ms. Zink has not been denied access to a public record by an agency – a prerequisite to a lawsuit under the PRA. A cause of action against an agency for non-disclosure of public records does not exist until the agency denies the public record request.

RCW 42.56.550(1) (the superior court may hear a motion to show cause when a person has “been denied an opportunity to inspect or copy a public record by an agency.”) If an agency has not denied a requestor access to a public record, then a PRA lawsuit is premature and the requestor does not have a cause of action against the agency. “Under the PRA, a requestor may initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record.” *Hobbs v. State*, ___ Wn. App. ___, 335 P.3d 1004 (2014) (emphasis in original). In this case, neither WASPC nor WSP denied Ms. Zink access to a public record. Instead, an injunction issued by the trial court under RCW 42.56.540 denied Ms. Zink access to the information. WASPC was neither the Plaintiff nor the moving party in the action below.

Even if the agencies in this litigation had denied Ms. Zink access to a public record, the PRA does not provide a cause of action when an agency complies with a court order enjoining disclosure of public records. The PRA provides two remedies to requestors: (1) an award of reasonable attorney fees and costs when a requestor prevails against an agency that denied the requestor access to a public record, or failed to respond to a public records request within a reasonable period of time; and (2) in the event an agency wrongfully withheld a public record, a court has discretion to award a per diem penalty not to exceed \$100. *See*,

RCW 42.56.550(4). Noticeably absent is any language that authorizes attorney's fees, costs, or daily penalties for either third party notice or compliance with a court order.

First, Ms. Zink has never “prevailed against the agency” in this litigation to merit an award of litigation costs. “[C]osts and reasonable attorney fees may be awarded for vindicating the right to inspect or copy or the right to receive a response.” *Yakima Cnty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011). Neither WASPC nor the WSP ever denied disclosure of the documents. It was never contended that WASPC failed to respond to Ms. Zink’s request. There is no finding by the trial court that the agencies violated the PRA in any way. Instead, Ms. Zink argues that because she has not received the records requested, she is entitled to mandatory penalties and costs. However, this contention lacks a basis in the PRA's plain language and the facts of this case.

Ms. Zink did not sue WASPC seeking access to the records, or claim WASPC failed to respond to her request within a reasonable amount of time. Ms. Zink was simply a co-defendant in this case arguing for disclosure. As such, Ms. Zink was never “denied” the right to inspect or copy a public record by an agency. The sole preclusion to Ms. Zink’s access to the records was the trial court’s injunction.

Second, neither WASPC nor the WSP wrongfully withheld any record from disclosure. A monetary award under RCW 42.56.550 is not available “in cases when an individual opposes disclosure of the records, and where the action was brought to prevent, rather than compel, disclosure.” *Id.* (citing *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 329, 890 P.2d 544 (1995)) (holding that the former RCW 42.17.340(4)² is inapplicable when the action is brought by a private party to prevent disclosure of records where the agency has agreed to release the records but is prevented from doing so by court order). A per diem penalty is only available when an agency wrongfully withholds a record from disclosure. *See Yakima Cnty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011) (“penalties are authorized only for denials of the right to inspect of copy.”) (citation omitted) (internal quotation marks omitted). Wrongful withholding occurs when an agency voluntarily withholds a record that is not subject to a statutory exemption. *See, Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

² Former RCW 42.17.340(4) states, “Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.”

Compliance with a court order is not wrongful withholding and does not give rise to daily penalties.

Apart from the PRA's plain language, imposing liability on an agency for obeying a court order is poor public policy. To impose a penalty for withholding documents enjoined from disclosure inherently penalizes state agencies for compliance with court orders. A state agency should not be forced to choose between monetary penalties for nondisclosure or contempt of court.

Ms. Zink argues for the first time on appeal that she should be awarded monetary damages because WASPC provided notice to interested third parties. The Court should not consider Ms. Zink's argument because it was never raised to the trial court. *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2012) (citing *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) ("Under Rule 2.5(a) of the Rules of Appellate Procedure...appellate courts will generally not consider issues raised for the first time on appeal.")). Nonetheless, Ms. Zink's arguments are misplaced, and she has provided no authority for her position that notice to interested third parties entitles her to per diem penalties. The PRA does not prohibit or mandate notice to third parties, but does allow such notice. RCW 42.56.520 (an agency may require additional time to comply with a PRA request to "notify third persons or agencies affected by the

request...”). Moreover, WASPC was well aware of other litigation about disclosure of the information sought, and court orders enjoining the same; therefore, WASPC provided notice in an abundance of caution to avoid the appearance of subverting any prior court orders or appearance of “unclean hands.” Ms. Zink’s argument that notice to interested third parties entitles her to damages is untimely and unsupported, thus it should be denied.

F. The Requestor Is Not Entitled To Fees Or Costs On Appeal.

Ms. Zink has requested an award of “fees and costs under RAP 14.” When an individual seeks to enjoin the release of records, the requestor may still be entitled to attorney’s fees and costs on appeal for the dissolution of a wrongful injunction, despite the absence of per diem monetary awards. This award is discretionary. *See Confederated Tribes*, 135 Wn.2d at 758. *See, also, Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989) (citing *Seattle Fire Fighters, Local 27 v. Hollister*, 48 Wn. App. 129, 137, 737 P.2d 1302 (1987)). However, Ms. Zink is not entitled to an award of attorney’s fees and costs against WASPC and WSP. Both Defendants below were aligned with Ms. Zink’s position that the records were not exempt and should be disclosed. Attorney’s fees were not incurred as a result of WASPC’s litigation position.

Neither WASPC nor the WSP ever denied disclosure of the documents. As such, neither WASPC nor the WSP can be accused of inadequately explaining the claim of exemption with particularity. Compare recently decided *City of Lakewood v. Koenig*, No. 89648-8 (Wa. Sup. Ct., December 11, 2014) at 7-8 (“the city’s response failed to cite a specific exemption or failed to provide any explanation for how a cited ‘other’ statute exemption applied...”). Because the disclosure of records was enjoined and not denied, fees or costs on appeal are not available to Ms. Zink.

Moreover, the WSP filed the present appeal to dissolve the injunction. As such, Ms. Zink cannot prevail against WASPC or the WSP. Should any award of fees or costs be granted in Ms. Zink’s favor, such award would be improper against WASPC.

V. CONCLUSION

While WASPC is not a state agency, and generally not subject to the PRA, it maintains public records specified by Legislative directive set forth in the Community Protection Act. WASPC, upon receiving a public records request from Ms. Zink, was prepared to disclose the requested information after determining that no exemption applied. Absent the injunction obtained by Plaintiff prohibiting WASPC from doing so, the information would have been disclosed. As such, Ms. Zink cannot support a basis for a monetary penalty awarded in her favor against WASPC.

Even if the trial court erred in enjoining the release of the requested documents, it correctly denied awarding Ms. Zink a per diem penalty under the PRA.

RESPECTFULLY SUBMITTED this 15th day of December, 2014.

SMITH ALLING, P.S.

By 
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CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of December, 2014, caused the document to which this Certificate is attached to be e-filed with the Clerk of the Supreme Court of the State of Washington, and served upon counsel of record via electronic mail:

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

DATED this 15th day of December, 2014, at Tacoma, Washington.



JULIE PEREZ

OFFICE RECEPTIONIST, CLERK

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Subject: RE: John Doe A, et al. v. Washington State Patrol, et al.

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Subject: John Doe A, et al. v. Washington State Patrol, et al.

John Doe A, et al. v. Washington State Patrol, et al.
Supreme Court Cause No. 90413-8
On Appeal from King County Superior Court Case No. 13-2-41107-5 SEA

Attached for filing is Washington Association of Sheriffs & Police Chiefs ("WASPC") Brief in Response.

If you have any questions, do not hesitate to contact our office.

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PLEASE NOTE OUR NEW ADDRESS EFFECTIVE October 11, 2014!

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