NO. 35469-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALLAN PARMELEE,

Appellant,

v.

LAURA MATHIEU, ET AL.,

Respondents.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION AND COLUMBIA LEGAL SERVICES IN RESPONSE TO AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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I. INTRODUCTION AND STATEMENT OF ISSUE

On May 7, 2008, the Court issued an Order for Amicus Curiae Brief requesting that the Attorney General submit a brief addressing, *inter alia*:

> (1) Whether an individual who has forfeited his right to vote by having been convicted of a felony has standing to request documents under the Public Records Act (PRA), chapter 42.56 RCW.

On June 6, 2008, the Attorney General submitted its response in which it championed the absolute denial of standing rights to incarcerated felons under the Public Records Act ("PRA" or "Act"). This radical position, unsupported by legal authority, has been eviscerated by the Supreme Court decision handed down last week in *Livingston v. Department of Corrections*. It also runs contrary to the State of Washington's commitment to the open administration of government and would destroy both the letter and spirit of the PRA. Moreover, the implications flowing from the Attorney General's position would necessarily reach beyond the rights of incarcerated felons as well as the unique needs of Washington's penal institutions. The Court should reject the invitation to craft a voter-eligible standing requirement nowhere found in the text of the Act.

On June 19, 2008, the American Civil Liberties Union of

Washington ("ACLU") and Columbia Legal Services ("CLS") sought leave to file an amicus brief addressing only the issue set forth above. Leave to file this brief was granted on June 27, 2008. The ACLU has long been an advocate for open government as envisioned by the PRA. ACLU policy recognizes that access to public documents is an essential component of the First Amendment rights to freedom of speech and the press, and to petition the government. The ACLU believes that public oversight of jails and prisons through access to their public records is no less important than public oversight of other government agencies.

Likewise, CLS and its predecessors have, for decades, assisted and represented low-income and special needs people and organizations, including people confined in Washington's jails and prisons. In the past several years, CLS has advised and represented prisoners and former prisoners who have sought records through the Act.

II. ARGUMENT

A. As the Washington Supreme Court Reaffirmed in *Livingston v. Department of Corrections*, The PRA Allows Prisoners, Like Any Other Person, to Request Records.

The PRA begins with a mandate of full disclosure of public records, and that mandate is limited only by the precise, specific, and limited exemptions the Act describes. *West v. Thurston County*, 183 P.3d

346, 350 (Wn. App. 2008) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 258, 884 P.2d 592 (1994)); *Livingston v. Dep't of Corr.*, No. 79608-4, __ Wn.2d __, __ P.3d __, 2008 WL 2612028, at *3 (July 3, 2008) ("The primary purpose of the public records act is to provide broad access to public records to ensure government accountability."); *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005) ("The PDA is a strongly worded mandate for broad disclosure of public records.").

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. *This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.* In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (emphasis added).

The Act requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. *Livingston*, 2008 WL 2612028, at *2 (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 450, 90 P.3d 26 (2004)); *Prison Legal News*, 154 Wn.2d at 635 (citing *O'Connor v. Dep't of Soc. & Health*

Servs., 143 Wn.2d 895, 905, 25 P.3d 426 (2001)). The PRA requires agencies to make records available to "any person" and forbids agencies from "distinguish[ing] among persons requesting records." *Livingston*, 2008 WL 2612028, at *3 (citing RCW 42.56.080). In interpreting the Act, Washington courts have followed the clear directive to construe the Act broadly and its exemptions narrowly. *Id.* at *2 (citing *Hangartner*, 151 Wn.2d at 450).

Last week, the Washington Supreme Court definitively explained how these principles apply with equal force to an incarcerated felon's public records request to the Department of Corrections ("DOC"). *Livingston v. Dep't of Corr.*, No. 79608-4, __ Wn.2d __, __ P.3d __, 2008 WL 2612028 (July 3, 2008). In *Livingston*, the Court was asked to determine whether the DOC complied with an incarcerated felon's public records request when the requested material was copied and mailed from the DOC but confiscated upon arrival at the correctional facility as contraband pursuant to the DOC's mail policy. In discussing the DOC's responsibilities to an incarcerated felon under the Act, the Court, after setting forth the principles outlined above, explained:

> In its capacity as an agency subject to the public records act, the Department must respond to all public disclosure requests without regard to the status or motivation of the requester. The statutory directive to screen incoming and outgoing mail [under the DOC mail policy] does not relieve

> the Department of its obligation to disclose public records requested by an inmate.

Id. at *3. The Court further explained that any disparate treatment of inmates under the Act would be "impermissible." *Id.*

In light of the *Livingston* decision, it can scarcely be argued that incarcerated prisoners do not have standing to make a request under the PRA. Nevertheless, because other positions advanced by the Attorney General are so antithetical to the scope and intent of the Act, Amici shall respond.

B. The History of the PRA Demonstrates that Convicted Felons Were Not Intended to Be Outside Its Scope.

The legislature has consistently adhered to its dual role as guardian of the PRA and protector of Washington's citizens and institutions from what it perceives to be improper uses of the Act. From its inception in 1972 through today, the list of exemptions has grown from 10 to at least 300. Washington Attorney General's Office, *Open Government Sunshine Committee,* http://www.atg.wa.gov/opengovernment/sunshine.aspx (last visited June 27, 2008). In 2008 alone, changes were made to six exemption provisions, including the section detailing exemptions for "investigative, law enforcement, and crime victims." *See, e.g.*, RCW 42.56.240. Additionally, in 2007, a "Public Records Exemptions Accountability Committee" was established with the expressed purpose of

"review[ing] public disclosure exemptions and provid[ing] recommendations." RCW 42.56.140(2).[1]

Nevertheless, the Attorney General asks this Court to craft an additional exemption related to incarcerated felons twice rejected in the last eight years by the legislature. First, in 2000, the legislature declined to adopt House Bill 2458, which would have carved out an exception to the definition of "any person" by preventing disclosure of public records to prison inmates. *See* H.B. 2458, 56th Leg., 2000 Reg. Sess. Then, in 2005, a bill was introduced to amend former RCW 42.17.310, "[r]elating to limiting access to public records by persons convicted of a gross misdemeanor or a felony." *See* H.B. 2138, 59th Leg., 2005 Reg. Sess. The bill would have provided the following exemption from disclosure:

> A public record requested by a person convicted of a gross misdemeanor or a felony who is serving a sentence of imprisonment in a federal, state, or county correctional facility in this state or any other state, or who is under the supervision of the department of corrections in the community, unless denial of the record would interfere with the person's right to mount a criminal defense under the federal and state constitutions.

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[1] In establishing the Public Records Exemptions Accountability Committee "[t]he legislature recognize[d] that public disclosure exemptions are enacted to meet objectives that are determined to be in the public interest. Given the changing nature of information technology and management, recordkeeping, and the increasing number of public disclosure exemptions, the legislature finds that periodic reviews of public disclosure exemptions are needed to determine if each exemption serves the public interest." 2007 Wash. Sess. Laws 739-740.

Id. Once again, the legislature declined to adopt the amendment. Even under this defeated approach, prisoners would still have retained standing to make public records requests, with the agency denying the request bearing the burden of demonstrating that the exemption applied. *Prison Legal News*, 154 Wn.2d at 636; RCW 42.56.210(3).

The legislative arena is the only proper forum for determining whether an exemption to the PRA should be crafted to restrict access to those individuals who have forfeited their voting rights.[2] The Court should decline the invitation to depart from the natural, plain-meaning of the PRA, and instead should give this unambiguous statute its full force and effect.

C. Prisoner Access to the PRA is Not in Conflict With the Penological Interests of the Department of Corrections.

Despite the Attorney General's suggestion to the contrary, there is no inherent conflict between the needs and objectives of Washington's penal institutions and the rights of felons to make records requests that justify denying felons their rights under the PRA. Washington courts have consistently balanced the rights of incarcerated felons to access public records with the penological needs of the DOC. *See, e.g.*, *Livingston*, 2008 WL 2612028, at *5 (balancing incarcerated felons' right to make

[2] Of course, any such exclusion may itself be constitutionally infirm.

PRA requests with the DOC's mail policy under RCW 72.09.530 and finding that the DOC's policy of offering to have rejected mail sent to another location indicates that it is not using the mail policy for the "illegitimate purpose of thwarting public disclosure, but for the legitimate purpose of ensuring the security of its institutions").

In *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005), the Washington Supreme Court was asked to determine whether the DOC had to respond to seven public disclosure requests from an incarcerated prisoner. The Court's analysis first assumed the facial validity of the prisoner's request and placed the "burden of proving that a specific exemption applies" on the state agency. *Id.* at 636. Similar to the argument asserted here, the DOC claimed that the disclosure of the requested material (the names of disciplined DOC medical staff and witnesses) should be withheld because "the release of the names and identifying information of witnesses and disciplined staff interferes with DOC's law enforcement mission; namely the legal, safe, secure and orderly operation of its prisons." *Id.* at 641 n.12; *see* A.G. Br. at 12-13.

The court rejected the DOC's sweeping rationalization, finding that the DOC's proposed definition "ignores the command of our prior case law that exemptions to the PDA be construed narrowly." *Id.* at 640.

In ordering the release of the unredacted investigative records, the Court emphasized that changes to the PRA must come from the legislature and not the Courts. *Id.* at 643-44 ("Had the legislature determined that all investigations potentially affecting operations of a penology agency would be exempt from disclosure, the legislature would surely have used more direct language.").

The Attorney General's similar reliance on *Sappenfield v. Department of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005), for the contention that providing prisoners access to public records is at odds with the scope and intent of the PRA is also misplaced. *Sappenfield* demonstrates that the penological interests of the DOC can be honored while maintaining the integrity of the Act. In *Sappenfield*, an incarcerated felon made several written requests to inspect certain DOC records. *Id.* at 84. The public disclosure coordinator compiled the requested disclosures but conditioned their release upon payment of the prescribed fees. *Id.* at 85. The felon argued that he had a right to inspect the records in person and that the PDA required that the agency "provide the fullest assistance," which meant that he be provided in person access to the documents stored where he was incarcerated. *Id.* at 85-86. Although the Court noted that ordinarily "the choice whether to copy or inspect on site is usually up to the requester, not the agency . . . [t]he circumstances here, however, are

not the usual case." *Id.* at 88. The Court found that the DOC complied with the PDA requirement that agencies adopt and enforce reasonable rules and regulations that not only maximize public access but also protect the records in their care from potential damage or disorganization, and prevent excessive interference with essential functions of the agency. *Id.* at 89. Nothing in the Court's opinion suggests that "making records available for public inspection and copying is at odds with the legal status of incarcerated felons" as the Attorney General implies.[3] A.G. Brief at 12.

The Attorney General suggests that the Court look to *Dawson v. Hearing Committee*, 92 Wn.2d 391, 597 P.2d 1353 (1979), for guidance. However, for all the reasons identified by the Appellant in his response, *Dawson* is not on point. *See* App. Resp. Br. at 12. In addition to pointing to the legislative history of the Administrative Procedures Act to demonstrate that the prison disciplinary proceedings were always intended to be excluded from the law's scope, the *Dawson* opinion stresses the

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[3] In support of its argument, the Attorney General also cherry picks a passage from a Michigan appellate court opinion regarding the "salient differences between persons who are members of the public community and prison inmates in that the latter, by law, are prohibited from exercising rights and privileges they enjoyed as free members of society." A.G. Brief at 6 (quoting *Mithrandir v. Dep't of Corr.*, 164 Mich. App. 143, 147, 416 N.W.2d 352 (1987)). *Mithrandir*, like *Sappenfield*, only held that an inmate did not have a right under Michigan's Freedom of Information Act to personally inspect documents (as opposed to receiving a copy upon paying a fee). Thus, the "limitation" accepted by the Michigan court was not stripping prisoners of their statutory rights, but rather a careful balancing of the "considerations peculiar to the penal system" which justify "imposing limitations on a prisoner's right to inspect its public records." *Id.* at 148.

inherent irreconcilability of the APA and prison disciplinary hearings. *See Dawson*, 92 Wn.2d at 395 ("The rigid, formal and time-consuming procedures created by the APA are clearly not designed to deal with the unique problems of enforcing disciplinary rules within a prison."); *Id.* at 398 ("[W]hile the prison resident now may seek review in state courts through the traditional writs of habeas corpus, certiorari, and mandamus, as well as personal restraint petitions under Rap [sic] 16.3, the APA specifies that its procedures for judicial review are exclusive, leaving no other avenue for review if the time for review of an administrative action has expired."). Unlike in *Dawson*, the Attorney General cannot point to any direct conflict between the PRA and prison regulations which evidences an intent to remove prisoners from the PRA's reach.

D. The Outdated Common Law "Civil Death" Doctrine – Never Applied in Washington – Provides No Basis For a Judicially Crafted Exception to the Act.

The Attorney General relies on the common law doctrine of "civil death" to argue that the PRA does not extend to incarcerated felons. A.G. Brief at 3. The antiquated "civil death" doctrine has never been applied in Washington and has long been obsolete throughout much of the United States. *See, e.g.*, *Ballinger v. Thompson*, 118 P.3d 429, 435 (Wyo. 2005) ("[I]n the absence of statute, the concept of civil death has generally been denied in this country.") (quoting *Whitson v. Baker*, 463 So.2d 146, 148

(Ala. 1985)); *see also In re Reinstatement of Walgren*, 104 Wn.2d 557, 569, 708 P.2d 380 (1985) ("Over the centuries, this harsh penalty has been somewhat tempered by our federal and state constitutions. [In Washington] . . . common law also has been modified by statute.") (citation omitted). The Attorney General's brief itself illustrates precisely how civil disabilities upon a convicted felon are established by the state constitution and statute in Washington.

First, the Attorney General acknowledges, as indeed it must, that two-thirds of the common law doctrine of "civil death" has been abrogated by the Washington Constitution. A.G. Brief at 3 (citing Const. art. I, § 15 ("No conviction shall work corruption of blood, nor forfeiture of estate.")). Thus, according to the Attorney General, whether, and to what extent, a felony conviction works an extinction of civil rights remains an open question under the common law. The Attorney General proposes that the "extent of the civil death effected on the civil rights of a prisoner must be determined in light of other statutory and constitutional provisions." A.G. Brief at 4 (quoting *Mehdipour v. Wise*, 65 P.3d 271, 272-73 (Okla. 2003)).[4] This is immediately followed by a non-exclusive

[4] Despite suggestively quoting *Mehdipour* as supportive, that opinion in no manner backs the Attorney General's position. In that case, the Oklahoma Supreme Court looked to Oklahoma's constitution and other statutory provisions to *limit* an otherwise overly broad civil disability statute. Specifically, the Court was asked to

(Footnote Continued)

list of specific civil disability statutes. A.G. Brief at 3 (citing RCW 2.36.070(5); RCW 9.92.120; RCW 42.04.020; RCW 9.41.040; RCW 9.96A.020); See also App. Resp. Br. at 11 (listing statutory losses of civil rights resulting from a felony conviction).[5]

Washington is far from unique in this regard. Specific disability regimes have been adopted in the vast majority of states. *Cole v. Campbell*, 968 S.W.2d 274, 276 (Tenn. 1998). As the Tennessee Supreme Court explained, in ruling that inmates have standing to make public records requests under a statute that gives "citizens" that right, "in this country, civil disabilities continue to play a significant role in the criminal

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determine whether a prisoner had the capacity to file a civil action despite a statute which on its face appears to suspend "all the civil rights" other than those few which were statutorily designated. *Mehdipour*, 65 P.3d at 271-72. Before concluding that a prisoner maintains his right to file suit, the Court quoted precedent nearly a century old which had already expressed doubt as to the continuing validity of the civil death doctrine and the statutes that promote it:

> [T]he principles of law which this verbiage literally imports had its origin in the fogs and fictions of feudal jurisprudence and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government. At any rate, the full significance of such statutes have never been enforced by our courts for the principal reason that they are out of harmony with the spirit of our fundamental laws and with other provisions of statutes.

Id. at 273 (quoting *Byers v. Sun Sav. Bank*, 139 P. 948, 949 (Okla. 1914)). Thus, the modern trend has been to extend, rather than limit, civil rights "except where they are expressly abridged by statute." *Id.*

[5] Considering that Washington has a civil disability statutory regime, it should hardly come as a surprise that "Washington courts have not fully considered the extent to which this common law principle otherwise remains part of Washington law." A.G. Brief at 3. What the Attorney General fails to provide is *any* Washington law supporting the argument that common law civil death can work an extinction on a civil right not expressly provided for by statute.

justice system and generally fall into one of two categories: civil death statutes and specific disability statutes." *Id.* Even in some states which had originally adopted civil death statutes modeled after the common law, the trend has been to replace those with specific disability statutes. *See, e.g.*, *Voth v. State*, 190 Or. App. 154, 158-59, 78 P.3d 565 (2003) (noting that Oregon's civil death statute was repealed in 1975 and replaced with a specific disability statute); Ariz. Rev. Stat. Ann. § 13-904 (suspension of civil rights and occupational disabilities) (repealing Ariz. Rev. Stat. Ann. § 13-1653(B) which had provided that "a person sentenced to imprisonment in the state prison for life is thereafter deemed 'civilly dead.'").

Washington, like most other states, has adopted specific disabling statutes for addressing limitations on the civil rights of convicted felons. The Attorney General provides no authority – or legitimate justification – for the proposition that the courts, under the guise of an obsolete common law principle, should legislate which civil rights are to be stripped upon the conviction of a felony and which are to remain intact.[6]

[6] Of course, an incarcerated felon's right to access public documents is not a common-law right at all, but rather one granted by statute.

E. The Right to Access Public Documents is Necessary to Safeguard Other Closely-Held Constitutional Rights Guaranteed to Incarcerated Felons.

Even if the Court were to accept the Attorney General's premise that determinations regarding the extent and application of the common law "civil death" doctrine were within the Court's province, a prisoner's legitimate interest in obtaining public records is so intrinsically linked to other retained rights it can hardly be fathomed that prisoners do not come within the scope of persons entitled to access "information concerning the conduct of government on every level." A.G. Brief at 11 (quoting former RCW 42.17.010). Despite the Attorney General's protestations that the Act may be abused by inmates,[7] unquestionably the PRA is a tool used by many incarcerated felons to exercise other closely held constitutional rights. As one very important example, incarcerated felons have used the Act to investigate government wrongdoing. *See, e.g.*, *Prison Legal News*, 154 Wn.2d at 628 (upholding records request by incarcerated journalist investigating prisoner deaths and misconduct by DOC medical staff). Those requests were inextricably tied to the prisoner's first amendment right to publish articles and communicate with the media, *Abu-Jamal v.*

[7] The PRA has explicit exemptions to protect against the harassment the Attorney General fears. *See, e.g.*, RCW 42.56.230 (personal information exemption); RCW 42.56.240 (investigative, law enforcement, and crime victim exemption). To the extent the Attorney General considers these exemptions inadequate, its remedy is with the legislature.

Price, 154 F.3d 128 (3rd Cir. 1998), and the people's right to "remain informed so that they may maintain control over the instruments that they have created." RCW 42.56.030.

Other prisoners use the Act to gather information and documentation to support various legal claims. *See, e.g.*, *Parmelee v. Porter*, No. 06-2-00520-5, slip op. (Mason County Super. Ct. Sept. 17, 2007) (finding that DOC was grossly negligent by failing to provide various infractions records to the prisoner). A prisoner's ability to access those documents is integral to his or her ability to petition the government for redress of grievances, a right retained under the First Amendment. *See Turner v. Safley*, 482 U.S. 78, 84, 107 S. Ct. 2254 (1987). As amici know first-hand, prisoners often cannot rely on attorneys, non-profit organizations, or other advocates to make public records requests on their behalf, as these entities do not have the resources to help the hundreds of prisoners who request assistance each year. Instead, these organizations frequently rely largely on the documentation already obtained by the prisoner through a public records request to advocate on the prisoner's behalf.

F. Denying Standing Rights Necessarily Implicates More Than Incarcerated Felons and the DOC.

Prisoners often make public records requests for reasons wholly

unrelated to their incarceration or the penal system. For example, to protect his community property rights, a prisoner could seek records from the county auditor's office regarding his former home to determine whether the property has been sold by his former wife. This request is in no way "fundamentally inconsistent with the objectives, needs and realities of the prison system and the legal status of inmates," but is necessary for protecting his retained civil rights. The Attorney General would strip incarcerated prisoners of access to this information without any reasonable justification or support at law.

Furthermore, the practical application of the Attorney General's approach undoubtedly would be more likely to create "unnecessary and inefficient public expenditures" for all government agencies than to "avoid unnecessary or inefficient public expenditures" for the DOC. This is so because, while the Attorney General has reframed the Court's standing question to address only incarcerated felons rather than an "individual[] who ha[s] forfeited his right to vote by having been convicted of a felony," it provides no legal basis for this arbitrary demarcation A.G. Brief at 1 n.1.[8] If the Court were to adopt the Attorney General's position and

[8] The Attorney General's proposed line-drawing not only violates RCW 42.56.080's no discrimination directive, but is also inconsistent with its own "civil death" concept by which the felon's rights are not restored at the end of incarceration but only when they are affirmatively reinstated.

apply it to the class of people upon which the Court requested briefing – all individuals who have forfeited their right to vote – it would mean that otherwise free citizens would be denied rights under the PRA simply because they could not afford to pay off all their legal financial obligations.[9] Thus, every agency would need to screen each request with the Secretary of State to determine whether the requester was eligible to vote. Placing such a burden on all governmental agencies would "divert . . . resources and . . . waste the public's money on an extraordinary scale." A.G. Brief at 13.

III. CONCLUSION

A judicially enacted broad exception to the Act eliminating the rights of individuals who have forfeited the right to vote from making a records request would do great harm to the letter and spirit of the Act and a disservice to the people of Washington. Similar proposals have been raised and rejected by the legislature – the appropriate body to consider such an exemption. Moreover, as reaffirmed by the Supreme Court just last week in *Livingston v. Department of Corrections*, there is no inherent conflict between this well-established right and the needs and objectives of

[9] For individuals sentenced under the Sentence Reform Act, RCW 9.94A et seq., voting rights are not restored on release from incarceration but upon completion of various actions, including when all legal financial obligations are paid. RCW 9.94A.637; RCW 9.94A.750.

the penal system that warrants this sweeping deprivation of prisoners' rights. Instead, strong enforcement of the PRA, including allowing incarcerated felons access to its tools, is critical to keeping government operations transparent and reviewable by all members of the public.

Therefore, we respectfully request that the Court not take from felons who cannot vote their statutory right to request public documents.

RESPECTFULLY SUBMITTED this 1st day of July, 2008.

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