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SUPREME COURT OF THE STATE OF WASHINGTON

PRISON LEGAL NEWS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Cognizant of the public's right to access information concerning the conduct of government on every level, the Washington State Department of Corrections (DOC) responded to Appellant's multiple public records requests regarding the manner and quality of inmate health care by providing over 1200 pages of records. By doing so, DOC gave access to information concerning how DOC provides medical care within its facilities, including detailing any misconduct by its medical personnel. At the same time, DOC was also cognizant of its statutory law enforcement mission to enforce laws, rules and regulations within its institutions in order to preserve the safety and security of staff and inmates. Therefore, DOC redacted the names and identifying features of disciplined medical staff pursuant to existing statutory exemptions.

While disclosure of the nature of the misconduct and DOC's response meets the public's interest in open government, disclosure of the names and identifying features of disciplined medical staff does not because disclosure impairs DOC's ability to meet its law enforcement mission. Disclosure of the names and identifying features of disciplined medical staff would result in the risk of physical harm and manipulation of those staff, refusal of medical treatment by inmates, increased problems with retention of medical professionals in DOC facilities which will ultimately reduce inmate access to health services. DOC's response also took into account an inmate's right to privacy in their health care information when that could readily be linked to that inmate. So, pursuant

to existing exemptions, DOC redacted both the identity of the inmate and information related to their health care.

II. STATEMENT OF THE CASE

Between January and August 2000, Appellant, Prison Legal News (PLN), through its publisher Paul Wright, made seven public records requests to DOC pursuant to RCW 42.17. The requests were for ten distinct classes of records or information, including documents related to discipline taken against DOC medical staff. CP at 158-59, 1432. In response, DOC provided over 1200 pages of responsive documents, some containing redactions. CP at 172-73.

Generally, DOC redacted or withheld the following information: (1) preliminary drafts of disciplinary letters pursuant to RCW 42.17.310(1)(i); (2) documents containing attorney client privileged communication or attorney work product privileged information pursuant to RCW 42.17.310(1)(j); (3) employee personnel files to the extent they did not contain evidence of complaints, investigations, or disciplinary actions pursuant to RCW 42.17.310(1)(b); (4) the names and identifying features of witnesses to misconduct pursuant to RCW 42.17.310(1)(d) and RCW 42.17.310(1)(e); (5) the names and identifying features of disciplined staff pursuant to RCW 42.17.310(1)(d); and (6) the names of inmate patients and all health care information about those inmate patients pursuant to RCW 42.17.312 and RCW 70.02.020. CP at 172-73. *See* Appendix A at 4.

PLN challenged DOC's response by filing suit in Thurston County Superior Court pursuant to RCW 42.17.340. The trial court ruled that DOC did not violate RCW 42.17.320 regarding the manner in which it responded to PLN. Moreover, the court found that the time DOC took to respond to the requests was reasonable. *See* Appendix A at 4.

In an effort to make the proceedings more orderly given the number of documents involved, the trial court initially heard the issue of the applicability of the exemptions claimed by the DOC. Based on the briefing, affidavits and argument of the parties, the trial court found that DOC did not violate RCW 42.17 with respect to the exemptions claimed. The trial court then gave PLN the opportunity to challenge the application of the allowed exemptions to any specific redaction on any specific record. However, PLN did not further challenge any specific redactions at the trial court. *See* Appendix A at 4, 16; CP at 1510, 1520, 1524.

PLN appealed the trial court's decision to the Court of Appeals. It asserted that DOC failed to respond to the public disclosure requests in a timely manner and that DOC withheld documents not covered by the statutory exemptions.¹

The Court of Appeals held that DOC complied with RCW 42.17.320 and timely responded to the numerous public records requests by PLN. The Court of Appeals upheld the trial court with respect to all of

¹ PLN did not appeal the trial court's ruling with respect to the application of RCW 42.17.310(1)(b) and RCW 42.17.310(1)(j).

the claimed exemptions except it reversed the trial court's ruling regarding draft disciplinary letters. *See* Appendix A.

The Court of Appeals also ruled that the trial court specifically gave PLN the opportunity to challenge the scope and breadth of specific redactions, including those made pursuant to RCW 42.17.312 and RCW 70.02.020, but PLN failed to do so. The Court of Appeals reversed and remanded the matter back to the trial court to order disclosure of 23 pages of draft disciplinary letters, and it awarded attorney fees and costs associated with obtaining disclosure of the draft letters. The Court of Appeals did not award a penalty, but it did not rule that a penalty was improper. *See* Appendix A.

PLN seeks review of three aspects of the Court of Appeals' decision: (1) the holding that DOC lawfully redacted the names and identifying features of disciplined staff members; (2) the holding that inmate medical complaints, diagnosis, treatment plans, and medical charts were properly redacted when the identities of the inmates were also redacted; and (3) the failure to order a penalty as a result of holding that the Petitioner was entitled to 23 pages of documents.

III. STATEMENT OF ISSUES

1. Where disclosure of the names and identifying features of disciplined medical staff would jeopardize the safety of the disciplined staff, place them at risk of manipulation or compromise, and hamper DOC's ability to meet its obligation to provide medical services to

inmates, did the Court of Appeals properly hold that nondisclosure of the names and identifying features of disciplined medical staff is essential to DOC's law enforcement mission to enforce laws, rules and regulations in its facilities in order to preserve the peace and safety of staff and inmates?

2. Where disclosure of an inmate's medical complaints, diagnosis, treatment plans and medical charts can readily be associated with that inmate, did the Court of Appeals properly hold that information was health care information and exempt from disclosure?

3. Is the matter of the Court of Appeals' silence as to a penalty ripe for review when the Court of Appeals did not deny a request for a penalty, but remanded the matter back to the trial court to order disclosure which can then take up PLN's request for a penalty?

IV. ARGUMENT

A. Nondisclosure of the Names and Identifying Features of Disciplined Staff is Essential to DOC's Law Enforcement Mission to Provide for the Legal, Safe, Secure, and Orderly Operation of its Facilities.

Pursuant to RCW 42.17.310(1)(b), DOC redacted the names and identifying features of disciplined staff because disclosure would impair effective law enforcement by: 1) placing the disciplined staff at risk of physical harm; 2) placing the disciplined staff at risk of manipulation and compromise; and 3) inhibiting DOC's ability to provide the constitutionally required medical services. CP at 1433-36, 1446-47, 1449-

51. RCW 42.17.310(1)(d) provides that the following is exempt from public disclosure:

[S]pecific investigative records compiled by investigative, law enforcement and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

RCW 42.17.310(1)(d).

There is no dispute that the records compiled by DOC are investigative records. Similarly, there is no dispute that DOC is a law enforcement agency. *McLean v. Dep't of Corrections*, 37 Wn. App. 255, 680 P.2d 65 (1984). Rather, PLN disputes that DOC is acting in a law enforcement capacity when meeting its mandate to provide constitutionally adequate medical care.

The Legislature's intent in creating the Department of Corrections was to establish a:

Comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives:

1. The system should ensure public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, staff, and the inmates.

...

8. The system should be accountable to the citizens of the state

RCW 72.09.010. DOC is a law enforcement agency that “must enforce laws, rules and regulations within the institution so as to ‘preserve the peace’ of staff and inmates.” *McLean v. Dep’t of Corrections*, 37 Wn. App. at 258.

In meeting this statutory obligation, DOC clothes, feeds, houses and otherwise cares for the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Among DOC’s duties is its constitutional obligation to provide health care to inmates. *Hudson v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993). This function cannot be separated from other aspects of supervising inmates. Moreover, none of these functions can be separated from DOC’s obligation to enforce laws, rules and regulations within the institution in order to preserve the peace of staff and inmates. “[C]entral to all other correctional goals is the institutional consideration of internal security within the correctional facilities themselves.” *Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. 119, 133, 97 S. Ct. 2532, 2554, 53 L. Ed. 2d 629 (1977) (citation omitted). Accordingly, DOC’s obligation to provide medical care to inmates is integrally related to DOC’s law enforcement mission.

PLN also disputes that the nondisclosure of the names and identifying features of disciplined staff is essential to effective law enforcement. PLN asserts that the Court of Appeals’ decision on this issue is in conflict with *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 566 (1990), where this Court held that the Superintendent of

Public Instruction's act of revoking or administering teacher certificates was neither criminal or civil law enforcement. *Brouillet*, 114 Wn.2d at 795. The Court did not overrule *Cowles v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), which held that the nondisclosure of the names of law enforcement officers against whom complaints have been sustained after an internal investigation was essential to effective law enforcement under RCW 42.17.310(1)(d). *Cowles v. State Patrol*, 109 Wn.2d 712.

In concluding that the nondisclosure of the names of law enforcement officers against whom complaints have been sustained after an internal investigation was essential to effective law enforcement, the Court looked to the overall nature of the agency's law enforcement functions rather than the specific nature of the investigations at issue. *Cowles v. State Patrol*, 109 Wn.2d at 729-31. The Court held that the State Patrol's internal investigations were not themselves law enforcement investigations, but disclosure of the names would have a chilling effect upon the reporting of violations and follow up investigations thereby negatively impacting the law enforcement tasks performed by the State Patrol as a whole. *Id.*; *Brouillet*, 114 Wn.2d at 797; *Cowles v. Spokane Police Dep't*, 69 Wn. App. 678, 684, 849 P.2d 1271 (1993).

In discussing effective law enforcement with respect to internal investigations, the Court said:

Effective law enforcement requires a workable reliable procedure for accepting and investigating complaints against law enforcement officers. Such a procedure is necessary to ensure that law enforcement officers do not

abuse their authority or engage in unlawful activities. In addition, reliable internal investigations procedures uphold the integrity of the law enforcement agency in the minds of the public and the officers.

Cowles v. State Patrol, 109 Wn.2d at 729. See also *Aspin v. Dep't of Defense*, 491 F.2d 24, 30 (D.C. Cir. 1973) (holding that, under the federal Freedom of Information Act, withholding the names of complainants, witnesses, and officers involved in a completed internal investigation of police departments was essential to that agency's future law enforcement efforts); *Koenig v. City of Des Moines*, No. 49656-5-I, 2004 WL 1689744, (Wash. App. Div. 1 July 19, 2004) (holding that disclosure of sexually explicit descriptions of sexual assaults on children would have a detrimental effect on the ability of law enforcement to investigate sexual assaults against children).²

In *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 520, 778 P.2d 1066 (1989), the Court of Appeals applied the analysis in *Cowles v. State Patrol* and held that the nondisclosure of witness and information source identity was essential to the effective law enforcement of Health Department investigations. *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 522-23, 778 P.2d 1066 (1989). However, the court held that nondisclosure of the identity of

² This analysis was conducted to determine whether disclosure of the sexually explicit descriptions of a sexual assault was of a legitimate public concern for the purposes of determining whether disclosure would violate the child victim's right to privacy pursuant to RCW 42.17.255 and RCW 42.17.310(1)(d).

the company investigated was not essential to effective law enforcement because the investigation was not a sensitive internal investigation that depended on trust and the cooperation of agency personnel. *Id.* at 523.

DOC does not contend that the investigations themselves are “law enforcement” investigations. Rather, as in *Cowles v. State Patrol* and distinguished from *Tacoma News, Inc.*, the release of the names and identifying features of disciplined staff interferes with DOC’s law enforcement mission; namely the legal, safe, secure and orderly operation of its prisons. There are three reasons this is so: 1) disclosure would place disciplined staff at risk of physical harm; 2) disclosure would place disciplined staff at risk of manipulation and compromise; and 3) disclosure would inhibit DOC’s ability to recruit and maintain staff to provide the constitutionally required services. CP at 1433-36, 1446-47, 1449-51.

a. Disclosure Will Jeopardize the Safety of Disciplined Staff.

The Deputy Secretary of DOC and the Health Care Administrator for DOC both testified that the release of the names and identifying features of disciplined staff contained in the investigative files may endanger the lives or physical safety of the informants if circulated among the inmate population. CP at 1433-34, 1446. The medical facility itself is one of the least secure areas at each prison due to its physical layout, location, and shortage of custody staff. CP at 1435. Medical staff work regularly with inmates, and nurses are often in a small room with inmates behind locked doors. CP at 1446. The records at issue are highly detailed

investigative notes, statements, and reports where allegations against staff members have been made by an inmate or another staff member. CP at 1433-34, 1436. Redaction of the names and identifying features of disciplined staff is essential to maintaining the physical safety of those individuals, and therefore essential to DOC's law enforcement mission.

b. Disclosure Will Place the Disciplined Staff at Risk of Manipulation or Compromise.

In addition to the risk of physical safety to these individuals, the disclosure of the names and identifying features of any disciplined staff member will lead to increased incidents of manipulation and attempted staff compromise. CP at 1434, 1446-47, 1450-51. Inmates have a strong incentive to manipulate health care professionals because health care staff have access to prescription medication and others items with limited distribution. Health services staff also write health status reports which provide inmates with medically necessary supplies and services. These supplies and services include meals, clothing, and release from work and programming. CP at 1446-47. If an offender believes that a medical staff member has not followed the rules for medication distribution, a security concern is that the offender will know which staff members to target for favors or extortion. CP at 1434. Accordingly, disclosure of the names and identifying features of disciplined staff will place staff at greater risk of manipulation, and therefore hamper DOC's law enforcement mission.

c. Disclosure Will Hamper DOC's Ability to Provide the Constitutionally Required Services.

Disclosure of the names and identifying features of disciplined DOC medical staff will make it difficult for that medical professional to continue working directly with inmates. CP at 1450-51, 1447. A patient barrier will be created by inmates doubting the credibility of the disciplined employee or refusing treatment from particular providers. *Id.* This only compounds DOC's current challenges of recruiting and retaining medical health care staff to work in state prisons.

The state has a constitutional obligation to provide health care. *Reynolds v. Wagner*, 128 F.3d 166, 174 (3rd Cir. 1997). In prison, inmates have a limited ability to seek health care on their own. The Constitution does not guarantee a prisoner the doctor or course of treatment of his or her choice. *Frohman v. Wayne*, 766 F. Supp. 909, 916 (D. Colo. 1991), *overruled on other grounds*, 958 F.2d 1024 (10th Cir. 1992); *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988). In fact, they only have a constitutional right to treatment by available providers. *Kinney v. Kalfus*, 25 F.3d 633, 634 (8th Cir. 1994).

Nondisclosure of the names and identifying features of the disciplined staff is essential to DOC maintaining the safe, secure, legal and orderly operation of its facilities. There is no public interest served in disclosing the names and identifying features of sanctioned health care providers when the result will be offender refusal of treatment, potential compromise in security, increased problems with retention of medical professionals in DOC facilities, and ultimately reduced offender access to

health services. CP at 1449-51. Disclosure of names and identifying features of disciplined staff will also lead to the manipulation and harassment of medical staff. Disclosure would impair the ability of the medical staff to focus on administering health care to inmates. This impairment will ultimately impact DOC's ability to recruit and maintain qualified staff, thereby impairing its law enforcement mission. *Id.* PLN did not provide or cite to testimony or evidence in the record that supports a different conclusion.

B. Inmates' Health Care Information is Exempt From Disclosure When It Can Readily be Associated With a Particular Inmate.

In RCW 70.02.010, the Legislature found that “[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm to a patient’s interest in privacy, health care or other interests.” RCW 70.02.005(2). Additionally, because of the desire to retain the full trust and confidence of the patient, health care providers have an interest in assuring that health care information is not improperly disclosed. RCW 70.02.005(3).

As a result, “a health care provider . . . may not disclose health care information about a patient to any other person without the patient’s written authorization” unless a statutory exemption in RCW 70.02.050 applies. RCW 70.02.020. The prohibition on disclosure applies to any of the patient’s “health care information” which is defined in RCW 70.02.010(6) as “any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a

patient and directly relates to the patient's health care." RCW 70.02.010(6).

There is no dispute that inmates are patients whose health care information is protected by RCW 70.02.020. PLN asserts that once the names of the inmates are redacted any remaining information, e.g., medical complaints, diagnosis, and treatment, does not constitute "health care information." This argument lacks common sense because this information may still be readily associated with a particular inmate.

"Identify" and "readily identify" are not defined in the statute and have not been considered by this Court. In *Wright v. Jeckle*, 121 Wn. App. 624, 90 P.3d 65 (2004), the Court of Appeals stated that the definition of health care information has two requisites—patient identity and information about the patient's health care. *Wright v. Jeckle*, 121 Wn. App. at 630.

Wright dealt with a discovery order in a suit that alleged improprieties by a physician. Over the physician's objection, the trial court ordered him to turn over a patient list to the plaintiff's mailing agent for the purpose of giving a class-action notification. *Id.* at 626. In affirming the trial court, the Court of Appeals concluded that while the mailing service would have access to the names on the list, neither it nor its employees would know what is in the sealed mailing. Further, the procedure did not allow for any inference as to anything about the persons on the list other than they are receiving an envelope with something from the court. *Id.*

In *Doe v. Group Health Coop. of Puget Sound, Inc.*, 85 Wn. App. 213, 932 P.2d 178 (1997), the Court found that information identifying the plaintiff in a training session on a claim processing system would reveal health care information. In reversing summary judgment for defendant, the Court of Appeals held that the “fact that Doe has a consumer number does not, by itself, directly relate to the person’s health care.” *Group Health Coop., Inc.*, 85 Wn. App. at 217. However, since the trainers were being trained how to access the mental health history of Group Health patients, “a reasonable person could infer from the context of the disclosure that Doe was a recipient of mental health treatment.” *Id.*

In this case, redaction of only the inmates’ identity does not sufficiently protect against improper disclosure of the inmate’s health care information. If only the inmate’s identity was redacted, a party could subsequently request documents that would similarly allow a person to link the information with a particular inmate. In fact, PLN did request the names of all inmates where medical neglect, malpractice or other medical misconduct by DOC personnel was deemed to be a contributing factor or cause of death. CP at 158-59. Accordingly, cross referencing that information would allow individuals to readily link the information to a particular inmate. Individuals, particularly inmates who are in close and continuous contact with each other, would be able to associate the information to a particular inmate. Finally, if PLN believed that DOC too broadly construed the term “health care information” on specific records, it had the opportunity to take those particular redactions before the trial

court, but it did not do so. Therefore, redaction of both the inmate's name and identifying features and information related to that inmate's health care is necessary and should be allowed.

C. PLN's Assertion that the Court of Appeals Erred in not Awarding a Penalty is not Ripe for Review.

PLN's assertions that the Court of Appeals erred in not awarding a penalty following its decision that DOC improperly withheld draft disciplinary letters is not ripe for review. When the Court of Appeals ruled that DOC improperly withheld draft disciplinary letters it remanded the case to the trial court to order disclosure of those letters. The Court did not address the issue of a penalty, but ordered the commissioner to award attorney fees. *See* Appendix A at 16. However, the court did not specifically state that PLN was not entitled to a penalty.

DOC does not dispute that PLN is entitled to a penalty. *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 855, 60 P.3d 667 (2003). Rather, there has been no error because the matter has been remanded back to the trial court, where after argument by the parties on the appropriate amount the trial court can impose the penalty. Accordingly, the issue is not ripe for review.

///

V. CONCLUSION

For the reasons set out above, the DOC respectfully requests that the Court affirm the ruling of the Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of August, 2004.

CHRISTINE O. GREGOIRE
Attorney General

A handwritten signature in black ink, appearing to read "Michael P. Sellars", written in a cursive style.

MICHAEL P. SELLARS
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PRISON LEGAL NEWS, INC., a Washington
non-profit corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS,

Respondent.

No. 28771-4-II

UNPUBLISHED OPINION

ARMSTRONG, J. -- The editor of the Prison Legal News (PLN) asked the Department of Corrections (DOC) for information pertaining to its medical care providers under the Public Disclosure Act. When DOC took some months to completely respond, and did so with redacted documents, PLN obtained an order requiring DOC to show cause why it had delayed and why it should not disclose the full documents. PLN also sought attorney fees and the statutory penalty against DOC for its late and incomplete disclosures. The trial judge ordered DOC to produce logs of the Public Disclosure Act exemptions it used and logs of the records it withheld entirely; otherwise, the court denied PLN relief. Except for documents that contained drafts of possible

APPENDIX A

disciplinary actions against staff, we agree with the trial court's analysis. Accordingly, we affirm except as to these draft documents.

FACTS

Between January and August 2000, Paul Wright, a prisoner and PLN editor, made seven requests for documents from DOC under the state's Public Disclosure Act (PDA).

DOC received the first request on January 21, 2000. In it Wright asked for: (1) documents of all disciplinary actions against DOC medical providers by any licensing authority; (2) names of all doctors, nurses, physician assistants, and mental health providers DOC employed; (3) records related to DOC medical staff practicing with restricted or suspended licenses; (4) records of prisoner deaths in 1999; (5) records of prisoner deaths where medical negligence was a factor; (6) post mortem documents regarding prisoner deaths; and (7) records of staff and prisoner assaults requiring medical treatment from 1994 through 1999.

On January 25, Wright delivered a second PDA request to DOC. It sought records of: (1) DOC medical providers who had been disciplined or fired; (2) names of disciplined staff members, and the actions taken; and (3) names of DOC staff with arrest records.

DOC responded to the first request within five days on January 26, 2000. DOC informed PLN that it needed approximately 30 additional days to find and compile the requested documents.

DOC responded to the second request, also within five days, on February 1. Again DOC told PLN that it required approximately 30 additional days to find and compile the requested documents.

The information PLN sought was potentially located at 16 different facilities across Washington. DOC asked agency staff at each facility to determine whether they had the requested documents and to respond within 30 days or by February 25. Thirty-seven DOC employees participated in the records search. The staff responded within the required timeframe and, on March 8, 2000, DOC made available to PLN: (1) the names of medical staff members, (2) the number of inmate deaths in 1999, and (3) the quarterly Intelligence Reports. DOC also advised PLN that it would require approximately 60 additional business days to respond to the records requests for: (1) licensing actions related to DOC medical providers, (2) post mortem records concerning prisoner deaths, (3) disciplinary actions involving DOC medical providers, and (4) the names of DOC employees with arrest records. The March 8 DOC letter also told PLN that DOC had no single post mortem document concerning prisoner deaths.

In making the documents available, DOC notified affected staff, conducted a final agency review of the disclosed material, and sought legal advice from the office of the Attorney General.

On May 30, DOC updated PLN on the two requests by advising it that one document was ready for disclosure and that several other documents would be ready around June 21, unless an affected staff member sought to enjoin the disclosure, as allowed under the current collective bargaining agreement. DOC also reported that it did not maintain records containing formal medical findings pertaining to prisoner deaths.

On June 20, DOC provided PLN with information on DOC medical employees practicing with restricted licenses. DOC also made available 1,207 pages of investigative records

No. 28771-4-II

pertaining to disciplinary action against DOC medical staff. But DOC withheld or redacted names and other identifying information on documents under RCW 42.17.310(1)(d) and (e).

On July 30, PLN appealed the June letter. DOC affirmed the decision and informed PLN on August 22.

On September 20, PLN wrote a check for \$243.60 for copying costs, but it made the check out to the Secretary of State. DOC returned the check, and PLN made out another check, one month later on October 20, 2000, and received the documents. DOC also provided PLN a chart explaining the general basis for each redaction or exemption.

After the show cause hearing, the trial court ruled that DOC did not violate RCW 42.17.320. The court found that DOC responded to PLN's requests in a reasonable timeframe. The court did require DOC to produce a log indicating specific exemptions for each non-disclosed document or redaction. The court also allowed for a second hearing on whether PLN could reasonably ascertain the reasons for each non-disclosure or redaction. PLN did not request a second hearing.

PLN now argues that DOC failed to respond to its requests in a timely fashion and that it withheld information not covered by the statutory exemptions. Specifically, PLN challenges DOC's (1) redactions in which it blacked out names and identifying information; (2) withholding of preliminary drafts, notes, recommendations, and opinions; and (3) withholding of patient health care information. PLN seeks an order stating that DOC must produce complete documents; it also seeks an award of its attorney fees and a statutory penalty for each day DOC wrongly withheld information.

ANALYSIS

Washington's Public Disclosure Act requires every governmental agency to disclose any public record upon request unless the record falls within certain specific exemptions. *O'Connor v. Dep't of Soc. and Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). Courts construe the Act broadly and its exemptions narrowly. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978). The PDA is a strongly worded mandate for broad disclosure of public records. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Any written information about government conduct is a public record, regardless of its physical form or characteristics. RCW 42.17.020(36); *Smith v. Okanogan Co.*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000).

Chapter 42.17 RCW specifies that "[j]udicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo." RCW 42.17.340(3); *Ockerman v. King County Dept. of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000). Moreover, where the trial court record consists only of affidavits, memoranda, and other documentary evidence, we stand in the same position as the trial court. *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). The state agency bears the burden of proving that a specific exemption applies. RCW 42.17.340(1); *Hoppe*, 90 Wn.2d at 130.

I. Timely Response

Under RCW 42.17.320, a state agency has five business days to respond to a records request. The agency must either provide the records or acknowledge that it has received the request and give an estimate of the time it will need to produce the records. RCW 42.17.320.

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And an agency may request additional time “to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.” RCW 42.17.320.

RCW 42.17.290 requires an agency to adopt rules that facilitate “full public access to public records . . . [and that] provide for the fullest assistance to inquirers and the most timely possible action on requests for information.” RCW 42.17.270 requires a state agency to make public records “available for inspection and copying, and [the agency] shall, upon request for identifiable public records, make them promptly available to any person.” PLN contends that DOC violated RCW 42.17.270, RCW 42.17.290, and RCW 42.17.320 when it did not fully assist PLN and failed to timely produce the information requested.

PLN does not contend that DOC failed to adopt the required rules or failed to follow them. Rather, PLN argues that DOC granted itself a number of time extensions and that the nine months DOC took to produce the records was simply too long. We disagree.

PLN’s request called for a substantial number of records from a number of facilities spread across the state. Thirty-seven state employees participated in the search for records to meet PLN’s request. Moreover, the requested records were at least potentially subject to exemptions to protect employees and inmates and to prevent disruption of prison operations.

DOC was also required to consider legal action from affected staff members as allowed under their collective bargaining agreement. Apparently because of these problems, DOC sought legal advice from the Attorney General before producing the documents. Finally, at least some

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of the material in the documents was subject to deletion and the redaction process itself took time.

Moreover, PLN misstates the record in arguing that DOC took nine months to produce the documents. DOC produced some records as early as March 8, 46 days after PLN's first request, when it made available: (1) the names of medical staff members, (2) the number of inmate deaths in 1999, and (3) the quarterly Intelligence Reports.

On May 30, DOC updated PLN on the two requests, noting one document was ready for disclosure, and that several other documents would be ready around June 21, unless an affected staff member sought to enjoin the disclosure, as allowed under the current collective bargaining agreement.

And on June 20, DOC provided PLN with information on DOC medical employees practicing with restricted licenses. DOC also made available 1,207 pages of investigative records pertaining to disciplinary action against DOC medical staff. Thus, DOC provided PLN with a response within the statutory requirement and access to information within five months, not nine months as PLN contends.

Prompt disclosure under RCW 42.17.270 is required only *after* the agency identifies the record and ascertains that it is not subject to any exemptions. And an agency may make public records available on a piecemeal basis if, under the circumstances, it is reasonable to do so. *Ockerman*, 102 Wn. App. at 219-20.

Finally, RCW 42.17.340(2) provides a remedy for a requesting person who believes that the agency has not given a reasonable time estimate. The person may seek an order for the

agency to show cause why its estimate is reasonable and the agency then has the burden of proving that its estimate is reasonable. RCW 42.17.340(2); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 615 n. 1, 989 P.2d 1257 (1999).

PLN did not challenge DOC's time estimate as it could have under RCW 42.17.340(2) at a time when the court could have ordered DOC to produce the records earlier. PLN makes its argument too late.

Because of the large volume of records and the complexity of ensuring that exempted materials were not released, we conclude that DOC did not unreasonably delay releasing the records.

II. Redactions and Withholding of Documents

RCW 42.17.310 provides specific exemptions to disclosing public records and states in part:

(1) The following are exempt from public inspection and copying:

...

(d) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

(e) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with . . . penology agencies . . . if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or nondisclosure, such desire shall govern.

RCW 42.17.310(d)-(e).

PLN maintains that DOC improperly withheld information. Specifically, PLN argues that DOC's redactions do not fall under RCW 42.17.310(1)(d), the investigative records

exception, or RCW 42.17.310(1)(e), the witness exception. PLN contends that the trial court erred by broadly construing these exemptions. Because we review the record de novo, we need not address PLN's argument that the trial court improperly construed the exemptions. The question is whether, narrowly construing the exemptions, DOC properly withheld the information.

A. Investigative Records

Investigative records are exempt "if they were 'compiled as a result of a specific investigation focusing with special intensity upon a particular party.'" *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993) (quoting *Laborers Int'l Union, Local 374 v. Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418 (1982)). The Act does not define the phrase "specific intelligence information." *King County v. Sheehan*, 114 Wn. App. 325, 337, 57 P.3d 307 (2002). In the absence of a statutory definition, we give words their ordinary meaning. *Washington State Coalition for the Homeless v. Dep't of Soc. and Health Servs.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997). And we look to dictionary definitions to do so. *Washington State Coalition for the Homeless*, 133 Wn.2d at 905.

An agency may withhold individual names contained in investigative records if: (1) the records were compiled by law enforcement, and (2) the records are essential to effective law enforcement. *Cowles Publ'g Co.*, 109 Wn.2d at 727-28 (redacted names); *Newman v. King County*, 133 Wn.2d 565, 572, 947 P.2d 712 (1997) (full records). PLN argues that the investigative records exemption does not apply because DOC investigations into medical misconduct are not investigations of illegal acts. PLN further contends that even if DOC medical

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malpractice investigations are considered “law enforcement,” the redactions were not essential to law enforcement.

PLN relies on *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). In *Brouillet*, the court held that the investigative records exemption did not apply to the Superintendent of Public Instruction’s office (SPI) because revoking a teacher’s certificate does not constitute law enforcement. *Brouillet*, 114 Wn.2d at 795. Accepting a dictionary definition of “law enforcement” as “[t]he act of putting . . . law into effect; . . . the carrying out of a mandate or command,” the court held that because revoking teaching certificates was discretionary, SPI was not carrying out a command. *Brouillet*, 114 Wn.2d at 795 (quoting BLACK’S LAW DICTIONARY, 474 (5th ed. 1979)). The court also noted that law enforcement requires a sanction for illegal conduct—usually a fine or prison term. *Brouillet*, 114 Wn.2d at 796. SPI, however, could revoke licenses for reasons other than illegal conduct. *Brouillet*, 114 Wn.2d at 796.

PLN also relies on *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). In *Melville*, the court dismissed a tort claim, concluding that DOC had no statutory duty to provide mental health services. *Melville*, 115 Wn.2d at 38-39. By analogy, PLN reasons that because health care professionals are not involved in DOC operations like wardens and guards, the redactions were not essential to law enforcement. We disagree.

First, DOC is by statute a law enforcement agency. RCW 72.09.010; *McLean v. Dept. of Corr.*, 37 Wn. App. 255, 258, 680 P.2d 65 (1984). DOC must enforce laws, rules, and regulations within the institution so as to “preserve the peace” of staff and inmates. *McLean*, 37

Wn. App. at 258. Second, the exemption statute specifically lists penology agencies as agencies that qualify for the investigative records exemption. RCW 42.17.310(d). And DOC is obligated to provide inmates with adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the inmates' safety. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Thus, the scope of DOC's duty to care for and supervise inmates is broad. *See McLean*, 37 Wn. App. at 258.

DOC presented evidence that its internal investigations are highly confidential and depend on the trust and cooperation of staff. "Confidentiality is a key component to the [misconduct investigative] process and this expectation is shared with staff members and offenders." Clerk's Papers (CP) at 1433. If staff or inmates knew that their names were subject to disclosure, they would be less likely to come forward and report misconduct. Finally, according to DOC affidavits, medical staff would be at risk for physical altercations or other retaliatory actions if an inmate believed that a particular health care worker was harming or abusing a fellow inmate. And staff must conduct confidential interviews about medical care complaints and, at times, must conduct medical examinations in inmate units.

Inmates face the same risk. Releasing an inmate informant's name could require DOC to place the inmate in protective custody, to protect the inmate from retaliation from the general prison population. Similarly, in conducting investigations, DOC affords confidentiality to staff who must work within the prison population because inmates often retaliate against informants, whether they are prisoners or staff members. Thus, the evidence shows that releasing staff and inmate names would hinder future investigations as witnesses would fear inmate retaliation. *See*

also *Cowles Publ'g Co.*, 109 Wn.2d at 732-33 (disclosure of names could reveal investigatory techniques and procedures, and hinder voluntary cooperation).

DOC also presented evidence that releasing the names of disciplined staff members would compromise the staff members. Inmates would use the information to blackmail or intimidate the staff members and obtain favors. Moreover, inmates would refuse treatment from a disciplined staff member and this would create an unmanageable situation for DOC because often only one medical staff person is available.

DOC has shown that it must protect the identities of staff, inmates, and witnesses to preserve its ability to investigate medical misconduct.

PLN argues that the court in *Cowles Publishing* took live testimony before reaching its conclusion regarding the PDA's investigative exception, while here the court relied on conclusive declarations. The PDA, however, allows the trial court to conduct a hearing based solely on affidavits. RCW 42.17.340(3). And PLN did not ask for a hearing with the opportunity to present live testimony.

We conclude that DOC properly withheld the names and other identifying information of staff persons, witnesses, and inmates involved in DOC internal investigations of misconduct.

B. Preliminary Drafts and Notes

RCW 42.17.310(1)(i) exempts, "[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended," unless the document is "publicly cited by an agency in connection with any agency action." RCW 42.17.310(1)(i).

The purpose of this exemption is to allow frank and uninhibited discussion during the decision-making process. *Hoppe*, 90 Wn.2d at 132. It protects “the give and take of deliberations necessary to formulation of agency policy.” *Hoppe*, 90 Wn.2d at 132-33 (citations omitted). For that reason, the exemption only protects documents that are part of “‘a deliberative or policy-making process.’” *Brouillet*, 114 Wn.2d at 799 (quoting *Hoppe*, 90 Wn.2d at 133). It does not protect all documents in which opinions are expressed regardless of whether the opinions pertain to the policy formulation. *Hoppe*, 90 Wn.2d at 132-33. Moreover, unless disclosure would reveal and expose the deliberative process, as distinct from disclosing the facts underlying a decision, the exemption does not apply. *Hoppe*, 90 Wn.2d at 133.

To rely on this exemption, an agency must show that: (1) the records contain pre-decisional opinions or recommendations of subordinates expressed as part of a deliberative process; (2) disclosure would be injurious to the deliberative or consultative function of the process; (3) disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, (4) the materials exemption cover reflect policy recommendations and opinions and not the raw factual data on which a decision is based. *Columbian Publ'g Co. v. Vancouver*, 36 Wn. App. 25, 31-32, 671 P.2d 280 (1983). Subjective evaluations are not exempt under this provision if they are treated as raw factual data and are not subject to further deliberation and consideration. *Hoppe*, 90 Wn. App. at 134. Once the policies or recommendations are implemented, the records cease to be protected under this exemption. *Brouillet*, 114 Wn.2d at 799-800.

PLN reasons that opinions expressed in draft employee notifications, discipline letters, and discipline action letters reflect policy-implementing, not policy-making and, thus, are not exempt from disclosure under RCW 42.17.310(1)(i). PLN also contends that if the draft letters were protected, they lost any protection once the policies or decisions they dealt with were implemented. Finally, PLN maintains that the court should have required DOC to show that the requested documents contained no factual materials or subjective material treated as factual material.

DOC provided no evidence for the trial court in support of its argument that the draft letters were protected. To support its argument before us, DOC points to the assistant attorney general's argument to the trial court. This is insufficient.

DOC has the burden of showing that a specific exemption to public disclosure applies. Here, that burden includes a showing that the policies discussed in the draft documents have not been implemented, *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 256-57, 884 P.2d 592 (1994); that the drafts do not contain unprotected factual material, *Hoppe*, 90 Wn.2d at 133; and that disclosure would inhibit the flow of recommendations, *Hoppe*, 90 Wn.2d at 133. DOC has not met its burden. On remand, the trial court shall order disclosure of the letters.

C. Patient Health Care Information

RCW 70.02.020, or the Uniform Health Care Information Act, reads in relevant part that, "a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care

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information about a patient to any other person without the patient's written authorization." RCW 70.02.020; *see also* RCW 42.17.312. A statute defines health care information as "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." RCW 70.02.010(6).

PLN argues that under these statutes, DOC can redact only the patient's name and other patient identifying information, such as the patient's identification number. And once this information is withheld, according to PLN, the medical privilege no longer applies because to be protected, the information must both identify the patient and relate to the patient's health care. PLN further argues that DOC redacted names of non-patients and DOC and Personnel Appeals Board staff not protected under the statute. We disagree.

Although non-patients and DOC staff names are not exempt from disclosure under the medical information exemption, they are exempt under the law enforcement and witness exemptions. And the medical records requested were all related in some way to the medical staff misconduct investigations. We have held that DOC properly withheld these names under the law enforcement investigative exemption as discussed earlier.

To protect the identity of the patient, DOC redacted some of the following information in various records: the patient's medical complaint, the provider's diagnosis, exam results, medication prescription, therapy, and test results.

DOC reasons that because inmates are in close and continuous contact with each other, an inmate could readily associate another inmate's medical treatments, diagnosis, complaints,

and prescribed medications to his or her identity. This is certainly plausible. And we have no way of knowing from the redacted records before us whether DOC redacted more information than necessary. Neither did the trial judge.

At the end of the hearing, the court ruled generally that it recognized the validity of the medical privilege but declined to rule on any specific document with exemptions. Rather, the court urged the parties to discuss the extent to which PLN needed further information to evaluate DOC's claimed exemptions of both parts of documents and entire documents.¹ And the court said that if the parties could not resolve the problems, it would hold another hearing. PLN did not ask for another hearing. We are not willing to speculate as to whether DOC redacted more than was necessary to protect the patient's identity when PLN was given the opportunity to clarify the issue and chose not to pursue it.

III. Attorney Fees and Statutory Penalties

RCW 42.17.340(4) mandates an award of attorney fees and costs in favor of a person who prevails in a PDA action against a government agency. Once a violation of the PDA has been established, courts are required to award reasonable attorney fees and statutory penalties. *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 855, 60 P.3d 667 (2003). But the PDA applies only to public records. *Smith*, 100 Wn. App. at 12. A public record is (1) any writing; (2) containing information relating to the conduct of government or performance of any governmental or proprietary function; (3) prepared, owned, used, or retained by any state or local

¹ The order on show cause also directed DOC to identify the specific exemption DOC claimed as to each redaction. PLN has not assigned to error to this; nor does it contend that DOC has failed to comply with the order.

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agency regardless of physical form or characteristic. RCW 42.17.020(36), *Smith*, 100 Wn. App. at 12. Under the Act, an agency is not required to create a record. *Smith*, 100 Wn. App. at 13-14.

DOC gave PLN a chart explaining the general basis for each redaction. The court, however, required DOC to produce a more specific statement as to records withheld in their entirety under RCW 42.17.310(4), identifying the type of record, its date and number of pages and, unless otherwise protected, the identity of the author and recipient or, if protected, other means of sufficiently identifying the document without disclosing protected content. But this court-ordered log is not a public record because it was not an existing DOC document when PLN made its PDA requests.

In addition, the log does not contain information relating to government conduct, performance, or a proprietary function. A document relating to a governmental function is “used” by the agency if it is applied to a given purpose or instrumental to an end or process. *Concerned Ratepayers Ass’n v. Pub. Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 959, 983 P.2d 635 (1999). The critical inquiry is whether the requested information bears a nexus to the agency’s decision-making process. *Concerned Ratepayers Ass’n*, 138 Wn.2d at 960. A nexus between the information at issue and an agency’s decision-making process exists where the information relates to the conduct or performance of the agency or its proprietary function and is a relevant factor in the agency action. *Concerned Ratepayers Ass’n*, 138 Wn.2d at 960-61.

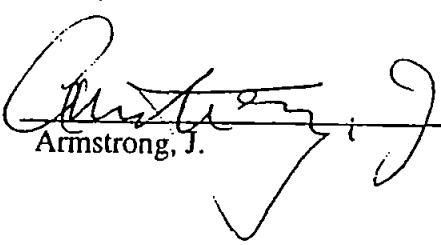
The log was created by court order to help PLN understand why DOC withheld certain documents. It was not used in any DOC decision-making process. Thus, the log is not a public

record under RCW 42.17.020(36), and PLN is not entitled to attorney fees for its work in obtaining the log.

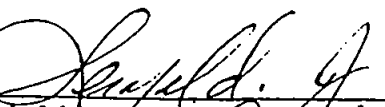
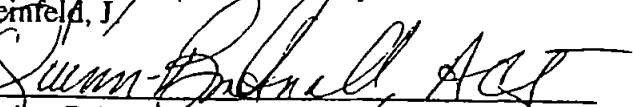
But PLN has also prevailed on its request for documents containing draft opinions as to disciplined staff. Accordingly, a commissioner of this court will award PLN attorney fees and costs incurred only for obtaining these documents upon compliance with RAP 18.1. RCW 42.17.340(4).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, J.

We concur:


Kaufeld, J.

Gunn-Brintnall, A.C.J.