No. 74890-0

SUPREME COURT OF THE STATE OF WASHINGTON

PRISON LEGAL NEWS,
Petitioner,

v.

DEPARTMENT OF CORRECTIONS,
Respondent

BRIEF OF AMICUS CURIAE

WASHINGTON COALITION FOR OPEN GOVERNMENT

ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC.

WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICUS

A. Washington Coalition for Open Government

The Washington Coalition for Open Government, a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. Its mission is to help foster the cornerstone of democracy: open government processes supervised by an informed and engaged citizenry. The Coalition represents a cross-section of the Washington public, press and government. Its board of directors exemplifies this diversity. A description of the Coalition's directors is attached to the Motion For Leave to File Brief of Amici Curiae as Appendix A.

B. Allied Daily Newspapers of Washington, Inc.

Allied Daily Newspapers of Washington, Inc. ("Allied") is a Washington not-for-profit association representing 25 daily newspapers serving Washington and the Washington bureaus of the Associated Press. A roster of Allied's member newspapers is attached to the Motion as Appendix B.

C. Washington Newspaper Publishers Association

Washington Newspaper Publishers Association ("WNPA") is a for-profit association representing 111 community newspapers in

Washington and 11 associate members in Washington, one associate member in Idaho and another in Tennessee. With the exception of four daily newspapers and three biweekly newspapers, WNPA's member newspapers are weekly or semi weekly newspapers, most serving rural or suburban communities. A roster of the WNPA member newspapers is attached to the Motion as Appendix C.

D. Interest of the Public Interest Amici

The interest of the Public Interest Amici in this case stems from the public's strong interest in preserving public access to information about government and to maintaining government accountability to the people of the state of Washington. The Public Interest Amici include the state's official freedom of information association as well as statewide media associations representing nearly every newspaper in the state of Washington. The Public Interest Amici daily promote access to government documents and decisions, and use the Public Disclosure Act ("PDA") in their business and civic activities.

The Public Interest Amici have a legitimate interest in assuring that the Court is adequately informed about the impact that this case may have on the ability of all record requesters—not just PLN—to obtain information about the care of inmates at the Department of Corrections. The Public Interest Amici are also concerned about the broader impact

that this case may have on the application of RCW 42.17.310(1)(d) to other agencies and other types of records.

II. STATEMENT OF THE CASE

The facts of this case are adequately discussed in the briefs submitted by the parties.

However, the Public Interest Amici remind the Court that the identity of the requester—Prison Legal News—is irrelevant. Under RCW 42.17.270 and Dawson v. Daly, 120 Wn.2d 782, 797-98, 845 P.2d 995 (1993), the application of RCW 42.17.310(1)(d) (or any other exemption) cannot be based on the identity of the requester. If this Court adopts an overly broad construction of that exemption, that construction will be binding on all other records requesters, including the Public Interest Amici.

III. ARGUMENT AND AUTHORITY

A. The records sought by PLN are not exempt under RCW 42.17.310(1)(d).

The exemption claimed by DOC and upheld by the Court of Appeals should be disposed of categorically, by narrowly interpreting the term "investigative records" in RCW 42.17.310(1)(d). This Court should hold that the records sought by PLN are ***not*** "investigative records" for purposes of RCW 42.17.310(1)(d). That holding would be consistent with

the purpose of the PDA, with the legislative command that PDA exemptions be narrowly construed, and with prior decisions of this Court.

It is not necessary for the Court to reach the issues of (i) whether the DOC records relate to "law enforcement" or (ii) whether the nondisclosure of such records is essential to such law enforcement.

1. The records sought by PLN are not "investigative records" for purposes of RCW 42.17.310(1)(d) because those records do not involve any investigative function of DOC.

The Court of Appeals erroneously held that "names and other identifying information of staff persons, witnesses, and inmates" in the records requested by PLN were exempt under the "effective law enforcement" prong of RCW42.17.310(1)(d). Slip Opinion at 12. That section exempts from disclosure:

> (d) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, 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); see RCW 42.17.251(11) (exemptions must be narrowly construed to promote policy of public disclosure). Both the Court of Appeals and DOC have construed the exemption far too broadly.

Both the Court of Appeals and DOC cite McLean v. Department of Corrections, 37 Wn. App. 255, 680 P.2d 65 (1984), for the proposition that

"DOC is a law enforcement agency." Supp Br. (DOC) at 6. But that is not the issue, and McLean did not address the PDA at all.[1] The critical threshold issue is whether the records maintained by DOC relating to malpractice and/or misconduct by DOC medical staff are "investigative records" within the meaning of RCW 42.17.310(1)(d). They are not.

The purpose of the PDA is "nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." Progressive Animal Welfare Society v. UW (PAWS), 125 Wn.2d 243, 251, 884 P.2d 592 (1995). To give effect to this policy, this Court must heed "the Legislature's thrice-repeated demand that exemptions be narrowly construed." PAWS, 125 Wn.2d at 261 n.7.

A survey of the relevant case law reveals that the term "investigative records" in RCW 42.17.310(1)(d) has always been narrowly construed by the Washington courts. The type of records at issue in this case—records relating to the job performance of government employees—have never been characterized as "investigative records" under that section.

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[1] McLean held that DOC is a law enforcement agency for purposes of RCW 9.96A.030 (which relates to employment of felons). McLean, 37 Wn. App. at 258.

In the first two cases to interpret the "investigative records" exemption in RCW 42.17.310(1)(d) the appellate courts clearly understood that the exemption only applies where the agency is carrying out a statutorily-mandated *investigatory* function. In Ashley v. Public Disclosure Commission, 16 Wn. App. 830, 560 P.2d 1156 (1977), a requester sought records of the Public Disclosure Commission ("PDC") relating to a pending investigation of alleged violations of Initiative 276. Noting that the PDC was charged under RCW 42.17.360 with investigating such matters, the Court of Appeals held that the records were exempt as investigative records under RCW 42.17.310(1)(d). Ashley, 16 Wn. App. at 837. In Laborers International Union v. Aberdeen, 31 Wn. App. 445, 642 P.2d 418 (1982), a union sought payroll records submitted by a contractor to the City to determine whether the contractor was complying with the Davis-Bacon Act. The Court of Appeals held that the City was not an "investigative agency" for purposes of RCW 42.17.310(1)(d) and the exemption did not apply. Laborers, 31 Wn. App. at 448.

The application of RCW 42.17.310(1)(d) to law enforcement first arose in Columbian Publishing Co. v. City of Vancouver, 36 P.2d 25, 671 P.2d 280 (1983). In that case, a newspaper sought disclosure of statements by various police officers complaining about the police chief.

The statements had been provided by the police association to the city manager. The Court of Appeals held that the statements were not exempt under RCW 42.17.310(1)(d) because the city manager "who is investigating the job performance of a person under his supervision, is not *functioning* as an 'investigative, law enforcement, [or] penology agency' as the exemption requires." Columbian Publishing Co., 36 Wn. App. at 30 (emphasis added) (citing both Ashley, supra, and Laborers, supra).

The application of RCW 42.17.310(1)(d) to police internal investigations records first arose in Barfield v. City of Seattle, 100 Wn.2d 878, 676 P.2d 438 (1984), which involved a discovery dispute. This Court assumed, without analysis, that internal investigation records were "investigative records" under RCW 42.17.310(1)(d). Barfield, 100 Wn.2d at 884-885. See also, State v Jones, 96 Wn. App. 369, 381, 979 P.2d 898 (1999) (police internal investigation files regarding a shooting incident are investigative records for purposes of RCW 42.17.310(1)(d)).

The basic proposition that police reports of crime are "investigative records" for purposes of RCW 42.17.310(1)(d) was established in Hudgens v. City of Renton, 49 Wn. App. 842, 846, 746 P.2d 320 (1987). The application of RCW 42.17.310(1)(d) to police reports was refined in later cases from this Court. See Newman v. King County, 133 Wn.2d 565, 573, 947 P.2d 712 (1997) (documents in an open criminal

investigation file are investigative records for purposes of RCW 42.17.310(1)(d)); Cowles Publishing v. Spokane Police Department, 139 Wn.2d 472, 987 P.2d 620 (2000) (police reports are not categorically exempt under RCW 42.17.310(1)(d) and Newman, supra, where the suspect has been arrested and the case referred to the prosecutor). See also City of Tacoma v. Tacoma News, Inc., 65 Wn. App. 140, 144, 827 P.2d 1094 (1992) (police reports relating to allegations of child abuse are investigative records for purposes of RCW 42.17.310(1)(d)); cf. Cowles Publishing Company v. City of Spokane, 69 Wn. App. 678, 683, 849 P.2d 1271 (1993) (routine police reports filled out whenever a police dog makes contact with a person are not investigative records for purposes of RCW 42.17.310(1)(d)).

The application of RCW 42.17.310(1)(d) to police internal investigations records was examined in greater detail in Cowles Publishing v. State Patrol, 109 Wn.2d 712, 748 P.2d 597 (1988). In that case, newspapers sought access to the names of law enforcement officers against whom complaints had been sustained after internal investigations. This Court held that the names were properly withheld as "investigative records" under section 310(1)(d). State Patrol, 109 Wn.2d at 713. In reaching this result, this Court noted that there are two necessary elements to the investigative records exemption: such records must be (i) "compiled

by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession," and (ii) "the nondisclosure of which is essential to effective law enforcement." State Patrol, 109 Wn.2d at 728.

Under the first element, this Court noted that the agencies at issue were all law enforcement agencies. But the Court went on to note that:

> The internal investigative divisions of each of those law enforcement agencies are mentioned in the same exemption section of the statutes as are "state agencies vested with the responsibility to discipline members of [a] profession." *It is the duty of the internal investigative divisions of the Spokane Police Department, the Spokane County Sheriff's Department and the Washington State Patrol to investigate complaints against and, if appropriate, to discipline members of the law enforcement profession.* (Emphasis added).

State Patrol, 109 Wn.2d at 713. If it were sufficient, under the first element, that the agencies were law enforcement agencies, this Court would not have pointed out that the internal investigations divisions had a duty to investigate and discipline police officers. This Court's analysis in State Patrol shows that the records were exempt, not merely because the records were held by law enforcement agencies, but because the internal affairs divisions of those agencies were performing their investigatory functions.

State Patrol was followed by three cases that further demonstrate how the "investigative records" exemption is tied to the investigatory function of the agency. First, in Spokane Police Guild v. Liquor Control Board, 112 Wn.2d 30, 769 P.2d 283 (1989), this Court held that an investigative report prepared by the Liquor Control Board relating to alleged liquor violations was an "investigative record" for purposes of RCW 42.17.310(1)(d), but the nondisclosure of that record was not essential to effective law enforcement. Spokane Police Guild, 112 Wn.2d at 37. Second, in Tacoma News, Inc., v. Tacoma-Pierce County Health Department, 55 Wn. App. 515, 778 P.2d 1066 (1989), the Court of Appeals held that local health department records relating to an ambulance company were "investigative records" for purposes of RCW 42.17.310(1)(d) because the health department was acting in its capacity as an investigative and law enforcement agency when it investigated allegations of misconduct and inadequate care against the ambulance company. Tacoma News, Inc., 55 Wn. App. at 520.

In the third case, Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 791 P.2d 526 (1990), a newspaper sought disclosure of records of the Superintendent of Public Instruction (SPI) specifying the reasons for teacher certificate revocations. This Court held that the records were "investigative records" for purposes of RCW 42.17.310(1)(d) because the

SPI was a state agency "with the responsibility to discipline teachers." Brouillet, 114 Wn.2d at 795.[2] Read together with Spokane Police Guild and Tacoma News, Inc., this Court's decision in Brouillet demonstrates that agency records are "investigative records" for purposes of RCW 42.17.310(1)(d) only where the agency is performing a statutorily-mandated investigative function.

Finally, in Dawson v. Daly, 120 Wn.2d 782, a defense expert witness, Daly, sought disclosure of a file created by the Snohomish County Prosecuting Attorney for the purpose of cross-examining and impeaching Daly at trial. This Court rejected the prosecutor's argument that the records were investigative records for purposes of RCW 42.17.310(1)(d) because the file on Daly was not generated in an investigation "'designed to ferret out criminal activity or shed light on some other allegation of malfeasance [by Daly].'" Dawson, 120 Wn.2d at 793 (quoting Columbian Pub'g Co., 36 Wn. App. at 31). Cf. Cowles Publishing Co. v. Pierce County Prosecutor's Office, 111 Wn. App. 502, 508, 45 P.3d 620 (2002) ("mitigation package" submitted by a death penalty defendant in an effort to persuade the prosecutor not to seek the

[2] However, the Court also held that the exemption did not apply because the revocation of teacher certificates was not law enforcement. Brouillet, 114 Wn.2d at 797. See subsection (2) below.

death penalty was an investigative record under RCW 42.17.310(1)(d) because the prosecutor was engaged in an investigation mandated by the duties of the prosecutor's office).

This case law, particularly this Court's decisions in State Patrol, Brouillet and Dawson, reveal a consistent and narrow construction of the term "investigative records" in RCW 42.17.310(1)(d): ***records generated or held by an agency are "investigative records" for purposes of RCW 42.17.310(1)(d) only where the agency is performing a statutorily-mandated investigative function.*** This Court should take the opportunity in this case to clearly restate this principle.

Applying this rule to this case it is clear that the records sought by PLN are not "investigative records" for purposes of RCW 42.17.310(1)(d). DOC may be a law enforcement agency, and, like all government agencies and private employers, it may wish to investigate its own employees. But the investigation and discipline of medical professionals is not the function of DOC. That function is delegated by statute to the medical quality assurance commission and related agencies. See RCW 18.71.002-.015.

If the construction of RCW 42.17.310(1)(d) advanced by DOC were accepted, virtually all records maintained by any law enforcement agency would be "investigative records." If DOC decided to investigate the unsanitary conditions in a prison cafeteria the resulting records would

be "investigative records." If the State Patrol chose to investigate the source of cigarette butts in patrol cars the resulting records would be "investigative records."

The construction of RCW 42.17.310(1)(d) advanced by DOC is much too broad, and would defeat the central purpose of the PDA, which is to hold public officials and institutions accountable to the public. PAWS, 125 Wn.2d at 251. Not only would PLN (and other media and watchdog organizations) be unable to report on medical misconduct at DOC institutions, but all public access to records of law enforcement agencies would be in jeopardy. The media organizations comprising the Public Interest Amici frequently make public records requests to law enforcement agencies seeking, *inter alia*, budgetary information, internal policies and memoranda, email, complaints, and employee records. Law enforcement agencies already several narrowly defined exemptions that protect some of their records from disclosure, including, but not limited to, section 310(1)(b) (employee privacy), section 310(1)(e) (identity of witnesses and victims); section 310(1)(i) (deliberative processes), and section 310(1)(j) (work product and privilege). Law enforcement agencies should not be permitted to argue that other records which do not involve an investigatory function are exempt under a broad and malleable construction of RCW 42.17.310(1)(d).

As the Court of Appeals held in Columbian Publishing Co., 36 Wn. App. at 30, an agency is not performing an investigative function or generating "investigative records" for purposes of RCW 42.17.310(1)(d) where it is merely evaluating, investigating or disciplining its own employees. With the exception of police internal investigations of law enforcement officers, RCW 42.17.310(1)(d) does not apply to employer evaluations or investigations of government employees.

Instead, records relating to the performance of government employees must be evaluated under RCW 42.17.310(1)(b), which only exempts such records to the extent necessary to protect narrowly-defined privacy rights. See Tiberino v. Spokane County, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (holding that employees' personal emails are exempt from disclosure under RCW 42.17.310(1)(b)). It is worth noting that the agency at issue in Tiberino was a law enforcement agency (Spokane County Prosecutor), but the possible application of the investigative records exemption in RCW 42.17.310(1)(d) to the employee emails wasn't even considered in that case.

In sum, this Court must narrowly construe RCW 42.17.310(1)(d) such that agency records are "investigative records" for purposes of that section only where the agency is performing a statutorily-mandated

investigative function. Applying that rule to this case, the records sought by PLN are clearly not exempt under RCW 42.17.310(1)(d).

2. Even if the DOC records were "investigative records" for purposes of RCW 42.17.310(1)(d), the investigations by DOC are not "law enforcement" for purposes of that section.

Although the Court should not reach the issue, the Public Interest Amici agree with PLN that nondisclosure of the DOC records cannot be "essential to effective law enforcement" because DOC's handling of the medical malpractice of its employees is not "law enforcement" under Brouillet, supra. See Supp. Br. Petitioner at 8. In Brouillet, this Court held that records of the Superintendent of Public Instruction (SPI) were "investigative records" for purposes of RCW 42.17.310(1)(d), but such records could not be "essential to effective law enforcement" under that section because the activity being performed—deciding whether to suspend or revoke a teachers' certificates—was not "law enforcement" for purposes of the "effective law enforcement" prong of RCW 42.17.310(1)(d). Brouillet, 114 Wn.2d at 797.[3]

Even where records are created by a law enforcement agency, the records are not automatically "law enforcement" records for purposes of

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[3] also considered and rejected the argument that nondisclosure of the records was necessary to protect individual Wn.2d at 797-98. That issue is not presented in this case. See Supp. Br. Petitioner at 6 n.1.

RCW 42.17.310(1)(d). In Cowles Pub'g Co., supra, the court held that routine police dog contact reports were not themselves "law enforcement" records.

> Nor is nondisclosure of the K-9 reports essential to effective "law enforcement", as that term is used in the statute. For purposes of RCW 42.17.310(1)(d), "law enforcement" involves the imposition of sanctions for illegal conduct. Brouillet, 114 Wash.2d at 795, 791 P.2d 526. The K-9 reports can lead to allegations of misconduct, which would trigger an investigation and imposition of sanctions if warranted, but are not themselves used for "law enforcement."

Cowles Pub'g Co., 69 Wn. App. at 684.

This Court should continue to interpret the term "law enforcement" narrowly. The records sought by PLN may have been created by a law enforcement agency (DOC), but those records are not used for "law enforcement." The DOC employees who committed medical malpractice may be suspended (or terminated) by DOC and reported to the appropriate licensing agencies for investigation and discipline. But DOC cannot imprison them or fine them. Under Brouillet and Cowles Pub'g Co., those records cannot be "essential to effective law enforcement" for purposes of RCW 42.17.310(1)(d).

3. Even if the DOC records were "investigative records" involving "law enforcement" for purposes of RCW 42.17.310(1)(d), nondisclosure of those records is not "essential to effective law enforcement."

PLN and the other amici curiae have adequately addressed DOC's self-serving claim that nondisclosure of the records is "essential to effective law enforcement." The Public Interest Amici agree that DOC interprets the term "essential" far too broadly. The safety and discipline problems discussed by DOC already exist. DOC's claim that these problems would become unmanageable if certain medical records were disclosed is far too attenuated to be the basis for nondisclosure of records under RCW 42.17.310(1)(d). This Court should be highly skeptical of any agency's claim that nondisclosure of records is "essential" to its mission. See Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978) ("[L]eaving interpretation of the [PDA] to those at whom it was aimed would be the most direct course to its devitalization.") This is particularly true where the records at issue relate to embarrassing problems in the agency itself. "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3).

This Court's acceptance of DOC's argument would encourage agencies to assert that the nondisclosure of all sorts of records is "essential to effective law enforcement." Agencies can and will generate self-serving factual arguments to support such claims, just as DOC has done in this case. It is difficult for records requesters to respond to such claims, and equally difficult for trial courts to evaluate them, even where the claim has little or no merit. Even if this Court considered and rejected DOC's claims relating to the particular records at issue in this case, that would not deter DOC or other agencies from making similar arguments about other types of records.

For these reasons, the Public Interest Amici urge the Court to avoid this highly-factual issue entirely. As explained in subsections (1) and (2) (above), this Court should narrowly interpret the terms "investigative record" and "law enforcement" such that RCW 42.17.310(1)(d) is not applicable to the records sought by PLN.

B. The records sought by PLN are not exempt under RCW 70.02.020.

The Public Interest Amici agree with PLN that the term "health care information" in RCW 70.02.010(6) must be construed narrowly. Once the patient's name and other identifiers are redacted, the records

sought by PLN are no longer "health care information" for purposes of the exemption provided by RCW 70.02.020.

DOC argues that redaction of identifying information is not sufficient because a records requester could obtain other information to link the redacted record to a particular person. This argument must be rejected because it is based on a broad rather than narrow, pro-disclosure construction of an exemption. See PAWS, 125 Wn.2d at 261 n.7.

A similar argument was properly rejected by the Court of Appeals in Koenig v. Des Moines, ___ Wn. App. ___, 95 P.3d 777 (2004). In that case, a requester sought redacted police reports relating to a specific person. Even though RCW 42.17.31901 specifically defines what "identifying information" may be redacted from police reports, the agency argued that the entire record was exempt in order to prevent linking the redacted records to a particular person. The Court of Appeals disagreed:

> Mindful of the legislature's charge to construe the Act's exemptions narrowly, we hold that RCW 42.17.31901 does not exempt from disclosure entire records pertaining to a specifically-named child victim of sexual assault. The trial court's redaction of identifying information from the records and its order to release the redacted records did not violate the requirements of RCW 42.17.31901.

Koenig, 95 P.3d at 781.

Similarly, this Court must construe RCW 70.02.010(6) narrowly. This Court must hold that medical records from which the patient's name

and other identifiers have been redacted are not "health care information" for purposes of the exemption provided by RCW 70.02.020.

C. The Court of Appeals' erroneously declined to award PLN attorney fees for obtaining the court-ordered log of withheld documents.

The Court of Appeals held that PLN could not recover the portion of its attorney fees incurred in obtaining a court-ordered log of documents that had been withheld by DOC. Slip Opinion at 17-18. PLN did not raise this issue in its petition for review. Therefore, that issue is not presented for review.

Nevertheless, the Public Interest Amici believe that the Court of Appeals' ruling on this issue is erroneous under RCW 42.17.340(4). The Public Interest Amici urge this Court *not* to affirm or endorse the decision of the Court of Appeals on this issue, even in dicta.

D. Prison Legal News is entitled to statutory penalties under RCW 42.17.340(4).

Although it did not address the issue, the Court of Appeals appears to have assumed that the trial court would award penalties to PLN under RCW 42.17.340(4) on remand. The Attorney General concedes that PLN is entitled to an award of penalties. Supp. Brief (AG) at 16. The Public Interest Amici agree that such penalties are mandatory under RCW 42.17.340(4), and that the amount of penalties should be determined by the trial court on remand.

RESPECTFULLY SUBMITTED this 20th day of September, 2004.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

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