NO. 35469-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Appellant,

v.

LAURA MATHIEU, ET AL.,

Respondents.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

I. INTRODUCTION

The Attorney General respectfully submits this amicus brief pursuant to the Court's May 7, 2008, Order for Amicus Curiae Brief and Continuing Oral Argument.

II. ISSUES ADRESSED BY AMICUS

The Court's Order "requests that the Attorney General . . . submit an amicus curiae brief . . . addressing the following issues:

(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?
(2) Whether government employees' badge identification photographs are public records, subject to disclosure under the PRA?
(3) To what extent government employees' performance reviews, training records, compensation records, administrative grievances, internal investigation records, and records defined by the requestor here as "critical employment records" are subject to disclosure under the PRA?"

III. ARGUMENT OF AMICUS

A. Incarcerated Felons Possess Diminished Legal Rights That Are Inconsistent With A Right To Request Records Under The PRA[1]

The Public Records Act does not extend to incarcerated felons. Under the common law and article VI, section 3 of the Washington Constitution, incarcerated felons lose their civil rights, and may neither

[1] The Court's first issue is framed as whether a person who has forfeited the right to vote by reason of a felony conviction is entitled to records under the terms of the Public Records Act. Because these issues arise with respect to Mr. Parmelee, an incarcerated felon, this brief addresses whether incarcerated felons are entitled to records under the terms of the PRA.

vote nor hold public office. Moreover, incarcerated felons are subject to the comprehensive control of the Secretary of the Department of Corrections. The purpose of the PRA is to protect the interests of the sovereign people of Washington in maintaining control over their government. But incarcerated felons have lost their sovereignty—they can neither vote nor hold public office, and they are under the substantial authority of the Department of Corrections. For these reasons, incarcerated felons are not within the scope of the PRA. The Supreme Court has recognized that inmates fall outside the scope of another generally applicable law. In *Dawson v. Hearing Comm.*, 92 Wn.2d 391, 597 P.2d 1353 (1979), the Court rejected an inmate's claim that prison disciplinary proceedings were subject to the Administrative Procedure Act because of the unique nature of prison disciplinary matters. For similar reasons, the PRA does not extend to incarcerated felons.

1. The Civil Rights Of Incarcerated Felons Were Limited At Common Law

RCW 4.04.010 provides that "[t]he common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." RCW 9A.04.060 similarly states that "[t]he provisions of the common law relating to the commission of crime and the punishment

thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state."

"At common law, a person convicted of a felony was considered to be "civilly dead"." *In the Matter of Walgren*, 104 Wn.2d 557, 569, 708 P.2d 380 (1985). "There were three principal incidents consequent upon an attainder for treason or felony,—forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death." *In re Sego,* 7 Wn. App. 457, 463-64, 499 P.2d 881 (1972), *rev'd on other grounds*, 82 Wn.2d 736, 513 P.2d 831 (1973), quoting *Avery v. Ever*ett, 65 Sickels 317, 110 N.Y. 317, 333, 18 N.E. 148, 155 (1888). Two of these, forfeiture of property and loss of inheritance rights, were specifically made inapplicable to convicted felons by article I, section 15, of the constitution.[2]

Washington courts have not fully considered the extent to which this common law principle otherwise remains part of Washington law, or the precise scope of civil rights that it would implicate. For example, in *Walgren*, the court noted that this "penalty has been somewhat tempered by our federal and state constitutions" 104 Wn.2d at 569, recounted certain constitutional and statutory felon civil disabilities, *Id.* at 569-70, but ultimately concluded that it "need not determine the exact status of the

[2] Article I, section 15, provides that "[n]o conviction shall work corruption of blood, nor forfeiture of estate."

[felon's] civil rights." *Id.* Presumably, "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." *Mehdipour v. Wise*, 65 P.3d 271, 272, 273 (Okla. 2003). Accordingly, in analyzing whether incarcerated felons are entitled to records under the terms of the PRA, this brief examines Washington's constitution, statutes and common law.

2. Washington's Constitution And Statutes Confirm That Felons Have Limited Civil Rights

Washington's constitution and statutes impose specific legal disabilities on persons convicted of a felony. Under article VI, section 3, felons are excluded from the franchise "unless restored to their civil rights." RCW 2.36.070(5) provides that a person who "[h]as been convicted of a felony and has not had his or her civil rights restored" is not competent to serve as a juror. A public officer convicted of a felony forfeits and is thereafter disqualified from holding public office. RCW 9.92.120. A felon whose voting rights have not been restored is incompetent to hold public office. RCW 42.04.020. Felons are prohibited from possessing firearms. RCW 9.41.040. And under RCW 9.96A.020, a felony conviction may disqualify an individual from public employment and licensed businesses and professions.

Washington law also provides for circumstances under which felons are restored to their civil rights, thus presupposing their loss. *See*

U.S. v. Brailey, 408 F.3d 609, 612 (9th Cir. 2005).[3] However, neither these statutes, nor cases considering them, define "civil rights" for their purposes.[4]

3. The Constitutional And Common Law Rights Of An Incarcerated Felon Are Limited

Although prisoners retain many fundamental constitutional protections, "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'" *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), citing *Price v. Johnson*, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948). Thus, even with respect to *constitutional* protections "[t]here must be

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[3] *See, e.g.* RCW 9.92.066(1) ("restoration of . . . civil rights" upon completion of suspended sentence); RCW 9.94A.637(4) ("discharge [upon completion of sentence] shall have the effect of restoring all civil rights lost by operation of law upon conviction"); RCW 9.94A.885(2) (clemency and pardons board may receive petitions "for the restoration of civil rights lost by operation of state law", based on federal or out-of-state felonies, and "may issue certificates of restoration limited to the elective rights to vote and to engage in political office"); RCW 9.96.050(1)(c) and (d) (indeterminate sentence review board certificate of discharge "shall have the effect of restoring all civil rights lost by operation of law upon conviction" but "shall not restore" rights relating to firearms); RCW 9.96.020 (when the governor "shall determine to restore [to a person convicted of an infamous crime] his civil rights").

[4] Construing a civil death statute to exclude forfeiture of estate, the Oklahoma Supreme Court observed that "in its broadest sense [the term] includes those rights which are the outgrowth of civilization, the existence and exercise of which necessarily follow from the rights that repose in the subjects of a country exercising self-government." *Grooms v. Thomas*, 93 Okla. 87, 219 P. 700, 701 (1923). *See also*, *Green v. State*, 251 A.D. 108, 295 N.Y.S. 672, 674 (1937) (recognizing statute suspending all civil rights upon imprisonment "as declaratory of the common law", and identifying civil rights as "those defined and given by positive law enacted for the maintenance of government."). *See also*, *Brailey*, referring to "core civil rights" in the context of a federal statute limiting the right to possess a firearm, as the right to vote, serve as a juror, or hold public office. 408 F.3d at 612-13.

mutual accommodation between [those provisions and] institutional needs and objectives." *Id.* at 556. "[O]ne cannot automatically apply . . . rules designed for free citizens in an open society . . . to the very different situation presented by . . . a state prison." *Id.* at 560. Prison regulations that impinge on an inmate's fundamental *constitutional* rights are valid provided they are reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). It hardly may be doubted then that, with respect to incarcerated felons, any *common law* rights that they retained were subject to similar restriction. This would include a common law right to public records, assuming that an imprisoned felon retained such a right at common law.[5]

These decisions reflect the undeniable fact that "there is a salient difference between persons who are members of the public community and prison inmates in that the latter, by law, are prohibited from exercising the rights and privileges they enjoyed as free members of society." *Mithrandir v. Dept. of Corr.*, 164 Mich. App. 143, 147, 416 N.W.2d 352, 354 (1987). These salient, indeed fundamental differences, between the

[5] The courts have "recognize[d] a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). An action seeking disclosure under the common law right requires "balanc[ing] the government's interest in keeping the document secret against the public's interest in disclosure", including "the specific nature of the governmental and public interests as they relate to the document itself." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1451-52 (D. C. Cir., 1994).

rights and privileges of members of the public, and inmates, and the regulation to which the rights of the latter may be subject, are explicit in statutes governing Washington's corrections system, and implicit in the scope of the Public Records Act.

4. Statutes Governing Washington's Corrections System Are At Odds With A PRA-Defined Right To Public Records

With notably few substantive statutory restrictions, the authority and responsibility to administer and manage the state's prison system is vested in the discretion of the secretary of the department of corrections. RCW 72.09.050. For example, to "provide consistent maximum protection of legitimate penological interests, including prison security and order", one of these statutes authorizes the secretary to adopt rules to review all materials coming into a prison, and authorizes confiscation of anything that the secretary determines to be contraband. RCW 72.09.530. It is very difficult to square such authority with a statutory right on behalf of incarcerated felons to public records under the more liberal provisions of the PRA.

In addition, in statutes explicitly distinguishing between members of the public and inmates, the legislature expresses its intent that the corrections system be "comprehensive" and "designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates." RCW 72.09.010(1). The

legislature deems it "essential" that the system "avoid[] unnecessary or inefficient public expenditures on the part of offenders and the department", and explicitly recognizes that "[t]he human and fiscal resources of the community are limited." RCW 72.09.010(6). Finally, the legislature directs that the system stress "personal responsibility and accountability" of offenders. RCW 72.09.010(3).

Under this comprehensive system, prison officials controlled any preexisting common law rights inmates had. The question relevant to the instant case, therefore, is whether Initiative 276, which expanded the public's common law right of access to records, was intended to replace the Department's control over inmates in this area. In our view, the comprehensive and clear statutory directives and objectives of the corrections laws can be thoroughly undermined if incarcerated felons possess a PRA-defined right to public records. One need only look to the facts of these consolidated cases to be struck by the wholesale disconnect between Washington's corrections system—where, for example, disruptive behavior and harassment directed to staff or other persons are grounds for discipline of an inmate—and a statutory right to access records as set forth in the PRA. *See* WAC 137-28-220(1) (General Infractions 202 and 353.) Having created a comprehensive, tightly controlled system of adult corrections, with the objectives of "maximum

feasible safety" for staff, the public and inmates; "avoiding unnecessary or inefficient expenditures on the part of offenders or the department"; and "stressing personal responsibility and accountability" of offenders, it is difficult to conceive that the people who enacted Initiative 276 decided to remove its regulatory authority over inmate access to public records, and grant expanded rights for incarcerated felons under the terms of the PRA.

5. The PRA Does Not Extend To Incarcerated Felons

When the above legal principles and provisions are considered together with the language and purposes of the PRA, it is apparent that incarcerated felons are not within the scope or intent of the Act. *See Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002) (the meaning of a statute is to be determined by all that the legislature has said in that statute and related statutes which disclose legislative intent.)

Originally adopted by the voters in 1972, the PRA was one aspect of Initiative 276, a multifaceted statute that also regulated matters related to campaign finance and lobbying. *See* Laws of 1973, ch. 1. The statute contained a single definition of "person." As relevant here, it provided only that "person" "includes an individual." Laws of 1973, ch. 1 § 2(36). The statute also provided that its definitions apply "unless the context

clearly requires otherwise." *Id.* Thus, the PRA itself recognized that the meaning of its terms required consideration of context.[6]

RCW 42.56.030 expresses the context of the PRA:

> 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.

(Emphasis added).

The PRA's purpose then is to protect the interests of the sovereign people of Washington in maintaining control over their government, and it is to be construed to promote that public policy. *See Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 565, 618 P.2d 75 (1980) ("[d]eclarations of policy in an act . . . serve as an important guide in determining the intended effect of the operative sections.")

Even if one considers only the civil rights explicitly forfeited by incarcerated felons under Washington's Constitution and statutes (the right to vote, to hold public office, to serve on a jury), it seems evident that the

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[6] The definition section of the PRA was amended by Laws of 2007, chapter 197, section 1, removing its adoption of definitions in RCW 42.17.020. The PRA presently does not define "person" but includes language that defined terms depend on context. *Id.*

persons referenced in RCW 42.56.030, and elsewhere in the PRA, would not include incarcerated felons. Until their civil rights are restored, felons enjoy no sovereignty; they forfeit the legal authority that citizens exercise over their government to influence its decision-making processes. It thus is highly doubtful that incarcerated felons come within the scope of "persons" under the PRA who are entitled to "insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.* As noted, Washington law "give[s] . . . [the secretary of corrections] the right to decide what is good for" incarcerated felons "to know and what is not good for them to know", *Id.*, under standards tailored to the prison setting, not the standards of the PRA. RCW 72.09.530.

The same point applies with equal force to the public policy of the PRA as expressed by the people of Washington who enacted Initiative 276 (an electorate that excluded incarcerated felons):

> [M]indful of the right of individuals to privacy and of the desirability of the efficient administration of government, full *access to information concerning the conduct of government* on every level *must be assured as a fundamental and necessary precondition to the sound governance of a free society.*

RCW 42.17.010(11) (emphasis added).

Incarcerated felons are precluded by Washington law from participating in the "sound governance of a free society", either as voters or office holders.

Accordingly, access to public records, the "necessary precondition" of such participation, has no application to them.

Finally, the very requirement for agencies to make records available for public inspection and copying is at odds with the legal status of incarcerated felons, who are not free to access them, and this is just one more indication that incarcerated felons are not within the scope or intent of the PRA. *See*, *Sappenfield v. Dep't of Corr.*, 127 Wn. App. 83, 110 P.3d 808 (2005); *Livingston v. Cedeno*, 135 Wn. App. 976, 146 P.3d 1220 (2006), *review granted*, 161 Wn.2d 1014 (2007).

In a highly instructive case, and for very similar reasons, the Washington Supreme Court held that the Administrative Procedure Act (APA) does not apply to prison disciplinary proceedings. *Dawson v. Hearing Comm.*, 92 Wn.2d 391, 597 P.2d 1353 (1979). In *Dawson*, an inmate argued that because such proceedings fell within the APA's definition of a "contested case", and were not within a series of exclusive exemptions, such proceedings were subject to the Act. The Court disagreed, holding that "[c]onsideration of the unique nature of prison disciplinary matters . . . leads inexorably to the conclusion that [such] proceedings are outside the scope and intent of the act." *Id.* at 395. The Court based its decision in large part on the "unique needs and objectives of penal institutions" and the limited rights to which inmates are entitled.

Id. at 396. The Court considered several factors, including the need of prison administrators "to preserve calm and order within the institution"; that "a prison is a tightly controlled environment populated by persons who have chosen to violate the criminal laws, many of whom have employed violence to achieve their ends"; that application of the APA would "tend to be counterproductive and disruptive of the institutions' goals"; that its "application would require an expenditure of time and funds" that was not intended when the APA was enacted; and that application of the "rigid, formal and time-consuming procedures created by the APA are clearly not designed to deal with the unique problems of . . . a prison." *Id.* at 395-98.

The same is true with respect to the Public Records Act. As the facts of these consolidated cases starkly demonstrate, a right on the part of inmates to public records under the PRA is fundamentally inconsistent with the objectives, needs and realities of the prison system and the legal status of inmates. Such a right allows inmates, including inmates with a history of violence, like Mr. Parmelee, to engage in harassment and intimidation of staff, to disrupt prison order by diverting its resources, and to waste the public's money on an extraordinary scale. As was the case in *Dawson*, when all of the laws bearing on the limited rights of incarcerated felons and the scope of the PRA are taken into account, they too lead to

the conclusion that neither the people who enacted Initiative 276 nor the legislature extended to incarcerated felons the right to records under the terms of the PRA.

B. Government Employees' Badge Identification Photographs Are Not Public Records Under The PRA

RCW 42.56.070(1) requires agencies to make "public records" available for inspection and copying, absent an exemption from disclosure. Thus, "[t]he determination of whether a document is a 'public record' is critical for purposes of the [Act]." *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d at 565 n.1. RCW 42.56.010(2) defines "public record" to include:

> [1] any writing [2] *containing information relating to the conduct of government or the performance of any governmental or proprietary function* [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

(Emphasis added).

In light of the broad definition of "writing" in RCW 42.56.010(3), and the fact that government employee badge identification photographs are prepared by agencies, there is little question that such photographs satisfy the first and third prongs of the definition of "public record."

The somewhat more difficult question is whether such photographs satisfy the second element of the "public record" definition—that the writing contain information "relat[ed] to the conduct of government or the

performance of any governmental or proprietary function." RCW 42.56.010(2). This element reflects that the purpose of the PRA is to "enable[] our citizens to retain sovereignty over our *government* and to demand full access to information relating to our *government's activities*". *Lindeman v. Kelso Sch. Dist. 458*, 127 Wn. App. 526, 535, 111 P.3d 1235 (2005) (*Lindeman* I), *rev'd on other grounds*, 162 Wn.2d 196, 172 P.3d 329 (2007). As *Lindeman* I explains, the PRA "was not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action due to personal factors . . .. Such personal information generally has no bearing on how our government operates." *Id.* at 535-36.[7]

Although several Washington cases have examined whether particular "writings" "prepared, owned, used or retained" by government "relate to the conduct of government or the performance of any governmental or proprietary function", none articulates a comprehensive test or analytical framework for making such a determination. Nonetheless, the limited question of whether government employee badge identification photographs are "public records" can be answered without

[7] The PRA is concerned with information of a governmental character. RCW 42.17.010(11) provides that "access to information concerning *the conduct of government*" is "assured as a fundamental and necessary precondition to the sound governance of a free society"; and its last paragraph explains that the PRA "shall be liberally construed to promote . . . full access to public records so as to ensure continuing public confidence of . . . *governmental processes*, and so as to assure that the *public interest* will be fully protected." (Emphasis added).

determining the precise contours of that concept. Taken together, *Oliver v. Harborview Med. Ctr.* and *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007) (*Lindeman* II), demonstrate that such photographs are not "public records". In *Oliver*, the Court considered whether a patient's public hospital medical records were subject to disclosure under the PRA, in response to the patient's request for them. Before determining whether a specific exemption in the PRA excluded the records from disclosure, the Court examined whether the patient's medical records were "public records" under Washington's law at all. *Oliver*, 94 Wn.2d at 565 n.1. Finding that the documents were a "writing" and that they were "prepared, owned, used or retained" by a state agency, the *Oliver* Court explained that "the only remaining question is whether the patient's hospital records contain 'information relating to the conduct of government or the performance of any governmental or proprietary function'." *Id.* at 566. The court concluded that the documents satisfied this standard because they contained *not only* personal data, but "also . . . information of a more public nature . . . administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which are carried out or relate to the performance of a governmental or proprietary function." *Id.* The *Oliver* Court then went on to observe that "[t]he fact that some personal or

private data is contained in the patient's record does not impress thereon the character of a nonpublic document", and explained that the PRA addresses personal information of a patient contained in a writing that constitutes a "public record" through separate exemptions. *Id.*[8]

Oliver makes two important points for the current inquiry. First, the "information relating to the conduct of government" element of a "public record" is not satisfied simply because government "prepares, owns, uses, or retains" a particular "writing". *Oliver*, 94 Wn.2d at 565. If that is all that the PRA required for a writing to be a "public record", the *Oliver* Court would have ended its analysis after concluding that the patient's records contained information reduced to writing that was collected, used and retained by the public hospital. Moreover, if that were not the case, all "writings" "prepared, owned, used or retained" by government would be public records and the second element of the definition would be meaningless. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994) (statutes should not be read to render any portion superfluous).

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[8] *Oliver*'s conclusion in this respect not only is legally sound, it also makes sense. When a "writing" contains information relating to the conduct of government as well as personal information, the need arises to determine the degree of protection that should be afforded to the personal information in the context of the "public record" that contains it. Under the PRA, the degree of protection varies. Compare, for example, subsections (1) and (2) of RCW 42.56.230. In contrast, when a "writing" contains no information relating to the conduct of government, the PRA strikes a different balance, consistent with its purpose, by excluding the "writing" from the scope of the Act in the first place. *See, Dawson v. Daly*, 120 Wn.2d 782, 788-89, 845 P.2d 995 (1993).

The second important point from *Oliver* is that a writing that is entirely personal or private information is not "information relating to the conduct of government or the performance of any governmental or proprietary function", and so is not a "public record" under the PRA. *Oliver,* 94 Wn.2d at 566. Indeed, the *Oliver* Court's determination that the record before it was a "public record" turned on the fact that the record contained not only personal information but "also . . . information of a more public nature . . . [matters] which are carried out or relate to the performance of a governmental or proprietary function." *Id.* [9]

The second case is *Lindeman* II. There, the court defined "personal information" for purposes of the student record exemption in RCW 42.56.020(1), as "[i]nformation peculiar or proper to private concerns" and rejected "not public or general" as the definition of "personal information." *Lindeman* II, 162 Wn.2d at 202, 206.

Employee badge photographs are personal information, as the only information in the photograph—the employee's image—is "information peculiar or proper to private concerns." *Id.* Consistent with the analytical framework of *Oliver*, because the photograph reveals no information

[9] These principles also are evident in *Dawson v. Daly,* where the court determined that a deputy prosecutor's performance evaluations, although ultimately exempt from disclosure, were "public records" "because they are prepared by the prosecutor's office *and* they contain information relating both to the conduct of government and to the performance of governmental, prosecutorial functions." 120 Wn.2d at 789. (Emphasis added).

concerning actions which "are carried out or relate to the performance of a governmental or proprietary function", *Oliver*, 94 Wn.2d at 566, the photographs are not "public records" under RCW 42.56.010(2).

C. Whether Other Government Employee Employment Records Are Subject To Disclosure Depends On The Nature Of The Record

Determining whether other government employee employment records are subject to disclosure under the PRA requires consideration of the particular document. That cannot be accomplished in an amicus brief. However, the analytical framework would be the same as the one undertaken to determine whether government employee badge identification photographs are subject to the PRA. See supra p. 14. First, is the document a public record? Second, if the document is a public record, is it subject to one of the PRA exemptions?

In this context, the most likely relevant exemption would be RCW 42.56.230(2), excluding from disclosure "personal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy." Under RCW 42.56.050, a person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." Balancing the individual's privacy interest against the interest of the public in disclosure is impermissible under RCW 42.56.050. *Brouillet v. Cowles Publ'g Co.*,

114 Wn.2d 788, 798, 791 P.2d 526 (1990). However, in determining whether the information is of "legitimate concern to the public", the public interest in *disclosure* may be balanced against the public interest in the *efficient administration* of government. *Dawson v. Daly*, 120 Wn.2d at 782. "Legitimate" means reasonable, and "the public concern is not legitimate" where the agency proves that "the public interest in efficient government could be harmed significantly more than the public would be served by disclosure." *Id.* In *Dawson v. Daly*, for example, the court held that the public interest in the efficient administration of government outweighed the public interest in disclosure of deputy prosecutor performance evaluations that did not discuss specific instances of misconduct or public job performance, because disclosure would seriously undermine employee morale and would harm the quality of the evaluation process. *Id.* at 799-800.

RESPECTFULLY SUBMITTED this 6th day of June, 2008.

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