IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

PRISON LEGAL NEWS, INC., a Washington non-profit corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Defendant.	No. 00-2-00432-7 REPLY OF PLAINTIFF PRISON LEGAL NEWS TO DEFENDANT'S RESPONSE TO COMPLAINT FOR PUBLIC DISCLOSURE OF RECORDS

I. INTRODUCTION

The Department of Corrections ("DOC") response brief is long on rhetoric and short on evidentiary fact. The Court should grant the relief sought by Prison Legal News ("PLN") under the Public Disclosure Act, for the following reasons:

First, DOC failed to provide prompt and adequate responses to the PDA requests.

Second, DOC failed to segregate non-exempt material from exempt material (if any), and withheld non-exempt records in their entirety, in response to the Airway Heights request.

Third, DOC has admitted it improperly redacted information in the Correctional Industries records, and continues to withhold information that is not exempt.[1]

Fourth, the maximum statutory penalty and attorneys' fees should be awarded to PLN because DOC has acted in bad faith and has violated the PDA on all counts.

Fifth, DOC still has not reimbursed Mr. Wright for photocopying charges, and even if it had recently done so, plaintiff would nevertheless be entitled to declaratory relief.

[1] Supplemental factual support for this Reply is found in the accompanying Supplemental Declaration of Paul Wright and Declaration of David M. Bowman and exhibits thereto.

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II. ARGUMENT

A. The Department of Corrections Failed to Timely and Adequately Respond to the Prison Legal News's PDA Request.

DOC complied with ***none*** of the requirements of promptness and adequacy of responses under the PDA. PLN was entitled to promptness and DOC's "fullest assistance" and "most timely possible action" on PLN's request. RCW 42.17.290. DOC did not provide ***any*** response within the five days required by the PDA. When it did respond, DOC did not make adequate requests for additional time. Ultimately, DOC did not come close to meeting its own estimated time constraints, instead taking an outrageously unreasonable time to send any documents to PLN. And when those records finally arrived, DOC still did not ultimately provide a sufficient explanation regarding redactions or documents withheld in their entirety.

DOC was required to grant or deny PLN's request as soon as possible but in no event later than 5 business days. RCW 42.17.320. In ***neither*** of the requests at issue in this lawsuit did DOC comply with that requirement. On the Airway Heights request, the very first response occurred on October 28, 1998, 22 days after the PLN request dated October 6. On the Correctional Industries request, DOC sent a notice of forwarding to PLN three days after receiving PLN's request, but the first response indicating whether DOC would be disclosing any records occurred a month later on August 2. The records were only disclosed, and the purported exemptions cited (without explanation), on September 17, some 82 days after the request.

When it did respond initially, DOC did not make adequate requests for additional time. The defendant is correct that under RCW 42.17.320, besides granting or denying the request, DOC had the option of—

> acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request . . . .

But this provision does not rescue DOC: in ***neither*** case did DOC, within five days of receiving PLN's request, provide a reasonable estimate of the time required to respond to the request. Even when it belatedly gave an estimate of when records would be disclosed, the agency did not

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offer proper explanations for why the repeatedly-extended time estimates were "required" to fulfill the request. As such, DOC violated the requirement of prompt responses under RCW 42.17.320.

DOC did not even meet its own belated estimates of the additional time it claimed it needed to fulfill the requests. In the case of Airway Heights, administrator Cly Evans stated in his letter to Paul Wright dated December 15, 1998—already more than two months after the request—that DOC "expect[ed] to have further response to you by 1/15/99." On January 22, 1999, Mr. Evans unilaterally pushed back the expected date of disclosure to March 1, 1999, admitting that the agency had only "begun compiling the data." There was no explanation for the delay, only a statement that DOC now planned to give affected employees the opportunity to seek protective orders related to PLN's request prior to disclosing any records. Wright Decl., Ex. J. Then, on March 10, Mr. Evans again pushed back the date of disclosure, this time indefinitely, purportedly to allow the Attorney General's office to review the materials to be disclosed and ***again*** to allow the subject employees "their right to seek a protective order from Superior Court." Wright Decl., Ex. L. Not until April 26, 1999, exactly 202 days after PLN's initial request, were ***any*** (albeit insufficient) records disclosed.

DOC also violated the PDA when it failed to independently fulfill its statutory duty to respond promptly on the basis of its expectation that affected employees would be filing motions for protective orders. In Doe I v. State Patrol, 80 Wn. App. 296 (1996), the agency impermissibly gave a subject of a record repeated extensions of time to obtain an injunction and agreed to withhold records voluntarily to assist that third party. 80 Wn. App. at 303-04. The court of appeals held that the agency, which appeared to have preferred the interests of the subject of the record over the requestor's, had not given the requestor the "fullest assistance" required by the PDA. Id. The agency further violated the PDA by failing to respond promptly to the requestor's request. Id. at 304. The requestor was awarded statutory penalties for the period of delay. Id. In this case, DOC clearly preferred the interests of the individual employee

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subjects of the request over the rights of PLN, giving the employees many weeks to seek court intervention. DOC essentially promised the employees that it would withhold the records voluntarily until such time as a hearing regarding protective orders would be held. As it turned out, the employees ***never sought protective orders at all***, and only upon its determination that no protective orders were forthcoming did DOC finally begin to disclose requested records.

Even after the long delay, if access to a record was to be denied, DOC was required to specify the exemption that authorized the withholding and give a brief explanation as to how it applied. RCW 42.17.310(4). Only the properly exempt portion of a record could be withheld, as RCW 42.17.310(2) imposes a duty to segregate and release those portions of records that are not exempt. As discussed more fully below, DOC was not justified in responding to the Airway Heights request by redacting names of persons found to have committed misconduct (let alone ***every pronoun*** in the documents) or in withholding records in their entirety. Nor was DOC justified in responding to the Correctional Industries by making the redactions it made, and DOC has admitted its improper segregation by "supplementing" this disclosure only after PLN instigated this lawsuit.

B. Records From Airway Heights Are Not Exempt.

1. The Records Are Not Exempt Under the Law Enforcement Provision of RCW 42.17.310(1)(d).

DOC bases its claim that the Airway Heights records are "essential to effective law enforcement" on misstatements of the law and mere speculation. There is no evidence that the records are exempt under RCW 42.17.310(1)(d). Therefore, DOC must disclose the requested information.

RCW 42.17 310(1)(d) does not provide a blanket exemption for prison misconduct investigations. DOC mistakenly cites Newman v. King County, 133 Wn.2d 565 (1997), for the proposition that ***all*** records from so-called "ongoing" investigations are exempt. DOC misreads Newman. The case applied to an unsolved, active, ongoing, criminal investigation where

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authorities had not identified or arrested a suspect. The Court held that under such sensitive circumstances it would defer to the investigators' judgment about whether disclosure would threaten their ability to solve the case. Id. at 574-75. No similar need exists for blanket deference to an internal misconduct investigation at a prison. Authorities ***already*** have identified the parties involved, so disclosure would not threaten the ability to "solve" anything.

In addition, DOC ignores recent decisions that significantly limit Newman and speak to this situation. See Cowles Pub'g Co. v. Spokane Police Dep't, 139 Wn.2d 472 (1999); Limstrom v. Ladenburg, 136 Wn.2d 595 (1998). The Cowles case undermines DOC's basic claim that its files are ongoing if an employee resigns before completion of the investigation. Cowles flatly states that "the fact that allegations have not yet been proven" does not provide a blanket exemption. 139 Wn.2d at 623. Once authorities have identified a suspect and referred the case to prosecutors, ***the investigation is closed***, regardless of the results. Id. at 624 (Talmadge, J., concurring). Cowles does not allow DOC to evade the PDA by labeling files as indefinitely "open" when DOC already has identified employees involved.

Even before Cowles, Limstrom held that a blanket exemption did not apply to prosecutors' open files; it applied only to police files. 136 Wn.2d at 613. The Court required the prosecutor to segregate and release nonexempt materials. Id. By analogy, DOC cannot claim a blanket exemption of all "ongoing" investigations once they have been referred to the administration for proceedings. By refusing to even examine its files and segregate disclosable materials, DOC has violated the PDA.[2]

In addition to misstating the law and attempting to evade its duty to review and release files, DOC has not provided evidence that any of the information within those "incomplete" files would render law enforcement ineffective. DOC speculates that release of details would create a "disruptive and conflicted working environment" and that staff members would become "targets

[2] In addition, Mr. Wright's disclosure request did not ask for information from true ongoing investigations within the meaning of state law. He requested that DOC inform him when investigations closed, and he would renew the request.

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of public scrutiny, ridicule, or harassment." Response at 8. However, mere embarrassment cannot prevent disclosure of information. See, e.g., Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 38 (1989). DOC also cannot evade the PDA's mandate of disclosure through promises of confidentiality. Id. at 40. DOC must show that disclosure would render its disciplinary efforts "ineffective." Speculation and parroting of language from other cases without providing hard facts does not sustain this burden.

DOC claims that even disclosure of names within ***completed*** reports would render enforcement efforts ineffective. The claim defies logic, since DOC has released—inadvertently or purposely—the employees' names on some of the documents. Information cannot be essential to law enforcement if the agency releases it. Id. at 37 (agency willing to release information, so not essential to enforcement). DOC's claim of necessity rings hollow in light of its actions.

Even if DOC had not released the information, the claimed exemption would not apply. That DOC must "retain a reliable internal investigation procedure" (Response at 9) does not justify nondisclosure: DOC must show ***how*** disclosure would render the procedure ineffective. Nor does the effect on "credibility and authority of staff" or the potential for complaints from unions and employees (Response at 10) support nondisclosure, because there is no exemption for agency embarrassment or union complaints. Nor is there an exemption for agencies that have a "policy encouraging staff not to share personal information with offenders." Response at 10. To the contrary, the PDA exists to prevent agencies from creating additional nondisclosure policies. See Brouillet v. Cowles Pub'g Co., 114 Wn.2d 788, 794 (1990) (agencies cannot determine scope of exemptions). Finally, DOC claims disclosure would affect staff morale and effectiveness after the investigation is complete. This, however, does not impact DOC's ability to ***conduct investigations and discipline staff***, which is the only relevant inquiry.

DOC relies on a case regarding police department internal affairs investigations in which the Court withheld names of targeted officers. See Cowles Pub'g Co. v. State Patrol, 109 Wn.2d 712 (1988). However, the Cowles case raised unusual procedural concerns. Internal affairs

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investigations ***required*** officers to provide a statement, prevented them from calling witnesses, and did not allow for a hearing. Id. at 15-16. DOC's procedures, on the other hand, do not impose forced disclosure requirements or limit procedural protections so significantly. Therefore, there is no similar compelling reason to protect names.

In sum, DOC has failed to provide law or facts supporting its claim that 42.17.310(1)(d) provides an exemption for its Airway Heights records. At the very least, DOC has violated the law by failing to examine its files and segregate nonexempt information for disclosure. In addition, DOC has provided no evidence that information in any of those files is exempt. Although release may prove embarrassing or difficult for some staff members, and could even affect some day-to-day procedures or policies at Airway Heights, DOC has not shown that disclosure would have ***any*** effect on the investigation and discipline itself.

2. The Privacy Exemption of RCW 42.17.310(b) Does Not Prevent Disclosure of Misconduct Records.

DOC also claims that employee investigations are exempt from disclosure on privacy grounds unless DOC has made a definitive ruling on misconduct, but case law leads to the opposite conclusion. DOC mistakenly relies on Dawson v. Daly, 120 Wn.2d 782 (1993), to shield its actions. The Dawson Court withheld performance evaluations because they contained ***no*** allegations of wrongdoing or misconduct. Id. at 796-97. Mr. Wright has asked only for records ***including*** allegations of misconduct. Therefore, Dawson supports Mr. Wright's position rather than that of DOC. Additionally, this state's courts regularly reject claims of privacy interests in incomplete or inconclusive records that involve allegations of misconduct. See e.g., Amren v. City of Kalama, 131 Wn.2d 25, 29, 34 (1997) (ordering release of report of complaints against police chief that Mayor concluded were unfounded and false; report contained no conclusions or recommendations); Tacoma News, Inc. v. Tacoma-Pierce County Health Dept., 55 Wn. App. 515, 517, 521 & n.3 (1989) (rejecting privacy exemption and ordering production of investigative records of complaints against ambulance company though no citation was ever

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issued); Hudgens v. City of Renton, 49 Wn. App. 842, 843, 846 (1987) (holding no privacy exemption to production of records regarding arrest and strip search of DWI defendant who was found not guilty at trial); Columbian Pub'g Co., 36 Wn. App. at 29-30 (ordering release of complaints by police officers against chief at a time when no conclusions had been reached and the investigation may not even have begun); see also Ames v. City of Fircrest, 71 Wn. App. 284, 286-87 (1993) (holding that records of investigation of police department and several officers were not exempt on privacy grounds though the investigation uncovered no criminal intent and no charges were ever filed).

Finally, aside from misplaced reliance on Dawson, DOC does not even attempt to meet the second prong of the privacy exemption test. DOC must prove that disclosure would serve ***no legitimate public interest***. Monitoring the government's handling of misconduct by prison employees is certainly a legitimate public interest. Cowles Pub'g Co., 109 Wn.2d at 727 ("matters of police misconduct are of legitimate concern to the public"); see also Hudgens, 49 Wn. App. at 846 (records on strip search of DWI suspect were of public interest); Columbian Pub'g Co., 36 Wn. App. at 29-30 (public interest in statements regarding assessment of job performance). Because of this public interest, DOC must release the records.

3. RCW 42.17.310(1)(e) Does Not Exempt Witness Information.

The witness exemption of the PDA is narrowly limited to situations where disclosure would endanger "life, physical safety, or property." RCW 42.17.310(e). DOC speculates that inmates might harm witnesses who report staff misconduct, but DOC provides no evidence or case law to support this bald assertion. DOC has the burden of proving that material is exempt, and it has failed that burden.

C. Records From Correctional Industries Are Not Exempt.

DOC has tacitly admitted it violated the PDA by redacting non-exempt information from Correctional Industries records. As recently as March 15, public disclosure officer Kay Wilson-Kirby wrote to Mr. Wright, upholding all of the redactions DOC had previously made. Decl. of

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David M. Bowman ¶ 3 and Ex. A. Yet on April 5, in its response brief in this lawsuit, DOC provided plaintiff with a "supplemental disclosure" containing critical information that had previously been redacted without basis. Response at 14, and Ex. 7; see also Ex. B to Bowman Decl. (chart comparing the two disclosures).[3]

As for the information it continues to withhold as exempt, DOC briefly argues that the effective law enforcement exemption of RCW 42.17.310(d) covers materials requested about the Correctional Industries telemarketing operation. DOC has provided no facts supporting the redactions. DOC simply asserts that releasing the disciplined inmate's name would harm law enforcement. Yet DOC ***already disclosed*** the prisoner's name, rending its argument meaningless. Bowman Decl. Ex. B. The same problem undermines DOC's attempt to redact prisoner wage information. As described below, DOC regularly ***posts*** such information. Wright Supp. Decl. ¶ 5. Any argument that the names and numbers are essential to law enforcement must fail.

D. PLN Is Entitled to the Maximum Statutory Award and Attorneys' Fees.

1. Statutory Penalty.

Contrary to DOC's assertion, the probative evidence in this lawsuit demonstrates that DOC acted in bad faith in violating the PDA on several counts in this lawsuit. On the Airway Heights request, the agency unjustifiably stonewalled Mr. Wright for many months. When it finally did disclose records, DOC unjustifiably redacted portions of the records and withheld an undetermined number of records—possibly more than a dozen—in their entirety ***without informing PLN that any such records were being withheld.***[4] On the Correctional Industries

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[3] Incredibly, DOC's supplemental disclosure also attempts to make ***new*** redactions of prisoner information that it ***previously disclosed***. Response at 14, and Ex. 7; Ex. B to Bowman Decl.

[4] Indeed, DOC suggested for the first time in its Response Brief that it did not disclose any records of employees who, upon being confronted with substantiated allegations of misconduct, resigned before the official "ECR" process had been completed. Response Brief, at 4; Walter Decl. ¶¶ 5-6. DOC attempts to fit these files under the "ongoing" investigations exemption because they were "incomplete," when in fact the investigations ***ended*** upon the employees' resignations.

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request, DOC unjustifiably delayed disclosure of the records and then redacted portions without any basis under the statute. This evidence amounts to more than mere liability for violating the PDA: it evidences a discriminatory attitude on the part of DOC toward the Prison Legal News as an organization and Mr. Wright as an individual. Such an attitude, in addition to evidencing bad faith, violates the clear mandate of the PDA: "Agencies shall not distinguish among persons requesting records . . . ." RCW 42.17.270 (1999).

There is yet additional evidence of discrimination. In his affidavit concerning the Correctional Industries request, Eldon Vail states that "[a]s a matter of practice, no inmate financial information is shared with other inmates in DOC prisons." Vail Decl. ¶ 17. But an agency cannot create PDA exemptions through its own policies. Brouillet v. Cowles Pub'g Co., 114 Wn.2d 788, 794 (1990). Even if it could, Mr. Vail's assertion is patently untrue. The McNeil Island Corrections Center routinely posts on a bulletin board a list of all inmate kitchen workers by name and DOC number and the specific wages paid to each by DOC. Wright Supp. Decl. ¶ 5. In addition, DOC appears to have no problem disclosing inmate financial information when it serves the agency's own ends; for example, in response to an unrelated class action, DOC (through the Attorney General's office) provided trust fund statements disclosing the financial information of Mr. Wright and two other prisoners. Wright Supp. Decl. ¶ 6. Mr. Vail's statement is thus specious and evidences a deliberate undertaking to withhold information from Mr. Wright and his publication because of Mr. Wright's identity as a prisoner.

2. Attorney's Fees

Defendant is correct that PLN is "not entitled to attorney fees on those claims where [it] had no success." But the Court should find that PLN has, in fact, succeeded on all counts in this litigation. DOC cannot avoid attorneys' fees simply by disclosing responsive documents only after the requestor was forced to bring suit. Where prosecution of an action could reasonably be regarded as necessary to obtain information requested, the requesting party has "prevailed" for

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purposes of the PDA. Coalition on Gov't Spying v. King County Dep't of Pub. Safety, 59 Wn. App. 856, 864 (1990).

PLN is entitled to attorneys' fees on the Airway Heights claim, with respect to both the request for unredacted documents and the request for additional records that DOC has withheld in their entirety. DOC was not justified in redacting names of the two employees who were terminated because of misconduct. But for the plaintiff's prosecution of this lawsuit, DOC would not have purposely disclosed the identities of the two Airway Heights employees who were terminated as a result of misconduct—see the Index provided by DOC by request of the Court, at pp. i-ii, where Kathy Lorentzen and Pamela Parker are specifically referenced. DOC also failed to properly segregate information by redacting things like pronouns from the records it disclosed. In addition, the Court should order disclosure of the additional Airway Heights files that DOC withheld in their entirety as "incomplete." PLN is thus the prevailing party on all aspects of the Airway Heights request.

PLN is entitled to attorneys' fees on the Correctional Industries claim because it was necessary for PLN to file this lawsuit in order to obtain the unredacted information that DOC finally released by way of its "supplemental disclosure." Response Brief, at 14; Ex. D to Bowman Decl. Only by bringing suit has PLN succeeded in obtaining this information. "[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the Act." Coalition on Gov't Spying, 59 Wn. App. at 862. The policy behind the PDA requires that attorney fees be awarded in this case, when prosecution of this action was necessary to bring about the belated disclosures. And because DOC continues to violate the PDA by redacting inmate financial information and the identity of the disciplined prisoner, PLN is entitled to recover attorneys' fees incurred in obtaining an order from this Court that such Correctional Industries information now be disclosed.

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E. DOC's Overcharging for Photocopies Is Not Moot.

In its response brief, DOC incorrectly argues that PLN's claim concerning overcharging for photocopies is "rendered moot by the reimbursement of $19.35 into [Mr. Wright's] inmate bank account." Response Brief, at 16. The amounts, however, were deposited March 23 and April 4 into a Monroe Correctional Complex account to which Mr. Wright no longer has access, because he was ***transferred*** to McNeil Island on March 13. Mr. Wright's current trust fund account statement, as of April 13, 2000, shows no deposits in the amounts claimed by Tom Georg in his affidavit accompanying the agency's response brief. Wright Supp. Decl. ¶ 8. Even if Mr. Wright had been reimbursed in recent weeks, plaintiff would nevertheless be entitled to declaratory judgment that DOC improperly overcharged him, and, as a result, an award of costs and attorneys' fees associated with this claim.

DATED this 3rd day of May, 2000.

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