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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMIE JANSSEN, Respondent, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent, and JEFFREY PAYNE, Appellant.	No. 50412-0-II UNPUBLISHED OPINION

MAXA, C.J. – Jeffrey Payne appeals the trial court's entry of a temporary restraining order (TRO) and a subsequent permanent injunction enjoining the Department of Social and Health Services (DSHS) from releasing records he had requested under the Public Records Act (PRA) regarding DSHS employee Jamie Janssen. Payne is a sexually violent predator (SVP) involuntarily committed to the Special Commitment Center (SCC) on McNeil Island, where Janssen works in food service. After Janssen learned that Payne had submitted multiple PRA requests relating to her personally, she sought an injunction to enjoin DSHS from responding to Payne's current PRA request and to enjoin future requests pertaining to her.

RCW 42.56.540 generally allows a court to enjoin the release of public records exempt from disclosure under the PRA if certain requirements are met. RCW 71.09.120(3) allows a court to enjoin the inspection of *nonexempt* public records by SVPs residing in a civil commitment facility through procedures identified in RCW 42.56.565. Under RCW 42.56.565(2)(c)(i), a court can enjoin the inspection of nonexempt public records if a PRA request was made to harass or intimidate an agency employee.

We hold that (1) Payne's challenge to issuance of the TRO is moot; (2) because no preliminary injunction hearing was required under RCW 42.56.565(4), the trial court was not required to conduct a preliminary injunction hearing before issuing the permanent injunction; (3) the absence of an applicable PRA exemption is immaterial because RCW 71.09.120(3) and RCW 42.56.565(2)(c)(i) allow the trial court to enjoin the release of nonexempt public records to SVPs residing in a civil commitment facility if the PRA request was made to harass an agency employee; (4) substantial evidence supported the trial court's finding that Payne's PRA requests were made to harass Janssen and therefore the permanent injunction was warranted under RCW 71.09.120(3) and RCW 42.56.565(2)(c)(i); and (5) DSHS did nothing improper in supporting Janssen's position during the injunction proceedings. However, we hold that the permanent injunction is overbroad to the extent that the injunction applied to any PRA request submitted by any person, but not to the extent that the injunction applied to Payne and his civil commitment attorney.

Accordingly, we affirm the issuance of the permanent injunction, but we remand for the trial court to modify the permanent injunction against DSHS to apply the injunction only to the disclosure of personal information regarding Janssen to Payne and persons under his control, including his civil commitment attorney.

FACTS

Payne is an SVP involuntarily committed to SCC. SCC is a secure civil commitment facility that provides for the commitment and treatment of SVPs pursuant to chapter 71.09 RCW.

DSHS employed Janssen as a food service supervisor at SCC. Payne worked in the kitchen and began acting inappropriately toward Janssen. He was suspended from working in the kitchen in December 2015 after an incident where he attempted to give Janssen a gift. Payne returned to work in the kitchen after a meeting with SCC food managers and Janssen where he apologized to her.

Payne's behavior toward Janssen after his return to work continued to be inappropriate. He was suspended again in February 2016 because of this behavior, and he later was moved from the evening shift to the morning shift so that he would not be working at the same time as Janssen. In April, SCC management terminated Payne from the food service department because he insisted that he be returned to the same shifts as Janssen, made a false statement to his supervisor that Janssen had approved his return to her crew, and attempted to get Janssen's attention by staring at her in the dining hall during her shifts.

On April 20, SCC entered a contact restriction against Payne, restraining him from contacting Janssen in any way or coming within 30 feet of her. On April 26, Payne violated the contact restriction by sitting on a bench near where Janssen and other employees had to pass when leaving SCC.

Janssen documented these instances and reported them to SCC management, including Payne's therapist, SCC chief of resident treatment Dr. Elena Lopez.

In August, Payne filed a lawsuit against Janssen and various other SCC personnel in which he represented himself. Payne demanded in his complaint that he be reinstated to his

former position, returned to the same shifts as Janssen, and granted a one-on-one meeting with Janssen. The superior court dismissed this lawsuit.

Payne then began submitting public records requests to DSHS, seeking videotape footage of Janssen's work area during her shifts. Between January 1 and February 24 of 2017, he submitted a total of 14 PRA requests for either video footage of Janssen's work area or her scheduling information. DSHS released some video footage to Payne pursuant to some of these requests without notifying Janssen.

On February 24, Payne submitted a PRA request to DSHS for Janssen's work time sheets from December 2015 through February 2017. On February 28, DSHS notified Janssen for the first time that she was the subject of a PRA request by Payne. DSHS informed Janssen it would release the records to Payne unless she asked the court to block the release under RCW 42.56.540 before March 20.

On March 8, representing herself, Janssen petitioned the trial court for a stalking protection order against Payne. The trial court apparently informed her at the hearing on that petition that she instead would need to file a motion to enjoin release of the records under the PRA. By March 16, Janssen had retained legal counsel, who wrote to DSHS asking for an extension of their March 20 release deadline to April 7 to allow Janssen time to prepare her petition. DSHS granted this request. On March 30, Janssen filed a motion with the trial court under RCW 42.56.540 to enjoin DSHS from releasing her records to Payne pursuant to his PRA requests. An injunction hearing was set for April 27.

On April 3, Janssen filed a motion for a TRO to prevent DSHS's release to Payne of any records relating to Janssen pending the hearing on the merits set for April 27. Janssen sent email notice of the TRO hearing to DSHS's counsel. But Janssen informed the court that service on

Payne would require the process server to first obtain security clearance from McNeil Island and that this procedure was underway. Janssen also stated that she was attempting to obtain Payne's telephone number.

The TRO hearing was held on April 4. The trial court granted the TRO, finding good cause to issue the TRO without notice to Payne and good cause to extend the TRO past 14 days until a hearing on the merits.

On April 25, DSHS submitted its response to Janssen's petition and did not oppose entry of a permanent injunction. DSHS submitted a declaration from Dr. Lopez in support of a permanent injunction. Dr. Lopez recounted Payne's history of inappropriate behavior toward Janssen and the no-contact restriction that SCC had placed on Payne. She concluded, "Mr. Payne has remained hyperfocused on Ms. Janssen and this obsession has prevented Mr. Payne from progressing in treatment due to an inability to move beyond and process the previous interactions with Ms. Janssen." Clerk's Papers (CP) at 154. Payne, representing himself, submitted a response.

A hearing on the permanent injunction was held on April 27. The trial court heard oral argument from counsel for both Janssen and DSHS. Payne attended the hearing telephonically, and asserted at length that the purpose of his public records requests was to defend himself against allegations that negatively affected his treatment at SCC.

The trial court entered an order issuing a permanent injunction and restraining order against DSHS and Payne. The court entered findings of fact, which included:

> 5. . . . The Declaration of Dr. Lopez supports that the respondent, Jeffrey Payne, has an obsession with Jamie Janssen that is contra-therapeutic such that fulfilling his public records act request impacts a primary mission of the function of the facility;

> 6. The petitioner has demonstrated that the stalking, harassment and obsession with her by the Respondent, Jeffrey Payne, has caused her fear and anxiety, has adversely affected her health, well-being, and has seriously impacted her ability to perform her work.

CP at 158. Further, the court made a factual finding, denominated as a conclusion of law, that "the records are sought solely to harass, intimidate and stalk Jamie Janssen; and that the request has no legitimate public purpose." CP at 159. Based on these findings, the court concluded that the showing required under RCW 42.56.565 and RCW 71.09.120(3) to obtain an injunction had been made.

The trial court restrained and permanently enjoined DSHS from divulging any public records or personal or confidential information regarding Janssen in response to any PRA request. The injunction applied to the disclosure of such information to any person, including, but not limited to, Payne, his attorneys, agents, and assigns. The court also restrained and permanently enjoined Payne from requesting any information regarding Janssen from any source and requesting any information regarding Janssen through a third party.

Payne appeals the trial court's entry of the TRO and the permanent injunction.

ANALYSIS

A. ENTRY OF TRO

Payne argues that the TRO that the trial court issued was void because he received no notice of the hearing and because the trial court extended the TRO beyond 14 days. He also argues that the TRO never should have been issued because it was obtained based on Janssen's representation that he was an "inmate" instead of a resident at SCC. We hold that Payne's challenge to the TRO is moot.

An issue is moot if we no longer can grant effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). Here, the TRO was a temporary order that

expired at the time of the April 27 hearing and was replaced by a permanent injunction that Payne has appealed. And Payne has not provided any authority for the proposition that a ruling on appeal that the TRO was defective somehow would require reversal of the permanent injunction. Therefore, even if we held that the trial court erred in issuing the TRO, that holding would have no effect on the outcome of this case.

We decline to address Payne's challenge to the TRO because the issues he raises are moot.

B. ENTRY OF PERMANENT INJUNCTION

Payne argues that the permanent injunction should not have been issued because (1) there was no discovery or preliminary injunction hearing, (2) the court did not find that an exemption to the PRA applied, (3) Janssen produced no evidence that he was making the requests for the purpose of harassing her, and (4) DSHS improperly supported Janssen's position during the injunction proceedings.[1] We disagree.

1. Legal Principles

The PRA mandates the broad disclosure of public records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). Under RCW 42.56.070(1), "a government agency must disclose public records upon request unless a specific exemption in the PRA applies or some other statute applies that exempts or prohibits disclosure of specific information or records." *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 391, 337 P.3d 214 (2016).

[1] In his statement of issues, Payne references "due process" when making these arguments. However, he presents no argument or citation to authority regarding due process. Therefore, we do not address any constitutional argument.

Under RCW 42.56.540, the trial court may enjoin the release of records in certain circumstances.

> The examination of any specific public record may be enjoined if, upon motion and affidavit by . . . a person who is named in the record or to whom the record specifically pertains, the superior court . . . finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

RCW 42.56.540. We conduct a two-part inquiry when an injunction is sought under RCW 42.56.540: (1) "determine whether the records are exempt," and (2) "determine whether the PRA injunction standard is met." *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 790, 418 P.3d 102 (2018).

The PRA also allows a court to enjoin inspection and copying of *nonexempt* records by "persons serving criminal sentences in state, local, or privately operated correctional facilities." RCW 42.56.565(2). In addition, RCW 71.09.120(3), states, "The inspection or copying of any nonexempt public record by persons residing in a civil commitment facility for sexually violent predators may be enjoined following procedures identified in RCW 42.56.565."

To enjoin the release of records under RCW 42.56.565(2)(c), the court must find that

> (i) The request was made to harass or intimidate the agency or its employees;
> (ii) Fulfilling the request would likely threaten the security of correctional facilities;
> (iii) Fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or
> (iv) Fulfilling the request may assist criminal activity.

The injunction may be requested by a person named in the record or a person to whom the request specifically pertains. RCW 42.56.565(2)(a).

2. Discovery Before Issuance of Injunction

Payne argues that he should have been allowed to conduct discovery before the permanent injunction was entered. But Payne raises his alleged inability to conduct discovery for the first time on appeal.

Generally, we will not consider an issue raised for the first time on appeal unless the party claiming the error can show that an exception applies. RAP 2.5(a); *In re Marriage of Sprute*, 186 Wn. App. 342, 354 n.3, 344 P.3d 730 (2015). Payne made no objection to the trial court regarding discovery, and does not claim on appeal that any exception under RAP 2.5(a) applies. Therefore, we decline to consider this issue.

3. Absence of Preliminary Injunction Hearing

Payne argues that the trial court was required to hold a separate preliminary injunction hearing before conducting a permanent injunction hearing and issuing a permanent injunction. We disagree.

Payne relies on CR 65(b), which states that if a TRO is granted without notice, "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time." Further, CR 65(b) states that if the party that obtains the TRO does not proceed with an application for a preliminary injunction, the TRO must be dissolved. Payne argues that because Janssen did not proceed with an application for a preliminary injunction, the trial court was required to dissolve the TRO and dismiss the case.

However, CR 65 does not state that a trial court must hold a preliminary injunction hearing before conducting a permanent injunction hearing. In fact, CR 65(a)(2) expressly contemplates that a court may consolidate the preliminary injunction hearing with a trial on the

merits. Payne cites no other authority for the proposition that the trial court was required to hold a preliminary injunction hearing before the permanent injunction hearing.

In addition, RCW 42.56.565(4) provides a special process for enjoining the release of public records to SVPs residing in civil commitment facilities. RCW 42.56.565(4) states that a motion for an injunction under RCW 42.56.565(2) "shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise. Upon a showing by a preponderance of the evidence, the court may enjoin all or any part of a request or requests." RCW 42.56.565(4) does not state that a trial court must hold a preliminary injunction hearing before moving forward with the "summary proceeding" authorized by that statute. And "the rapidity envisioned by RCW 42.56.565(4) likely renders moot any need for a preliminary injunction." *Dep't of Corr. v. McKee*, 199 Wn. App. 635, 650, 399 P.3d 1187 (2017).

Payne also argues that a trial court cannot consolidate a preliminary injunction hearing with a permanent injunction hearing unless the court expressly informs the parties that consolidation will occur. However, as noted above, RCW 42.56.565(4) does not contemplate that a trial court will hold a preliminary injunction hearing before conducting the "summary proceeding" authorized under that statute.

We hold that under RCW 42.56.565(4), the trial court was not required to hold a preliminary injunction hearing before conducting a hearing for and issuing the permanent injunction.

4. Lack of PRA Exemption

Payne argues that the trial court was required to find that a PRA exemption applied before entering the permanent injunction and that no such exemption applied to the facts here. We disagree.

A trial court must determine that a PRA exemption applies before issuing an injunction under RCW 42.56.540. *Lyft*, 190 Wn.2d at 790. However, RCW 71.09.120(3) and RCW 42.56.565(2) expressly authorize injunctions that apply to *nonexempt* public records. Therefore, we hold that the trial court was not required to find that a PRA exemption applied before issuing the permanent injunction.

5. Evidence of Intent to Harass

Payne argues that Janssen submitted no evidence that he was using the PRA requests to harass her. We disagree.[2]

The general rule is that we review de novo a trial court's decision granting an injunction issued under the PRA. *Lyft*, 190 Wn.2d at 791. One of the grounds for enjoining the release of records to SVPs in a civil commitment facility is that the PRA request was made to harass or intimidate an agency's employees. RCW 42.56.565(2)(c)(i); RCW 71.09.120(3). The trial court made a factual finding that "the records are sought solely to harass, intimidate and stalk" Janssen. CP at 159

Here, Janssen submitted a large amount of evidence to support the conclusion that Payne's PRA requests had been made in order to harass her. This evidence was in the form of SCC observation, behavior management, and resident job performance reports; Payne's 14 PRA requests relating to Janssen; email exchanges between DSHS/SCC staff regarding Payne's PRA requests; Janssen's email correspondence with Payne's therapist Dr. Lopez; the SCC contact restriction; Payne's August 2016 lawsuit against SCC and Janssen's response; SCC's 2015

[2] The trial court also concluded that the other three grounds in RCW 42.56.565(2)(c) supported issuance of the permanent injunction. However, RCW 42.56.565(2)(c) is disjunctive; only one of the grounds is necessary to issue an injunction. Because we hold that the PRA requests were made to harass Janssen, we need not address the other grounds.

annual review of Payne's treatment progress; Payne's letter to SCC management accusing another resident of stalking Janssen and requesting a one-on-one meeting with her; and Janssen's initial petition for a stalking protection order against Payne.

This evidence showed that Payne had developed an obsession with Janssen, that his behavior toward her had been inappropriate and threatening, that Payne continued seek out contact with Janssen despite termination from his food service job and the entry of an SCC contact restriction order, and that his PRA requests were concerning because they sought both video footage of her work area and time records of her shifts.

Payne claims that his actual motive in making the PRA requests relating to Janssen was to defend himself in an SCC investigation triggered by allegations Janssen was making against him. But there is no evidence to support Payne's contention that his PRA requests were intended to mount a defense against an alleged investigation at SCC prompted by Janssen's reports of his behavior. Payne did not submit any "affidavits or declarations" as contemplated by RCW 42.56.565(4). He merely made allegations during argument at the permanent injunction hearing.[3]

We hold that based on our review of the record, the trial court did not err in finding that Payne's PRA requests were made to harass Janssen. And we hold that this finding supported the trial court's issuance of a permanent injunction under RCW 71.09.120(3) and RCW 42.56.565(2)(c)(i).

[3] Payne also argues that enjoining the release of records pertaining to Janssen because it would be contraindicated to his therapy at SCC was not a valid reason for the trial court to issue the injunction. One of the trial court's findings of fact states that fulfilling serial PRA requests would be "counter-therapeutic to the residents." CP at 158. But the court's conclusions of law show that the court did not rely on this finding to support issuance of the injunction.

6. DSHS Supporting Janssen's Position

Payne argues that DSHS improperly supported Janssen's position during the injunction proceedings. But DSHS was a necessary party to this action because it was the government agency from which Payne requested public records. RCW 42.56.565; RCW 42.56.540; RCW 71.09.120. Payne cites no authority suggesting that a state agency that is the subject of a PRA request must oppose an action to enjoin release of the requested records. In fact, the agency itself may seek such an injunction under RCW 42.56.565(2)(a)(i) and RCW 71.09.120(3)(a). Therefore, we reject this argument.

C. SCOPE OF PERMANENT INJUNCTION

Payne argues that the permanent injunction's terms are overly broad. He claims that the trial court erred in applying the injunction to any person requesting records regarding Janssen, and specifically to his civil commitment attorney. We agree that the permanent injunction is overbroad to the extent that the injunction applied to any PRA request submitted by any person, but not to the extent that the injunction applied to Payne's civil commitment attorney.

Under RCW 71.09.120(3), a trial court may enjoin inspection or copying of public records "by persons residing in a civil commitment facility for sexually violent predators" based on the procedures in RCW 42.56.565. Here, the trial court's injunction against DSHS was not limited to the inspection or copying of records by Payne. Instead, the court permanently enjoined DSHS from "[d]ivulging any public records or personal and confidential information regarding Jamie Janssen in response [to a] public record request." CP at 160. In the next paragraph the court emphasized that such information could not be disclosed to *any* person, "*including but not limited to* Jeffrey Payne, his attorneys, agents, and assigns." CP at 160 (emphasis added).

RCW 71.09.120(3) and RCW 42.56.565(2) authorize a trial court to issue an injunction that applies only to an SVP residing in a civil commitment facility. Those statutes do not authorize an injunction that applies to *any* PRA request submitted by *any* person. Therefore, this portion of the permanent injunction was overbroad.

Under RCW 42.56.565(4), the trial court may "enjoin, for a period of time the court deems reasonable, future requests by: (a) [t]he same requestor; or (b) [a]n entity owned or controlled in whole or in part by the same requestor." As noted above, the injunction against DSHS applied to disclosure of records to Payne as well as to his "attorneys, agents, and assigns." CP at 160. The injunction against Payne prohibited him from "[r]equesting any information regarding [Janssen] from any source" but also from "[r]equesting any information regarding the petitioner through a third party, regardless whether those third parties know of the order." CP at 161.

Payne challenges the application of these provisions to his civil commitment attorney. He relies on CR 65(d), which states that an injunction is binding only against "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them." Payne apparently believes that "attorneys" refers to attorneys in the injunction action.

However, to the extent that Payne's attorney is working on his behalf, he would qualify as an entity controlled by Payne for purposes of RCW 42.56.565(4). And Payne's attorney also would qualify under CR 65(d) either as Payne's attorney or as a person in active concert or participation with him. Therefore, we conclude that the permanent injunction is not overbroad in this respect.

We hold that the permanent injunction was overbroad to the extent that the injunction against DSHS applied to any PRA request submitted by any person, but not to the extent that the injunction applied to Payne's civil commitment attorney.

D. ATTORNEY FEES ON APPEAL

Janssen argues she is entitled to reasonable attorney fees because Payne's appeal in this action is frivolous. We decline to award attorney fees to Janssen on appeal.

Under RAP 18.9(a), we may sanction a party who files a frivolous appeal. "An appeal is frivolous when, considering the entire record and resolving all doubts in favor of the appellant, it does not present any debatable issues about which reasonable minds might differ and 'is so devoid of merit that there is no possibility of reversal.' " *Dewitt v. Mullen*, 193 Wn. App. 548, 560, 375 P.3d 694 (2016) (quoting *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010)).

Some of Payne's arguments are weak and certainly some of them are frivolous. But he prevailed on his argument about the overbreadth of the permanent injunction. We decline to award reasonable attorney fees to Janssen.

CONCLUSION

We affirm the issuance of the permanent injunction, but we remand for the trial court to modify the permanent injunction against DSHS to apply the injunction only to the disclosure of personal information regarding Janssen to Payne and persons under his control, including his civil commitment attorney.

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 in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

JOHANSON, J.

LEE, J.