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Honorable Thomas O. Rice

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF WASHINGTON AT RICHLAND

15 JOHN DOE 1; JOHN DOE 2; JANE
16 DOE 1; JANE DOE 2; JANE DOE 3; and
17 all persons similarly situated,

18 Plaintiffs,

19 v.

20 WASHINGTON STATE DEPART-
21 MENT OF CORRECTIONS; CHERYL
22 STRANGE, Secretary of The Department
23 of Corrections, in her official capacity,

24 Defendants.

NO. 4:21-cv-05059-TOR

SETTLEMENT AGREEMENT

1 This Settlement Agreement is between undersigned Plaintiffs JOHN and
2 JANE DOEs, and the provisional class they represent, through counsel KATHE-
3 RINE M. FORSTER, ETHAN FRENCHMAN, JOE SHAEFFER, and NANCY
4 TALNER, and Defendants Washington State Department of Corrections and Cheryl
5 Strange, in her official capacity as Secretary, by and through their attorneys of rec-
6 ord, ROBERT W. FERGUSON, Attorney General, and CANDIE M. DIBBLE
7 and TIM LANG, Assistant Attorneys General. Plaintiffs and Defendants are col-
8 lectively referred to herein as the “Parties.”
9

10 I. INTRODUCTION

11 1. The purpose of this Settlement Agreement is to resolve claims asserted
12 in Plaintiffs’ Complaint for Injunctive Relief, filed in this matter in April of 2021.
13 The Complaint alleged that Defendants intended to release certain records requested
14 pursuant to the Washington Public Records Act, RCW 42.56, in violation of Plain-
15 tiffs’ rights under the Eighth and Fourteenth Amendments to the United States Con-
16 stitution; Article 1, Section 7 of the Washington Constitution; and the injunction
17 provisions of the Washington Public Records Act. In their Answer, Defendants
18 denied Plaintiffs’ claims and alleged that no Public Records Act exemption existed
19 that would authorize the Department of Corrections to withhold the requested infor-
20 mation.
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23 2. On May 17, 2021, the Court entered an Order Granting Motion for
24 Provisional Class Certification (ECF No. 69) and an Order Granting Preliminary
25 Injunction (ECF No. 70). The preliminary injunction prohibited Defendants “from
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1 releasing any records (including names and prisoner identification numbers) con-
2 cerning or that identify the gender identity, transgender status (including non-bi-
3 nary, intersex, and gender non-conforming people), sexual history, sexual orienta-
4 tion, sexual victimization, genital anatomy, mental and physical health, of the pro-
5 posed class members....” ECF No. 70 at 38. The Court later entered an Order
6 Granting Defendants’ Motion for Clarification (ECF No. 98), instructing that:
7

8 Defendants are not enjoined from sharing such records in a non-public
9 manner consistent with federal and state law and penological necessity.
10 Defendants may share this information with other correctional and law
11 enforcement agencies, outside health care treatment providers for the
12 purposes of treatment, the Office of Corrections Ombuds, and the state
13 protection and advocacy system. Defendants may also release this in-
14 formation in defensive litigation where a plaintiff has already disclosed
15 the exact same information in open court, but in all other circumstances
16 information or records covered by this Order must be distributed with a
17 protective order and filed in court under seal.

18 ECF No. 98 at 4.

19 3. In 2022, the Washington Legislature passed, and Governor Inslee
20 signed into law, Engrossed Substitute House Bill 1956 (ESHB 1956). Codified at
21 RCW 42.56.475, ESHB 1956 took effect March 31, 2022, and provides an exemp-
22 tion from disclosure of certain information under the Public Records Act, including
23 information covered by the Court’s Preliminary Injunction.

24 4. The Parties agree that this Settlement Agreement embodies a compro-
25 mise and settlement of all claims that were raised in this lawsuit, and that nothing
26 herein shall be deemed an admission of any wrongdoing by or liability on the part
of the Defendants. Plaintiffs further understand and agree that by entering into this

1 Settlement Agreement, they are stipulating to the dismissal of all claims asserted in
2 their Complaint with prejudice upon completion of the term of settlement as pro-
3 vided herein. Upon such dismissal, Plaintiffs agree and covenant not to sue the State
4 of Washington or its agencies, employees and officials over the claims concluded
5 by this Settlement Agreement.
6

7 5. The Parties stipulate that the Court has jurisdiction over this action
8 pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343, including to enforce the terms
9 of this Settlement Agreement, and that venue is proper in this district pursuant to
10 28 U.S.C. § 1391. This Settlement Agreement will take effect upon the Court's
11 entry of an Order approving and adopting the Agreement (the "Effective Date").
12

13 6. The Parties stipulate that the prospective relief provided in this Agree-
14 ment complies with the requirements for prospective relief under the Prison Liti-
15 gation Reform Act, 18 U.S.C. § 3626(a). The Parties stipulate that the prospective
16 relief in this Agreement is narrowly tailored, extends no further than would be nec-
17 essary to correct the violations of federal rights as set forth by Plaintiffs in their
18 Complaint, is the least intrusive means necessary to correct the violations asserted
19 in Plaintiffs' Complaint, and will not have an adverse impact on public safety or
20 the operation of a criminal justice system. Defendants agree not to contest that the
21 entry of an order adopting this Agreement or entering a permanent injunction, as
22 described below, complies with the requirements for prospective relief under 18
23 U.S.C. § 3626(a).
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1 **II. APPROVAL PROCESS**

2 7. **Motion for Approval:** Plaintiffs shall move the Court within 30 days
3 of execution of this Settlement Agreement for an Order granting approval of the
4 Agreement. Defendants will submit a statement of non-opposition.
5

6 8. **Notice:** Should the Court deem it appropriate to provide Notice of the
7 settlement to the Class prior to granting final approval of the settlement, the Parties
8 shall negotiate, draft, and post notice to the Class.

9 9. **Final Approval of the Agreement:** If the Court orders notice to the
10 Class with a final approval hearing to follow, Plaintiffs will move for final approval
11 of the Agreement, and Defendants will submit a statement of non-opposition to
12 final approval.
13

14 **III. SUBSTANTIVE TERMS**

15 10. **Injunction:** The Parties agree that, solely for the purpose of facilitat-
16 ing this Settlement Agreement and ensuring Plaintiffs' information is protected as
17 the Parties have agreed, the Court may enter a permanent injunction (Injunction) in
18 the form proposed as Exhibit 1. The Injunction shall remain in effect only for the
19 duration of this Settlement, as defined in Paragraph No. 15 below, and shall auto-
20 matically terminate thereafter with the dismissal of this lawsuit, unless Plaintiffs
21 have successfully moved the Court for an order extending the Settlement duration.
22

23 11. **Training:** Defendants agree to adopt and implement the training ma-
24 terials attached hereto as Exhibit 2 (Training Materials), which Plaintiffs agree will
25 be used to instruct public records staff on the proper interpretation and application
26

1 of RCW 42.56.475. Defendants further agree to train all staff responsible for re-
2 viewing and redacting records under the Public Records Act within 45 days of the
3 date the Parties sign this Settlement Agreement.

4 12. **Notice to Plaintiffs' Counsel and Other Courts:** Within 5 days of
5 Defendants receiving notice of any other court action regarding RCW 42.56.475,
6 Defendants shall notify Plaintiffs' counsel of the action. Defendants shall also, in
7 responsive pleadings, promptly notify any court overseeing the action of this
8 Agreement, accompanying exhibits, and any associated orders and injunctions.

9 13. **Notification to Requestors:** Within 10 days of the Effective Date,
10 Defendants will send letters to all public records requestors with requests then
11 known to be subject to the Preliminary Injunction to confirm whether the requestors
12 wish for their requests to remain open.

13 14. **Records Review and Disclosure Process:** The Parties agree that the
14 following process will govern redaction and review of records subject to the In-
15 junction:

- 16 a. **Scope:** The purpose of this review process is to allow Plaintiffs
17 to confirm whether records and information will be protected consistent
18 with RCW 42.56.475 and the Training Materials. The Parties therefore
19 agree that Plaintiffs' review will focus solely on whether redactions/with-
20 holdings are consistent with the Training Materials and RCW 42.56.475.
21 The Parties agree this Settlement does not concern the propriety of redac-
22 tions under other Public Records Act exemptions or confidentiality laws.
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1 b. **PRR Report:** Within 45 days of the Effective Date, Defendants
2 will produce a report of all Public Records Requests since April 1, 2021,
3 including: (1) text of the request; (2) name of the requestor; (3) type of
4 requestor if known (e.g., attorney, media, incarcerated individual); (4)
5 staff member assigned to the request; (5) date of receipt; (6) request sta-
6 tus; and (7) pages offered (the “PRR report”).
7

8 c. **Doe Class List:** Within 45 days of the Effective Date, Defend-
9 ants will produce a current copy of the Defendants’ confidential list of all
10 current and former incarcerated individuals known to Defendants to be
11 transgender, intersex, gender non-conforming, and/or non-binary (the
12 “Doe Class List”).
13

14 d. **Enjoined Request List:** Within 45 days of the Effective Date,
15 Defendants will provide Plaintiffs’ Counsel a list of all outstanding re-
16 quests then known to be subject to the Injunction, including: (1) text of
17 the request; (2) name of the requestor; (3) type of requestor if known (e.g.,
18 attorney, media, incarcerated individual); (4) staff member assigned to
19 the request; (5) date of receipt; (6) request status; and (7) pages offered
20 (the “Enjoined Request List”).
21

22 e. **Updated Lists:** Within 30 days after providing the PRR Report,
23 *Doe Class List*, and *Enjoined Request List*, and every 30 days thereafter
24 for a total of four months, Defendants will update these documents. In
25 addition to updating the status of requests on previous lists, the updated
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1 lists will include the information required in subparagraphs (b) above for
2 all new requests received since the previous list was provided that are
3 known to be subject to the Injunction. Upon the request of either party,
4 the Parties shall meet for a status conference within one week of Plain-
5 tiffs' counsel's receipt of these documents.
6

7 f. **Requests to Review:** During the first six months after the Ef-
8 fective Date, Defendants shall provide Plaintiffs' Counsel relevant rec-
9 ords, including requestor correspondence, responsive records, and pro-
10 posed redactions/withholdings, for up to 27 Public Records Act requests
11 selected by Plaintiffs' Counsel from those appearing on the Enjoined List
12 or PRR Report. DOC will provide requested records with redactions
13 marked within 5 business days if the response is completed at the time of
14 Plaintiffs' Counsel's request to review. If the response is not completed
15 when Plaintiffs' Counsel request review, Defendants will make good
16 faith efforts to prioritize and complete the response (and provide it to
17 Plaintiffs' Counsel) within 60 calendar days. If the response cannot be
18 completed within 60 days, Defendants will produce an installment of no
19 fewer than 500 pages. Defendants will continue to produce an installment
20 of no fewer than 500 pages every 60 calendar days until the production is
21 complete or until 8 months after the Effective Date, whichever comes
22 first. The Parties agree that DOC will not be required to produce pro-
23 posed redactions for a request after it has been abandoned or withdrawn
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1 by the requestor. Also, in recognition of the potential workload impacts
2 of this process on DOC Public Records Unit staff, Plaintiffs agree they
3 will make good faith efforts to sequence their requests over the 6-month
4 period so as not to overwhelm staff with multiple requests at any one
5 time.

6
7 g. **Deadline for Completing Review and Response:** Plaintiffs
8 will complete their review of any request made under subparagraph (f) as
9 soon as practicable, but no later than 60 calendar days after receiving the
10 records. Upon completing their review, Plaintiffs' Counsel shall identify
11 any instances in which they believe RCW 42.56.475 was not applied to
12 the reviewed records consistent with the Training Materials.

13
14 h. **Meet and Confer:** Within ten calendar days after receiving
15 Plaintiffs' response, the Parties will meet and confer to resolve any disa-
16 greement. If the Parties cannot reach agreement, Plaintiffs will have 14
17 calendar days to file a motion for *in camera* review.

18
19 i. ***In Camera* Review:** On *in camera* review, the Parties agree
20 they will request that the Court determine whether DOC applied RCW
21 42.56.475 to the records at issue in a manner consistent with the Training
22 Materials. Before producing records that have been reviewed by the
23 Court, Plaintiffs will have ten calendar days to review the final production
24 to ensure the redactions/withholdings reflect the Court's decision.
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1 j. **Post-Review Disclosure:** The Parties agree that records that
2 have been approved for release by Plaintiffs' Counsel or the Court may
3 be disclosed to the requestor without violating the Injunction. Records
4 that have not gone through the review process and been approved for re-
5 lease will remain subject to the Injunction. Except in instances where a
6 proposed release of records is brought to the Court for *in camera* review,
7 Defendants will be the party ultimately responsible for the legal determi-
8 nation of whether records may be disclosed in response to Public Records
9 Act requests.
10

11 15. **Settlement Duration and Enforcement:** The following provisions
12 shall govern the duration and enforcement of this settlement:
13

14 a. **Automatic Expiration:** This Settlement Agreement shall auto-
15 matically expire one year after the Effective Date, at which time the Par-
16 ties will present a Stipulated Order dissolving the Injunction and dismiss-
17 ing the action with prejudice.

18 b. **Motion to Extend Duration:** The Court may extend the Settle-
19 ment upon motion by Plaintiffs if the Court finds that Defendants have
20 failed to apply RCW 42.56.475 in a manner substantially consistent with
21 the Training Materials, such that Plaintiffs would have a high likelihood
22 of prevailing on their Eighth or Fourteenth Amendment claims if the In-
23 junction were dissolved, or that Defendants have failed to train staff or to
24 comply with the records review and disclosure process according to this
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1 Agreement. Extension of this Agreement shall include continuing the
2 Permanent Injunction, an additional period of monitoring by Plaintiffs’
3 Counsel as described in Paragraph 14 of this Agreement, and such further
4 relief as the Court determines appropriate. For purposes of extending or
5 terminating the Settlement Agreement, the Parties agree that non-sys-
6 temic deviations shall not prevent a finding that Defendants have applied
7 RCW 42.56.475 in a manner substantially consistent with the Training
8 Materials, provided that Defendants demonstrate that they have instituted
9 policies and practices that are reasonably calculated to achieve durable
10 and sustained compliance. Evidence of episodic or isolated instances of
11 redaction/withholding errors is not a sufficient basis to extend the Settle-
12 ment.
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15 c. **Informal Dispute Resolution:** The Parties agree to work in
16 good faith to resolve disputes informally and minimize the need for Court
17 involvement in enforcing this Settlement Agreement.
18

19 d. **Enforcement:** The Court shall retain jurisdiction to enforce the
20 terms of this Agreement while it remains in effect. Violations of the
21 terms of this Agreement, including but not limited to the Injunction, train-
22 ing, and review and disclosure process, may be brought to the Court for
23 enforcement and such further relief the Court determines appropriate.
24

25 16. **Attorneys’ Fees:** Within ten business days of the Effective Date, De-
26 fendants will pay \$650,000.00 in attorneys’ fees and costs. The Parties agree that

1 this amount resolves the claim for attorneys' fees and costs for this litigation, in-
2 cluding any fees incurred by Plaintiffs in monitoring Defendants' compliance with
3 the initial one-year term of this Settlement Agreement. However, Defendants agree
4 that they will pay Plaintiffs' reasonable fees and costs directly associated with any
5 successful motion to enforce the Settlement Agreement, including to extend the
6 term of the Settlement or a motion for *in camera* review provided that, if Plaintiffs
7 bring a successful motion for *in camera* review, the Court will not award Plaintiffs
8 attorneys' fees for that motion if the Court finds that Defendants' interpretation of
9 RCW 42.56.475 and the Training Materials was reasonable. Defendants further
10 agree that they will pay Plaintiffs' reasonable fees and costs for monitoring De-
11 fendants' compliance beyond the initial one-year term of this Agreement, should
12 the Agreement be extended. The Parties otherwise agree that neither party is to be
13 considered a prevailing party in this action for any purpose, including, but not lim-
14 ited to, attorney fees.

17 17. **Amendment:** By mutual agreement, the parties may change the terms
18 of this Agreement, provided that such mutual agreement is memorialized in writ-
19 ing, signed by the Parties, and approved by the Court.

21 18. **Construction:** This Agreement constitutes the final written expres-
22 sion of all the terms of this Agreement and is a complete and exclusive statement
23 of these terms. No party hereto shall be considered the drafter of this Settlement
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1 Agreement for the purpose of any statute, case law, or rule of interpretation or con-
2 struction that would or might cause the provision to be construed against the drafter
3 thereof.

4 19. **DRW Authority:** Nothing in this Agreement shall be deemed to limit
5 the ability of Disability Rights Washington to fulfill its federal mandates pursuant
6 to the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act,
7 42 U.S.C. §§ 10801-51, the Developmental Disabilities Assistance and Bill of
8 Rights (DD) Act, 42 U.S.C. §§ 15041-45, and their implementing regulations, or
9 limit DRW’s authority as the Washington State protection and advocacy system,
10 including its ability to access Defendants’ records under federal and state law.
11

12 20. **Voluntary and Knowing Agreement:** The Parties verify that they
13 have read and understand this Settlement Agreement, that they enter into this
14 Agreement knowingly and voluntarily, and that this Agreement represents the en-
15 tire agreement of the Parties in this case.
16

17 21. **Binding Effect:** This Settlement Agreement binds and inures to the
18 benefit of the Parties and their successors.
19

20 Accepted:

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23 TODD DOWLER
24 Assistant Secretary
25 Department of Corrections
26

05-31-2023

DATE

Tim Lang

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CANDIE M. DIBBLE, WSBA #42279
TIM LANG, WSBA #21314
Assistant Attorneys General
Corrections Division

5/31/2023
DATE

Accepted:

[Signature]

KATHERINE M. FORSTER, CA Bar #217609
Attorney for Plaintiffs
Munger, Tolles & Olson LLP

5/30/23
DATE

[Signature]

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5/30/23
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5/30/23
DATE