NO. 102255-7

SUPREME COURT OF THE STATE OF WASHINGTON

TALON CUTLER-FLINN,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Talon Cutler-Flinn made a request under the Public Records Act (PRA) for all records used in one of his prison classification reviews. As the superior court found, the Department conducted an adequate search for records, provided all of the records that were reasonably identified within the request, and Cutler-Flinn was unable to identify any other records that were responsive to his request. As a result, the superior court correctly concluded that the Department did not violate the PRA and dismissed his claims. The Court of Appeals affirmed that dismissal in an unpublished opinion. In doing so, the Court of Appeals affirmed that the Department conducted an adequate search and rejected Cutler-Flinn's assertions that other records should have been produced. Cutler-Flinn now seeks discretionary review of the Court of Appeals decision.

This Court should deny Cutler-Flinn's petition for review. Cutler-Flinn's petition does not meaningfully address the criteria for discretionary review in RAP 13.4. Regardless, the Court of

Appeals decision on the specific facts of this case does not meet any of the criteria for discretionary review. Instead, the unpublished decision simply affirmed the superior court's decision that there was no PRA violation on the specific facts of this case. And despite Cutler-Flinn's suggestion that there were other unspecified records that were not provided to him, he explicitly acknowledged in the superior court that he could not identify any specific documents that were not provided to him.

Based on his own statements and the record, the superior court made factual findings that are now verities because Cutler-Flinn failed to assign error to them. These findings and the records support the determination by the superior court and the Court of Appeals that the Department did not violate the PRA. Therefore, this fact-specific case and the unpublished decision below do not meet the criteria for discretionary review and this Court should deny review.

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II. STATEMENT OF ISSUE

Whether an agency violates the PRA when it conducts an adequate search and provides all responsive records that were reasonably interpreted to be within the scope of the request.

III. STATEMENT OF THE CASE

A. The Department's Classification System

The Department has a classification system by which it assigns incarcerated individuals to a given custody level. As part of this classification process, the Department conducts regular classification reviews for each incarcerated individual. CP 367. These classification reviews are very informal. CP 367. The decisions made in a classification review are captured in a custody facility plan (CFP). CP 367.

The actual classification "hearing" is conducted by a group of Department staff that is referred to as either a multi-disciplinary team or a facility risk management team. CP 367. Although the Department refers to these meetings as hearings, these classification actions are essentially a discussion between

the incarcerated individual and staff about classification issues. CP 367. The incarcerated individual is given at least forty-eight hours advance written notice of the hearing, unless the individual waives this notice, and the individual is given an opportunity to attend the hearing. CP 367. The actual hearing is generally short and informal. CP 367.

B. Cutler-Flinn's Public Records Request

On January 21, 2020, Cutler-Flinn spoke to Cindy Meyer, his classification counselor at the time, about his upcoming classification review. CP 402. As part of this classification review, Cutler-Flinn ultimately received a custody promotion to medium custody from close custody[1] and remained in the same facility where he was housed at the time. CP 403.[2]

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[1] A custody promotion involves being moved from a higher custody (i.e. more restrictive custody) to a lower custody. Close custody is a more restrictive custody level than medium custody.

[2] Cutler-Flinn claims in a conclusory manner that the 2020 classification action was "a significant change from Flinn's January 2019 classification." Petition for Discretionary Review, at 2. The Petition for Discretionary Review appears to be the first

A few weeks after the classification hearing, the Department received a public records request from Cutler-Flinn. CP 449, 454. In this request, Cutler-Flinn sought "all records used in [his January 2020] classification process." CP 454. The Department acknowledged this request within five business days and informed Cutler-Flinn of the estimated date by which he could expect an installment of records. CP 460.

On the same day that the request was received, the assigned public records specialist, Chase McMillan, forwarded the request to the Washington State Penitentiary (WSP) and asked staff at WSP to search for records. CP 449. After WSP staff initially responded that there were no responsive records, McMillan emailed WSP staff to ask staff additional questions about WSP's search and response to the request. CP 450, 457.

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time that Cutler-Flinn has claimed in this case that the 2020 review involved some kind of significant change in his custody. That statement is belied by the record. Indeed, Cutler-Flinn received a custody promotion and did not attend his classification review.

McMillan and another staff member in the Department's public records unit subsequently exchanged a series of emails with staff at WSP regarding the request. CP 456-57.

After a follow-up question from McMillan, Kitzi Brannock, the public records coordinator at WSP, provided a copy of the CFP from the Department's electronic system, OMNI. CP 457, 449. Brannock also contacted Cutler-Flinn's classification counselor at the time, Cindy Meyer, and Meyer indicated that she had no records beyond the Classification Hearing Notice/Appearance Waiver form. CP 456. Those two documents were provided to Cutler-Flinn in response to his public records request after the Department received payment. CP 465-72. The Department did not receive any further correspondence from Cutler-Flinn related to this request until it was served with the lawsuit. CP 428.

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C. Cutler-Flinn Files a Lawsuit and the Superior Court Concludes That the Department Did Not Violate the PRA

The Department was served the present lawsuit in September 2020. CP 20-21, 31-32. After extensive pre-trial proceedings, the superior court set a hearing to determine whether the Department violated the PRA. CP 331-32.

After the Court considered briefing and argument from both parties, the superior court determined that the Department did not violate the PRA in its response to Cutler-Flinn's request. The court made the following findings of fact:

> 1. The Department received Plaintiff Talon Cutler-Flinn's request on February 18, 2020. This request was assigned tracking number P-11804. The request sought all records "used in [Plaintiff's January 2020] classification process." Although this request was a request for identifiable public records for the reasons discussed below, it was a very broad request in that it sought "any and all records." Such a broad request does make it difficult to determine precisely what was being requested. The agency was justifiably confused about the precise nature of the records that Plaintiff was seeking.
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> …

> 5. The Department's search was reasonable. The Department's search was appropriately focused on the places where any records could be located. The Department's reliance upon Plaintiff Cutler-Flinn's classification counselor at the time was reasonable, and the Department's public records staff conducted appropriate follow up with WSP staff.
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> 6. Plaintiff has failed to identify any specific documents that were not provided in response to his request and that were within the scope of his request. Even if he were able to identify such documents, the Department's search was reasonable.

CP 538-39. Cutler-Flinn appealed from that decision as well as various discovery rulings. Cutler-Flinn did not assign error to any of the above factual findings. Cutler-Flinn's COA Brief, at 1-2.

D. The Court of Appeals Affirms the Dismissal of Cutler-Flinn's Claims

The Court of Appeals affirmed the superior court's dismissal of Cutler-Flinn's claims in an unpublished opinion. Slip Op., at 1-16. The Court of Appeals rejected Cutler-Flinn's argument that the Department violated the PRA by failing to conduct an adequate search. Slip Op., at 10. Instead, relying on

pre-existing case law describing the adequate search requirement, the Court of Appeals concluded that "the DOC performed an adequate search because the search was reasonably calculated to uncover all relevant records." Slip Op., at 11. The Court of Appeals also discussed Cutler-Flinn's arguments on appeal that there must have been other records that were responsive to his request.[3] Slip Op., at 12-14. As the Court of Appeals explained, Cutler-Flinn's speculation that there were other records responsive to his request was rebutted by the evidence presented by the Department in terms of what records were "used" for this particular classification action. Slip Op., at 12-14. Therefore, Cutler-Flinn failed to show any error on the part of the superior court and his PRA claims were appropriately dismissed.

[3] This argument on appeal was contrary to his own concession in the superior court and the unchallenged factual findings.

Cutler-Flinn seeks review from this unpublished decision. The Department now responds and asks that the Court deny discretionary review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Cutler-Flinn suggests that review is appropriate because the decision of the Court of Appeals conflicts with this Court's precedent, conflicts with a published decision of the Court of Appeals, and involves an issue of substantial public interest that should be determined by this Court. Petition for Discretionary Review, at 4 (citing RAP 13.4(b)(1), (2), (4)). Although Cutler-Flinn identifies these grounds as the basis for his petition for discretionary review, he fails to conduct any meaningful analysis about how such criteria are met here.

Moreover, Cutler-Flinn does not accurately characterize the decision by the Court of Appeals or the superior court. Rather, both Courts concluded that the Department conducted an adequate search and that Cutler-Flinn failed to identify any non-disclosed records that were reasonably interpreted to be within

the scope of his request. In reaching this decision, the Court of Appeals relied upon the specific facts of this case. Nothing about that decision conflicts with this Court's precedent or published decisions from the Court of Appeals. Given the fact specific nature of the issues in the case, it also does not raise an issue of substantial public importance. Therefore, the Court should deny discretionary review.

A. Cutler-Flinn Fails to Discuss in Any Meaningfully Manner the Criteria in RAP 13.4(b)

RAP 13.4(b)(1)-(4) outline the criteria for discretionary review of a Court of Appeals decision that terminated review. Cutler-Flinn invokes three of the four criteria. Petition for Discretionary Review, at 4. However, he makes no meaningfully attempt to demonstrate that such criteria are met here and presents no meaningful argument about why the fact-specific, unpublished Court of Appeals decision warrants review under such criteria. Because Cutler-Flinn fails to demonstrate that the

Court of Appeals decision meets any of the criteria in RAP 13.4, the Court should deny the petition for discretionary review.

B. The Court of Appeals Decision Applied Well-Settled Case Law Involving the PRA and Its Decision in This Fact-Specific Case Does Not Warrant Review

The Court of Appeals and the superior court both concluded that that the Department conducted an adequate search and that Cutler-Flinn failed to show that any other documents existed that were responsive to a reasonable interpretation of his request. Slip Op., at 11-14 (discussing the adequacy of the Department's search and rejecting Cutler-Flinn's arguments that other unspecified records should have been produced); CP 539 (making factual findings, which were unchallenged on appeal, that the Department conducted an adequate search and Cutler-Flinn failed to identify any specific documents that were not provided). Based on this, both the superior court and the Court of Appeals concluded that the Department did not violate the PRA on the specific facts of this case.

That unpublished decision applies well-established case law involving the PRA and the decision does not conflict with prior case law from this Court or the Court of Appeals. Instead, in reaching this decision, the Court of Appeals relied upon this Court's prior decision in *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), which identified the standard for an agency's adequate search, and subsequent Court of Appeals case law applying that standard, including *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014), and *Cantu v. Yakima School District No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022). The Court of Appeals then applied this standard to the specific facts of this case. Slip Op., at 1 ("We hold that the DOC did not violate the PRA, because on this record, it conducted an adequate search."). As such, this decision does not establish any new principles under the PRA or conflict with any prior decision by this Court or the Court of Appeals.

Additionally, this decision does not implicate any issue of substantial public importance. The determination that the search

was adequate and that the Department did not violate the PRA by providing the CFP and classification hearing notice is incredibly fact specific. The Court of Appeals emphasized the fact-specific nature of its opinion. Slip Op., at 1, 13. The underlying request and classification action are also individualized to Cutler-Flinn and do not implicate any broader issue of public concern. Indeed, the request at issue was specific to a classification review that resulted in Cutler-Flinn being promoted to a lower custody level. Therefore, the Court of Appeals decision does not meet the criteria for discretionary review in RAP 13.4(b)(1), (2), or (4).

Cutler-Flinn urges this Court take review to address issues that are not implicated by the Court of Appeals decision. For instance, he argues that this Court should review the issue of whether "a record containing information referenced by a governmental agency in the conduct or performance of the agencies used in the conduct or performance of the agencies [sic] function and decision making process used by the agency as

defined in RCW 42.56.010(3) subjecting the record to disclosure under RCW 42.56.070(1) even if the agency personnel did not physically look at the record." Petition for Discretionary Review, at 1 (capitalization cleaned up). This issue was not something that is addressed at all in the Court of Appeals opinion and does not appear to be an issue raised below. Because the Court of Appeals decision does not implicate this issue and it was not raised below, it does not provide a basis for discretionary review.

Similarly, Cutler-Flinn asserts that the Court of Appeals decision warrants review because it absolves an agency from PRA liability when the agency conducts an adequate search and responsive records exist that are not disclosed. Petition for Discretionary Review, at 1. This argument though is contradicted by the record and is not implicated by the Court of Appeals decision. As discussed above, the Court of Appeals and superior court concluded that the Department conducted an adequate search and, importantly, that there was no support for the proposition that additional responsive records existed. As such,

this case does not implicate this issue. Additionally, this issue was not adequately preserved in the superior court. Instead, Cutler-Flinn's briefing focused primarily on the adequate search issue. Therefore, this case does not present a vehicle to review the issue identified in the petition for discretionary review.

Moreover, even if this broad principle were implicated by the facts of this case, Cutler-Flinn fails to show that this abstract issue warrants discretionary review of this case. To argue that this principle conflicts with prior case law, Cutler-Flinn cites to a dissenting opinion by Judge Fearing in *Cantu v. Yakima School District No. 7*, 23 Wn. App 2d 57, 108-17, 514 P.3d 661 (2022). In that dissenting opinion, Judge Fearing disagreed with existing PRA case law. *Cantu*, 23 Wn. App. 2d at 108-17 (Fearing, J., concurring in part and dissenting in part). A dissenting opinion, however, does not establish precedent. As such, even if the Court of Appeals unpublished opinion that relied upon prior PRA precedent conflicted with Judge Fearing's dissent, such a conflict would not present a persuasive basis for granting discretionary

review in this case, especially in light of the fact-specific nature of the request and the Court of Appeals decision. For the reasons discussed above, the Court of Appeals below and the majority opinion in *Cantu* applied well-established PRA case law.

Because the Court of Appeals unpublished decision correctly applied pre-existing PRA precedent to specific facts of Cutler-Flinn's case, this Court should deny review.

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V. CONCLUSION

For the above stated reasons, the Court should deny Cutler-Flinn's petition for discretionary review.

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RESPECTFULLY SUBMITTED this 22nd day of September, 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 22nd day of September, 2023, at Olympia, WA.

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