NO. 42774-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEREK GRONQUIST,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Derek Gronquist, a Washington State prisoner, filed a complaint based on two public records requests received by the Department of Corrections (Department or DOC) on July 30, 2007, and August 9, 2007. Mr. Gronquist raised claims under the Public Records Act (PRA) and Article I, section 5 of the Washington State Constitution.

The trial court correctly determined Mr. Gronquist's requests pertaining to "undocumented alien workers" did not request identifiable records because the records did not exist. Additionally, Mr. Gronquist sought disclosure of the Department's prison surveillance videos, but consistent with Fischer v. Washington State Dept. of Corr., 160 Wn. App. 722, 254 P.3d 824, 827, review denied, 172 Wn.2d 1001, 257 P.3d 666 (2011), surveillance videos are exempt from disclosure under RCW 42.56.240(1). Furthermore, the trial court correctly determined the Department did not act in bad faith when it inadvertently omitted one page of a disclosed document[1] and calculated a twenty-four (24) day penalty period due to Mr. Gronquist's delay in bringing his claim. Lastly, the trial court properly denied all claims and properly denied leave to amend the complaint. This Court should affirm all of the trial court's decisions.

[1] The Department inadvertently omitted one page of a three page report contained in the ninety-six pages of documents disclosed to Mr. Gronquist.

II. COUNTER STATEMENTS OF THE ISSUES

1. Is there a Public Records Act violation when the Department presents testimony through declarations that a public records request asked for documents that did not exist and the plaintiff failed to present any competent evidence that the records did exist as requested?

2. Is there a Public Records Act violation when the Department presents testimony through declarations that a public records request failed to ask for identifiable records because the records requested were not readily identifiable and would require the Department to research its records to fulfill the request?

3. Does RCW 42.56.565(1)'s provision prohibiting a prisoner from collecting penalties under the Public Records Act when the agency is found to not have acted in "bad faith" for any judgment that occurred after July 22, 2011, bar a prisoner from challenging a trial court's 2009 calculation of a penalty period in a case where a final judgment was entered on April 25, 2012, and the Department was found to not have acted in bad faith?

4. Does the doctrine of laches apply in a Public Records Act case when the requestor knew or should have known the Department inadvertently omitted one page of a three page report due to a copying error and unreasonably delayed notifying the Department of its omission

by waiting more than nine months to file a Public Records Act case based on the accidental omission causing the Department to incur penalties under the Public Records Act even though it believed it had disclosed the record?

5. Does the Public Records Act exemption for specific intelligence information compiled by the Department where the nondisclosure is essential to effective law enforcement apply to the Department's prison surveillance videos law when the Department presents testimony through declaration that all prison surveillance videos contain intelligence information essential to effective law enforcement?

6. Should the Court deny review of an Article I, section 5 Washington State Constitution claim abandoned in the trial court when the Appellant informed the trial court it could dismiss his Article I, section 5 claim as moot and deny review for constitutional claims for prior restraint, overbreadth, and vagueness when they were not raised in the Plaintiff's amended complaint?

7. Should a prior restraint claim be dismissed when the Appellant fails to identify an official restriction prohibiting future speech or assert that the Department prohibited future speech in his Amended Complaint?

8. Is denial of a motion to vacate proper when the Plaintiff fails to establish by clear and convincing evidence the underlying order dismissing Plaintiff's public records act claim for failing to disclose prison surveillance videos was caused by fraud, misrepresentation, or other misconduct by the Department?

9. Is denial of a motion for leave to amend proper when the Plaintiff attempted to amend a Public Records Act claim one year after it was dismissed with prejudice, the amendment would prejudice the Department because it would have to secure evidence more than three years after the first complaint was filed and amendment was futile because the Plaintiff did not have any definitive proof that the alleged documents actually existed?

III. STATEMENT OF THE CASE

A. Factual History

On July 30, 2007, the Department received a public records request, Request Number CBCC-655, from Mr. Gronquist for records pertaining to "undocumented alien workers" employed by correctional industries. CP 247. Specifically, Mr. Gronquist asked for:

> 1. All Department of Corrections (DOC) inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries from January 1, 2004, to today's date;

2. All records demonstrating the payment of any wages, gratuities, or other forms of payment to undocumented alien workers employed by the DOC's Class II Industries from January 1, 2004, to today's date; and

3. All records revealing internal DOC communications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program, regardless of class. This third request seeks all records in existence on this subject.

The term "undocumented alien worker" means any person who is not a United States Citizen and who does not possess a current and valid work permit or similar document authorizing such person to be employed in the United States.

CP 247, 252-53. The Department investigated the request and determined that there were no responsive records. CP 248. The Department responded to Mr. Gronquist and notified him that no responsive documents existed in a letter dated July 31, 2007. CP 248.

On August 9, 2007, the Department received a second PRA request, Request Number CBCC-672, from Mr. Gronquist requesting:

The following records concerning an assault and/or extortion attempt that happened to me at the Clallam Bay Corrections Center on June 17, 2007:

1. All documents created in response to, or because of, this incident;

2. All infraction reports, witness statements, inmate statements, disciplinary hearing findings and recommendations, confidential information summaries, and administrative segregation placement, referrals and/or recommendations;

3. All photographs;

4. The surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007;

5. The surveillance video of the chow hall used for C-unit inmates on and for the breakfast meal on June 17, 2007;

6. All records of staff interviews;

7. All inmate statements;

8. Any summaries or reports;

9. The complete internal investigations file;

10. All communications, letters, and emails;

11. Any recommendations;

12. All disciplinary actions taken against staff;

13. Any information or documentation gathered, made, or obtained because of events occurring since June 17, 2007 which may relate to this event; and

14. All documents and communications from outside law enforcement officials.

CP 248, 263-64.

The Department responded in a letter dated August 9, 2007, acknowledging receipt of the request and requested clarification as to some of the documents requested by Mr. Gronquist. CP 249. On August 27, 2007, the Department received a follow-up letter from Mr. Gronquist clarifying his request. CP 249. The Department acknowledged Mr. Gronquist's clarification in a letter dated August 30, 2007, and estimated up to twenty (20) more business days to review and assemble responsive records. CP 249.

On September 24, 2007, the Department sent Mr. Gronquist a letter notifying him that ninety-six (96) pages of responsive records had been located. CP 248. After receiving payment from Mr. Gronquist for copying and postage, the Department sent Mr. Gronquist a letter acknowledging his payment and enclosing the records responsive to his request on October 26, 2007. CP 249-50. Unfortunately, the Department inadvertently omitted one page of a three page report contained in the ninety-six (96) pages of documents disclosed to Mr. Gronquist. CP 250. Included with the responsive documents was a denial of disclosure form notifying him that prison surveillance tapes are exempt from public disclosure under RCW 42.56.420 and would be withheld. CP 250.

The documents denial of disclosure form were received at the Stafford Creek Corrections Center mail room. CP 315. Upon receipt, the mail room screened the records and withheld portions of the enclosed records in accordance with the Department's mail policy, Policy No. 450.100. CP 315. The mail room sent Mr. Gronquist a mail rejection form, including reasons for restricting access to documents, along with non-rejected documents pursuant to Policy No. 450.100. CP 315; see Livingston v. Cedeno, 164 Wn.2d 46, 50-51, 186 P.3d 1055 (2008) (The Department screened and properly rejected parts of a public records request based on Policy No. 450.100).

B. Procedural History

On August 1, 2008, Mr. Gronquist filed a pro se civil complaint alleging violations of the PRA. CP 435-39. In his complaint, Mr. Gronquist specifically alleged that the Department violated the PRA when a number of documents were withheld from him after the Department received two PRA requests from him on July 30, 2007, and August 9, 2007. CP 435-38. The case was assigned to Judge Taylor in Clallam County Superior Court.

On July 27, 2009, Mr. Gronquist filed an amended complaint after being granted leave to file an amended complaint by the trial court. CP 319-27. In his amended complaint, Mr. Gronquist re-asserted his two previous PRA claims and added one new state constitutional claim in alleging the Department's "acts and/or omissions . . . violate the Free Speech Clause of Article I, section 5 of the Washington State Constitution" when the records sent to him in response to a public records request were confiscated by the mail room at Stafford Creek Corrections Center. CP 323-24. Mr. Gronquist's amended complaint did not state any other constitutional claim. See CP 323-24.

Mr. Gronquist filed a show cause motion in June 2009, and the trial court entered findings and an order on Mr. Gronquist's PRA claims on December 18, 2009. CP 125-27; CP 337-429. The trial court

determined the merits of Mr. Gronquist's PRA claims, and it found the Department complied with the PRA except for inadvertently withholding one page of a three page report. CP 125-26. However, the trial court correctly found the Department did not act in bad faith and found a violation period of twenty-four (24) days with a penalty of fifteen dollars ($15.00) per day. CP 126. The trial court calculated the twenty-four (24) day period between when the Department was served with the complaint and when it disclosed the record. Second Amended Opening Brief (Opening Brief) at 22; CP 125-26; CP 195-96.

On October 8, 2010, the Department filed a motion to dismiss, and the trial court entered an Order granting partial dismissal of Mr. Gronquist's claims on January 3, 2011. CP 98-99; CP 118-24. The Court dismissed "all Plaintiff's claims with prejudice," but it allowed him to proceed with his Article I, section 5 claim. CP 98-99. Mr. Gronquist filed a motion for reconsideration, and the court denied his motion for reconsideration on January 18, 2011. CP 100-03; CP 97.

On August 5, 2011, Mr. Gronquist filed a motion to vacate the trial court's December 18, 2009 Order under Civil Rule (CR) 60(b)(4). CP 19-96. Mr. Gronquist argued the order must be vacated because evidence obtained from discovery conducted in a federal civil rights case demonstrated that the video surveillance previously requested was not

preserved, and the court's decision to dismiss his PRA claim regarding the Department's withholding of its prison surveillance videos was based upon fraud perpetrated by the Department and its counsel. CP 25-30. On September 28, 2011, the trial court entered an Order denying Mr. Gronquist's motion to vacate while affirming the Department's exemption for surveillance videos. CP 11-12.

Mr. Gronquist filed a notice of appeal on October 28, 2011. However, he failed to have his issue certified by the trial court because he still had one claim pending. CP 8; see CP 98-99. Then, on January 31, 2012, Mr. Gronquist requested leave from the trial court to file a second amended complaint. CP 475-79. Mr. Gronquist's second amended complaint attempted to add facts to his already dismissed PRA claims and he added an Article I, section 5 "facial" challenge to the Department's actions in this matter. CP 468-74.

Mr. Gronquist's request for leave to file an amended complaint was heard by Judge Wood in Clallam County Superior Court. The trial court denied Mr. Gronquist leave to file a second amended complaint. CP 446-48; CP 459-60. The trial court determined that any attempt to amend the dismissed causes of action was improper unless Judge Taylor issued an order of revision under CR 54(b). CP 446-48. Additionally, the trial court dismissed Mr. Gronquist's Article I, section 5 claim with

prejudice because Mr. Gronquist, in his motion for leave to amend and during argument, declared his remaining Article I, section 5 claim was moot because he had received the records and an injunction was no longer necessary. CP 459-60; CP 475-77. On May 24, 2012, Mr. Gronquist timely filed a notice of appeal. CP 444-45.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the Public Records Act de novo. City of Federal Way v. Koenig, 167 Wn.2d 341, 217 P.3d 1172 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. Mitchell v. Washington State Dept. of Corr., 164 Wn. App. 597, 602, 277 P.3d 670 (2011), as amended on reconsideration in part.

Additionally, a trial court's dismissal of a claim under CR 12(b)(6) or CR 12(c) is reviewed de novo. Parmelee v. O'Neel, 145 Wn. App. 223, 231–32, 186 P.3d 1094 (2008), rev'd in part on other grounds, 168 Wn.2d 515, 229 P.3d 723 (2010). However, a trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof. Bock v. State, 91 Wn.2d 94, 586 P.2d 1173 (1978).

V. ARGUMENT

A. Appellant's PRA Request Received On July 30, 2007, Requesting Public Records Pertaining To "Undocumented Alien Workers"

1. Appellant's PRA Request For Records Regarding "Undocumented Alien Workers" Asked For Records That Did Not Exist As Requested

Mr. Gronquist argues that the Department did not disclose documents related to his PRA request received by the Department on July 30, 2007. Opening Brief at 22. Mr. Gronquist's PRA request, Request Number CBCC-655, asked for identification badges/cards, and payroll information regarding "undocumented alien workers" allegedly working in Class II Correctional Industries. CP 247, 252-53. It also requested all communications and/or deliberations concerning the use of "undocumented alien workers." CP 247, 252-53. The trial court determined that Mr. Gronquist "failed to properly identify records in his request numbered CBCC-655 regarding documentation for undocumented aliens working in Class II industries because the records in the form requested did not exist." CP 125.

A person has "no right to inspect or copy records that do not exist" and "[a]n agency has no duty to create or produce a record that is non-existent." Sperr v. City of Spokane, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). Therefore, there is no agency action to review under the

PRA when records do not exist. Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 738-40, 218 P.3d 196 (2009); Sperr, 123 Wn. App. 132 at 137.

Here, the Department presented evidence that records regarding "undocumented alien workers" did not exist. CP 247-49. Specifically, Mr. Holthe, the Department's legal liaison officer at Clallam Bay Corrections Center that processed Mr. Gronquist's request, stated in his declaration that "there were no responsive records as Correctional Industries does not identify offenders by citizenship, nor is offender citizenship part of the Correctional Industries employment process." CP 248.

After Mr. Hothle informed Mr. Gronquist there were no documents responsive to his request, Mr. Gronquist sent a letter challenging Mr. Hothle's assertion stating "I know that responsive records exist, as DOC employs undocumented alien workers in its Class I Industries program and federal law requires all employers to verify citizenship as a precondition to employment." CP 259. However, contrary to Mr. Gronquist's belief, Mr. Holthe informed Mr. Gronquist that "there were no records responsive to his request." CP 248.

Additionally, Mr. Gronquist failed to present to the trial court any competent evidence that the records did exist as requested. Mr.

Gronquist's argument that records did exist is based on his conclusory argument that he asked for identification badges/cards, payroll information, and all communications and/or deliberations concerning the use of "undocumented alien workers." Opening Brief at 25-29; CP 109-17. However, the evidence clearly showed that the Department's Correctional Industries did not identify offenders by citizenship and an offender's citizenship was not part of the Correctional Industries employment process. CP 248. Therefore, the records Mr. Gronquist sought in this PRA request did not exist as requested and there was no agency action to review. Consequently, the trial court's decision should be affirmed.

2. The Records Requested Did Not Readily Identify Offenders As "Undocument Alien Workers" And The Department Would Have To Research Its Records To Fulfill The Request

Mr. Gronquist argues that the trial court erred in determining that he failed to request identifiable records in his PRA request, Request Number CBCC-655, for documents related to "undocumented alien workers." Opening Brief at 22-29. Additionally, he argues that the Department did not conduct a reasonable search for the records requested. Opening Brief at 29-31. The trial court determined that his request for identification badges/cards, payroll information, and all communications and/or deliberations for offenders who were "undocumented alien

workers" failed to request identifiable records because the records did not exist as requested. CP 125-27.

Mr. Gronquist's July 30, 2007 request, Number CBCC-655, asked for:

> 1. All Department of Corrections (DOC) inmate identification badges/cards from undocumented alien workers employed by DOC's Class II Industries from January 1, 2004, to today's date;
>
> 1. All records demonstrating the payment of any wages, gratuities, or other forms of payment to undocumented alien workers employed by the DOC's Class II Industries from January 1, 2004, to today's date; and
>
> 2. All records revealing internal DOC communications and/or deliberations concerning the use of undocumented alien workers in DOC's Industries program, regardless of class. This third request seeks all records in existence on this subject.
>
> The term "undocumented alien worker" means any person who is not a United States Citizen and who does not possess a current and valid work permit or similar document authorizing such person to be employed in the United States.

CP 247, 252-53.

The PRA requires agencies to produce only "identifiable public records." RCW 42.56.080. A public records request "must identify or describe the document with reasonable clarity." Greenhalgh v. Dep't of Corr., 160 Wn. App. 706, 714, 248 P.3d 150 (2011). A record is identifiable if there is a reasonable description enabling the agency to

locate the requested records. Hangartner v. City of Seattle, 151 Wn.2d 439, 447, 90 P.3d 26 (2004); Bonamy v. City of Seattle, 92 Wn. App. 403, 410, 960 P.2d 447 (1998) (citing Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 938 (D.C. Cir. 1970)).

The PRA does not require the agency to research or explain its records but only to make those records accessible to the public. Smith v. Okanagon County, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). An agency has no duty to create or produce a record that is nonexistent. West v. Washington State Dept. of Natural Res., 163 Wn. App. 235, 242, 258 P.3d 78 (2011), review denied, 173 Wn.2d 1020, 272 P.3d 850 (2012); see also Limstrom v. Ladenburg, 136 Wn.2d 595, 604, 963 P.2d 869 (1998) (the PRA does not provide "a right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or ascribed to the agency"). "An important distinction must be drawn between a request for information about public records and a request for the records themselves." Bonamy, 92 Wn. App. 409.

Mr. Gronquist's argument is that he stated identifiable documents because he asked for identification badges/cards, payroll information, and all communications and/or deliberations for offenders who were "undocumented alien workers." Opening Brief at 22-27. Mr. Gronquist

also asserts that DOC concedes it "uses undocumented alien labor in its Class II Industries."[2] First, the Department has always contested Mr. Gronquist's assertions regarding "undocumented alien workers" in this matter. CP 137-38; CP 178-295; CP 314. Moreover, Mr. Gronquist's evidence to support his assertion that "undocumented alien workers" were employed in Class II industries was that he knows "DOC employs undocumented alien workers in its Class I Industries programs." CP 259. Thus, the court was correct to discount Mr. Gronquist's conclusory and unsupported accusations related to his belief that the Department employs "undocumented alien workers."

Second, the documents Mr. Gronquist identifies—identification badges/cards, payroll information, written communications and/or deliberations—do not readily identify prisoners by citizenship or as an "undocumented alien worker" and the Department would have to research its records to attempt to fulfill his request. CP 248. The Department attempted to determine if there were records responsive to his request. CP 247-49. However, the Department submitted uncontroverted evidence that "there were no responsive records as Correctional Industries does not identify offenders by citizenship, nor is offender citizenship part of the Correctional Industries employment process." CP 248.

[2] Opening Brief at 23.

In order to fulfill his request, the Department would have needed to create a list of all prisoners not citizens of the United States. Next, it would have to determine what prisoners on the list did not have a work visa. Then, it would have needed to cross check the names without work visas with all offenders who work in Class II industries to determine if there were any prisoners who met the "undocumented alien worker" definition in Mr. Gronquist's PRA request. Finally, it would have needed to identify any badges/cards or payroll information related to these offenders.

Mr. Gronquist could have conducted this research on his own had he filed a PRA request asking for the necessary records regarding offenders working in Class II industries and their citizenships. However, he wanted the Department to research their records for him. Thus, Mr. Gronquist's request was improper because he failed to request identifiable records because the Department needed to research its records to fulfill his request since the records requested did not readily identify prisoners by citizenship or as an "undocumented alien worker". See Smith v. Okanagon County, 100 Wn. App. 7, 12, 994 P.2d 857 (2000).

Consequently, the trial court's determination that Mr. Gronquist failed to request identifiable records was proper and this Court should affirm the trial court's order.

B. Appellant's PRA Request For Documents Related To His Assault At Clallam Bay Corrections Center

1. The Department Did Not Act In Bad Faith And Mr. Gronquist's Appeal Of The Trial Court's Determination Of A Twenty-Four (24) Day Penalty Period Is Moot

On August 9, 2007, the Department received a PRA request asking for a series of documents related to an assault of Mr. Gronquist at Clallam Bay Corrections Center on June 17, 2007. CP 248, 263-64. The Department sent Mr. Gronquist ninety-six (96) pages of responsive documents related to his request. CP 250. Unfortunately, the Department inadvertently omitted one page of a three page report contained in the documents disclosed to Mr. Gronquist. CP 250. The trial court determined that the Department did not act in "bad faith" and that a fifteen dollar ($15) per day penalty should be imposed for twenty-four (24) days. CP 125-27. Mr. Gronquist challenges the trial court's imposition of a twenty-four (24) day penalty period. Opening Brief at 21.

RCW 42.56.565 expressly states that "[a] court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1). Moreover, RCW

42.56.565(1) "applies to all actions brought under 42.56.550 in which a final judgment has not been entered as of July 22, 2011." RCW 42.56.565 (as amended by Laws 2011, ch. 300, § 2). Thus, prisoners are barred from receiving a penalty under the PRA if the court expressly finds the Department did not act in bad faith in a final judgment entered after July 22, 2011.

Additionally, in general, appellate courts will not endeavor to decide issues in a case if they are moot. Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); Sorenson v City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972) (As a general rule, courts should dismiss an appeal as moot where "substantial questions in the trial court no longer exist . . ."). The rare exception is if the appellate court determines that the appeal involves matters of continuing and substantial public interest. Grays Harbor Paper Co., 74 Wn.2d at 73; State ex rel. Evans v. Amusement Ass'n of Wash., Inc., 7 Wash. App. 305, 307, 499 P.2d 906, 907 (1972).

It is uncontested that the trial court found that the Department did not act in bad faith when it inadvertently omitted one page of a three page report in its ninety-six page disclosure to Mr. Gronquist. See Opening Brief at 20-22; CP 125-27. A final judgment was entered on April 25, 2012; Judge Wood signed an order finalizing dismissal of Mr. Gronquist's

last remaining claim while dismissing Mr. Gronquist's motion for leave to amend his complaint.[3] See CP 448.

Thus, Mr. Gronquist is barred from receiving penalties under the PRA because the trial court found the Department did not act in bad faith, and the final order in this matter was not entered until April 25, 2012. Consequently, the penalty period in this matter is irrelevant because the trial court found the Department did not act in bad faith and Mr. Gronquist's challenge to the court's calculation of a twenty-four (24) day penalty period should be dismissed as moot.

2. The Trial Court Properly Imposed A Twenty-Four (24) Day Penalty Period Based On The Doctrine Of Laches

If Mr. Gronquist's appeal of the twenty-four (24) day penalty period is not moot, the trial court properly determined a penalty period of twenty-four (24) days for the accidental non-disclosure of one page of a three page report. The common law doctrine of laches is applicable in PRA cases. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 438 n.11, 98 P.3d 463 (2004). The doctrine of laches is an equitable doctrine based on the principles of equitable estoppel. Luellen v. City of Aberdeen, 20 Wn.2d 594, 602, 148 P.2d 849 (1944), overruled on other grounds by

[3] Although the trial court issued orders on Mr. Gronquist's PRA claims in December 2009 and January 2011, the trial court's April 2012 modification to its February 2012 order was the final appealable judgment in this case because it disposed of the final remaining claim from Mr. Gronquist's First Amended Complaint. See CP 444-45; CP 448; CP 323-24.

Stenberg v. Pac. Power & Light Co., Inc., 104 Wn.2d 710, 709 P.2d 793 (1985). Laches is a party's implied waiver of rights arising from knowledge of existing conditions and acquiescence to them. Cotton v. City of Elma, 100 Wn. App. 685, 694, 998 P.2d 339 (2000). A party's action will be barred by laches if: (1) the party was aware or should have been aware of the facts constituting the cause of action; (2) commencement of the action was unreasonably delayed; and (3) the opposing party was damaged by the delay. Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991). The primary factor to be considered is prejudice to the other party. Clark County Pub. Util. Dist. v. Wilkinson, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000).

Here, the record indicates that the trial court applied laches in this matter. See CP 129-31. The application of laches was proper because Mr. Gronquist knew or should have known about this missing page when the Department sent the requested documents on October 26, 2007. CP 249, 285-88; see also CP 247-288. Mr. Gronquist should have known about the missing page because the first page of the report, CP 287, ends stating "Inmate Gronquist stated 'I was asleep in my'" and the next page, CP 288, begins "Gronquist then stated. . . ." Clearly, these pages are not sequential and Mr. Gronquist had to know there was a missing page or he would not

have been able to definitely state a PRA violation in his complaint for failure to disclose the one page of the three page report. CP See 437.

Next, Mr. Gronquist unreasonably delayed notifying the Department of its error when he waited more than nine months before filing his complaint. CP 435-39. The Department would have immediately disclosed the one page had Mr. Gronquist informed it of the error. CP 248-50. Lastly, the Department was damaged by his unreasonable delay. The Department was damaged because it would have unnecessarily incurred penalties under the PRA for unintentionally omitting the one page of the report when it fully intended to disclose it within the ninety-six (96) pages sent to Mr. Gronquist in response to his PRA request. See CP 129-32; CP 247-88. Thus, the trial court properly determined laches applied when it determined the Department should only pay penalties from when Mr. Gronquist served the complaint on the Defendant until it disclosed the one page omitted page on August 11, 2008, for a penalty period of twenty-four (24) days. Opening Brief at 22; CP 285-88. Consequently, this Court should affirm its decision.

3. The Trial Court Properly Determined The Department's Video Surveillance Is Exempt Under The PRA

Mr. Gronquist's PRA request asked for "[t]he surveillance video of C-unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007; and [t]he surveillance

video of the chow hall used for C-unit inmates on and for the breakfast meal on June 17, 2007." CP 263-64. The Department did not disclose the surveillance videos and claimed an exemption under RCW 42.56.420(1). CP 281. The trial court determined that the surveillance videos requested were exempt from disclosure. CP 126. Mr. Gronquist argues the Department's prison surveillance videos identified in his PRA request were not exempt under RCW 42.56.240(1). Opening Brief at 31-37.

RCW 42.56.240 states:

> The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:
>
> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

RCW 42.56.240(1).

Additionally, Courts should consider the unique circumstances of prisons in deciding whether an inmate has established a violation of the PRA by the Department of Corrections. *Sappenfield v. Dep't of Corr.*, 127 Wn. App. 83, 88-89, 110 P.3d 808 (2005). Fischer v. Washington State Dept. of Corr. specifically addressed the Department's prison video surveillance system. See Fischer, 160 Wn. App. 722. Fischer determined

that "intelligence information provided by video surveillance systems falls squarely within the core definitions of 'law enforcement.'" 160 Wn. App. at 727-28.

Mr. Gronquist argues that the Department's surveillance video system exemption identified in Fischer does not apply to the specific surveillance videos identified in his public records request. Opening Brief at 31-37. However, the declaration by Richard Morgan submitted in this matter is nearly identical to the declaration he submitted in Fischer. Compare id. at 726 with CP 289-94. Thus, Fischer is relevant to Mr. Gronquist's PRA request for prison surveillance videos.

First, Mr. Gronquist argues that the Department's exemption under RCW 42.56.240(1) is too general. Opening Brief at 31-32. However, the Department did not state a "general" exemption for video surveillance. The exemption it identified is provided for in RCW 42.56.240(1). Moreover, the exemption relates to specific intelligence information regarding video surveillance recordings maintained by the Department. CP 289-95. The exemption did not extend to all records in his request and only to his requests for video surveillance footage. Thus, information in the Department's surveillance system is "specific intelligence information" as identified in RCW 42.56.240(1) and not a general exemption as discouraged by the Court in Prison Legal News, Inc. v.

Dep't of Corrections, 154 Wn.2d 628, 115 P.3d 316 (2005). See Fischer, 160 Wn. App. at 727-28; CP 291-92.

Second, Mr. Gronquist argues that the prison surveillance videos he requested did not contain "intelligence information. Opening Brief at 34. As found in Fischer and established by the Department's Director of Prisons, Richard Morgan, an unquestioned expert on prison security issues, prison surveillance cameras provide Department staff and officials a "steady and valuable stream of intelligence information." CP 292. He indicated that prison surveillance videos contain not only the "specific intelligence information" that has been recorded, but also "the specific intelligence information of the surveillance and recording capabilities of the surveillance cameras in DOC institutions." CP 291-92. Additionally, he stated that "[i]t is mission critical that offenders and their cohorts not know the capabilities and the limitation of DOC's surveillance capabilities." CP 290.

Several federal cases have also recognized that the nondisclosure of prison surveillance videotapes is critical to effective law enforcement in prison because they contain intelligence information. See Gaither v. Anderson, 236 F.3d 817 (7th Cir. 2000) (citing Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981) ("prison officials articulated a legitimate security concern for refusing to disclose the videotape, namely, because they 'did

not want the offenders to know the capabilities of the cameras for security reasons.'"); Piggie v. Cotton, 344 F.3d 674, 679 (7th Cir. 2003) ("we have had no trouble approving of nondisclosure where prison officials have asserted a bona fide security justification, for example, that if the inmate were permitted to watch the tape, he might learn the location and capabilities of the prison surveillance system, thus allowing him to avoid detection in the future.")

Thus, Mr. Gronquist's argument that surveillance video information is not "intelligence information" is unsupported by the record.[4] The Department's evidence before the trial court indicated that surveillance videos contain "intelligence information" as identified in RCW 42.56.240(1) and are exempt from public disclosure.

Lastly, Mr. Gronquist argues that the Department's prison surveillance videos are not related to "law enforcement." Fischer determined that intelligence information provided by video surveillance systems "falls squarely within the core definitions of 'law enforcement.'" Fischer, 160 Wn. App. at 727-28. In addition, RCW 9.94.050 states that "[a]ny correctional employee, while acting in the supervision and

[4] The Department also contests the evidence cited by Mr. Gronquist to support this argument. See Opening Brief at 34. Mr. Gronquist cites to evidence that was not before the trial court when it issued its December 18, 2009 Order because he references information only provided with his motion to vacate submitted nearly twenty (20) months after the court determined the video surveillance videos were exempt. See CP 81-83, 89-90; CP 125-27.

transportation of prisoners . . . shall have the powers and duties of a peace officer." Law Enforcement also includes the "detection of persons committing infractions," and the Supreme Court has held that law enforcement "involves the imposition of sanctions for illegal conduct." RCW 10.93.020(2); Prison Legal News, 154 Wn.2d at 640.

Similar to Fischer, Mr. Morgan's declaration stated that the prison surveillance videos are used to detect illegal conduct and enforce the prisons' disciplinary system identified in WAC 137-25 and WAC 137-28. CP 289-92. Additionally, the surveillance videos are directly related to its law enforcement responsibilities. CP 289-94. Therefore, the Department conclusively established that its surveillance videotapes are exempt under RCW 42.56.240(1) because they essential to its "law enforcement" responsibilities. See CP 289-95.

Accordingly, the Department asserted a specific exemption identified in RCW 42.56.240(1). Prison surveillance videos contain intelligence information that "falls squarely within the core definitions of 'law enforcement.'" See Fischer, 160 Wn. App. at 727-28. Additionally, prison surveillance videos are always used to detect unlawful behavior and are often used to infract inmates for violations of DOC's disciplinary regulations which are clearly law enforcement activities. See CP 289-95. Thus, the Court should affirm the trial court's order finding that the

Department properly asserted an exemption for its surveillance videos under RCW 42.56.240(1).

C. Appellant's Article I, section 5 Washington State Constitution Claim

1. Mr. Gronquist Abandoned His Article I, section 5 Claim and Asserts Constitutional Claims Not Raised In The Trial Court

a. Mr. Gronquist Abandoned His Article I, section 5 Claim

The Court does "not consider issues apparently abandoned at trial and clearly abandoned" on appeal. Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) (quoting Seattle First–Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 243, 588 P.2d 1308 (1978)). Here, Mr. Gronquist only asserted one claim under Article I, section 5, in his amended complaint. CP 319-27. The Department filed a motion to dismiss the Article I, section 5, claim, but the court did not dismiss it. CP 98-99. Eventually, Mr. Gronquist's Article I, section 5 claim was dismissed with prejudice after Mr. Gronquist informed the court, through his motion for leave to amend and during argument, that his Article I, section 5 claim was moot because he had received the records and an injunction was no longer necessary. CP 459-60; CP 475-77. Therefore, Mr. Gronquist forfeited his right to appeal this issue when he abandoned his Article I, section 5 claim by asking the court to dismiss the claim as

moot. Holder, 136 Wn. App. at 107. Consequently, the Court should deny review of Mr. Gronquist's Article I, section 5 claim.

b. Mr. Gronquist Asserts Constitutional Claims Not Raised In The Trial Court

Mr. Gronquist also asserts errors that were not raised in the trial court. See Opening Brief at 38-49. Generally, appellate courts will not consider an issue that was not raised at the trial court. *Harris v. Dep't of* Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d 1056 (1993). RAP 2.5 provides "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). However, appellate courts "will not review a case on a theory different from that on which it was presented at the trial level. Questions not raised in [the trial] court will not be considered on appeal." Peoples Nat. Bank of Washington v. Peterson, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973).

Mr. Gronquist only alleged a singular state constitutional violation by alleging the Department's "acts and/or omissions . . . violate the Free Speech Clause of Article I, section 5 of the Washington State Constitution." CP 324. The claim was based on the Department's alleged acts of intercepting his public records request and withholding part of the records from him. CP 323-24. The amended complaint did not raise claims challenging the constitutionality of RCW 72.09.530 for it being vague and overbroad. See CP 319-25. Additionally, it did not assert that

Article I, section 5 of the Washington State Constitution gave prisoners greater protection than the First Amendment or that there was a prior restraint.[5] See CP 319-25.

Thus, these issues were not raised in the trial court and they could not reasonably be inferred through Mr. Gronquist's amended complaint. Consequently, they are raised for the first time on appeal and the Court should deny review of these constitutional claims.

2. Mr. Gronquist Did Not Allege Sufficient Facts For A Prior Restrain Claim Because He Did Not Identify A Restriction That Prohibited Future Speech

Even if Mr. Gronquist has raised a prior restraint claim in his amended complaint, he does not identify an official restriction prohibiting future speech or assert that the Department prohibited future speech in his Amended Complaint. Opening Brief at 39-44; CP 323-24; Id. at 224. The Department sent Mr. Gronquist ninety-six (96) pages of responsive documents in response his PRA request regarding an assault of Mr. Gronquist at Clallam Bay Corrections Center on June 17, 2007. CP 248, 263-64. Upon receipt, the mail room screened the records and withheld portions of the enclosed records in accordance with the Department's mail

[5] Mr. Gronquist sets forth a Gunwall analysis regarding Article I, section 5 and the First Amendment. Opening Brief at 40-49. However, the courts have previously determined that Article I, section 5 is subject to independent interpretation. Bradburn v. N. Cent. Reg'l Library Dist., 168 Wn.2d 789, 800, 231 P.3d 166, 172 (2010). Therefore, the Department will not respond to Mr. Gronquist's Gunwall argument. Moreover, even if a Gunwall analysis were applicable, Mr. Gronquist failed to raise it in the trial court. See CP 109-17. Thus, he would be precluded from asserting it here.

policy, Policy No. 450.100. CP 315. The mail room sent Mr. Gronquist a mail rejection form, including reasons for restricting access to documents, along with non-rejected documents pursuant to DOC Policy No. 450.100. CP 315; See Livingston v. Cedeno, 164 Wn.2d 46, 50-51, 186 P.3d 1055 (2008) (The Department screened and properly rejected parts of a public records request based on Policy No. 450.100).

Prior restraints occur when there is an administrative or judicial order precluding speech prior to its occurrence. Soundgarden v. Eikenberry, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994). A prior restraint pertains to speech and not conduct. State v. Immelt, 173 Wn.2d 1, 29, 267 P.3d 305 (2011). "A prior restraint is an official restriction imposed on speech or another form of expression in advance of its occurrence." Bradburn v. N. Cent. Reg'l Library Dist., 168 Wn.2d 789, 801-02, 231 P.3d 166 (2010) (quoting Sanders v. City of Seattle, 160 Wn.2d 198, 224, 156 P.3d 874 (2007)).

Courts also have distinguished between a prior restraint prohibiting speech and the regulation of access to information. Bradburn, 168 Wn.2d 789; Halquist v. Dep't of Corr., 113 Wn.2d 818, 821, 783 P.2d 1065 (1989) ("this court distinguished between prior restraints and restraints on access to information . . ."). Moreover, restrictions on speech in a nonpublic forum are evaluated in the light of the purpose of the forum and

all the surrounding circumstances. Sanders v. City of Seattle, 160 Wn.2d 198, 156 P.3d 874 (2007).

"Inmates do not retain all of the other rights a free citizen would have, such as the right to vote, freedom of association, or freedom of speech." DeLong v. Parmelee, 157 Wn. App. 119, 144-145, 236 P.3d 936 (2010) cause remanded on other grounds, 171 Wn.2d 1004, 248 P.3d 1042 (2011). "A prisoner retains those First Amendment rights that are consistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." In re Parmelee, 115 Wn. App. 273, 281, 63 P.3d 800 (2003). Moreover, a prisoner's First Amendment rights are "subject to limitation" while incarcerated "because institutional goals and policies take top priority." Id. at 288. "As a condition of confinement, an inmate's first amendment right to send and receive mail lawfully may be restricted by prison regulations reasonably related to legitimate penological interests." Livingston v. Cedeno, 164 Wn.2d 46, 55-56, 186 P.3d 1055 (2008) citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989).

Here, Mr. Gronquist asserts a "prior restraint" because the Department intercepted and withheld a sub-set of documents contained in a public records disclosure. Opening Brief at 39-44; CP 323-24. However, Mr. Gronquist fails to state an official restriction imposed by the

Department that prohibits Mr. Gronquist's speech prior to his speech occurring. The Department allowed Mr. Gronquist to submit a PRA request. Additionally, he was allowed to receive documents that did not conflict with the Department's mail policy. Mr. Gronquist fails to identify an official restriction prohibiting future speech or assert that the Department prohibited future speech in his Amended Complaint. The only assertion here is that the Department regulated Mr. Gronquist's access to information. The courts are clear that the Department has a penological interest in regulating a prisoner's access to information received by mail. See Livingston 164 Wn.2d at 55-56; Thornburgh v. Abbott, 490 U.S. 401, 407, 109 S. Ct. 1874 (1989). Thus, Mr. Gronquist's amended complaint was void of any colorable "prior restraint" claim. Consequently, Mr. Gronquist's prior restraint claim would have been dismissed even if he had raised it in the trial court.

D. Appellant Failed To Establish Fraud, Misrepresentation, Or Other Misconduct Under CR 60(b) By Clear And Convincing Evidence

Mr. Gronquist argues that the trial court abused its discretion by denying his motion to vacate because the court applied the wrong legal standard and its order upholding the Department's exemption for prison surveillance videos was based on fraud and/or misrepresentation by the Department. Opening Brief at 50-51. Mr. Gronquist alleges he was

assaulted on June 17, 2007. CP 322. On August 9, 2007, the Department received his PRA request for documents and surveillance videos related to his June 17, 2007 assault. CP 248, 263-64. The Department did not disclose the surveillance videos based on an exemption under RCW 42.56.420(1). CP 281. The trial court determined that the surveillance videos requested were exempt from disclosure. CP 126.

On August 5, 2011, Mr. Gronquist moved to vacate the trial court's December 18, 2009 Order. CP 19-96. Mr. Gronquist argued that the Department fraudulently asserted an exemption for record that did not exist. CP 19-96. Mr. Gronquist supported his argument with evidence from discovery conducted in a separate federal civil rights case. He argued the discovery submitted demonstrated that the video surveillance previously requested was not preserved, and the court's decision to dismiss his PRA claim regarding the Department's withholding of its prison surveillance videos was based upon fraud perpetrated by the Department and its counsel. CP 25-30. On September 28, 2011, the trial court entered an Order denying Mr. Gronquist's motion to vacate while affirming the Department's exemption for surveillance videos. CP 11-12.

A trial court's decision denying a motion to vacate under CR 60(b) is reviewed for an abuse of discretion. Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). "An abuse of discretion is present only if

there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); Mitchell v. Washington State Institute of Public Policy, 153 Wn. App. 803, 822, 225 P.3d 280 (2009).

A review of a trial court's denial of a CR 60(b) motion is limited to the appropriateness of the denial, and the merits of the underlying judgment are not before the appellate court. Bjurstrom v. Campbell, 27 Wn. App. 449, 451 n.2, 618 P.2d 533 (1980). The exclusive procedure to attack an allegedly defective judgment is an appeal of the judgment. Id. at 451. Thus, CR 60(b) may not be used to obtain correction of errors of law. Id.

Moreover, a party may not assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). "Thus, the alleged fraudulent conduct or misrepresentation must cause the entry of the judgment . . . ." Lindgren, 58 Wn. App. at 596. "The party attacking a

judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence." Id.

First, Mr. Gronquist asserts that the trial court applied the wrong legal standard in its decision to deny his motion to vacate. Opening Brief at 52-53. However, Mr. Gronquist's reliance on Olpinski is misplaced because Olpinski addressed the granting of a motion for a new trial under CR 59 and not a request to vacate a judgment. See Olpinski v. Clement, 73 Wn.2d 944, 945-46, 442 P.2d 260 (1968). Thus, Olpinski is not applicable in this matter because Mr. Gronquist's motion to vacate an order was based on CR 60(b) and it was not a request for a new trial under CR 59.

Second, Mr. Gronquist argues that discovery obtained in a federal civil rights case shows that the Department's exemption for its prison surveillance videos was based upon fraud.[6] Opening Brief at 54-56. The evidence cited to by Mr. Gronquist was obtained through court-ordered discovery not applicable to a PRA request. CP 31-96. Additionally, the depositions and written discovery indicates that the June 17, 2007 surveillance videos were not destroyed but recorded over in the normal course of business. CP 49, 54, 66-68. This most likely happened because the system recorded over itself prior to Mr. Gronquist's PRA request since

[6] The Department notes that Mr. Gronquist did not submit complete copies of the discovery obtained in the separate civil rights matter to the trial court. The written discovery and deposition transcripts are not complete. See CP 31-96.

his request was received fifty-five (55) days after the assault occurred. CP 49, 54, 66-68.

Additionally, the Department asserted that Mr. Gronquist's request for video surveillance would reveal the specific intelligence information about the camera requested, such as "whether the camera works, records, the quality of the tape, the scope of the camera, the cycle of the recording, and the maneuverability of the camera." CP 140; CP 289-92. These security concerns were clearly identified to the trial court by the Department and withholding of surveillance video is appropriate under RCW 42.56.240(1). See Fischer, 160 Wn. App. 722. Thus, the court was aware of the Department's basis for asserting an exemption under RCW 42.56.240 for non-disclosure of prison surveillance videos. CP 126.

Lastly, Mr. Gronquist argument asserts that the trial court improperly upheld an exemption under RCW 42.56.240(1). Opening Brief at 53-55. However, this argument attacks the appropriateness of the denial, and the merits of the underlying judgment are not before the appellate court. Bjurstrom, 27 Wn. App. at 451 n.2. Therefore, Mr. Gronquist has not established fraud, misrepresentation, or other misconduct by clear and convincing evidence. Consequently, Mr. Gronquist did not show by clear and convincing evidence that the trial

court abused its discretion and its decision to deny Mr. Gronquist's motion to vacate should be affirmed.

E. Appellant's Motion For Leave To Amend Was Untimely, Futile, And Prejudicial To The Department

Mr. Gronquist argues that the trial court abused its discretion in denying him leave to file a second amended complaint. Opening Brief at 49-50. On January 31, 2012, Mr. Gronquist requested leave from the trial court to file a second amended complaint. CP 475-479. Mr. Gronquist's second amended complaint did not add any additional claims, but it added facts to his already dismissed PRA claims. CP 468-74. Mr. Gronquist's request for leave to file an amended complaint was heard by Judge Wood in Clallam County Superior Court. CP 446-48; CP 459-60. Judge Wood denied Mr. Gronquist leave to file a second amended complaint because he determined that any attempt to amend the dismissed causes of action was improper unless Judge Taylor issued an order of revision under CR 54(b). CP 446-48; CP 459-60.

A trial court's decision denying leave to amend a complaint after the pleadings have closed is reviewed for an abuse of discretion. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997). A trial court may consider whether the new claim is futile or untimely. Id.; see also Doyle v. Planned Parenthood of Seattle–King County, Inc., 31 Wn. App. 126, 131, 639 P.2d 240 (1982) (noting that the motion asserted a

meritless claim and was submitted after judgment). Granting or refusing permission to amend pleadings rests with the sound discretion of the trial court. Criscola v. Guglielmelli, 50 Wn.2d 29, 308 P.2d 239 (1957). There are several well-established constraints on the court's authority to allow an amendment to a pleading. Amendments to pleadings should not be allowed when they cause the opposing party undue prejudice, are untimely, or constitute an exercise in futility. See Ino Ino, Inc., 132 Wn.2d at 142.

Here, it is uncontested that all of Mr. Gronquist's PRA claims were dismissed with prejudice a year prior to his request to file his second amended complaint. See Opening Brief at 49-50; CP 446-48. Mr. Gronquist's second amended complaint did not add any additional claims but sought to add facts to his second PRA claim previously asserted. Compare CP 468-74 with CP 319-25. Thus, his amendment was untimely because his claims were already dismissed and not open for amendment under CR 15.

Additionally, the Department would have been prejudiced by the amendment because the claim to be amended was properly resolved through dismissal. By re-opening Mr. Gronquist's PRA claims, the Department would have to secure additional evidence more than three years after the complaint was first filed. See Herron v. Tribune Pub. Co.,

108 Wn.2d 162, 168, 736 P.2d 249 (1987) (affirming denial of leave to amend and reasoning that if motion had been granted, defendants would have had to contact an entirely new set of witnesses and begun new efforts to secure evidence).

Lastly, Mr. Gronquist's motion to amend was futile because he had proffered no evidence indicating that the Department failed to comply with his August 5, 2007 public records request.[7] State v. Canyon Lumber Corp., 46 Wn.2d 701, 284 P.2d 316 (1955). (Failure to submit an affidavit or declaration indicating the materiality of the evidence or whether the evidence could have been discovered earlier with the exercise of due diligence is reason to deny leave to amend). Therefore, the court should affirm the trial court's order denying Mr. Gronquist leave to amend his complaint because the trial court did not abuse its discretion.

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[7] Mr. Gronquist's motion was only supported by his belief that an investigation by Lester Schneider generated responsive documents to his August 5, 2007, request. CP 20. However, the deposition transcript cited to by Mr. Gronquist only indicates a possible investigation by Mr. Schneider and it does not indicate that any documents were generated or that the Department withheld any documents from Mr. Gronquist. See CP 30-31.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the trial court's orders be affirmed.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I certify that on the date indicted below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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TO:

DEREK E. GRONQUIST, DOC #943857
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EXECUTED this 15th day of October, 2012 at Olympia, WA.

s/ Karen Bailey
KAREN BAILEY

WASHINGTON STATE ATTORNEY GENERAL

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