NO. 31658-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CLARENCE JAY FAULKNER,

Appellant-Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent-Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Clarence Jay Faulkner, a Washington State prisoner, appeals two rulings in a Public Records Act (PRA) action. Faulkner's claims stem from a July 11, 2012, public records request in which he sought two records: a mail rejection disposition notice, and a legal mail signature sheet. The trial court correctly determined Faulkner's request for a mail rejection disposition notice was not for an identifiable record because no such disposition notice existed. Furthermore, the trial court correctly determined the Department did not act in bad faith when it inadvertently disclosed an incomplete version of the legal mail signature sheet based on early confusion over the record sought. This Court should affirm both of the trial court's decisions.

II. COUNTER STATEMENTS OF THE ISSUES

1. Whether failure to produce a record that does not exist is a violation of the PRA.

2. Whether, under RCW 42.56.565(1) (prohibiting penalty awards to inmates in the absence of bad faith), the Department denied Faulkner a record in bad faith when staff mistakenly interpreted his request, and thereby produced an incomplete version of the requested record.

3. Whether Faulkner is entitled to recover his costs on appeal when he cannot establish error in the trial court's decision.

III. STATEMENT OF THE CASE

On July 11, 2012, the Department received a PRA request from Faulkner. In this request he sought:

> 1. A copy of the Coyote Ridge Corrections Center's "signature sheet" for the issuance of incoming Legal Mail from the Thurston County Superior Court addressed to Clarence Jay Faulkner #842107 received on July 2, 2012 and logged in at 11:36 a.m. by OA3 Mr. Michael True. This signature sheet contains 9 entries and the entry for Clarence Faulkner is line 6. In the place where prisoner Faulkner would normally sign his name is written "NOT RECEIVED" and is signed by prison guard V. Miller and possibly another prison guard. If you assert that this document does not exist, or is exempt from disclosure, please so state.
>
> AND
>
> 2. A copy of the CRCC [Coyote Ridge Corrections Center] Local Mail Rejection Disposition Notice Mail Rejection F-4-60.

CP 84. On July 18, 2012, Public Disclosure Specialist Paula Terrell responded to Faulkner summarizing his request as:

> 1. A copy of the Coyote Ridge Corrections Center "signature sheet" for the issuance of incoming legal mail from the Thurston County Superior Court addressed to you Clarence Faulkner #842107 and received on July 2, 2012 and logged in at 11:36 a.m. by OA3 Michael True;
>
> 2. Coyote Ridge Corrections Center local mail rejection disposition notice mail rejection #F460.

CP 88. That same day, Ms. Terrell contacted Coyote Ridge Corrections Center (Coyote Ridge) and requested that they gather responsive records. CP 88. In her request, she summarized Faulkner's request as seeking "1. A copy of the Coyote Ridge Corrections Center 'signature sheet' for the issuance of incoming legal mail from the Thurston County Superior Court addressed to you Clarence Faulkner #842107 and received on July 2, 2012 and logged in at 11:36 a.m. by OA3 Michael True; 2. Coyote Ridge Corrections Center local mail rejection disposition notice mail rejection #F-4-60.[1]" CP 89.

On August 29, 2012, the Department sent Faulkner a cost letter and informed him that one page of responsive records had been gathered and would be promptly provided to him upon payment. CP 91. The Department received payment from Faulkner on September 17, 2012, and provided him Coyote Ridge's July 2, 2012, legal mail signature sheet the following day, absent the associated signatures or notations. CP 93-94.

Faulkner notified the Department in a letter received September 24, 2012, that the record produced was a "blank original" and that the form, as produced, "was prior to the line where my legal mail was written 'NOT RECEIVED'", and he requested an appeal form. CP 96. The

[1] This F-4-60 identifier is a distinct tracking number assigned to Faulkner's April 10, 2012, mail rejection. CP 124. Accordingly, all documentation and paperwork associated with this particular mail rejection would bear this tracking number.

Department received another letter from Faulkner on September 26, 2012, reiterating his concerns regarding the produced legal mail signature sheet and inquiring about the production of the requested Coyote Ridge local mail rejection disposition notice. CP 98. The Department then received an appeal from Faulkner on September 28, 2012, in which he stated that he had been provided an incomplete copy of the legal mail signature sheet. CP 119. He also stated that he asked for and did not receive a copy of the Coyote Ridge Local Mail Rejection Disposition Notice. CP 119.

The Department responded to Faulkner's September 24, 2012, and September 26, 2012, letters on October 1, 2012, and October 3, 2012. CP 100-101. In these letters, Terry Pernula, another Public Disclosure Specialist in the Public Disclosure Unit, responded on Ms. Terrell's behalf because she was out of the office. CP 100-101. Ms. Pernula included the requested appeal form and notified Faulkner that, because she did not have access to Ms. Terrell's emails, Ms. Terrell would respond further on or before October 17, 2012. CP 100-101.

The Department considered Faulkner's PRA appeal, and on October 31, 2012, Barbara Parry of the Public Disclosure Appeal Unit notified Faulkner that an additional search for responsive records would be conducted and he would receive further communication from the Department on or before December 10, 2012. CP 116, CP 121. As a

result of this appeal and the subsequent search, the Department provided Faulkner with the July 2, 2012, Coyote Ridge legal mail signature sheet with the associated signatures and notations on December 7, 2012. CP 112. This letter further notified Faulkner that no copy of the mail rejection disposition notice could be located. CP 112.

Procedural History

On October 29, 2012, Faulkner filed suit against the Department. CP 225. In his complaint, Faulkner alleged the Department violated the PRA in responding to his request for the July 2, 2012, legal mail signature sheet with the associated signatures and notations, together with the mail rejection disposition notice. CP 225-257.

Faulkner filed a show cause motion in December 2012, and the trial court entered its order on April 19, 2013. CP 187-216. The court found no violation relating to the request for the mail rejection disposition notice because no such record existed. CP 3. The court further found that, although the Department did violate the PRA as to Faulkner's request for the Coyote Ridge legal mail signature sheet when the Department initially produced an incomplete version of the record, it did not do so in bad faith because it was an unfortunate mistake, and Faulkner failed to provide any evidence that the delay or denial was intentional. CP 3-4. Faulkner subsequently filed a timely notice of appeal on May 10, 2013. CP 220.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808, (2009) *review denied,* 169 Wn.2d 1007, 236 P.3d 206 (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 Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part.*

The "trial court's determination of appropriate daily penalties [under the PRA] is properly reviewed for an abuse of discretion." *Yousoufian* II, 152 Wn.2d at 431, 98 P.3d 463 (2004).

V. ARGUMENT

A. Faulkner's PRA Request For A Coyote Ridge Local Mail Rejection Disposition Notice Asked For A Record That Did Not Exist

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." *Spérr 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 a requestor seeks records that 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. at 137.

Moreover, 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)).

Faulkner argues the Department violated the PRA when it responded that "no copy of mail rejection disposition notice F-4-60 can be located" in response to his request for "CRCC Local Mail Rejection Disposition Notice Mail Rejection F-4-60." *See* Opening Brief at pp. 7-11; CP 112. However, Faulkner requested a specific record that did not exist. CP 124. Since it did not exist, there is no PRA violation.

As explained in the declaration of Coyote Ridge's Mailroom Supervisor, the Department does not notify an offender in writing of the final disposition of his rejected mail. CP 124. Upon rejecting mail, mailroom staff provides notice to the offender using a Mail Rejection

Notice. CP 124, CP 149. This notice assigns the rejection a tracking number, indicates the reason for rejection, and informs the offender of his opportunity to appeal the rejection. *Id.* If the mail rejection is appealed and upheld by the Assistant Secretary of Corrections, the offender is given an opportunity to direct the Department on how to further process the rejected items. CP 124. Offenders are provided an "Options for Rejected Mail" form and may choose to mail the rejected item out of the facility, donate it to charity, or allow it to be destroyed. CP 124; *See* CP 186. Once the offender notifies the facility of his decision, the mailroom processes the rejected mail accordingly. CP 124. Offenders receive no notice of this disposition because it is done in accordance with their request. *Id.*

Throughout this process, no "mail rejection disposition notice" is created. *Id.* Instead, prison staff simply disposes of the rejected mail in the manner previously requested by the offender. CP 124. Because no disposition notice exists, the Department cannot be found to have violated the PRA for failing to produce it. *B.I.A.W. v. McCarthy*, 152 Wn. App. at 734 (a request for a record that does not exist leaves "no agency action [for a court] to review under the Act.").

Additionally, Faulkner failed to present any evidence to the trial court that the requested record did exist. Instead, Faulkner claims a Department form entitled "Options For Rejected Mail" was responsive to

this request, and that the Department violated the PRA when it failed to produce that form. Opening Brief at pp. 7-11; CP 186. However, Faulkner's request for a "mail rejection disposition notice" does not constitute a request for a different form with a different name, nor would the Department have reasonably concluded that Faulkner's request was for this different form. Faulkner has failed to show that he asked for a record that existed or was identifiable at the time of his request.

Faulkner surmises that an email chain in which Department staff discussed Faulkner's mail rejection packet and referred to a "rejection disposition sheet" reveals that the Department was on notice of the record he sought. Opening Brief at p. 8. The suggestion that this email shows the Department considered this a disposition notice, and thus knew what Faulkner was seeking, is mere supposition and is contradicted by the testimony of mailroom supervisor Randall Smith that "[t]he CRCC mailroom does not use a formal disposition notice, and, in any event, because I never received the F-4-60 mail rejection packet from headquarters, no disposition decision was made regarding these items." CP 125.

The "[Coyote Ridge Corrections Center] Local Mail Rejection Disposition Notice Mail Rejection F-4-60" record Faulkner sought in this

PRA request did not exist and thus there was no agency action to review. Consequently, the trial court's decision should be affirmed.[2]

B. The Department's Mistaken Production Of An Incomplete Version Of The Requested Legal Mail Signature Sheet Does Not Amount To Bad Faith

In 2011, the Legislature passed a statute limiting the award of penalties to inmate requestors in PRA actions. The law states:

> [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.
>
> This act applies to all actions brought under RCW 42.56.550 in which final judgment has not been entered as of the effective date of this section.

RCW 42.56.565 (as amended by Laws of 2011, ch. 300, §§ 1, 2). This law went into effect on July 25, 2011.

Under this statute, an inmate seeking PRA penalties has the burden of persuasion to show the Department acted with bad faith. Unlike "bad faith" as an aggravator which can increase a penalty under the *Yousoufian* factors when it has been established that the requester is entitled to a penalty, the finding of "bad faith" under the 2011 statute is a *requirement* for the

[2] Faulkner argues not only that the Department violated the PRA regarding the mail rejection disposition notice, but that the Department did so in bad faith. Opening Brief at pp. 11-13. While the Department did not violate the PRA, if this Court were to find otherwise, the appropriate relief would be to remand to the trial court for further proceedings.

award of *any* penalty to an inmate. RCW 42.56.565(1); *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian* V).

While the bad faith requirement for incarcerated requestors is relatively new, the concept of withholding of documents in bad faith has been discussed in prior PRA case law. *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (*Yousoufian* I, 2003), *aff'd in part and rev'd in part on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (*Yousoufian* II, 2004)[3]; *King County v. Sheehan*, 114 Wn. App. 325, 357, 57 P.3d 307 (2002). Bad faith exists when an agency knows it has records that should be disclosed, but intentionally and without justification fails to disclose them. *See Yousoufian* I, 114 Wn. App at 853. An agency's reliance on an invalid basis for nondisclosure may not result in a finding of bad faith, so long as the basis is not "farfetched" or asserted with knowledge of its invalidity. *See Sheehan*, 114 Wn. App. at 357.

The concept that "bad faith" equates to an intentional, wrongful act is further supported by state cases outside the PRA context. For example, one of the four recognized equitable grounds to award attorney

[3] While the *Yousoufian* appellate history is long, culminating in *Yousoufian* V, 168 Wn.2d 444, 229 P.3d 735 (2010), the analysis of "bad faith" in *Yousoufian* I has not been revised or overturned.

fees is bad faith. *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 275 P.3d 339 (2012). In that context, "substantive bad faith occurs when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive." *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999). Similarly, contesting a will in bad faith has been defined as "'actual or constructive fraud' or 'prompted [not] by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'" *In re Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999) (quoting *Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993)).

The lower court here correctly held that the Department's mistaken production of the incomplete July 2, 2012, legal mail signature sheet did not amount to bad faith. *See* CP 5-6. Moreover, the record plainly shows that the production of the legal signature sheet without the associated signatures was a product of Ms. Terrell's inadvertent mistake, which was later compounded by the high volume of requests and administrative appeals the Department processes. CP 78-82; *see* CP 88. While Faulkner's request appropriately specified that he sought the legal mail signature sheet with the associated signatures and notations, this specificity was not relayed to the persons searching for the record. CP 88. In an effort for brevity and because she did not understand that her

summary would change the nature of his request, Ms. Terrell requested that Coyote Ridge search for "[a] copy of the Coyote Ridge Corrections Center 'signature sheet' for the issuance of incoming legal mail from the Thurston County Superior Court addressed to you Clarence Faulkner #842107 and received on July 2, 2012 and logged in at 11:36 a.m. by OA3 Michael True." CP 88. In this request to search for records, Ms. Terrell left out the specification regarding the "not received" notation and the signature of Correctional Officer V. Miller. CP 88. These unintentional oversights are significant, as the requested and produced legal mail signature sheet are identical in all other respects. *See* CP 94 and CP 113. As a result of this confusion, the Department essentially searched for and subsequently produced the wrong record, the legal mail signature sheet absent the signatures and notations. CP 82. It was this inadvertent error as a result of Ms. Terrell's workload and in an effort for brevity, not any intentional or wrongful withholding, that resulted in a PRA violation.

Although there is no evidence to suggest Ms. Terrell's mistake in describing the request was anything other than honest or innocent, it is important to consider her actions in context. The Department responds to thousands of public records requests every year. CP 79. For example, in

2011[4], the Department responded to 14,226 requests, including inmate central and medical file reviews, health record requests, and broader requests for records handled by the Department's Public Disclosure Unit and designated statewide Public Disclosure Coordinators. CP 79. Of the 14,226 requests, 4,484 were for records other than file reviews or offender health records and were handled by the Public Disclosure Unit or designated statewide Public Disclosure Coordinators. CP 79. In response to these 4,484 requests, over one million pages of records were gathered and offered to requestors. CP 79. Approximately 34,500 hours of staff time was devoted to responding to these requests. CP 79. The majority included some claim of exemption and redaction or withholding of exempt information. CP 79. At any one time, a Public Disclosure Specialist may have 80 open requests assigned to them. CP 79.

The Department does not contest that it initially produced the incomplete legal mail signature sheet.[5] CP 67-68. However, in light of the thousands of PRA requests the Department processes each year, this mistake cannot be found to have been in bad faith. Rather, it was a good

[4] 2011 Public Disclosure statistics were the most current at the time of briefing and argument in the lower Court.

[5] To the extent that Faulkner attempts to reargue a PRA violation regarding the Department's response to his request for the legal mail signature sheet, the Department does not respond substantively because it is not a contested issue on appeal. The trial court held: "Defendant Department of Corrections did violate the Public Records Act in relation to Plaintiff's July 11, 2012, request when it initially produced an incomplete version of the requested July 2, 2012, Coyote Ridge Corrections Center (CRCC) legal mail signature sheet" and the Department is not appealing this ruling. CP 3.

faith error by a Public Disclosure Specialist tasked with carrying a substantial caseload of requests. CP 78.

The lower court also correctly determined that the Department's subsequent production of the legal mail signature sheet with the associated signatures was not in bad faith because Faulkner failed to provide any evidence that the delay in providing the record was intentional. Once the Department became aware of its error, the Department worked to get Faulkner the correct version of the legal mail signature sheet, the version with the associated signatures and notations. CP 103-105. The evidence further shows that the Department responded to letters received from Faulkner and provided him the requested appeal forms. CP 100-101. CP 103-105. These actions do not indicate any intentional or wrongful withholding of records. Rather, the evidence supports that the Department provided him the correct record and any delay in providing Faulkner the proper record was as a result of the high workloads of the Public Disclosure Unit and appeals officers. CP 79; CP 116.

Finally, Faulkner has not provided any evidence of an intentional or wrongful withholding. Instead, Faulkner relies on conclusory allegations that "[t]he delayed response showed evasiveness, a lack of diligence, and willful rendering of poor performance." Opening Brief at p. 20. This is insufficient to show bad faith. Moreover, at the penalties

hearing in the lower court, Faulkner conceded that he could not identify anything that suggests that those working on his request had reason to believe that the request was important or time-sensitive. *See* CP 6. The court further noted that he did not "point to anything that shows that anyone was intentional in their denial—or in the delay." CP 6.

Faulkner alleges for the first time on appeal that the Department willingly created a blank document which was generated after the request. Opening Brief at p. 21. Without any evidence, Faulkner attempts to twist the date in which the record was retrieved from the computer into some sinister motive. Opening Brief p. 21; *See* CP 94. This is not supported by the record. Rather, the Department initially misunderstood his request as seeking the legal mail signature sheet without regard to the associated signatures and notations. *See* CP 88. That the Department retrieved this record, the record it believed he sought, eight days after his request shows no sinister intent, but instead an attempt to timely comply with the PRA. There is no evidence in the record of malicious intent or any other evidence that the Department's delay in providing Faulkner the legal mail signature sheet as requested was intentional or wrongful.

Therefore, because the record shows an inadvertent error which led to the Department's initial production of the incomplete legal mail

signature sheet and Faulkner has failed to show any bad faith denial of records, the trial court's decision should be affirmed.

C. Faulkner Is Not A Prevailing Party On Appeal And Therefore Cannot Recover His Costs On Appeal

Under the PRA, a requestor who prevails in an action against an agency seeking access to a record is entitled to recover all costs incurred in connection with the action, including reasonable attorney's fees. RCW 42.56.550(4). However, *pro se* litigants like Faulkner cannot recover attorney's fees. *Mitchell v. DOC,* 164 Wn. App 597, 608, 277 P.3d 670 (2011). Here, the Department conceded a PRA violation with regard to the legal mail signature sheet and the trial court properly awarded Faulkner the costs he incurred in bringing the action. CP 3-4. However, for the reasons discussed above, Faulkner has not demonstrated error in the trial court's rulings and thus, is not a prevailing party entitled to costs on appeal. The Court should therefore deny his requests for costs on appeal.

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VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Faulkner's appeal be denied and that the lower court's order be affirmed.

RESPECTFULLY SUBMITTED this 9th day of August, 2013.

ROBERT W. FERGUSON
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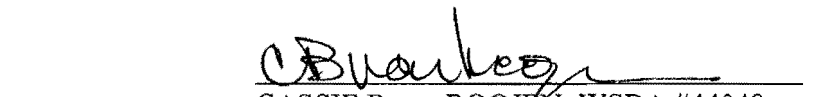

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT 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:

CLARENCE J. FAULKNER, DOC #842107
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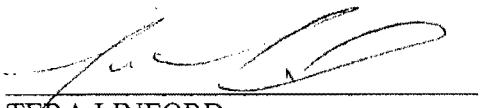
I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 9th day of August, 2013, at Olympia, WA.



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