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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

Review of Division III Cause #32912-7-III

No. 92610-7

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
DEC 17 2015
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STATE OF WASHINGTON

DONNA ZINK

v.

BENTON COUNTY, et al

DISCRETIONARY REVIEW BY SUPREME COURT

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Washington Administrative Code

Rules of Appellate Proceedure

Benton County Code

I. IDENTITY OF PETITIONER

Petitioner is Donna Zink, a pro se appellant in this cause of action. Zink respectfully ask this court to accept review of the Court of Appeals published opinion, terminating review as designated in section II of this petition.

II. COURT OF APPEALS DECISION

The Zinks seek review of *Benton County v. Zink*, No. 32912-7-III, ___ Wash. App. ____ (November 10, 2015). It is a published decision of Division III of the Court of Appeals filed on November 10, 2015. No motion for reconsideration has been submitted and it has been less than 30 days since the decision of Division II was filed. A copy of the opinion is attached to this request for review at Appendix A; pages A1 through A15.

III. ISSUES PRESENTED FOR REVIEW

1. Under this Court's decision in *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), is an agency required to provide electronic copies of redacted documents even if they are held in paper copy only or require printing and hand redaction?
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11. Does Benton County meet the requirements of a "person of interest" under RCW 42.56.010(2) and therefore is within the "zone of protection" of RCW 42.56.060 and .100?
12. Does RCW 42.56.060 and .100 provide legal authority allowing an agency to initiate a declaratory action under the UDJA?

IV. STATEMENT OF THE CASE

1. Decision of the Court of Appeals Division III

This dispute arises from Benton County's insistence that it is not required under the Public Record Act (PRA) to produce electronic copies of public records to requesters despite the agency's ability to provide the requested records in electronic format. Division III of the Court of Appeals upholding the Benton County Superior Court found; 1) the UDJA does not require a stand-alone statue as long as an interest is sought to be protected; 2) under the PRA an agency is within the zone of interest pursuant to RCW 42.56.060 and .100; 3) allowing an agency to initiate action under the UDJA spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding; 4) an agency has no obligation to provide electronic copies of public records; 5) scanning paper copies into electronic format is creating a new document; 6) providing electronic copies unnecessarily takes up hard space on the agency server; 7) use of an outside vendor for scanning avoids creating a new document and uses space on the vendors server; and 8) an agency has a right to enact rules, under RCW 42.56.100, allowing the agency to hire an outside vendor to provide copies of public records.

2. Events Leading to Litigation and Entry of Declaratory Judgment

In August 2013, Zink made a request for all Special Sex Offender Sentencing Alternative (SSOSA) evaluations as well as victim impact

statements (VIS)[1] to be provide in electronic copy via e-mail. SSOSA evaluations are sentencing documents used by sentencing courts to determine the sentencing of certain sex offenders meeting requirements set forth by statute under the Sentencing Reform Act of 1981 Chapter 9.94A RCW; specifically RCW 9.94A.670(3)-(5) *(Koenig v. Thurston County*, 175 Wn.2d 837, ¶30, 287 P.3d 523 (2012)).

The Sentencing Reform Act of 1981 requires copies of all sentencing documents to be maintained as public records (RCW 9.94A.475)[2] in the Prosecuting Attorney's Office (RCW9.94A.480(1)).[3] Despite the requirement, Benton County insists it will take the prosecutor's office ten years to fulfill Zink's request without identifying the reason for a ten-year delay in production of the records.

Under the Benton County Code (BCC) 5.14.120(c), if an electronic record necessitates redaction, the County is under no obligation to provide

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[1] Zink clarified that she wanted VIS statements filed in cases regarding those convicted of sex offenses. The request for VIS was eventually withdrawn. (App. A: pg. 2).

[2] Any and all recommended sentencing agreements or plea agreements and the sentences for any and all felony crimes shall be made and retained as public records if the felony crime involves: (2) Any most serious offense as defined in this chapter... RCW 9.94A.475. See RCW 9.94A.030(32) for definitions of "most serious crime."

[3] A current, newly created or reworked judgment and sentence document for each felony sentencing shall record any and all recommended sentencing agreements or plea agreements and the sentences for any and all felony crimes kept as public records under RCW 9.94A.475 shall contain the clearly printed name and legal signature of the sentencing judge. The judgment and sentence document as defined in this section shall also provide additional space for the sentencing judge's reasons for going either above or below the presumptive sentence range for any and all felony crimes covered as public records under RCW 9.94A.475(emphasis added). **Both the sentencing judge and the prosecuting attorney's office shall each retain or receive a completed copy of each sentencing document as defined in this section for their own records.** RCW 9.94A.480(1)(emphasis added).

the record electronically. (App. A: pg. 2). Further, BCC section 5.14.120(c) grants Benton County the right to outsource any request for records of more than twenty–five (25) pages to a private copy shop and charge the requester a higher cost than is allowable under RCW 42.56.070(8); without the need to provide a reasonable explanation. Benton County claims, and Division III agreed, under the Public Records Act (PRA), an agency can decide whether to provide electronic records or send requests for electronic documents or documents containing more than twenty-five (25) pages to an outside vendor rather than use agency equipment and resources to fulfill requests. (App. A).

In responding to Zink's requests for copies of records in electronic format, Benton County refused to provide the records in electronic format claiming "[w]e do not have the resources to copy all original records (which will involve potentially thousands), redact them and then scan them back into electronic form for you" citing the decisions of the Court of Appeals Division I in *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) and Division II in *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (2011)(App. A: pg. 3).

Initially, Zink accepted paper copies of the requested records. Despite the fact that Benton County has electronic redacting software available, Benton County printed the electronic copy and physically redacted the requested records. After receiving several installments of the requested

SSOSA evaluations, Zink discovered most of the requested records were created in electronic format. Zink made clear that she wanted the copies in electronic format only and requested to know the cost of providing the records electronically. Benton County responded that they would provide the records in electronic format but that they would be using an outside vendor at the cost of twenty-five (25) cents per page copy charge. Zink responded that Benton County was in violation of the PRA and threatened suit to force Benton County to comply. Benton County responded that it would only provide paper only and electronic records needing redaction through use of an outside vendor at the cost of twenty-five (25) cents per page. Ms. Zink again reiterated that she was requesting electronic copies only and that Benton County was in violation of the PRA.

In January 2014, Benton County filed a declaratory action seeking a court determination of its obligations under the PRA. (App. A: pg. 4). Zink responded to Benton County's action requesting penalties, costs and fees for violations of the PRA. However, the trial court order that Zink either pay the cost of a counterclaim fee or withdraw her request for penalties, fees and costs. (App. A: pg. 5). Zink submitted a revised answer withdrawing her request for penalties, fees, and costs stating that she would just file another suit if she prevailed on the issue of violations of the PRA. Benton County moved for summary judgment requesting the trial court to declare that an agency does not have to provide public records in an electronic format and

that Benton County can use an outside vendor to create copies of public records and charge over the mandatory limit of fifteen (15) cents per page copy fee. Zink responded that under the PRA Benton County lacked standing to bring suit; filing a motion to dismiss. (*Id.*).

In October 2014, the Benton County Superior Court dismissed Zink's motion to dismiss and entered declaratory judgment in favor of Benton County. (App. A: pg. 6). The trial court declared that:

1) There is an existing dispute between the parties regarding the Counties obligations under the PRA;
2) A justifiable controversy exists under RCW 7.24;
3) No other parties are necessary;
4) There are no disputed facts material to the issues;
5) Three quotes were obtained from outside vendors and twenty-five (25) cents was the lowest quote;
6) The Public Records Officer does not have redaction software on her computer allowing her to redact electronic records;
7) In order to provide the requested records in electronic format the public record officer would need to create additional public records;
8) The PRA allows agencies to hire a third party vendor to create electronic records from records it possesses only in paper form and from its electronic records that must be redacted and to charge twenty-five cents per page or the actual cost, whichever is less, to have such electronic records created;
9) The PRA does not require an agency to create or pay someone to create additional records that the agency possesses in paper form only; and

10) The PRA does not require an agency to create or pay someone to create additional electronic records from records that the agency possess in electronic form, but that it appropriately redacts under the terms of the PRA.

App. A: pgs. 6-7. Zink timely appealed the trial court's decision to Division III.

On November 10, 2015, Division III upheld the trial court's determination finding:

> Ms. Zink chose to receive copies of the records as opposed to inspect the records in person. Benton County was under no obligation to create electronic records for Ms. Zink, but decided to accommodate her by having an outside vendor create the electronic copies on its own server for 25 cents per page. This was the actual cost Benton County incurred based on the lowest of three quotes from outside vendors. The PRA allows Benton County to charge Ms. Zink the actual costs it incurs for such a service. [4]

Appendix A: pg. 15). It is from these judicial decisions of the trial court and the Court of Appeals, Division III, that Zink requests discretionary review of.

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[4] It should be noted that the record actually shows Benton County never sent any records to an outside vendor. Rather they filed suit when Zink emphatically explained that she was not going to pay twenty-five (25) cents per page scanning fee to an outside vendor when Benton County could easily use the scan button rather than the copy button on the copy/printer/fax machine being used. At the time Benton County initiated this action, they were faxing the redacted copies of the SSOSA evaluations to Zink at no charge.

V. GROUNDS FOR DIRECT REVIEW

1. The Decision is in Conflict with a Supreme Court Decision RAP 13.4(b)(1)

Review of an Appellate Court decision will be accepted by this Court if the decision made is in direct conflict with a Supreme Court decision (RAP 13.4(b)(1). In 2013, this Court clearly found that in responding to requests for public records in an electronic format, agencies should provide the records, with or without redaction, in the requested electronic format.

> **The trial court acted within its broad discretion in ordering SHA to produce responsive documents in electronic format,** in also ordering SHA to establish policies and procedures necessary to ensuring compliance with the PRA, and in awarding statutory damages.

Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, ¶26, 327 P.3d 600 (2013)(emphasis added). This Court went on to find:

> The trial court did not abuse its discretion in ordering injunctive relief. The trial court ordered SHA to produce properly redacted copies of the grievance hearing decisions in electronic format. The trial court also ordered SHA to publish procedures regarding public records requests; to publish a list of applicable exemptions; and to establish policies governing redaction, explanations of withholding, and electronic records.

(*Id.* ¶41)(emphasis added). This decision is in keeping with the strongly worded mandate of the PRA that agencies provide copies of public records of all sorts **as well as the facilities for the copying of public records**.

> **Public records shall be available for inspection and copying,** and **agencies shall**, upon request for identifiable public records, **make them promptly available to any person** including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. ... **Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency.**

RCW 42.56.080(emphasis added). The strongly worded mandate of the PRA demands agencies provide records for inspection and demands agencies to provide the equipment needed to make copies in the format requested; whether they are electronic or paper. To interpret RCW 42.56.080 to allow agencies to outsource copying of public records, at costs to the public greater than allowed by statute (RCW 42.56.070(7) is specious and can only be accomplished by removing and inserting language not intended by our legislature.

Courts are not allowed to add or remove language from a statute that is clear on its face. Rather, they must interpret a law that is clear to mean exactly what it says. Here the statute clearly states **agency shall provide their facilities to make any copies requested.** There is simply no language in this statute allowing an agency to use the facilities of a vendor. The decision of the Court of Appeals is in direct conflict with the decision made by this Court as discussed above.

The decision of Division III is in direct conflict with this Court's decision in *Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) where this Court found that a party only has standing under the UDJA if a party can establish personal standing and a justiciable controversy exists.

> To find that a party has personal standing in order to seek a declaratory judgment, the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, states:
>
> > A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
>
> RCW 7.24.020. To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract. Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." Id. at 419.
>
> This court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " Save a Valuable Env't v.

> City of Bothell, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). The second part of the test considers whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the party seeking standing. Id. at 866. Both tests must be met by the party seeking standing.

Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). In this case, Benton County did not show they are within the zone of interest or that a justiciable controversy exists. Rather, Division III determined that because RCW 42.56.060 protects an agency from liability for good faith release of public records and RCW 42.56.100 requires and agency to provide "full public access to public records" though adoption and enforcement of reasonable rules, including rules to "prevent excessive interference with other essential functions of the agency" Benton County established they are within the zone of interest and that a controversy exists (App. A: pg. 9). This is error.

RCW 42.56.060 speaks only to the issue of a good faith release in records and not to whether an agency can outsource copying of public records. Further, although RCW 42.56.100 requires and agency to enact and enforce rules, those rules must comply with the mandates of the PRA. As discussed, the PRA requires an agency to provide the facilities and equipment for the public to make copies of public records; including electronic records. Benton County's rules established under the BCC § 5.14.120(c) are in violation of the PRA. The rules adopted by Benton

County allow an agency to refuse to provide copying of public records using agency facilities and equipment. Further, RCW 42.56.060 and .100 do not provide the language necessary for an agency to initiate an action in the court. In contrast to RCW 42.56.060 and .100, this Court found that the language contained in RCW 42.56.540 states an agency can initiate action.

> The plain language of RCW 42.56.540 allows "an agency or its representative or a person who is named in the record or to whom the record specifically pertains" to file a motion or affidavit asking the superior court to enjoin disclosure of a public record. (Emphasis added.) Therefore, it is clear that either agencies or persons named in the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction.

Soter v. Cowles Publ'g Co., 162 Wn.2d 716, ¶58, 174 P.3d 60 (2007).

> We hold that the plain language of RCW 42.56.540 allows agencies to seek a judicial determination as to whether a requested public record must be disclosed. However, if an agency has improperly denied a requester access to a public record, per diem penalties apply for every day that access was denied. We affirm the Court of Appeals.

(*Id.* ¶68). Neither RCW 42.56.060 or .100 contain language allowing an agency to initiate a declaratory action under the UDJA and do not identify a justiciable controversy.

Furthermore, Benton County did not establish there was an "'injury in fact." The only injury found was that Zink told Benton County to either

follow the mandates of the PRA or an action would be initiated. Although there was a potential for injury, Zink's threats of suit were not substantial and, in fact, Zink withdrew her request for penalties, costs and fees. Furthermore, the record clearly indicates that despite Zink's threats of suit, at the time litigation was initiated, Benton County was providing the records via fax at no charge to Zink. Therefore, Benton County did not establish they would suffer an injury in fact. Division III's opinion filed in this case are in conflict with the decisions made by this Court.

2. The Decision Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court RAP 13.4(b)(4)

Review of an Appellate Court decision will be accepted by this Court if the decision involves an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)). The question of whether agencies must produce electronic records is of great public interest. The record clearly shows that Benton County has approximately 40 scanners between the sheriff and prosecutors office and 59 copies of redaction software (App. A: pg. 12). None the less, Benton County claims they do not have the resources needed to provide electronic copies of public records (*Id.* Pg. 3).

Even the Division III Court recognized that Benton County was clearly capable of providing the records in electronic format to Zink and has provided redacted electronic copies of records in the past. (App. A: pg. 12). However, the Court found that because the request potentially involved

several thousand pages, Zink could not establish Benton County was able to provide the requested records in electronic format. In other words, because Zink's request was broad, the agency was unable to properly respond.[5] This is error. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad (RCW 42.56.080). The decision of Division III is in opposition to the PRA.

In 1996, Congress amended the FOIA to require disclosure of electronic information in an electronic form.

> In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

Freedom of Information Act 5 U.S.C. § 552(a)(3)(B). A public record is defined by our legislature as:

> "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency **regardless of physical form or characteristics.**

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[5] A reason the number of pages responsive to a request would be relevant to the issue of whether an agency has the ability to provide electronic copies is that a large number of pages would make use of an outside vendor prohibitive. Division III's reference to the fact that Zink chose to receive copies as opposed to just inspection supports this position. (App. A; pg. 12 and 15).

RCW 42.56.010(3)(emphasis added). Our legislature defined a writing as:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication or representation** including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and **other documents including existing data compilations from which information may be obtained or translated.**

RCW 42.56.010(4)(emphasis added). Both of these definitions include electronic documents. Agencies must allow copying of public records during the customary office hours of the agency (RCW 42.56.090) and the agency must provide the equipment needed to make the copies.

> Agency facilities **shall** be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency.

RCW 42.56.080(emphasis added). Agencies must establish a written statement outlining the actual costs and the factors and manner used to determine the actual cost charged by the agency for making copies of public records available to the public. RCW 42.56.070(7). The cost analysis includes any costs directly incident to copying such public records including the use of agency equipment. The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the

use of agency equipment to photocopy public records. RCW 42.56.070(7)(a)(b)(8). All of these statutes clearly indicate that an agency must provide copies of public records in various formats. None of these statutes state that an agency does not need to provide electronic copies or that an agency can outsource the copying of public records. Rather, the PRA specifically mandates that an agency must use its own equipment and facilities to make copies; including electronic copies. If an agency refuses to comply with the strict mandates of the PRA in providing copies, the requester can initiate action to enforce the PRA.

> Upon the motion of any person having been denied an opportunity to inspect **or copy a public record** by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1)(emphasis added). Further, the party initiating action to enforce the strict rules of the PRA is entitled to penalties. RCW 42.56.550(4). Finally, although agencies must adopt rules, those rules must be consistent with the mandatory requirements of the PRA.

> Agencies **shall** adopt and enforce reasonable rules and regulations... **consonant with the intent of this chapter to provide full public access to public records**, to protect public

> records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

RCW 42.56.100(emphasis added). Benton County has not claimed, and Division III did not find, that providing the records in electronic format was an unreasonably disruption to the agency. On the contrary, Division III found that Benton County has the manpower and equipment to scan redacted paper copies and has done so in the past (App. A: pg. 12).

In fact the only disruption identified by Division III was that scanning a redacted paper copy of a record into electronic format on an agency's server creates a new public record. Division III, citing to *Mechling*[6] and *Mitchell*,[7] determined that an agency is not required to create new public records by scanning properly redacted paper copies of records into an agencies server. Whether the records are printed and redacted or redacted electronically, a new document has not been created. Rather the document has been altered and must be maintained by the agency in either electronic or paper format.

> Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. It is often a

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[6] *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (Div. I, 2009).

[7] *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (Div. II, 2011).

> good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted. For electronic records such as data bases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). See (b)(ii) of this subsection.

WAC 44-14-04004(4)(b)(i). In other words, if Zink agreed to paper copies, thousands of pieces of redacted paper copies would need to be retained by the agency. Requesting copies of redacted paper copies would take up more shelf storage than hard space storage. The Division III decision is clearly in opposition to the strongly worded mandates of the PRA.

VI. CONCLUSION

The Decision made by Division III is in conflict with decisions made by this Court as well as being a decision of great public importance requiring this Court's review. The PRA demands an agency use its own equipment to make copies of public records and does not allow agencies to outsource scanning; especially in instances where the agency has more than adequate equipment and software to provide the records electronically as requested. This issue is extremely important to the public since the use of electronic

technology has made access and sharing of records easy, efficient and ecologically friendly.

Once records are in an electronic format the records are easily accessible. Our Courts have recognized the benefits of electronic retention of court document, allowing and often requiring, parties to litigation to file court documents electronically. This necessitates scanning of original documents.[8] Briefings for causes in our Appellate Courts are published on-line. In this Court, briefings are filed via e-mail. Paper copies of court documents are becoming obsolete and less feasible. Despite the fact that a document filed in the Court is scanned after it is printed and signed, does not create a new document. It is the same document produced by its writer whether it exists in paper or electronic format.

For all of the reasons stated herein, the Zink respectfully request this court to review the decision of Division III issues in this cause of action.

RESPECTFULLY SUBMITTED this 10th day of December, 2015.

By Donna K Zink
Donna Zink
Pro se

[8] In Benton County, bench copies are required to be uploaded to the website and paper copies are not accepted unless preapproved.

A. CERTIFICATE OF MAILING

I declare that on the 10th day of December, 2015, I did personally deposit in the US Postal Service, postage prepaid, addressed to the following address of record, a true and correct copy of Appellant's "*Motion for Discretionary Review to the Supreme Court*" of the Published Decision of Division III in cause #32912-7-III:

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Dated this 10th day of December, 2015

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Appendix A

FILED
NOVEMBER 10, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BENTON COUNTY, a political subdivision of the State of Washington,	)	No. 32912-7-III
Respondent,	)	
v.	)	PUBLISHED OPINION
DONNA ZINK,	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Donna Zink threatened suit against Benton County for its decisions not to make electronic copies of paper records responsive to her public records request, and to charge her the outside vendor's cost to make such electronic copies. Benton County filed a declaratory action against Ms. Zink and moved for summary judgment, seeking confirmation that its decisions were lawful under the Public Records Act (PRA), chapter 42.56 RCW. The trial court granted Benton County's summary judgment motion and entered a declaratory judgment. Ms. Zink appeals. We affirm the trial court's order and declaratory judgment.

FACTS

In August 2013, Ms. Zink e-mailed a PRA request to the Benton County prosecutor's office "to review and/or copy all SSOSA [special sex offender sentencing alternative] forms as well as all victim impact statements filed and maintained anywhere in Benton County." Clerk's Papers (CP) at 180. Over time, Ms. Zink's request was narrowed to records relating to convicted sex offenders and, in April 2014, she withdrew her request for any future victim impact statements. Benton County estimates that Ms. Zink's request will not be fulfilled until 2023.

This dispute stems from Ms. Zink's persistence on receiving all responsive documents from Benton County in electronic format. Under Benton County Code 5.14.100, if an electronic record "necessitates redaction due to an exemption, the County is under no obligation to provide the record electronically." CP at 115. Further, Benton County Code 5.14.120(c) provides "[a]ny request for more than twenty-five (25) pages of documents . . . may be sent by the County to a private copy shop for copying, in which case the fee shall be the actual charge imposed for copying." CP at 118.

Shortly after making the request, Ms. Zink inquired into the cost of receiving the records in electronic format. Benton County responded:

> We do not have the resources to copy all the original records (which will involve potentially thousands), redact them, and then scan them back into electronic form for you. The Mitchell[1] court and Mechling[2] court make clear such duplication of effort is outside the county's obligations under the PRA.

CP at 97. However, Benton County offered to accommodate Ms. Zink by having an outside vendor create electronic copies of the records for 25 cents per page. The 25 cents per page cost was the lowest of three outside vendor quotes. Under this method, the scanned-in electronic copies would be created on the outside vendor's server.

After discovering that some of the redacted paper copies of records she was receiving were also held in electronic format, Ms. Zink made it clear that she was requesting all records in electronic format and failure to provide the records in electronic format was "a violation of the PRA." CP at 79. By the time of the trial court proceedings resulting in this appeal, Benton County had produced 91 records encompassing 561 pages. Of the 91 records, 66 were held by the Benton County prosecutor's office in paper format and 25 were held in electronic format. Moreover, 19 of the 25 electronic records required redaction of information exempt under the PRA.

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[1] *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (2011).

[2] *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009).

In responding to Ms. Zink's request, the Benton County prosecutor's office has redacted the applicable 19 electronic records by hand and provided Ms. Zink with paper copies. The employee tasked with responding to Ms. Zink's request does not have access to software allowing electronic redaction, and would therefore have to "print the original electronic document, physically redact it and then scan the paper document and save it onto the County's server" in order to provide Ms. Zink with electronic copies. CP at 121. Benton County believes this "would result in the creation of data about that electronic document and consume storage space on the server." CP at 128. The electronic records that do not need redaction have been provided to Ms. Zink in electronic format.

In November and December 2013, Ms. Zink e-mailed Benton County multiple times demanding, with thinly-veiled litigation threats, electronic copies of the records. Benton County reiterated its outside vendor offer to Ms. Zink. In early January 2014, Ms. Zink e-mailed Benton County, **"either send me the records as requested or wait until we go to court and find out if Benton County has the right to refuse to provide the requested records in electronic format as requested."** CP at 89 (bold in original). In late January 2014, rather than wait for potential per diem penalties to accumulate, Benton County filed a declaratory action seeking a court determination of its obligations under the PRA.

> Benton County's declaratory action sought a judicial determination that:
>
> (a) the Public Records Act does not mandate that a public agency create an electronic public record if it does not possess the public record in electronic form; (b) the Public Records Act does not mandate that a public agency create a second electronic record with respect to an electronic record it possesses but which must be redacted under the terms of the Public Records Act; and (c) if a public agency chooses to or is obligated to create an electronic record, the Public Records Act allows the agency to hire a third party vendor to create an electronic record from a public record that the agency does not possess electronically and/or from an electronic record that must be redacted and to charge the requestor the actual cost of creating an electronic record.

CP at 1. In her original answer, Ms. Zink sought PRA penalties against Benton County, but dropped that language in her second revised answer after she failed to pay the counterclaim filing fee. She subsequently told Benton County that she will "just file a motion for penalties if I win." CP at 162.

Benton County moved for summary judgment. Ms. Zink responded with a lack of standing argument in a combined memorandum in opposition to summary judgment and a motion to dismiss Benton County's declaratory action. In October 2014, the trial court denied Ms. Zink's motion to dismiss, granted Benton County's motion for summary judgment, and entered a declaratory judgment in favor of Benton County.

The trial court determined that there was no genuine issue of material fact as to the following:

> 1. There is an existing dispute between the parties regarding the County's authority and obligations under Washington's Public Records Act (PRA), and such dispute is not hypothetical and can be determined by a declaratory judgment issued by this Court.
>
> 2. A justiciable controversy exists, and this Court's jurisdiction under RCW 7.24 has properly been invoked.
>
> 3. No other parties are necessary or indispensable parties to this action.
>
> 4. There are no disputed facts material to the issue of whether Benton County is authorized under the PRA to have scanning services performed by a third party and charge Ms. Zink the actual reasonable cost thereof.
>
> 5. Benton County obtained quotes from three vendors as to the cost of scanning services, and a charge of 25 cents per page was the lowest quoted and is reasonable.
>
> 6. The Public Records Officer for the Benton County Prosecutor's Office does not have software on her computer to enable her to electronically redact any of the documents responsive to her request.
>
> 7. To provide Ms. Zink with electronic versions of responsive documents that it possesses in paper form only or that it possesses in electronic form that must be redacted, the Prosecutor's Public Records Officer would need to create additional public records.

CP at 217-18.

Consequently, the trial court entered the following declaratory judgment in favor of Benton County:

> 1. Washington's Public Records Act (PRA), chapter 42.56 RCW, allows Benton County to hire a third party vendor to create electronic records from records it possesses only in paper form and from its electronic records that must be redacted and to charge Ms. Zink twenty-five cents per page or the actual cost, whichever is less, to have such electronic records created if she requests responsive documents be provided in electronic form.

2. The PRA does not require that Benton County create or pay someone to create additional records that the County possesses in paper form only; and

3. The PRA does not require that Benton County create or pay someone to create additional electronic records from records that the County possesses in electronic form, but that it appropriately redacts under the terms of the PRA.

CP at 220-21. Ms. Zink timely appealed the order granting Benton County's motion for summary judgment, the order denying her motion to dismiss, and the declaratory judgment itself.

ANALYSIS

1. *Whether Benton County has standing to seek a declaratory judgment*

Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (UDJA), "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. The UDJA "is to be liberally construed and administered." RCW 7.24.120. In order to decide an action for declaratory relief, a justiciable controversy must be present. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-11, 27 P.3d 1149 (2001). Because the trial court determined that Benton County had standing as a matter of law, we view the evidence bearing on this

issue in the light most favorable to Ms. Zink and the conclusions of law de novo. *See id.* at 410 (this court applies "the customary principles of appellate review").

In order to have a justiciable controversy under the UDJA, the following elements are required:

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties have genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Id. at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *Id.* Specifically, the "direct, substantial interest" element "encompasses the doctrine of standing." *Id.* at 414.

Under the UDJA standing requirement, a party must (1) be within the zone of interests protected or regulated by a statute, and (2) have suffered an injury in fact. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007); *To-Ro Trade Shows*, 144 Wn.2d at 414 (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 493-94, 585 P.2d 71 (1978)). To put it most succinctly, "[t]he doctrine of standing

requires that a claimant must have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002).

A stand alone statute is not needed under the UDJA so long as "'the interest sought to be protected . . . is arguably within the zone of interests to be protected *or regulated* by the statute.'" *To-Ro Trade Shows*, 144 Wn.2d at 414 (emphasis added) (internal quotation marks omitted) (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 493); *see Nelson*, 160 Wn.2d at 187 ("Of course, no additional private right of action is necessary for parties to seek a declaratory judgment whenever their rights are affected by a statute."). If the party's interests are affected or impacted by a statute, the party is within the zone of interests. *See Nelson*, 160 Wn.2d at 187.

An important aim of the PRA is for each agency to provide "full public access to public records." RCW 42.56.100. This aim is accomplished by adoption and enforcement of reasonable rules, including rules to "prevent excessive interference with other essential functions of the agency." *Id.* The PRA thus recognizes that agencies should have limited protections when carrying out their duties, and are therefore within the zone of interests protected by the PRA. *See also* RCW 42.56.060 (disclaimer of agency liability for good faith release of public records).

Standing under the UDJA also requires injury in fact. *Nelson*, 160 Wn.2d at 186. Washington courts have held that additional financial and administrative burdens imposed on an agency constitute sufficient injury. *See Whatcom County v. State*, 99 Wn. App. 237, 241, 993 P.2d 273 (2000) (county had standing to seek declaration that the State was obligated to defend a civil rights action because "if the State [did] not defend and indemnify . . . the County [would] be forced to do so"). Seeking a declaratory judgment under the PRA, "'spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding.'" *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007) (quoting *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 907, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716).

Here, Benton County has standing to seek a declaratory judgment. Benton County is within the zone of interests regulated by the PRA. Further, Benton County has a personal stake in the outcome and has suffered an injury for declaratory judgment purposes based on Ms. Zink's explicit threats to sue Benton County. Allowing Benton County to seek a declaratory judgment that it has complied with the PRA "'spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding.'" *Soter*, 162 Wn.2d at 751 (quoting *Soter*, 131 Wn. App. at 907). We hold

that the trial court properly denied Ms. Zink's argument that Benton County lacked standing to bring its action.

2. *Whether the declaratory judgment properly determined the parties' rights*

The PRA is a "'strongly worded mandate for broad disclosure of public records.'" *Soter*, 162 Wn.2d at 731 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). "The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014); RCW 42.56.030 (the PRA must be "liberally construed and its exemptions narrowly construed" to ensure that the public's interest is protected). Consistent with RCW 42.56.100, agencies must adopt rules that "provide for the fullest assistance to inquirers," but still "prevent excessive interference with other essential functions of the agency." However, "administrative inconvenience or difficulty does not excuse strict compliance with the [PRA]." *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007).

This court reviews the legality of agency actions under the PRA de novo. RCW 42.56.550(3); *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011). "While agencies have some discretion in establishing procedures for making public information available, the provision for de novo review confirms that courts owe

no deference to agency interpretations of the [PRA]." *Zink*, 140 Wn. App. at 335. When interpreting the PRA, this court "'look[s] at the act in its entirety in order to enforce the law's overall purpose.'" *Mitchell*, 164 Wn. App. at 603 (quoting *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009)); *see Mechling v. City of Monroe*, 152 Wn. App. 830, 845, 222 P.3d 808 (2009) ([T]his court avoids any "unlikely, absurd, or strained result.").

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court "may affirm summary judgment on any grounds supported by the record." *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

Ms. Zink argues that she presented genuine issues of material fact when she filed various discovery responses from the County. Specifically, the filed responses show that Benton County has the manpower and equipment to scan redacted paper copies and indeed has done so in the past. Ms. Zink however has not established that Benton County has done so in situations similar to her records request, where redacted paper copies potentially total several thousand pages.

a. *There is no requirement to create a new record by scanning hard paper copies into electronic format*

"Nothing in the PRA obligates an agency to disclose records electronically." *Mitchell*, 164 Wn. App. at 606; *accord Mechling*, 152 Wn. App. at 849. Under the PRA "[a]n agency has no duty to create or produce a record that is nonexistent." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). "Whether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment." *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 524, 326 P.3d 688 (2014).

In this situation, scanning a redacted paper copy of a record into electronic format on an agency's server *creates* a new public record. In *Mechling*, the court expressly rejected the argument that "as to properly redacted e-mails . . . the City has an obligation to scan the e-mails to create portable document format (PDF) or tagged image file format (TIFF) files." *Mechling*, 152 Wn. App. at 850. In the same vein, the court in *Mitchell* reasoned:

> The requested records are stored in a computer database and ostensibly include information that must be redacted. Requiring [the agency] to disclose these records electronically would force the agency to print the records, redact them, and then scan them back into electronic format. . . .

> [W]e hold that such duplication of effort is outside of the agency's obligation of "fullest assistance"[3] [to inquirers] under the PRA.

Mitchell, 164 Wn. App. at 607. Under both *Mechling* and *Mitchell*, an agency is not required to *create* new public records by scanning properly redacted paper copies of records into an agency's server.

The trial court was presented with unrefuted evidence that scanning in redacted paper copies of electronic records in order to make electronic copies for Ms. Zink "would result in the creation of data about that electronic document and consume storage space on the server." CP at 128. Use of the outside vendor for scanning avoids creating a new public record on Benton County's server. Benton County is under no obligation to create new electronic records for Ms. Zink just because Ms. Zink believes it is more convenient for her and all other PRA requestors.

b. *Benton County may assess Ms. Zink the charge of the outside vendor for converting paper copies into electronic format*

Since the PRA allows a requestor to either inspect the records or request copies, a requestor may elect merely to inspect the records rather than bear the cost of copies. RCW 42.56.120. "A reasonable charge may be imposed for providing copies of public records[,] which charges shall not exceed the amount necessary to reimburse the agency

[3] *See* RCW 42.56.100.

. . . for its *actual costs* directly incident to such copying." RCW 42.56.120 (emphasis added). The Attorney General's model rule states, "[a]n agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor." WAC 44-14-07001(5).

Ms. Zink chose to receive copies of the records as opposed to inspect the records in person. Benton County was under no obligation to create electronic records for Ms. Zink, but decided to accommodate her by having an outside vendor create the electronic copies on its own server for 25 cents per page. This was the actual cost Benton County incurred based on the lowest of three quotes from outside vendors. The PRA allows Benton County to charge Ms. Zink the actual costs it incurs for such a service.

Affirm.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

To the Clerk of Division III

Please find attached my motion for discretionary review of Division III's decision in cause # 32912-7-III Benton County v. Donna Zink filed on November 10, 2015. I sent payment of $200 dollars for the filing fee separately and you should have received the check made out to the Supreme Court on Monday or Tuesday.

Sincerely,

Donna L. Zink

Pro Se Litigant