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NO. 92792-8

IN THE COURT WASHINGTON STATE SUPREME COURT

STEVEN P. KOZOL,

Plaintiff-Petition,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant-Respondent.

DEPARTMENT OF CORRECTIONS' ANSWER

ROBERT W. FERGUSON
Attorney General

CANDIE M. DIBBLE, WSBA #42279
Assistant Attorney General
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
(509) 456-3123
CandieD@atg.wa.gov

ORIGINAL

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I. INTRODUCTION

Kozol submitted thirty-one individual public records requests for separate offender grievance records from the Airway Heights Corrections Center. The Department of Corrections timely acknowledged each request and searched for the thirty-one separate grievance packets. The Department provided records related to thirty grievances, but was unable to locate one grievance record because it had never been logged and scanned into the Department's grievance database. Kozol later filed this action, asserting the Department violated the Public Records Act (PRA) under RCW 42.56 by not providing him with the back page of the grievance forms, which contained only boilerplate instructions to inmates for completing the forms. After litigation began, the Department located the final grievance record.

The trial court dismissed Kozol's claims for failure to state a claim under the PRA finding the back page of the grievance form was not responsive to his request. With respect to the one grievance the Department had not produced, the trial court held Kozol failed to establish a PRA violation because the Department had conducted a search of all reasonable locations where responsive documents might be located.

The Court of Appeals recognized that this litigation arose from "a scheme" that Kozol and a former inmate "concocted" "in prison to make

money off the Public Records Act." *Kozol v. Washington Dep't of Corr.*, 2015 WL 9915869, at *2, __ Wn. App. ___, __ P.3d ___ (2015). The Court of Appeals affirmed the trial court's findings and specifically held that the Department was not required to produce the back page of the grievance form as it was not an identifiable record responsive to Kozol's request. In regards to the later-located grievance record, the Court held the Department "looked in all of the places the record should have been. Nothing more was required of it." *Kozol*, 2015 WL 9915869, at *3. Kozol now seeks review.

This Court should deny review because the Court of Appeals decision is well-reasoned and does not conflict with decisions of this Court or other courts. Further, the Court of Appeals decision is supported by prior PRA case law and principles of statutory interpretation.

II. COUNTERSTATEMENT OF ISSUES

Review is not warranted in this case, but if review were granted, the issues would be:

(1) Whether the boilerplate back page of the grievance form was an identifiable record responsive to Kozol's request for inmate grievance records; and

(2) Whether the Department conducted an adequate search for the grievance record it was initially unable to locate.

III. COUNTERSTATEMENT OF FACTS

Under the Department's grievance program, offenders can file complaints related to multiple issues. CP 152. An offender initiates a grievance using the Department's form DOC 05-165, Offender Complaint form. CP 152. The offender writes a grievance on the front page of the form. CP 152, 155. The back page of the form simply provides boilerplate instructions on how to fill out the front page of the form. CP 152, 156.

After the Department receives and responds to an offender grievance, the grievance coordinator scans the original and maintains a digital copy of the front page of the grievance form in accordance with Department policy. CP 153. None of the information on the back page of the grievance form is used to process the offender's grievance and it is not considered to be part of the grievance record. CP 153. Therefore, the grievance coordinator does not scan and maintain the back page of the form as part of the official grievance record. CP 153. Because the scanned copies are maintained in the Department's database, the Liberty system, the hard paper copies of the grievance packet are destroyed six months (or later) after the resolution of the grievance. CP 153.

In 2011, Kozol and former inmate Aaron Leigh began their plan to file PRA requests for inmate grievance records. CP 481-528. They purposefully chose to limit their request to the new Department forms,

which were double sided, noting: "Do not waste a moment on old NCR-type forms: charge full-speed ahead on new ones." CP 482. In order to obtain as many valid Grievance Log ID numbers as possible, Kozol began "recruiting passers-by" to obtain their grievance number information. He then funneled that information so that he and his partner could begin filing duplicative PRA requests. CP 493-494. Once Kozol received the Department's responses where they could "park" in his email account, he and his partner would then move forward with their "avalanche of suits." CP 904-918. There would be no need to even review the records when they were received because Kozol knew the Department would not identify the back page of the grievance form as responsive to his request. CP 497-513. Kozol and Leigh could then move forward with filing PRA lawsuits in multiple counties to ensure the cases would not be considered duplicative and consolidated, thereby maximizing potential recovery. CP 517-522.

On February 10, 2012, the Department's Public Disclosure Unit received thirty-one separate requests from Kozol for "any and all records" including "the original complaint form," related to thirty-one individual offender grievances. CP 42-71. Five business days later, the Department issued a response letter indicating his requests were assigned tracking numbers PDU-18880 through PDU-18910. CP 50. Kozol was also

informed he would receive a response to his requests on or before April 16, 2012. CP 72-73.

Because all offender grievances are scanned into the Liberty system, the assigned Public Disclosure Coordinator reviewed Liberty for responsive documents. CP 36. During the review, she noticed the only grievance record not in the Liberty system was Kozol's request for Grievance Log ID 1109284, assigned tracking number PDU-18880. CP 36-37. Therefore, the Public Disclosure Coordinator contacted the Department's Statewide Grievance Coordinator, as he would have access to all grievances statewide.[1] CP 39. After conducting a search for the grievance in Liberty, the Grievance Coordinator informed the Department Grievance Log ID 1109284 did not exist. CP 40.

After following up with the Grievance Coordinator, the responsive documents for PDU-18881 through PDU-18910 were then emailed to the address provided by Kozol on April 2, 2012, April 9, 2012 and April 16, 2012. CP 76-150. In her cover letter, the Public Disclosure Coordinator noted a search for records related to PDU-18880 resulted in the discovery of no responsive records. CP 77. The back pages of the grievance forms, which contained only boilerplate instructions, were not used to process

[1] At the same time another requestor, Aaron Leigh, made a public disclosure request for the same Grievance Log ID.

grievances, nor were they considered to be part of the grievance record, nor were they maintained by the Department. CP 153. Thus, they were not included in the responsive documents. CP 76-150.

Nineteen months later, Kozol filed his PRA complaint alleging failure to timely respond to his PRA requests and "silent withholding" of responsive records. CP 11-16. The trial court granted the Department's show cause motion finding Kozol failed to show a PRA violation. CP 354-364. Kozol appealed, and the Court of Appeals affirmed. The Court held that regardless of whether the original grievance forms existed at the time of Kozol's request, the back pages of the form "were not substantively employed in the grievance process, they were not records reasonably identifiable from Mr. Kozol's requests for records on specific grievances." *Kozol*, 2015 WL 9915869, at *4. The Court further held the search for records must be reasonably calculated to locate all documents but that "reasonable search need neither be exhaustive or successful." *Kozol*, 2015 WL 9915869, at *3. Because the Department looked for the grievance record in all places it was reasonably likely to be found, Kozol failed to show a PRA violation. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Ruling That the Back Page of the Grievance Form Was Not Responsive to Kozol's Request Is Consistent with Existing Case Law

The Court of Appeals held that the back page of the grievance form was not responsive to Kozol's request for grievance documents because the back page contained only boilerplate instructions that are not used in processing or resolving inmate grievances. This holding is consistent with prior case law and supported by the evidence.

Under the PRA, the "record sought must be reasonably identifiable." RCW 42.56.080; *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012). An identifiable public record is "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009); *see also* WAC 44-14-04002(2) (an "identifiable record" is one agency staff can "reasonably locate"). In this regard, the PRA does not require agencies to be mind readers or to produce records that have not been requested. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied* 137 Wn.2d 1012, 978 P.2d 1099 (1999).

The Court of Appeals' decision is based on a straightforward application of this principle. Kozol submitted requests that sought any and

all records for specific inmate grievances, including the original complaint form. While the grievance form contains a back information page, that page is merely instructional for the offender. CP 152, 156. None of the information on the back page of the grievance form is used to process the offender's grievance because it is not considered to be part of the grievance record. CP 153. For the same reasons, it is not scanned and maintained as part of the official grievance record. CP 153. Therefore, when Kozol's requests for documents related to grievances was processed, the Department did not identify or consider the back page of the grievance form to be part of the offender grievance complaint, nor did the Department consider the back page to be responsive to his request. CP 153. The Department's decision to provide only the portions of the grievance records that it considered part of the official packet, including the offender grievance itself, was based on a reasonable interpretation of Kozol's request. Again, it is well established that agencies do not violate the PRA by providing only those records that are reasonably identifiable as being responsive to the request. In holding the Department was only required to produce records which were reasonably identifiable as responsive, the Court of Appeals applied well established statutory interpretation and case law. Therefore, the Court of Appeals decision does not conflict with other cases and this Court should deny review.

B. The Court of Appeals Ruling That the Department Conducted an Adequate Search for Records Is Consistent With Existing Case Law

The Court of Appeals correctly held that the Department did not violate the PRA because it produced all responsive records that it located after a reasonable search. *Kozol*, 2015 WL 9915869, at *3. An agency does not violate the PRA when it conducts an adequate search for records, even if additional responsive documents are later found. *Block v. City of Gold Bar*, 189 Wn. App. 262, 270-71, 355 P.3d 266 (2015); *Hobbs v. State*, 183 Wn. App. 925, 945, 335 P.3d 1004 (2014). The Court of Appeals' decision was based on well-established case law and Kozol has not identified any case in which a court has found a PRA violation existed despite an adequate search for records.

Kozol argues the Department failed to perform an adequate search because it did not hand search the grievance records for documents responsive to his requests. However, the Court of Appeals found that an additional hand search was unnecessary as the Department met the reasonable search requirement by checking the Liberty system and also inquiring with the Statewide Grievance Coordinator to ensure the grievance did not exist. *Kozol*, 2015 WL 9915869, at *3. This decision is consistent with this Court's adequate search requirement in *Neighborhood Alliance v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011).

The proper inquiry under the PRA is not whether the grievance existed but whether the Department conducted an adequate search to locate the records. *See Neighborhood Alliance*, 172 Wn.2d at 720-21. In that case, the county searched the computer an employee had only recently been assigned for responsive records. *Id.* at 712. The county did not inquire as to whether the employee had a different computer, nor did it search the old computer or any shared server. *Id.* at 712-713. This Court held the agency had a duty to search for the records in all places it knew the record could likely be located and the agency had the burden of establishing through affidavits the locations searched were "all places likely to contain responsive materials." *Id.* at 720-721. Because the agency did not search the employee's previous computer or ensure the information was not located in another database, this Court found the agency's search to be inadequate. *Id.* at 721-723.

The Court of Appeals applied the *Neighborhood Alliance* standards and found the Department performed more than a perfunctory search for the grievance record it was initially unable to locate.[2] *Id.* at 721. The Court noted the Department initially searched the Liberty database, as that was

[2] After Kozol filed this lawsuit, the grievance was found at Airway Heights Corrections Center when looking for documents responsive to Kozol's discovery requests. An additional review of Liberty indicated the grievance had never been entered and scanned into the database. CP 37.

the location the record was likely to be stored since all of the grievances were scanned and maintained in this location. *Kozol*, 2015 WL 9915869, at *3. In addition, the Court found the Department then conducted an additional inquiry to ensure there were no other locations the record would likely be located when it sought out information from the Statewide Grievance Coordinator. *Kozol*, 2015 WL 9915869, at *3. After the Grievance Coordinator informed the Department's public records coordinator that the grievance record did not exist in the grievance database, the Department had no reason to believe the record would be located anywhere else. *Kozol*, 2015 WL 9915869, at *3. Consistent with this Court's *Neighborhood Alliance* decision, the Court held because the Department looked in all areas where the grievance record was likely to be found, its search for records was adequate. *Kozol*, 2015 WL 9915869, at *3. Accordingly, this Court should deny review because the decision below is well-reasoned and does not conflict with *Neighborhood Alliance.*

C. The Court of Appeals' Ruling That Kozol Was Not the Prevailing Party and Therefore Was Not Entitled to an Award of Costs Is Consistent With Existing Case Law

In addition, Kozol asserts the Court of Appeals ruling conflicts with case law because the subsequent production of responsive records to his request under PDU-18880 renders him the prevailing party, thereby precluding dismissal of his case without an award of costs. However, this

argument ignores case law establishing that an agency's subsequent discovery of responsive records does not itself create a viable PRA claim. To be a prevailing party, a requestor must establish a PRA violation. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 119, 231 P.3d 219 (2010). Here, there was no violation because a reasonable search was conducted in the database where the grievance record should have been stored. As such, Kozol was not a prevailing party.

Further, this case does not conflict with the court's ruling in *West v. Thurston County*, 144 Wn. App. 573, 183 P.3d 346 (2008), where the court awarded costs when the agency voluntarily turned over the records after litigation began. In that case, the agency purposefully refused to respond to the request for records. *West*, 144 Wn. App at 347-348. Only after the requestor filed litigation, did the agency provide him with copies of the records he was requesting. *West*, 144 Wn. App at 347-349. In this matter, the Department was unaware it was holding documents responsive to Kozol's request until after litigation began. Those documents were discovered in a location where they were unexpected to be found and when they were discovered, they were promptly provided to Kozol. CP 37. As noted above, the Court of Appeals decision is consistent with both

statute and case law and is clearly supported by the evidence. Therefore, this Court should deny review.

D. The Court of Appeals Ruling Did Not Hold an Agency Is Permitted to Consider the Requestor's Intent Behind the PRA Request

Finally, Kozol asserts the Court of Appeals held that an agency is permitted to consider the requestor's intent when responding to the request. Although the Court acknowledged Kozol's money-making scheme, it did not hold the Department was allowed to consider Kozol's motivations when searching for records and responding to his requests. Therefore, this is not a basis for granting review.

Further, while RCW 42.56.080 does not require a requestor provide the purpose of his public disclosure request, it does require an agency produce records that are identifiable. The email evidence shows Kozol knew he was asking for records that would not be identified as responsive to his request. CP 481-528.

Kozol's correspondence clearly indicates he sought to trick the Department and misuse the PRA by ensuring his requests were evasive, only including the "new" forms that would contain a front and back page, and "recruiting passers-by" to obtain their grievance number information. CP 481-528. Such information was probative as to whether the records Kozol sought were identifiable records.

In addition, Kozol raised his own explanation for requesting the records in his response to the Show Cause Motion, contending that he needed the grievances as evidence to file a civil rights claim alleging mismanagement of the grievance system. CP 218. But this was contradicted by evidence in the record that Kozol requested the grievances in order to file an "avalanche" of PRA lawsuits. CP 501. The record shows that Kozol saw "no need to print any of the content" of the records he was requesting. CP 512. Kozol's strategy to file his lawsuits in multiple counties to ensure his cases would not be considered duplicative and consolidated shows an intent to maximize recovery. CP 515-521. Accordingly his request for review should be denied, as the information contained in his own emails was material and probative to the issue of whether Kozol requested an identifiable record.

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V. CONCLUSION

The Court of Appeals decision in this case is carefully reasoned, it is consistent with case law, and it correctly interprets and applies statutory authority. None of the criteria for accepting review under RAP 13.4(b) are satisfied. Therefore, the Department asks this Court to deny review.

RESPECTFULLY SUBMITTED this 24 day of March, 2016.

ROBERT W. FERGUSON
Attorney General

for: J. Schaumburg, 39393

CANDIE M. DIBBLE, WSBA #42279
Assistant Attorney General
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
(509) 456-3123
CandieD@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Corrections' Answer by US Mail Postage Prepaid to the following addresses:

STEVEN P. KOZOL, DOC #974691
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

DATED this 24th day of March, 2016, at Spokane, Washington.

PATTY WILLOUGHBY
Legal Assistant III
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
(509) 456-3123
PattyW@atg.wa.gov

OFFICE RECEPTIONIST, CLERK

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Subject: Kozol v. DOC, WSSC No. 92792-8

Attached for filing the Department of Corrections' Answer to Petition for Review in the above-referenced matter.
Thank you.
Patty Willoughby
Legal Assistant III
Office of the Attorney General
Corrections Division
1116 West Riverside, Suite 100
Spokane, WA 99201-1106
(509) 458-3542-phone
(509) 458-3548-fax
PattyW@atg.wa.gov
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