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Court of Appeals
Division III
State of Washington

NO. 33163-6-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III**

STEVEN P. KOZOL,

Plaintiff/Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant/Appellee.

BRIEF OF DEFENDANT/APPELLEE

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....2

 A. Statement of Facts.....2

 B. Statement of Procedural History.....4

III. STANDARD OF REVIEW.....5

IV. ARGUMENT5

 A. The Trial Court Correctly Dismissed Kozol’s Claims for Failing to State a Violation of the PRA5

 1. The Department did not purposefully withhold the back page of the grievance form and therefore cannot be deemed to have “silently withheld” the record.....8

 2. Search of available paper grievances or any change in “search terms” would not have yielded the back page of the grievance form responsive to Kozol’s request.....10

 3. The back page of the grievance form was not responsive regardless of whether it contained any handwriting.....13

 4. Kozol cannot establish a PRA violation for PDU-18880 because the Department searched in all reasonable locations for responsive records to the request.....15

 5. Kozol’s unlawful destruction claim has no merit.....16

 B. Kozol Had Adequate Time to Conduct Discovery and Any Additional Continuance Was Unnecessary.....18

C.	Kozol’s Email Communications Detailing His Scheme to Manipulate the Public Disclosure Process Is Probative Evidence Necessary to Determine Whether the Back Page of the Grievance Form Was an Identifiable Record.....	18
V.	CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Beal v. City of Seattle</i> , 150 Wn. App. 865, 209 P.3d 872 (2009)	6, 12, 19
<i>Bonamy v. City of Seattle</i> , 92 Wn. App. 403, 960 P.2d 447 (1998), <i>review denied</i> 137 Wn.2d 1012, 978 P.2d 1099 (1999)	6, 12, 19
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	5
<i>Farmer v. Davis</i> , 161 Wn. App. 420, 250 P.3d 138 (2011).....	5
<i>Gronquist v. Washington State Dept. of Licensing</i> , 175 Wn. App. 729, 309 P.3d 538 (2013)	9
<i>Mechling v. City of Monroe</i> , 152 Wn. App. 830, 222 P.3d 808 (2009), <i>review denied</i> , 169 Wn.2d 1007, 236 P.3d 206 (2010)	5
<i>Mitchell v. Washington State Dep’t of Corr.</i> , 164 Wn. App. 597, 277 P.3d 670 (2011).....	5
<i>Neighborhood Alliance v. County of Spokane</i> , 153 Wn. App. 241, 224 P.3d 775 (2009), <i>affirmed in part, reversed on other grounds</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	6, 7, 16
<i>Progressive Animal Welfare Soc. v. University of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	8, 9
<i>Rental Housing Ass’n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009), <i>reversed and remanded on other grounds</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	9

Statutes

RCW 42.17 7

RCW 42.56 1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 19, 20

WAC 44-14-04002..... 6, 7, 12, 19

WAC 44-14-04003..... 7

Rules

CR 56 5, 18

Evidence Rule 402 18

Evidence Rule 403 19

I. INTRODUCTION

This Public Records Act (PRA) case involves prisoner Steven Kozol's 31 individual requests for separate offender grievance records. The Washington State Department of Corrections (hereinafter "the Department") properly responded to each request by providing Kozol with the responsive record in its possession.

The offender grievance form is a single document with a front and back page. The front page of the form contains a place for the offender to state the grievance, and for the Department to write its response to the grievance. The back page of the form is simply boilerplate instructions on how to complete the front page of the form. The Department's standard practice is to scan and maintain only the front page of the completed forms. The Department does not retain the back page, and it does not consider the back instructional page to be part of the offender's grievance record.

Kozol submitted 31 separate public disclosure requests to the Department. Each request asked for a copy of an individual grievance record. The Department timely responded to each request, except for one which no records were able to be located, by providing Kozol with the requested grievance record as maintained by the Department. As part of its responses, the Department provided the front page of each requested

grievance form. Kozol later filed this action, asserting of the Department violated the PRA by not providing him with the back page of the grievance form. The trial court dismissed Kozol's claims for failure to state a claim under the PRA as the back page of the grievance form was not responsive to his request. Because Kozol does not show a violation of the PRA, the Court should affirm the dismissal of his claims.

II. STATEMENT OF THE CASE

A. Statement 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 form DOC 05-165, Offender Complaint form. CP 152. The offender writes the grievance on the front page of the form. CP 152. CP 155. The back page of the form simply provides boilerplate instructions on how to fill out the front page of the form. CP 152. CP 156.

After the Department has received and responded to an offender grievance, the grievance coordinator scans and maintains a copy of the front page of the grievance form as required by DOC Policy 550.100. 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

would not scan and maintain the back page of the form as part of the official grievance record. CP 153.

On February 10, 2012, the Department's Public Disclosure Unit received 31 separate requests from Kozol for records related to 31 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 Department's Liberty system, the Public Disclosure Coordinator assigned to the requests reviewed Liberty for the documents responsive to Kozol's requests. CP 36. During the review, she noticed the only grievance packet 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 Statewide Grievance Coordinator to see whether the documents were available as the Grievance Coordinator would have access to all grievances statewide¹. CP 39. The Grievance Coordinator indicated that Grievance Log ID 1109284 did not exist. CP 40.

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

After reassurance from 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 instruction page, which was not considered part of the grievance or maintained by the Department, was not included in the responsive documents. CP 76-150.

B. Statement of Procedural History

On December 11, 2013, Kozol filed a PRA Complaint alleging failure to respond within the time frames of the PRA and “silent withholding” of records. CP 3-10. One month later, Kozol filed his First Amended Complaint. CP 11-16. On May 28, 2014, the Department filed a motion to show cause arguing Kozol failed to timely file his claims and state a claim under the PRA as the back page of the grievance form was not responsive to his request. CP 23-156. Kozol filed his response as well as a motion to strike the show cause motion and a motion to continue. CP 161-165. CP 167-353. The trial court granted the Department’s motion dismissing Kozol’s claims noting Kozol failed to show a violation of the PRA and denied his request for a continuance. CP 354-364. CP 457-461. CP 468-468.

III. 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 (2010). 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*.

Further, challenges to the trial court's decision on a motion to continue under CR 56(f) "will not be disturbed on review except on a clear showing of abuse of discretion." *Farmer v. Davis*, 161 Wn. App. 420, 430, 250 P.3d 138 (2011).

IV. ARGUMENT

A. The Trial Court Correctly Dismissed Kozol's Claims for Failing to State a Violation of the PRA

Kozol failed to state a claim under the PRA because the back page of the grievance form was not responsive to his request for offender grievance records.

The PRA requires agencies to make identifiable public records available for inspection and copying. RCW 42.56.080. 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). To hold otherwise would put agencies in an untenable position. *Id.*

The adequacy of an agency’s search for public records is separate from the question of whether the requested records are found. *Neighborhood Alliance v. County of Spokane*, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), *affirmed in part, reversed on other grounds*, 172 Wn.2d 702, 261 P.3d 119 (2011). As the Court in *Neighborhood Alliance* explained, the standard for determining the adequacy of an agency’s search is one of reasonableness:

“The adequacy of the agency’s search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor.” *Citizen’s Comm’n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995). An agency fulfills its obligations under the

PRA if it can demonstrate beyond a material doubt that its search was “‘reasonably calculated to uncover all relevant documents.’” *Weisberg v. U.S. Dept. of Justice*, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (1984). Moreover, the agency must show that it “‘made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’” *Oglesby v. U.S. Dept. of Army*, U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

Id. at 257 (parenthetical citation omitted); *see also* WAC 44-14-04003(9) (“An agency must conduct an objectively reasonable search for responsive records.”). Additionally, when a request uses inexact phrasing such as “all records relating to” a topic, the agency may interpret the request to be for records that directly and fairly address the topic. WAC 44-14-04002(2). The Washington Supreme Court has held that an agency is not required to search every possible place a record may be “conceivably stored, but only those places where it is reasonably *likely* to be found.” *Neighborhood Alliance*, 172 Wn.2d at 719.

Under the PRA, public agencies are required to provide inspection or copying of public records. RCW 42.56.070. The purpose of the PRA is to provide full access to public records. RCW 42.17.010(11). If an agency denies a requestor “an opportunity to inspect or copy a public record” a requestor may proceed to court to require the agency to comply with the PRA. RCW 42.56.550(1). Under certain circumstances, the PRA shifts the burden of proof onto the agency to justify the actions taken. *See, e.g.*,

RCW 42.56.550(1) (“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.”). However, the statute does not alleviate a plaintiff’s burden of proof to show that there is a controversy at issue.

1. The Department did not purposefully withhold the back page of the grievance form and therefore cannot be deemed to have “silently withheld” the record.

The Department did not silently withhold the back of the grievance form, containing only boilerplate instructions for filling out the form, because it was not responsive to Kozol’s requests.

The Supreme Court has noted “silent withholding” occurs when an agency “retains a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applied to the specific record withheld.” *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 270, 884 P.2d 592 (1994). Thus, when an agency chooses to withhold a record from a requestor, the requestor must be given notice of the exemption for which the agency believes the records are exempt from production. In *Progressive*, the requestor sought a grant proposal. The *Progressive* Court noted a clear withholding had occurred with a failure to identify the

records in the exemption log as the agency only included 23 pages of the grant proposal when it was clear the record had included at least 55 pages. *Id.* at 269. A similar purposeful withholding was deemed to be “silent withholding” when an agency provided responsive records to a requestor and noted in its cover letter that it was refusing to provide hundreds of pages of records without identifying them in an exemption log. *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009), *reversed and remanded on other grounds*, 165 Wn.2d 525, 199 P.3d 393 (2009). “Silent withholding” can also occur when an agency redacts information and fails to provide a statutory basis for the redactions. *Gronquist v. Washington State Dept. of Licensing*, 175 Wn. App. 729, 736, 309 P.3d 538 (2013). In each of the cases where the Court found an agency to be silently withholding records, it was clear the agency deemed the records responsive to the requests and yet failed to provide the requestor with proper identification or any explanation for the withholding.

The facts here do not amount to “silent withholding” because the Department did not purposefully deny or refuse Kozol from reviewing the back page of the grievance form. The back page of the form was not responsive to the request. While the form contains a back information page, that page is merely instructional for the offender. CP 152. CP 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 request for documents related to grievances was processed, the Department did not consider the back page of the grievance form to be responsive to his request. CP 153. The Department's reasonable interpretation of Kozol's request yielded exactly what Kozol expected and what was provided to him, the official grievance record. The grievance record does not contain the instructional page nor would it ever be considered to be part of the retained grievance packet. CP 153. As such, the Department did not "silently withhold" a record that was never responsive to Kozol's request in the first place. Nor was Kozol entitled to an exemption log identifying a record that was not responsive to his request. Accordingly, the decision dismissing Kozol's claim should be affirmed.

2. Search of available paper grievances or any change in "search terms" would not have yielded the back page of the grievance form responsive to Kozol's request.

Kozol then asserts the Department failed to perform an adequate search for the records because its search did not include the paper grievance forms and the Department's search terms were inadequate.

However, neither review of the paper copies of the grievances nor a change in the search terms would have yielded the back page of grievance form as responsive to his request because the Department reasonably interpreted the request not to include the boilerplate instruction page.

Kozol was aware the back page would not have been deemed responsive to his request and used his request for grievance records as a pretext to set up the Department to “fail” in providing its response to his request for individual grievance records. CP 481-528. Kozol was well aware of this and began his campaign with former offender Aaron Leigh to create as many frivolous PRA claims as possible against the Department. CP 481-528. This included ensuring he only requested grievances that were written on the “new” forms which would contain a front and back page as the old grievance forms would not contain the back page boilerplate instructions. CP 482-483. CP 490-492. Further, Kozol’s emails indicate he had no rhyme or reason to seek the grievance records he requested. CP 493. Therefore, in order to obtain as many valid Grievance Log ID numbers as possible, Kozol began “recruiting passers-by” to obtain their grievance number information and 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” on his email address, he and his partner could then move

forward with their “avalanche of suits.” CP 904-918. Kozol had no intention of even reviewing the records which is evidenced by his request to see if the documents arrived with “no need to print any the content.” CP 497-513. Kozol then moved forward with filing his lawsuits by being purposely evasive and filing in multiple counties to ensure his cases would not be considered duplicative and consolidated. CP 517-522.

It is clear Kozol knew the Department would not identify the back page of the grievance form as responsive to his request. Such a request goes beyond the parameters of RCW 42.56.080 which requires the Department to produce records which are identifiable. 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*, 150 Wn. App. at 872; *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*, 92 Wn. App. at 409. To hold otherwise would put agencies in an untenable position. *Id.*

The Department interpreted Kozol’s request under the same context in which Kozol expected the request to be considered. The back page of a grievance form would be produced in response to a request that specifically seeks the back page of the form. CP 260-271. However, a

request for a specific offender's grievance records would never yield the back page of the grievance form as a responsive record because the Department does not consider the back page to be part of the official offender grievance record. CP 153. The same records would have been deemed responsive and provided to Kozol regardless of whether the Department reviewed the paper copy of the offender grievance record or changed its search terms. As such, Kozol never met his burden of establishing a prima facie case for a PRA violation as required by RCW 42.56.550 by failing to show there is even a controversy at issue. Therefore, the Court should affirm the dismissal of Kozol's claims.

3. The back page of the grievance form was not responsive regardless of whether it contained any handwriting.

Kozol further argues the back page of the grievance forms were responsive to his request because some of the forms appear to have writing on them. During the course of litigating these cases, Kozol filed another public disclosure request with the Department. CP 260. Unlike his requests in this case, Kozol specifically asked for copies of the "DOC 05-165 Back" of every original paper Offender Complaint/Grievance form filed by offenders within the last six (6) years at the Washington State Penitentiary." CP 260. Kozol asserts that because some of the back pages

have writing on them, the Department cannot take the position that they are merely instructional. However, Kozol's assertion is misplaced.

Offenders housed in the Intensive Management Unit do not have access to a locked grievance box; therefore, the grievance documents are collected directly from the offender. CP 344-345. At times, an offender may fold his grievance in half, causing the "back page" of the grievance to become the outside/envelope of the grievance. CP 345. The collecting staff member may write the grievance office mailbox number "W40" or the grievance officer's name on the outside of the grievance to ensure the grievance is delivered to the grievance office for processing. CP 345. This information is not deemed to be relevant to the grievance complaint itself and would not be used to investigate the offender's complaint. CP 345. Nor would the fact that the grievance mailbox number or the grievance officer's name be maintained for any purpose related to the offender's grievance complaint record. CP 345.

While Kozol may have received the back page of the grievance form, when he specifically requested it, does not make them responsive to his requests for the official grievance record. Further, the mere fact that a back page has handwriting on it, does not change whether it is considered in the grievance investigation or scanned as part of the official grievance record. Despite his assertions, Kozol has failed to show the back page of

the grievance form was responsive to his request and the Court should affirm the decision of the trial court dismissing his claims.

4. Kozol cannot establish a PRA violation for PDU-18880 because the Department searched in all reasonable locations for responsive records to the request.

In addition, Kozol asserts the subsequent location of responsive records to his request under PDU-18880 renders him the prevailing party and precluded a dismissal. However, the Department performed a reasonable search for the records under PDU-18880. All offender grievance packets are scanned and saved into the Liberty system. CP 36. Therefore, the Public Disclosure Coordinator assigned to the requests reviewed Liberty for the responsive documents. CP 36. During her review, she noticed the only grievance packet not in the Liberty system was Kozol's request for Grievance Log ID 1109284, assigned PDU-18880. CP 36-37. Therefore, the Public Disclosure Coordinator contacted the Statewide Grievance Coordinator to see whether the documents were available as the Grievance Coordinator would have access to all grievances statewide². CP 37. The Grievance Coordinator indicated that Grievance Log ID 1109284 did not exist. CP 40.

The Department made a reasonable search for the responsive records by not only checking the system where they are maintained but by

² At the same time another requestor, Aaron Leigh, made a public disclosure request for the same Grievance Log ID.

also following up with the Statewide Grievance Coordinator to ensure they would not be located anywhere else. It was only after notification that the grievance did not exist that the Department informed Kozol there were no responsive records. The Department had no reason to believe there were any additional areas where the documents would likely be stored. This is evidenced by the Department's review of Liberty which still indicated the grievance did not exist on April 3, 2014 after the documents were found while conducting discovery in this case. CP 37. The agency is not required to search every possible place a record may be "conceivably stored, but only those places where it is reasonably *likely* to be found." *Neighborhood Alliance*, 172 Wn.2d at 719. Because the Department conducted a reasonable search for the documents responsive to PDU-18880 where the documents were likely to be found, the Court should uphold the dismissal of his claim.

5. Kozol's unlawful destruction claim has no merit.

Kozol also asserts his claims related to the unlawful destruction of the records after his request was made precluded a dismissal. However, Kozol's amended complaint is devoid of any wrongful destruction of records claims and he never moved to amend his complaint to add them. CP 11-16. Further, the Department cannot be blamed for destroying the original paper copies containing the boilerplate back pages of the various

grievances Kozol was requesting. Kozol purposefully failed to provide specific information in his complaint in order to avoid any consolidation of his cases. CP 517. While he identified the exact PDU numbers in his amended complaint, he still purposefully failed to place the Department on notice of exactly which document he was alleging was silently withheld. CP 11-16. This was well after the hard copy documents had been scheduled for destruction. CP 254-255. As noted from Kozol's complaint, he did not send letters of his disagreement with the responses to the Attorney General's Office until March 27, 2013. CP 13-14. Destruction of the back page of the grievance forms occurred well before Kozol bothered to inform the Department that he was seeking those records.

Further, the actual grievance records were not destroyed. They were scanned and maintained by the Department. At the time it was processing the request, the Department reasonably read Kozol's request to exclude the boilerplate language on the back of the form. Regardless of whether Kozol amended his complaint, the back page was not responsive to Kozol's request. Accordingly, the Court should affirm the decision of the trial court and dismiss his claims.

B. Kozol Had Adequate Time to Conduct Discovery and Any Additional Continuance Was Unnecessary

Kozol argues the trial court erred when it refused to grant his motion for a CR 56(f) continuance as he needed additional time to obtain evidence to rebut the Department's claims. However, he had two years from the date he received the records, to investigate his claims. CP 76-150. Instead, Kozol waited more than 20 months to initiate his lawsuit. Kozol presented evidence regarding back page of grievance forms which contained handwriting. Yet, none of that changed the position of the Department and no additional discovery would have changed the position of the Department that the back page of the grievance form was not used to investigate grievance complaints or retained as part of the grievance record. CP 344-345. Any additional discovery to find evidence otherwise would have been futile. Kozol should not be rewarded for failing to fully investigate his claims for two years and the Court should find there was no manifest error in refusing to grant his continuance request.

C. Kozol's Email Communications Detailing His Scheme to Manipulate the Public Disclosure Process Is Probative Evidence Necessary to Determine Whether the Back Page of the Grievance Form Was an Identifiable Record

Finally, Kozol asserts the trial court should have stricken email communications between him and former offender Aaron Leigh because they were not relevant under Evidence Rule 402 and any probative value

is outweighed by the danger of prejudice under Evidence Rule 403. 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 which are identifiable. The email evidence shows Kozol clearly knew he was asking for records which would not be identified as responsive to his request.

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*, 150 Wn. App. at 872; *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*, 92 Wn. App. at 409. To hold otherwise would put agencies in an untenable position. *Id.*

The email evidence submitted clearly shows Kozol sought to trick the Department and misuse the PRA by ensuring his requests were evasive, only included the “new” forms which would contain a front and back page as claims would not be readily had with the old grievance forms and “recruiting passers-by” to obtain their grievance number information. CP 481-528. Such information is probative regarding whether the records Kozol sought were identifiable records.

In addition, Kozol raised his “reason” 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. It is clear Kozol only requested the grievances in order to file an “avalanche” of PRA lawsuits. CP 501. He had no intention of even reviewing the records which is evidenced by his request to see if the documents arrived with “no need to print any the content.” CP 512. Kozol then moved forward with filing his lawsuits by being purposely evasive and filing in multiple counties to ensure his cases would not be considered duplicative and consolidated. Accordingly, the information contained in the emails is material and probative to the issue of whether Kozol requested an identifiable record and to respond to his assertion as to why he “needed” the grievance information.

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V. CONCLUSION

For the reasons stated above, the Court should affirm the trial court's holding in this matter and dismiss Kozol's claims.

RESPECTFULLY SUBMITTED this 25th day of June, 2015.

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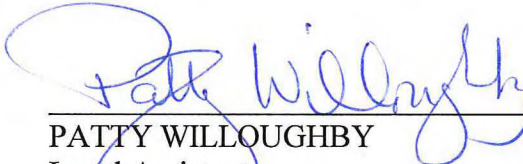
CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Defendant/Appellee by US Mail Postage Prepaid to the following addresses:

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

DATED this 25th day of June, 2015, at Spokane, Washington.



PATTY WILLOUGHBY
Legal Assistant