Supreme Court No. 93365-1

COA No. 32596-2-III
COA No. 32643-8-III
(consolidated)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STEVEN P. KOZOL,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR REVIEW

ORIGINAL

STEVEN P. KOZOL
Appellant/Petitioner
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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

IDENTITY OF PETITIONER.....1

COURT OF APPEALS DECISION.....1

INTRODUCTION.....1

ISSUES PRESENTED FOR REVIEW.....1

STATEMENT OF THE CASE.....2

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....5

1. There Exists a Conflict Between the Court of Appeals' Decision and the Decisions of the Supreme Court and Statutory Authority as to Whether an Agency Can Claim That Part of a Public Record Is not Responsive to a Specific Request for That Record.....5

2. As an Issue of First Impression There Is no Statutory Authority for an Agency to Modify or Disregard a Record Request Without the Requestor's Consent.....15

3. There Exists a Conflict Between the Court of Appeals' Decision and the Decisions of the Supreme Court as to Whether an Agency's Destruction of Requested Records Violates the Public Records Act.....17

4. When an Agency Attempts to Evade Its Statutory Burden to Prove a Withheld Record Is not Responsive by Relying on Records It Unlawfully Destroyed, Does Spoliation Apply in a Public Records Act Case?.....18

CONCLUSION.....20

DECLARATION OF MAILING.....21

APPENDIX.....22

TABLE OF AUTHORITIES

Cases

Berrocal v, Fernandez, 155 Wn.2d 585, 121 P.3d 82 (2005).....8

Daines v. Spokane County, 111 Wn.App. 342, 44 P.3d 909 (2002)...13

Fisher Broadcasting - Seattle TV LLC v. City of Seattle, 184 Wn.2d 515, 326 P.3d 688 (2014).....17

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 753 P.2d 517 (1988).....20

Homeworks Constr., Inc. v. Wells, 133 Wn.App. 892, 138 P.3d 654 (2006).....19

Jane Doe, et al. v. King County, 192 Wn.App. 10 (2016).....7

Marshall v. Bally's Pac West, 94 Wn.App. 372, 972 P.2d 475 (1999).....19

Melville v. State, 115 Wn.2d 34, 793 P.2d 952 (1990).....20

Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011).....11, 13, 14, 16, 17

Nissen v. Pierce County, 183 Wn.2d 863 (2015).....6, 9

O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010).....6, 8, 17

Pier 67, Inc. v. King County, 89 Wn.2d 379, 573 P.2d 2 (1977)...19

Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009).....7

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003).....8

Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010).....14

Wade's Eastside Gun Shop v. State Dep't of Labor & Industries, 185 Wn.2d 270 (2016).....7

Statutes

RCW 42.56.010(3).....6, 7, 9, 10

RCW 42.46.010(4).....7

RCW 42.56.070(1).....14

RCW 42.56.100.....17, 18, 19

RCW 42.56.210(3).....14

RCW 42.56.550(1).....19

Rules

RAP 9.11.....5, 9

RAP 13.4(b).....14, 15, 16, 18, 20

Additional Authorities

DOC Records Management Policy 280.525.....18, 19

DOC Records Retention Schedule.....17

Black's Law Dictionary (8th ed. 2004).....18

A. IDENTITY OF PETITIONER

STEVEN P. KOZOL, the Appellant below, now petitions this Court to grant discretionary review of the decisions below as identified in Section B. Notice of Appearance by attorney Michael C. Kahrs in this matter will follow shortly under separate cover.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' Unpublished Opinion dated April 12, 2016, and the Order Denying Motion for Reconsideration dated June 2, 2016. These decisions are attached hereto as Appendices A and B.

C. INTRODUCTION

A public record document is frequently comprised of multiple pages. The statutory definition of a public record is interpreted broadly to ensure full access to government activity. Frequently a requestor does not know how many pages a requested record is comprised of. When a requestor seeks a copy of a specifically named identifiable document possessed by the agency, the agency cannot silently withhold select pages of the identified document and then later claim that it did not know the complete record was requested. This case presents several novel issues that are of broad importance.

D. ISSUES PRESENTED FOR REVIEW

1. When a requestor specifically requests a copy of a certain public document by its identifying name, does this require the entire document to be responsive to the request under the Public Records Act?

2. Under the Public Records Act is an agency permitted to modify, alter or disregard a specific portion of a request to reduce its scope without consent from the requestor?

3. Does an agency violate the Public Records Act when it destroys specifically requested documents before the agency's actions are judicially determined?

4. Does spoliation apply under the Public Records Act if an agency claims a portion of a specific record is not responsive to the request, but then destroys the record prior to judicial review being completed?

E. STATEMENT OF THE CASE

On April 8, 2011, Petitioner Steven P. Kozol submitted a group of 22 separate Public Records Act (PRA) requests to the Department of Corrections (DOC). Each request sought a copy of "any and all records for inmate/offender grievance # [ ]. This includes the original complaint form." Clerk's Papers (CP) 256-277. DOC Public Disclosure Specialist Theresa Pernula responded to each of the 22 requests and expressly confirmed that each request specifically sought a copy of the "original complaint form." CP 282-302.

The Public Disclosure Unit forwarded the 22 requests to employee Debra Tracy at the Washington State Penitentiary (WSP) to determine if there were responsive records. CP 137. Ms. Tracy, in turn, then delegated the records search to another WSP employee, Ms. Lee Young. However, in delegating the records

search, Ms. Tracy altered each of Mr. Kozol's 22 requests and dropped the specific sentences requesting a copy of each "original complaint form." As a result of this wrongful alteration, Ms. Young was only tasked to conduct a search for "any and all documents related to each of the following Grievances. (22)...." CP 143. Based upon this alteration of the requests, Ms. Young then interpreted the requests for "any and all" records related to grievances to merely implicate the partial versions of the original grievance documents scanned into DOC's secondary computer file system. CP 442 (¶ 6).

Not knowing that these alterations had occurred and caused responsive record pages to be overlooked, the Public Disclosure Unit sent letters to Mr. Kozol purporting to identify and produce all responsive records to him "including the original complaint form" for each request. CP 303-324. Mr. Kozol then asked for the records to be sent to his email account in the community, and the DOC sent additional letters confirming that it sent what it purported to be all records, "including the original complaint form" for each request, to the email account. CP 330-371.

The DOC does not permit inmates to receive other inmate's grievance paperwork via the U.S. Mail and will reject such documents. CP 548-549. As such, Mr. Kozol had the records forwarded to his attorney and Mr. Kozol then learned that the DOC did not identify or produce the second pages of each of the 22 original paper grievance forms. CP 438. Mr. Kozol sent a

series of eight follow-up letters notifying the DOC the second pages had not been produced. CP 603-605. The DOC never claimed an exemption on the pages, never gave an explanation, and never produced the withheld pages. Mr. Kozol filed suit to begin obtaining the records in July 2012. The DOC destroyed the requested records in December 2012 and February 2013. CP 389-390.

The Department moved for summary judgment dismissal arguing the withheld second pages of each original grievance form were not responsive to Mr. Kozol's requests for the original forms, based upon the assertion that the second page was not "used" in the grievance process and therefore was not scanned into the secondary computer system, where the agency had elected to confine its records searches. The trial court granted summary judgment, and the Court of Appeals affirmed in its April 12, 2016 unpublished opinion. Appendix A. Mr. Kozol moved for reconsideration, arguing the second pages were not only "used" but were also created and retained by the agency, and that the dispositive issue misapprehended by the Court of Appeals was that the Department unlawfully altered/modified Mr. Kozol's requests which led to an inadequate records search. Reconsideration was denied on June 2, 2016. Appendix B. Mr. Kozol now respectfully petitions this Court to accept review, as this case raises issues of broad importance pertaining to the Public Records Act.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. There Exists a Conflict Between the Court of Appeals' Decision and the Decisions of the Supreme Court and Statutory Authority as to Whether an Agency Can Claim That Part of a Public Record Is not Responsive to a Specific Request for That Record

On summary judgment several material facts were undisputed. Each of Mr. Kozol's 22 requests contained a separate sentence requesting a copy of each "original complaint form." CP 256-277. DOC confirmed each "original complaint form" was requested. CP 303-324, 330-371. The DOC admitted that it knew each paper original complaint "form" was comprised of two pages, labeled "DOC 05-165 Front" and "DOC 05-165 Back." CP 501. Each of the 22 requested original grievance forms existed in the DOC's primary paper file system at the time the DOC produced responsive records to Mr. Kozol, and were not destroyed until eight months later in December 2012 and February 2013. CP 389-390.

Despite these undisputed facts, the Department argued that it did not violate the PRA because the second pages ("DOC 05-165 Back") only contained boilerplate instructions and were never used by inmates or staff in the agency's grievance process, and therefore were not responsive to Mr. Kozol's requests. Mr. Kozol moved for a CR 56(f) continuance to obtain rebuttal evidence that the second pages often contained more than boilerplate instructions and that DOC inmates and staff do in fact use the second pages. The trial court denied the motion.

Nevertheless, on appeal the Court of Appeals granted Mr. Kozol's RAP 9.11 motion to submit new evidence that various

second/back pages of original grievance forms are in fact substantively used by inmates or staff, including inmates continuing the grievance onto the second page, and staff making notations and writing routing codes to process the grievances. Appellant's Opening Brief (No. 32643-8-III) at Appendix A.

Despite this apparent dispute of material fact as to whether the second pages were "used," the Court of Appeals determined that "infrequent and random use" of the second/back pages does not render the pages to be "used" to the extent they would be responsive to Mr. Kozol's requests for the original (two-page) grievance forms. Unpublished Opinion, at 9. But this determination below is in sharp conflict with this Court's well-established holdings of what comprises the entirety of a public record.

As defined by the legislature, "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 a state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). In construing this definition, this Court has observed that "public record" is defined very broadly encompassing "virtually any record related to the conduct of government." O'Neill v. City of Shoreline, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010); see also Nissen v. Pierce County, 183 Wn.2d 863, 880 (2015) ("This language casts a wide net.") "This broad construction is deliberate and meant to give the public access

to information about every aspect of state and local government." Id., at 874.

> "RCW 42.56.010(3) does not, by its plain language, limit the definition of a 'public record' to those showing direct government action (e.g., a traffic stop), but rather uses broad language to capture 'information relating to the conduct of government or the performance of any governmental or proprietary function.'"

Jane Doe, et al. v. King County, 192 Wn.App. 10, 22 (2016) (quoting RCW 42.56.010(3)).

The Court of Appeals' determination that part of each original grievance document was not responsive to Mr. Kozol's explicit requests for each "original complaint form" conflicts with controlling authority and the undisputed facts in the record. To begin, "the PRA defines 'public record' to include 'any writing containing information relating to the conduct of government.'" Wade's Eastside Gun Shop v. State Dep't of Labor & Indus., 185 Wn.2d 270, *2 (2016) (quoting RCW 42.56.010(3)). By the plain statutory language "[a] 'writing' is defined to include 'all papers.'" Id. (quoting RCW 42.56.010(4)). As a "writing," the only rational way to view each of the 22 requested original complaint forms is to include all pages of the document. See Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009) (explaining that when the meaning of statutory language is plain, the court must give effect to that plain meaning).

The Court of Appeals' reasoning that only a portion of a named document is responsive because the other portion is not

"used" is a strained interpretation of plain statutory language, and produces absurd results. Under the reasoning below, if, for example, an agency's vendor contract was requested, the agency would only have to produce the signature pages where the parties executed the contract, and other pages, such as appendices, addendums and the like, could be withheld as not being "used." It is black-letter law that a contract is viewed in its entirety, and thus, it is without question that the entire contract is responsive to a request for the specific document. This logically holds true for all named records that are requested.

As this Court established, in undertaking a plain language analysis, a court must avoid interpreting a statute in a manner that leads to unlikely, strained, or absurd results. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Absurd results should be avoided because "it will not be presumed that the legislature intended absurd results." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

In O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010), this Court held that the metadata associated with public email records is subject to disclosure under the PRA, and clearly stated that "[t]here is no doubt here that the relevant email itself is a public record, so its embedded metadata is also a public record and must be disclosed." Id., at 147-48. Concluding an email's "embedded" metadata to be part of the email "document" or "writing" makes clear that the second page of a multi-paged document is responsive as part of the document.

Further, not only did the DOC admit that it knew each requested original complaint "form" was comprised of two pages, labeled "DOC 05-165 Front" and "DOC 05-165 Back" (CP 501), but the DOC further knew the document was two pages, as it stated that its staff elect to only scan the first page of each original grievance into the secondary computer system. CP 137. The withheld pages were stored in the primary paper file system until they were destroyed eight months after Mr. Kozol requested them. CP 389-390. Because the DOC knew the specifically requested original grievance forms contained multiple pages, and knew where all pages were located at, it was required to produce the complete version of these requested records, absent a claimed exemption.

Next, Mr. Kozol's RAP 9.11 evidence, when viewed in the light most favorable to him as the non-moving party, establishes that inmates or staff often "use" the second pages. This undisputed evidence contradicts DOC's assertion that the second pages are never used. This clearly raised a genuine issue of material fact precluding summary judgment dismissal.

Moreover, the determination below that "boilerplate instructions" do not constitute a responsive record also squarely conflicts with this Court's prior decisions and the plain statutory language of the Public Records Act. "A public record must be 'prepared, owned, used, or retained' by an agency, which includes an agency employee acting within the scope of employment." Nissen v. Pierce County, 183 Wn.2d at 881 (quoting RCW 42.56.010(3)). It is undisputed that the DOC created or

"prepared" the instructions on the second pages, including designating it with the page identifier "DOC 05-165 Back." CP 746.

It is also undisputed below that the DOC "owns" and "retains" the second page of each paper original grievance form in its primary paper file system. Not only did these specific 22 second pages exist in the paper files until the DOC wrongfully destroyed them in December 2012 and February 2013 (CP 389-390), but when Mr. Kozol submitted additional PRA requests in an effort to prove generally that the second pages of original grievances were substantively "used," the DOC produced an initial installment of at least 1,530 copies of second/back pages of original grievance forms. CP 854-865. This demonstrates the DOC retains the second pages. There is no question the owned, created, and retained second page portion of the original grievances are public records and are part of the entire document/writing under the meaning in RCW 42.56.010(3),(4).

While the entirety of the DOC's argument was the ad hoc assertion that it did not ever use the second pages and therefore the pages were not responsive to Mr. Kozol's requests for each original grievance form, these withheld pages of the documents being responsive to Mr. Kozol's requests does not turn exclusively on whether they were "used" in the grievance process, because they were also created, owned and retained by the agency. As this Court has made clear, "[t]here is little difference between a document needed by the [agency] for its operation and a document

needed by the [agency] to fulfill a public record request." Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 723 n.13, 261 P.3d 119 (2011).

The Court of Appeals concluded the DOC did not know Mr. Kozol was requesting the complete versions of the named and numbered "original complaint forms" until it deposed him on November 22, 2013. Unpublished Opinion, at 4. However, not only did the DOC admit that each requested original complaint "form" was comprised of two pages (CP 501), and confirmed these original documents were being provided (CP 303- 324), but the DOC never sought clarification of Mr. Kozol's requests. Under this Court's controlling decision, "if the agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance, 172 Wn.2d at 727.

The analysis below conflicts with Neighborhood Alliance in that it removes the burden from the agency to seek clarification of a request it considers unclear and instead now improperly permits an agency to wait until the summary judgment stage of litigation to assert for the first time it misunderstood the request. Here, Mr. Kozol initiated suit on one of the 22 requests because he identified a page discrepancy in the number of pages produced and the number he believed to exist. CP 9. Mr. Kozol had obtained this grievance information from another inmate, Pierre Parent, who possessed various grievance documents. CP 209. From this, Mr. Kozol knew there were more responsive

pages than the seven pages DOC produced for this grievance. CP 210. DOC mail policy prohibited Mr. Kozol from personally receiving and reviewing other inmate's grievance records. CP 548-549. Mr. Kozol had all produced records in all 22 requests routed to his attorney, which meant Mr. Kozol had never seen the produced documents. CP 429.

Having later learned all 22 second/back pages were withheld, Mr. Kozol submitted eight different follow-up requests specifically seeking the withheld second/back pages. CP 603-605. But these considerable efforts were futile, as the DOC had already destroyed the records in December 2012 and February 2013, and largely ignored and rebuffed the follow-up requests. As such, any purported need by DOC for clarification would have been remedied and the second pages would have been produced -- if only the DOC had not proceeded to destroy the records. DOC only first notified Mr. Kozol of these destructions by way of interrogatory answers signed in March and April 2014. CP 389-392.

In excusing the DOC's burden to seek clarification by finding it did not know the complete original grievance forms were requested until it deposed Mr. Kozol, this ersatz analysis only serves to compound the absurd results flowing from the strained interpretation of the PRA's plain language. Mr. Kozol could not have personally viewed the record productions and had to rely on conferring with an attorney before he knew all 22 of the second/back pages of the original grievance forms had

been withheld. It is improper to alleviate an agency's burden to seek clarification when it destroys the records the requestor is attempting to clarify with follow-up requests.

This case presents an issue of first impression, as the Court of Appeals is effectively now requiring requestors to take extraordinary and unnecessarily redundant steps of having to notify the agency he or she is seeking the "complete" version of each specifically requested document, and tell the agency where all pages are located. The Court of Appeals did not cite to any specific controlling authority to support its conclusions, and holding that an agency does not know a requestor was seeking the complete version of a specifically named document is to interpret the statutory definition of an identifiable public record in a manner that produces absurd results.

It is contrary to the PRA to now require requestors to be "mind readers" and tell the agency how many pages each specific record is comprised of.[1] Since requestors may not know beforehand exactly how many pages are supposed to be responsive to any specific document, the Court of Appeals' reasoning further contradicts this Court's holding in Neighborhood Alliance, where the Court stated that generally,

> "a party does not know with certainty that a document in its possession is the public record it seeks until the agency responds....The fact that the requesting party possesses

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[1] Indeed, the Court of Appeals previously recognized in another opinion that a requestor "need not exhaust his or her own ingenuity to ferret out records through some combination of intuition and diligent research." Daines v. Spokane County, 111 Wn.App. 342, 349, 44 P.3d 909 (2002).

the document does not relieve an agency of its statutory duties."

Neighborhood Alliance, 172 Wn.2d at 727. It follows under stare decisis that when a specific named or numbered document is requested, any knowledge a requestor may believe to have about what should be responsive does not relieve the agency of its duty to provide the complete version of the requested record, absent a claimed exemption.

The Court of Appeals has now solidified a method by which agencies can withhold pages of a specifically requested document without claiming an exemption, proceed to destroy the withheld pages, and then wait until being sued to claim the records request was not clear. This gives birth to a viable means for agencies to avoid accountability under the strict mandates of the PRA, permits agencies to cater to their interests or whims in disclosing records, and deprives the courts of de novo review of whether records were improperly withheld. Without question, this is emphatically prohibited under the PRA.

"Agencies are required to disclose any public record on request unless it falls within a specific enumerated exemption." Neighborhood Alliance, 172 Wn.2d at 715 (citing RCW 42.56.070(1)). "RCW 42.56.210(3) prohibits an agency's withholding of a part of a record unless it claims an exemption." Tobin v. Worden, 156 Wn.App. 507, 514, 233 P.3d 906 (2010).

The Court should accept review pursuant to RAP 13.4(b) because the opinion below conflicts with prior decisions of this

Supreme Court and the plain statutory language in permitting an agency to avoid PRA compliance by silently withholding a portion of a specifically requested record without claiming an exemption, and then wait until it is sued to assert the complete record did not have to be produced because only certain portions were "used." Further, this Court should accept review under RAP 13.4(b) because whether a request for a specific document implicates the "complete" document is an issue of first impression and is of substantial public importance.

2. As an Issue of First Impression There Is no Statutory Authority for an Agency to Modify or Disregard a Record Request Without the Requestor's Consent

Despite confirming that a copy of each "original complaint form" was requested (CP 282-302), the DOC's email activity shows this important part of each request was altered or dropped, as the search was only conducted for "any and all documents related to each of the following Grievances. (22)...." CP 143. The DOC then claimed this remaining "any and all" language permitted "the agency [to] interpret the requests to be for records that directly and fairly addresses the topic." CP 620

Employee Lee Young then only searched for what she considered part of the "grievance packets" scanned into the secondary computer file system. CP 442. Ms. Young's interpretation of the requests was based upon her assertion that the second page of each original grievance form "is [not] used to process the offender's grievance" and therefore, "it is not considered to be part of the grievance record" that is created by scanning

paper originals into the secondary computer file system. CP 442. As a result of the alteration of each request, it was ultimately the agency -- not the requestor -- who determined what was being requested.

Importantly, Ms. Young's declaration that the second pages "would not have been provided in response to a request for all documents related to a particular grievance" (CP 442, emphasis added) could only apply to the remnant of Mr. Kozol's requests after the alterations occurred to leave only "any and all" language. It is dispositive that DOC presented no declaration evidence attesting that the second pages were not responsive to Mr. Kozol's specific requests for paper "original complaint forms." The DOC's entire line of argument that second pages were not responsive is fatally flawed because it could only apply to the improperly modified/altered requests.

As this case demonstrates, when an agency improperly alters or modifies a request without consent, it then results in an inadequate records search, because the agency will not search in other locations where it knows the records should reasonably be located. See Neighborhood Alliance, 172 Wn.2d at 720.

It is an issue of first impression whether an agency is permitted under the Public Records Act to modify, alter or disregard a specific portion of a request absent consent from the requestor, and this Court should accept review pursuant to RAP 13.4(b) because this issue is of substantial public importance.

3. There Exists a Conflict Between the Court of Appeals' Decision and the Decisions of the Supreme Court as to Whether an Agency's Destruction of Requested Records Violates the Public Records Act

Under the plain statutory language in RCW 42.56.100,

> "[i]f a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency...shall retain possession of the record, and may not destroy or erase the record until the request is resolved."

RCW 42.56.100. See Fisher Broadcasting - Seattle TV LLC v. City of Seattle, 180 Wn.2d at 515, 541, 326 P.3d 688 (2014). "When a PRA request is made, a government agency must hold onto the records." O'Neill, 170 Wn.2d at 150. "Destruction of a requested record violates the PRA." Neighborhood Alliance, 172 Wn.2d at 750 (Madsen, C.J., concurring).

The Court of Appeals determined the destruction of these requested records after Mr. Kozol requested them was "innocent." Unpublished Opinion, at 9. This is contrary to the undisputed facts and to law. These original grievances were filed by inmates around August 2010. CP 146. The records retention schedule for original grievance forms is six years. CP 797. Mr. Kozol requested the records on April 8, 2011. CP 256-277. DOC destroyed each of the 22 original (two-page) grievance forms in December 2012 and February 2013. CP 389-390.

The plain, mandatory "shall retain" language in RCW 42.56.100 leaves no room for interpretation to excuse these record destructions as "innocent." Further, DOC's Records Management Policy also prohibited these records from being destroyed, as Mr. Kozol had already filed suit. CP 794. DOC knew all 22

requests were related as it responded to all at the same time on April 19, 2011. CP 142-143. When Mr. Kozol filed suit on one request in July 2012 (CP 8-9), the DOC's position that no second pages were ever "used" logically applied to all 22 requests, and at a minimum put DOC on notice of potential litigation on the remaining 21 requests, as cautioned in its Records Management Policy. CP 794. All the more, even if only the first/front page of each original grievance was responsive, the DOC nevertheless "shredded" each of the 22 original (double-sided) forms after they were requested. This is prohibited by RCW 42.56.100, and had these destructions not occurred, Mr. Kozol's follow-up letters, or litigation, would have caused the withheld second/back pages to be properly produced for him, so he could obtain the proof of DOC misconduct he believed to exist.

The Court should accept review pursuant to RAP 13.4(b) because the Court of Appeals decision conflicts with the decisions of this Supreme Court, and the issue is of substantial public importance.

4. When an Agency Attempts to Evade Its Statutory Burden to Prove a Withheld Record Is not Responsive by Relying on Records It Unlawfully Destroyed, Does Spoliation Apply in a Public Records Act Case?

Spoliation is the intentional destruction of evidence. BLACK'S LAW DICTIONARY (8th ed. 2004). Washington courts treat spoliation as an evidentiary matter. To remedy spoliation, a court may apply a rebuttal presumption that shifts the burden

of proof to the party who destroys or alters important evidence. Marshall v. Bally's Pac West, Inc., 94 Wn.App. 372, 381, 972 P.2d 475 (1999). As this Court established:

> "where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would normally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him."

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). A party's actions in destroying evidence are improper, constituting spoliation, where the party has a duty to preserve the evidence in the first place. Homeworks Constr., Inc. v. Wells, 133 Wn.App. 892, 900, 138 P.3d 654 (2006).

Here, not only does RCW 42.56.100 mandate that DOC "shall retain" the 22 original grievance forms once Mr. Kozol requested them, but DOC Policy 280.525(III)(D) required written signature approval before any of these 22 records could be destroyed. CP 400. Yet DOC's Answer to Interrogatory No. 3 stated that no documents existed pertaining to the destruction of the 22 original grievance forms. CP 782.

Because the plain statutory language of RCW 42.56.550(1) places the burden upon the agency to prove it did not violate the Act, an agency cannot claim withheld record pages are not responsive because they are not "used," then proceed to destroy the withheld pages that it had a duty to retain under RCW 42.56.100. As the record on review makes clear, the Declaration of Lee Young only speaks in generalities and does not establish

what staff actually processed or scanned these specific 22 original griavances, so DOC offered no proof of what the 22 second/back pages actually contained. CP 491-93. On summary judgment, if documents are relied upon, they shall be attached in full. Affidavits as to their substance or effect are not sufficient. Melville v. State, 115 Wn.2d 34, 36, 793 P.2d 952 (1990). Conclusory statements of fact are insufficient for summary judgment purposes. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Because the DOC intentionally destroyed the withheld document pages after Mr. Kozol requested them and brought suit to obtain them, spoliation requires a legal inference that the destroyed evidence contained both proof that the pages were "used," and proof of the DOC misconduct -- including staff's racially derogatory written comments about inmates -- that Mr. Kozol believed to exist. As an issue of first impression, this Court should accept review under RAP 13.4(b) because the issue is of substantial public importance.

G. CONCLUSION

For the foregoing reasons Petitioner respectfully requests that review be granted of these issues of broad importance.

RESPECTFULLY submitted this 1st day of July, 2016.

STEVEN P. KOZOL, Petitioner
191 Constantine Way
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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 1st day of July, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 32596-2-III/32643-8-III:

Petition for Review to Supreme Court;

;

;

.

addressed to the following:

Clerk of the Court
Court of Appeals - Division III
500 N. Cedar ST
Spokane, WA 99201-1905

Candie M. Dibble, AAG
John C. Dittman, AAG
Attorney General's Office
1116 W. Riverside Ave.,#100
Spokane, WA 99201-1194

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 1st day of July, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol
Signature

STEVEN P. KOZOL
Print Name

DOC# 974691 UNIT# H6-A86
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
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Appendix A

FILED
APRIL 12, 2016
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	)	No. 32596-2-III (consolidated with No. 32643-8-III) UNPUBLISHED OPINION

SIDDOWAY, J. — In this consolidated appeal, Steven Kozol challenges the dismissal of two actions he filed under the Public Records Act (PRA), chapter 42.56 RCW. He complains that the Department of Corrections (DOC) failed to produce copies of the back side of a document that it electronically preserved in part, but then destroyed before realizing that Mr. Kozol viewed the unpreserved portion as responsive to his public record requests. We affirm the dismissal of both actions.

FACTS AND PROCEDURAL BACKGROUND

On April 15, 2011, Steve Kozol submitted 22 requests for records to the DOC "pursuant to the PRA." Clerk's Papers (CP) at 140, 630-50. Each request sought "any and all records" for a different offender grievance, by grievance number, adding, "This

includes the original complaint form." *Id.* Upon receipt, the DOC forwarded the requests to the Washington State Penitentiary's grievance coordinator to gather responsive documents. Within a week of Mr. Kozol's request the DOC responded to him, indicating that the requests had been assigned tracking numbers from PDU 15229 to PDU 15250 and that he would receive a response to his requests by June 28.

The DOC's grievance form, entitled "Offender Complaint," appears on the front side of a grievance form/instruction document. DOC's internal designation for the document is DOC 05-165. Appearing on the back side of DOC 05-165 are preprinted instructions on how to complete the form, along with a checklist for the information that should be provided. The grievance coordinator located the complaint forms requested by Mr. Kozol and e-mailed scanned copies back to the DOC. The instructions on the back sides of the DOC 05-165 documents, which the DOC does not consider part of the grievance form, were not scanned or provided.

On or before its promised June 28 response date, the DOC sent Mr. Kozol a total of 22 letters, one for each PRA request, notifying him that the responsive documents located would be provided to him upon payment of the costs of postage and the CD on which each had been stored.[1] The DOC later complied with Mr. Kozol's revised request that it e-mail him the documents.

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[1] Mr. Kozol's requests had asked that the DOC "[p]lease provide these records in electronic format on CD." CP at 140, 630-50.

On April 11, 2012, Mr. Kozol commenced the first of the two PRA actions in Walla Walla County that are consolidated in this appeal.[2] His complaint alleged he had submitted a PRA request to which the DOC had "failed to respond within the terms and timeframes of the PRA." CP at 4. He further alleged that he had "personal knowledge that there are additional public records that Defendant is not identifying or producing, constituting a 'silent withholding', in violation of RCW 42.56 et. seq." *Id.* When the DOC requested a more definite statement, Mr. Kozol filed an amended complaint that identified PDU-15229 as the request at issue.

In November 2013, Mr. Kozol filed a motion to amend his April 2012 PRA complaint to assert a failure to properly respond to another 52 PRA requests: the remaining 21 made in April 2011, and another 31 made in February 2012. The DOC objected and the trial court, Judge M. Scott Wolfram, denied the motion to amend.

In December 2013, Mr. Kozol filed a second PRA complaint[3] alleging the DOC had failed to timely respond to the remaining 21 PRA requests he had made in April 2011 and that it was silently withholding responsive records. He filed an affidavit of prejudice against Judge Wolfram.

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[2] Walla Walla Superior Court No. 12-2-00285-2 (Court of Appeals No. 32643-8-III).

[3] Walla Walla Superior Court No. 13-2-00930-8 (Court of Appeals No. 32596-2-III).

On November 22, 2013, Mr. Kozol was deposed. He revealed for the first time that it was DOC's failure to provide him with copies of the back side of each DOC 05-165 that he contended was the PRA violation.

In a declaration filed in support of the DOC's motion practice below, Lee Young, a correctional specialist assigned as the grievance coordinator, explained that because "[n]one of the information on the back page of DOC 05-165 is used to process the offender's grievance . . . it is not considered to be part of the grievance record." CP at 443. She also testified to her standard practice in processing a grievance, as a part of which, after responding to an inmate complaint, she "scan[s] and maintain[s] a copy of the completed complaint and response." *Id.* Because the back side of the document is not considered part of the complaint, "it would not be scanned and maintained as part of the grievance record." *Id.* The original inmate complaint is shredded after being scanned, so the back sides of the 22 offender complaints requested by Mr. Kozol had been destroyed almost a year before Mr. Kozol revealed in his deposition that he viewed them as responsive to his request.

By May 2014, the parties had filed and briefed several motions in the second action. They included the DOC's show cause motion seeking dismissal of the 21-claim action and a motion by Mr. Kozol to consolidate his two cases.

On May 12, Judge John Lohrmann heard argument of the parties' pending motions. He denied Mr. Kozol's motions to amend or consolidate and granted the DOC's

show cause motion, dismissing the 21-claim case with prejudice. In addition to finding that Mr. Kozol's second action was time barred, Judge Lohrmann concluded that dismissal was warranted for the further reason that

> the sole basis of the alleged violation is the Defendant[']s failure to provide [Mr. Kozol] with the back instruction page of each of the separate grievances. Per the declarations filed, it is clear that said page is merely instructional for the offender filling out the form; it would not be scanned and maintained as part of the grievance record, and it would not have been considered responsive to the request.

CP at 810. In addition to dismissing the 21-claim action, the court found it to be "frivolous and malicious" within the meaning and purposes of RCW 4.24.430. *Id.* at 811. Mr. Kozol moved for reconsideration, which was denied.

A few days later, the DOC filed a motion for summary judgment in the single-claim action, presenting the same issue of whether the back side of the DOC grievance form was a document responsive to Mr. Kozol's PRA request. Mr. Kozol responded. On June 19, 2014, Judge Lohrmann heard the DOC's motion for summary judgment and a number of motions filed by Mr. Kozol. He denied all of Mr. Kozol's motions, granted the DOC's motion, and dismissed Mr. Kozol's single-claim action, making the following handwritten addition to the DOC's proposed order:

> Because the sole purpose of the complaint was a scheme to request a document or documents regarding which the Plaintiff might anticipate and argue that a page was missing—without any true or good faith desire or need to see the page alleged to be missing—this action is deemed "frivolous and malicious" within the meaning of RCW 4.24.430.

CP at 570. Mr. Kozol appealed the dismissal of both actions. We consolidated the appeals.

ANALYSIS

"The PRA is a 'strongly worded mandate for broad disclosure of public records.'" *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The policy behind the PRA is that "free and open examination of public records is in the public interest." *Neigh. All. of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). Accordingly, the PRA is to be "liberally construed . . . to assure that the public interest will be fully protected." RCW 42.56.030.

Under RCW 42.56.080, agencies must make "identifiable public records" available for public inspection and copying. A public record is broadly defined as "any writing containing information relating to the conduct of government." RCW 42.56.010. "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). When interpreting public records requests, the PRA does not require agencies to be mind readers. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

Agencies are not required to provide records that do not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). However, where the agency

possesses undisclosed responsive records, it "must explain and justify any withholding, in whole or in part, of any requested public records." *Resident Action Council*, 177 Wn.2d at 432. "Silent withholding is prohibited." *Id.* Agency actions taken or challenged under the PRA are reviewed de novo. RCW 42.56.550.

Mr. Kozol's opening briefs in the two appeals before us challenge the trial court's actions in denying amendment, refusing to deem his first complaint amended, concluding that his claims were not timely, refusing to consolidate his two cases, engaging in allegedly improper procedure, denying a motion to continue the DOC's summary judgment motion and permit further discovery, and concluding that the back side of the DOC's grievance form was not responsive to his 22 PRA requests. The last issue proves dispositive.

Mr. Kozol's contention that the DOC withheld responsive documents is based solely on its failure to produce copies of the back side of the 22 grievance forms. He disputes the DOC's position that the back side is solely instructional and not a part of the grievance or complaint form. Focusing on his request for the "original complaint form," he contends that the back side of each DOC 05-165 was encompassed by his requests.

It first bears noting that RCW 42.56.070(1) requires agencies to make their public records "available for public inspection and copying"—it is not required to give its original public records to requesters. For that reason, and also because Mr. Kozol's request was for an electronic copy of the record, his use of the word "original" could not

be understood as meaning the actual complaint form completed and signed by the inmate (which would necessarily have the instructions on the back). It could only have meant a copy of the actual complaint form. At issue, then, is whether "complaint form" is reasonably understood to mean the "Offender Complaint" side of DOC 05-165 or both the "Offender Complaint" side and the instruction side of that document.

The relevant meaning of the word "form" is defined as

> **e** (1) : a printed or typed document with blank spaces for insertion of required or requested specific information <a [form] for a deed> <be sure to fill all blanks on your tax [form]>.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 892 (1993).

Only the front, "Offender Complaint" side of DOC 05-165 includes blank spaces for inserting the specific information required for a grievance. Mr. Kozol has offered supplemental evidence of back sides of grievance forms on which handwriting appears,[4]

[4] On May 27, 2015, our commissioner granted Mr. Kozol's motion to add to the record on appeal the material in appendix A to his brief in cause no. 32596-2-III. It contains a total of 51 single-sided sheets. *See* Appellant's Opening Br. (No. 32643-8-III) at Appendix A. Forty-two sheets contain preprinted instructions from the back side of DOC 05-165, the grievance form, and nine contain no preprinted material, suggesting that the inmate was using a photocopy of the Offender's Complaint form. While 30 sheets have some form of writing on them, 23 of those only contain the date, or the name or mailbox number of the grievance counselor. Only six appear to reflect anything remotely substantive. On one, the offender suggests a remedy for the grievance. On another, which is largely incomprehensible, the offender makes vague allegations of kidnapping, torture, and false statements and then makes potential threats to several people. On three, it appears that the offender was just working through the questions on the bottom of the grid in shorthand in order to fully explain the grievance on the front. One is illegible. Appellant's Opening Br. (No. 32643-8-III) at Appendix A.

but none undercut the DOC's evidence that the instruction page is not a part of the grievance as processed by the DOC. The infrequent and random use of the instruction sheet by third parties does not support a conclusion that the DOC should reasonably have regarded it as responsive to Mr. Kozol's request. The DOC did not violate the PRA in failing to recognize that Mr. Kozol was seeking copies of preprinted instruction sheets never used by the DOC in processing grievances.

The DOC's innocent destruction of the records also excuses its failure to produce them. In a decision involving an action commenced in Spokane County by Mr. Kozol, this court recently held:

> [W]hether or not a record should exist is a different question than whether it does exist. The PRA only requires that access be granted to existent records, not nonexistent records that one believes should exist. While Mr. Kozol believes that the back side of the original grievance form should exist, DOC proved otherwise. As DOC produced the only part of the specified grievance forms that still existed, it complied with the dictates of the PRA.

Kozol v. Dep't of Corr., 192 Wn. App. 1, 7-8, 366 P.3d 933 (2015) (footnote and citation omitted).

For both reasons, no further discovery was warranted and Mr. Kozol's claims, whether time-barred or not, were properly dismissed.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, A.C.J.

Appendix B

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WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	)	No. 32596-2-III (consolidated with No. 32643-8-III) ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 12, 2016, is hereby denied.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:

George B. Fearing

GEORGE B. FEARING, Chief Judge