NO. 93827-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH JONES,

Plaintiff-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Public Records Act (PRA) case involves the Department of Corrections' response to prisoner Joseph Jones's request for a copy of his signed classification hearing notice form. At the time Jones signed the form, he was instructed to file a request with the Department's Public Disclosure Unit if he wanted to obtain a copy. His counselor then followed the Department process and provided the form for her supervisor's review. By the time the Department received Jones's request and began its search for the record, it discovered the form had been lost.

The Department filed a show cause motion asserting the form was inadvertently lost and therefore it could not produce a record that did not exist. Jones agreed the form was lost and did not argue the Department's search for the form was unreasonably delayed or that the search itself was inadequate. Instead, Jones alleged the Department lost the form after his request was submitted and should be strictly liable. The trial court dismissed Jones's lawsuit for failure to state a claim under the PRA finding there was inadequate evidence to establish the document was lost after the PRA request was properly submitted.

Jones filed an appeal asserting only that an agency should have a heightened evidentiary standard when asserting a document is lost or destroyed. In an unpublished decision, the Court of Appeals affirmed the

trial court's findings and specifically held, "the purpose of the Public Records Act is not to subject a government entity to liability for lost records." Jones abandons a majority of the arguments he made in his appeal and now seeks review on new issues of liability. Jones asserts the Court should accept review of his newly asserted positions because they are matters of substantial public importance.

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 it is in the public interest for this Court to establish that there is no actionable difference for the purposes of liability between the loss or destruction of a record after a request for that record has been made?**

2. **Whether it is in the public's interest for this Court to clarify whether or not losing a record after a Public Record Act request has been made mandates liability to the agency losing the record?**

3. **Whether it is in the public interest for this Court to establish that the burden of proof is on the agency to show that the document was lost before it was requested?**

III. COUNTERSTATEMENT OF FACTS

A. Statement of Facts

An inmate's custody facility plan is periodically reviewed during their incarceration to ensure the inmate is placed in the proper security classification level. Pursuant to Department Policy 300.380(IV), Custody Facility Plans are routinely initiated by a counselor through the Facility Risk Management Team. CP 44. The counselor will provide the inmate with notice of the classification hearing at least 48 hours before the review by using form DOC 05-794 Classification Hearing Notice/Appearance Waiver. CP 44. The form provides the inmate with the option to attend the classification review meeting and also provides the inmate with a notice of his rights related to the hearing. CP 61. Once the form is signed, the counselor provides the paperwork to the Classification Counselor 3 for review. CP 64. From there the form goes to the Custody Unit Supervisor and then to the Correctional Program Manager's Office for scanning into the OnBase data system. CP 64. The counselor does not retain the form. CP 64. In 2014, counselors informed inmates seeking a copy of the form that they had to file a public disclosure request directly with the Department's Public Disclosure Unit. CP 29.

Jones is housed at the Coyote Ridge Corrections Center and is assigned to Counselor Jennifer Lynch. CP 64. Jones was provided with a

DOC 05-794 Classification Hearing Notice/Appearance Waiver form informing him of his upcoming classification review. CP 64. On November 3, 2014, Counselor Lynch met with Jones for his classification review and to go over his Custody Facility Plan. CP 64. During the meeting, Counselor Lynch read Jones the Custody Facility Plan and he indicated he understood the recommendations. CP 64. Based on Jones's history, it was recommended that he be maintained at MI3 custody level, complete all recommended programs, program in a positive manner, and maintain infraction free behavior. CP 64. Counselor Lynch documented the meeting in the comments section of his Custody Facility Plan. CP 37. CP 64. The Facility Risk Management Team later met and agreed with the plan to maintain Jones at MI3 custody level. CP 38. This was the lowest classification level Jones could receive due to his conviction for Rape of a Child 1 under RCW 9A.44.073. CP 65.

After his meeting with Counselor Lynch, Jones filed a public disclosure request seeking a copy of his signed hearing notice form. CP 2. On November 7, 2014, the Department's Public Disclosure Unit in Tumwater, Washington, directly assigned the public disclosure request to Lori Wonders at the Coyote Ridge Corrections Center. CP 24. In addition to her duties as the facility's Public Disclosure Coordinator, Wonders is also assigned as the facility's Legal Liaison Officer, Tort Claim Manager,

Policy Manager, Form Coordinator, Public Information Officer and Limited English Proficiency Coordinator. CP 20.

A few days later, Wonders sent Jones a letter acknowledging his request for the "Classification Hearing Notice/Appearance Waiver, dated November 3, 2014." CP 27. Then on December 8, 2014, Wonders began the search for records and emailed Counselor Lynch to see whether she had the hearing notice form Jones was requesting. CP 28. Counselor Lynch indicated she did not have the form as it had been forwarded to the Correctional Program Manager's office for scanning. CP 28. The same day, Wonders emailed the Correctional Program Manager to see whether she was able to locate the November 3, 2014 form. CP 31. The following day, she was notified the Correctional Program Manager's office had not received the form and it could not be located. CP 30-31. Therefore, on December 12, 2014, Jones was notified there were no records responsive to his request. CP 32.

Jones filed a PRA complaint alleging the Department failed to respond to his public disclosure request when it did not produce his signed November 3, 2014 hearing notice form. CP 1-7. The trial court granted the Department's show cause motion finding Jones failed to show a PRA violation. CP 335-342. The judge specifically noted there was inadequate evidence to establish that the document was lost after the PRA request was

properly submitted. CP 246-250. Jones appealed, and the Court of Appeals affirmed.

The Court of Appeals noted "Jones did not contend the Department of Corrections engaged in an inadequate search." Therefore, applying the standards set forth in *Neighborhood Alliance of Spokane County*, the Department may be considered to have conformed to it requirements under the PRA "despite a missing document." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). The Court further held that the PRA was not intended to "penalize inadvertent loss, a phenomenon endemic to a large organization" and the Department had no reason to purposely destroy the signed notice form.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Ruling That Inadvertent Loss or Destruction of A Record Does Not Implicate A PRA Claim Is Consistent With Existing Case Law

Jones asserts that because RCW 42.56.100 prohibits destruction of a requested record until an issue is resolved, an agency is strictly liable under the PRA for any records it may have lost after the request was made. In support of his contention, Jones cites to no existing PRA case law. Instead, he relies on a criminal case regarding a warrantless search of a vehicle, an estate case regarding evidentiary rules when presenting

evidence of a lost record and a probate proceeding over a lost will. None of which are applicable to Jones's claims.

There is clear established PRA case law which squarely addresses an agency's duty to only produce records which exist and which establishes no violation in cases where there the record was inadvertently lost or destroyed before it could be produced. An agency has "no duty to create or produce a record that is nonexistent." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136–37, 96 P.3d 1012 (2004) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13–14, 994 P.2d 857 [2000]). Therefore, a requestor has no cause of action under the PRA when the public record he seeks does not exist. *Sperr*, 23 Wn. App. at 137. *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had "made available all that it could find"); *Smith*, 100 Wn. App at 22 (when county had nothing to disclose, its failure to do so was proper).

Further, documents which have already been destroyed or lost at the time of the request, even ones that have not met their retention expiration, do not present a cause of action under the PRA. *West v. Washington State Department of Natural Resources*, 163 Wn. App. 235, 244-46, 258 P.3d 78 (2011). In *West*, the requestor sought numerous emails, which were already destroyed at the time he made the request.

West, 163 Wn. App. at 240. While the emails should have been retained under the applicable retention schedule, they were determined to be inadvertently lost and therefore no longer existed. *West*, 163 Wn. App. at 240-241. The court found that even though West alleged the emails were unlawfully destroyed, there was "simply no evidence" to support such an assertion. *West*, 163 Wn. App. at 244. The court rejected West' argument that the record were destroyed and held that the emails had been inadvertently lost and did not exist at the time of the request. Therefore, there was no agency action to review under the PRA. *West*, 163 Wn. App. at 244-246. *See also Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009) (holding a requestor did not have a viable action under the PRA for emails which were already destroyed at the time of the request).

Similar rulings have been made in cases regarding Freedom of Information Act requests where the federal courts have found the agency in compliance when it performed a reasonable search which resulted in discovering some of the requested records had been accidentally lost. *See Iturralde v. Comptroller of the Currency*, 345 U.S. App. D.C. 230, 315 F.3d 311 (2003) (holding the requestor did not meet his burden of showing a violation as an agency's failure to find one specific document in response to a search does not alone render a search inadequate); *Maynard*

v. C.I.A., 986 F.2d 547 (1st Cir. 1993) (finding that while a document may have previously existed does not mean the agency retained it nor does it mean the agency's search was unreasonable); *Rollins v. United States Department of State*, 70 F.Supp.3d 546 (D.D.C. 2014) (holding the adequacy of a search is "not determined by the fruits of the search," as some documents may have been lost or destroyed).

The Court of Appeals decision on the Department's liability for the loss of the form is based on a straightforward application of the above established case law. When the courts have found the record to be inadvertently lost or destroyed, the courts have determined the agency cannot produce a record that does not exist. Also noted in the above decisions, the courts have further declined to hold that an inadvertent loss or destruction amounts to a PRA violation under RCW 42.56. While the PRA promotes the production of public records, it is not intended to provide strict liability in cases where an agency simply lost a record. Because the Court of Appeals decision is consistent with pre-existing case law and does not conflict with other cases, this Court should deny review.

B. The Department Had the Initial Burden When It Brought Its Show Cause Motion. Once the Department Met Its Burden, the Burden Shifted to Jones

Jones asserts the burden should have been on the Department to prove that the form was lost at the time it began its search for the records.

However, Jones ignores that the burden only shifted to him after the Department presented evidence, through sworn declarations in support of its dispositive motion, to meet its burden of proof as to why it was unable to produce the classification hearing notice form. At that point, when Jones failed to assert the search was unreasonably delayed or that the search itself was inadequate and did not present any evidence to support his contrary allegations, the trial court correctly dismissed his claims. Simply put, the Department presented unrebutted evidence showing it did not have the record Jones was seeking, including evidence of its two searches for the record and that the Department would have no reason to purposely destroy the form in order to prevent its production to Jones's request. The Court of Appeals holding is consistent with the findings in both *West* and *Building Industry Ass'n of Washington* that the requestor must do more than simply make an allegation of wrongful destruction. *West*, 163 Wn. App. at 246-247. *Building Industry Ass'n of Washington*, 152 Wn. App at 736-737. Therefore, the Court should deny review.

C. The Court of Appeals Decision That a Rebuttable Presumption is Not Applicable When a Document Has Been Inadvertently Lost Is Supported By PRA Case Law and PRA Statutes

Jones argues because the Department cannot point to a specific date when the document was lost, he should receive a rebuttable presumption the form was lost or destroyed after the Department received

his request. Jones asks the Court to provide a requestor with a rebuttable presumption by holding an agency is required to present a "prima facie showing that a document was destroyed at an appropriate time using evidence available to the agency." Petition at 10. It is only after this showing, would the burden switch to the requestor "to show the record was actually destroyed after the request was received by the agency." Brief at 10. Jones asserts the control of the evidence imposes a special obligation onto the agency which supports the shift in the agency's burden.

However, all of these arguments are contrary to law as neither the PRA itself nor PRA case law provides for such a presumption. When making a claim of unlawful destruction of records, a requestor still has an obligation to do more than simply allege misconduct. There must be evidence in the record to support the claim. *West*, 163 Wn. App. at 244-246. *Building Industry Ass'n of Washington*, 152 Wn. App. at 736-737.

Further, Jones's request that the Court require the agency to show the documents were destroyed prior to the "appropriate time" goes beyond the *West* decision. The documents at issue in *West* were destroyed prior to the "appropriate time," as they should have been maintained according to the records retention policy. *West*, 163 Wn. App. at 244-245. The *West* Court did not require any showing the records were "destroyed at an

appropriate time." Instead, the Court focused on whether the documents had been unlawfully destroyed, as Jones claims here, or whether the agency inadvertently lost the records before they could be produced. *West*, 163 Wn. App. at 244-246. In support of his argument of wrongful destruction, West asserted the agency delayed its search to recover the records. *West*, 163 Wn. App. at 245. The Court again noted West failed to supply any legal argument to support his argument and the facts supported a reasonable delay. *West*, 163 Wn. App. at 245-246.

Unlike *West*, Jones has never argued the Department should have begun its search for the form sooner. Because a requestor must do more than simply make a claim, the Court of Appeals decision is well reasoned and based on both existing case law and the PRA statute itself. Accordingly, the Court should deny review.

Jones also asserts the Court should provide a rebuttable presumption because the Department has sole access to the information necessary to meet the burden. In support of this contention, Jones cites to the Court's ruling in *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981). However, the Court's holding in *U.S. Oil* focuses on the statute of limitations in that matter and whether the discovery rule applies. None of which apply to the case at hand. Jones was aware of his cause of action when he was informed that the Department

was unable to locate the record. As noted above, at the time the Department argued its show cause motion, it had the burden of showing the record did not exist at the time it began to search for the form and presented evidence the form was inadvertently lost. Jones did not argue an unreasonable delay in the search nor did he assert the search was unreasonable. Because the Court of Appeals decision is consistent with case law, the Court should deny review.

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 30th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answer to Petition for Review to be electronically filed with the Clerk of the Court which will send notification of such filing to the following:

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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 30th day of November, 2016, at Spokane, Washington.

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