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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 93827-0

COA No. 33920-3-III

**FILED**

NOV 14 2016

WASHINGTON STATE  
SUPREME COURT

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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JOSEPH JONES

Appellant;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY

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PETITION FOR REVIEW

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STATE OF WASHINGTON  
NOT PUBLIC

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ORIGINAL

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER..... 1

B. DECISION BELOW..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT..... 4

    1. THIS COURT SHOULD HOLD THAT LOSS OR DESTRUCTION MUST BE TREATED EQUALLY PURSUANT TO RCW 42.56.100..... 4

    2. IT IS OF PUBLIC IMPORTANCE TO CLARIFY WHETHER OR NOT THE BURDEN IS ON THE DEPARTMENT TO SHOW HOW A RECORD WAS LOST AFTER THE REQUEST WAS MADE..... 6

    3. TO AVOID LIABILITY, AN AGENCY HAS THE BURDEN OF PROOF TO SHOW THAT THE DOCUMENT WAS LOST OR DESTROYED PRIOR TO THE REQUEST. ... 9

F. CONCLUSION..... 11

## TABLE OF AUTHORITIES

### Cases

<i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138, 141 (1977).....	10
<i>Arkansas v. Sanders</i> , 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).....	5
<i>Bates v. Bowles White &amp; Co.</i> , 56 Wn.2d 374, 353 P.2d 663 (1960).....	10
<i>Building Industry Association of Washington v. McCarthy</i> , 152 Wn. App. 720, 218 Wn. App. 720 (2009) (BIAW).....	8, 9
<i>Estate of Bowers</i> , 132 Wn. App. 334, 342-43, 131 P.3d 916 (2006).....	5
<i>Estate of Brownfield v. Bank of America, NA.</i> , 170 Wn. App. 553, 285 P.3d 886 (2012) .....	5
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998) .....	7
<i>O'Neill v. City of Shoreline</i> , 170 Wn.2d 138, 240 P.3d 1149 (2010) .....	4, 7
<i>Predisik v. Spokane Sch. Dist. No. 81</i> , 182 Wn.2d 896, 346 P.3d 737 (2015) .....	6
<i>Sperr v. City of Spokane</i> , 123 Wn. App. 132, 96 P.3d 1012 (2004).....	7
<i>Spokane Research &amp; Def. Fund. v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005) .....	8
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016) .....	5
<i>State v. Houser</i> , 95 Wn.2d 143, 622 P.2d 1218 (1980) .....	5
<i>U.S. Oil v. Department of Ecology</i> , 96 Wn.2d 85, 633 P.2d 1329 (1981)	11
<i>West v. Dept. of Natural Resources</i> , 163 Wn. App. 234, 258 P.3d 78 (2011) .....	8, 9
<i>Yousoufian v. King County</i> , 168 Wn.2d 444, 229 P.3d 735 (2010).....	7

Statutes

RCW .....	7
RCW 11.20.070 .....	5
RCW 42.56.120 .....	6
RCW 42.56.550(2).....	7

**A. IDENTITY OF PETITIONER**

Joseph Jones (“Jones”) requests this Court to review the unpublished decision issued by the Court of Appeals, Division III, filed August 18, 2016 and designated in Appendix A of this petition.

**B. DECISION BELOW**

Division III’s Opinion No. (“Opinion”) ruled that “the purpose of the Public Records Act (“PRA”) is not to subject a government entity to liability for lost records.” Appendix A (Opinion), p. 3. In doing so, it held that the Department of Corrections (Department) had “no burden to show when it lost a requested document.” *Id.* It questioned the legal validity of the supposition that an inadvertently lost document after the request was made inferred liability. *Id.*, p. 8. While it claimed it proceeded on this assumption, it rejected Jones’ assumption the record had been destroyed. It then presumed the Department conducted an adequate search. *Id.*, p. 13. The reconsideration motion challenging this decision was denied without comment. Appendix B.

**C. ISSUES PRESENTED FOR REVIEW**

1. Is it 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. Is it in the public's interest for this Court to clarify whether or not losing a record after a Public Records Act request had been made mandates liability to the agency losing the record?

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

#### **D. STATEMENT OF THE CASE**

At a meeting with his Department of Corrections ("Department") institutional counselor Jennifer Lynch ("Lynch") on November 3, 2014, Jones was asked to sign a Classification Hearing Notice/Appearance Waiver ("CHN/AW") form. On form Jones signed, he did not waive his appearance at the hearing. CP 181. The form had a distribution list on the lower left hand quarter of the one-page document. CP 190. The inmate (offender) was on the distribution list. Jones asked Lynch for a copy. CP 181, 194. She refused to make him a copy, instead telling him he would have to make a public records request if he wanted a copy.<sup>1</sup> *Id.* Jones then

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<sup>1</sup>The Department requires inmates requesting documents other than their central or medical file to make their requests to the PDU in Olympia.

told Lynch that he would be submitting the public records request for the form to Olympia that day as she required. CP 181.

Jones then sent the request to the Department that day. CP 182.

The request stated the following:

Today my Corrections Counselor Jennifer Lynch had me sign Classification Hearing Notice/Appearance Waiver. The bottom of the form states a copy is to be provided to the inmate. I asked Ms. Lynch for my copy and she stated I must obtain this through the public disclosure unit. Please send me my copy of the Classification Hearing Notice/Appearance Waiver per Ms. Lynch's directive.

*Id.*; CP 2.

The Department received the request from Jones on November 7, 2014. CP 34. It sent the five-day letter to Jones on November 10, 2014. *Id.* In this letter, Jones was informed he would be contacted before December 10, 2014. *Id.* On December 8, 2014, a request was sent from the Department's Public Disclosure Unit ("PDU") to Jones' Counselor asking for a copy of the document Jones requested. CP 35-36. In response, the PDU was informed it had been forwarded to the Correctional Program Manager's ("CPM") office for scanning. CP 35. As of December 11, 2014, the document had not been received by the CPM's staff. CP 37-38. Jones then received a letter dated December 12, 2014 from the PDU informing him that the document he had requested was not in the

Department's possession. CP 39. It is unknown how the document went missing.

The Counselor personally handed the signed form to another employee. CP 194. This employee was supposed to forward the document to the Custody Unit Supervisor for scanning. The Department supplied no evidence establishing when the Department lost or destroyed the requested document.

#### **E. ARGUMENT**

There are four sets of criteria upon which this Court relies when it considers whether or not to accept review. RAP 13.4(b). Mr. Jones believes this is a case of first impression. Thus he believes that this Court must accept review because the issues are of substantial public interest and will reoccur. RAP 13.4 (b)(4).

1. THIS COURT SHOULD HOLD THAT LOSS OR DESTRUCTION MUST BE TREATED EQUALLY PURSUANT TO RCW 42.56.100.

Division III focused on the difference between loss and destruction. Opinion, p. 12. This distinction is artificial for the purposes of liability. The PRA is a strict liability statute. It is prohibited by statute to destroy a requested record until the request is resolved. RCW 42.56.100; *see also O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010). Is not a record that is never found destroyed?



This Court has recognized there is no practical difference between the loss and destruction of a document – the document simply is not available. Legally, our courts have addressed loss and destruction synonymously. An exception to the warrant requirement includes when there is “the risk of ‘loss or destruction’ of evidence ...” *State v. Duncan*, 185 Wn.2d 430, 439, 374 P.3d 83 (2016) (emphasis added) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979))). Nor does the “loss or destruction” of a document prohibit using other evidence to prove its contents. *Estate of Brownfield v. Bank of America, NA.*, 170 Wn. App. 553, 563, 285 P.3d 886 (2012). And a will that has been “lost or destroyed” is interpreted as being revoked. *Estate of Bowers*, 132 Wn. App. 334, 342-43, 131 P.3d 916 (2006).<sup>1</sup> In all these cases, whether it was lost or destroyed made no initial difference in how the courts have treated the consequence of the missing document. An agency is responsible for all documents in its possession. Losing a document after a request was made is the same as destroying it. Public policy requires this to be so.

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<sup>1</sup>Of course, circumstances may exist where the will is not revoked even though it was lost or destroyed. RCW 11.20.070.

2. IT IS OF PUBLIC IMPORTANCE TO CLARIFY WHETHER OR NOT THE BURDEN IS ON THE DEPARTMENT TO SHOW HOW A RECORD WAS LOST AFTER THE REQUEST WAS MADE.

In making its decision, Division III failed to incorporate the basic tenets of the PRA – namely it is a strict liability statute and the onus is on the agency to show it has not violated it. The Legislature established the purpose of the Public Records Act – free and open examination of records by citizens – to serve the public interest. RCW 42.56.550(3). To meet this lofty purpose, courts reviewing agency responses to public records requests “start with the presumption that all public records are subject to disclosure.” *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015). This Court held that “[a]gencies can withhold a record only if it falls within one of the PRA's specific, limited exemptions.” *Id.* (citing RCW 42.56.070(1)).

The PRA requires a great deal from an agency. It requires each agency to maintain indexes of specific types of documents. RCW 42.56.070. Each agency is required to justify its cost per record unless it accepts the statutorily defined amount. RCW 42.56.070(7). It further prohibits an agency from charging for its search for documents and for inspection on the premises. RCW 42.56.120. Agencies are required to show that any claimed exemption “falls within the specific exemptions of

[the Act], or other statute which exempts or prohibits disclosure of specific information or records.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, 963 P.2d 869 (1998) (quoting RCW 42.56.070(1)). They must also provide a reasonable time estimate for disclosure. RCW 42.56.550(2). Finally, “the PRA does not allow agencies to destroy records that are subject to a pending records request.” *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010). “[A]gencies “shall retain possession of the record, and may not destroy or erase the record until the request is resolved.” RCW 42.56.100.

If a document has been lost before a request was made, there is no liability. *See e.g. Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). (“The problem with Mr. Sperr’s argument is that he has no right to inspect or copy records that do not exist.”). However, if it is possible the form existed after the request was made, then the agency must be held liable.<sup>1</sup>

The agency must be held liable for records lost after their request because otherwise this removes any incentive for the agency to properly maintain records. It would also permit the agency to hide any malfeasance behind a claim the records were lost because the poor requester could not

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<sup>1</sup> This does not address agency culpability which would be addressed in any penalty argument. *See Yousoufian v. King County*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010) (mitigating and aggravating factors).

afford to hire an attorney on a contingent basis to try to obtain the missing records. The purpose of the attorney fees provision is to protect the public's right to know. "[S]trict enforcement of this provision discourages improper denial of access to public records." *Spokane Research & Def. Fund. v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005). Without requiring liability for losing a record after it was requested, the enforcement mechanism of the PRA is toothless. It is in the penalty determination evaluation where an agency's actions are examined for culpability. This interpretation unnecessarily immunizes agencies from liability and fails to protect the rights of the requester to hold an agency accountable not only for records production but for its processes.

Division III cited two Washington cases to support its decision to deny liability. Opinion, p. 13 (citing *West v. Dept. of Natural Resources*, 163 Wn. App. 234, 258 P.3d 78 (2011) and *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 218 Wn. App. 720 (2009) (BIAW)). It claimed these cases supported the proposition that the PRA was not intended to "penalize inadvertent loss." These cases stand for no such proposition. *West* is easily distinguishable. In *West*, the agency provided actual evidence showing that the requested records were destroyed *prior* to the date they were

requested. *Id.* at 240. In *BIAW*, the Pierce County Auditor's Office had previously deleted the emails from the Washington Secretary of State's Office. *BIAW*, 152 Wn. App. at 729. Neither case addresses the situation when a record is lost after the record request was made.

In the PRA, whether the document was lost or destroyed also makes no difference because the agency cannot produce the document to the requester. There can be many different reasons for why a document was lost or destroyed. A document can be lost accidentally through negligence, indifference or recklessness. A document can be destroyed accidentally or deliberately. In all these scenarios, the agency must still be held liable to protect the requester's right to ask for the document because the requester does not know how or why the document was not produced.

3. TO AVOID LIABILITY, AN AGENCY HAS THE BURDEN OF PROOF TO SHOW THAT THE DOCUMENT WAS LOST OR DESTROYED PRIOR TO THE REQUEST.

In granting the show cause motion, the trial court ruled that since Jones could not show when the record was destroyed, he did not prevail. This holding turns the Public Records Act on its head because (1) it establishes a presumption against Jones when the evidence required to rebut that presumption is in the possession of the Department, and (2) all other PRA presumptions are against the agency. In other words, the court

shifted the evidentiary burden of persuasion to Jones. Given the presumption that records are disclosable unless the agency shows otherwise, there must also be the presumption that the loss or destruction of a record violates the PRA unless the agency can show that the loss or destruction happened prior to the request. Here, the Department's failure to show that the record was lost or destroyed before it was requested imposes liability on it.

Of course, any such presumption is rebuttable. A rebuttable presumption is challenged by the presentation of evidence to the contrary. This is because “[a] presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary.” *Amend v. Bell*, 89 Wn.2d 124, 128, 570 P.2d 138 (1977) (citing *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960)). The presumption of premature destruction may be overcome by an agency's prima facie showing that a document was lost or destroyed at an appropriate time using evidence available to the agency. Upon such a showing, the burden would shift to the requester to show that the record was actually destroyed after the request was received by the agency. Here, the Department failed to provide any evidence showing how or when the document was destroyed. It failed to make the proper evidentiary showing to overcome the rebuttable presumption.

In allocating evidentiary burdens, courts must consider whether a party has sole access to information necessary to meet that burden. See e.g. *U.S. Oil v. Department of Ecology* (“DOE”), 96 Wn.2d 85, 633 P.2d 1329 (1981). In *U.S. Oil*, DOE was charged by statute with the duty to collect penalties for unlawful waste discharges and had to rely on industry self-reporting to discover violations. *Id.* at 92. This Court used U.S. Oil’s failure to self-report to extend the statute of limitations to avoid letting U.S. Oil avoid penalties for its bad acts. *Id.* at 87, 92. This Court stated that “[w]here self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. *Id.* at 93. Here, Jones has absolutely no control over document handling and production and the burden of proof must be on the agency. Where the agency has sole control over document storage and production, the burden of proof concerning the timing of the loss or destruction of the record must not be placed on the requester because it ignores precedent and contravenes the purpose of the Public Records Act.

#### **F. CONCLUSION**

For the reasons stated above, this Court must accept review to provide guidance to agencies and requesters on how lost records must be treated under the Public Records Act. This Court should also accept review to clarify that the burden of proof is on the agency to show that

records were lost or destroyed prior to the request for the records was made.

Respectfully submitted this 2<sup>nd</sup> day of November, 2016.

KAHRS LAW FIRM, P.S.

A handwritten signature in black ink, appearing to read "Michael C. Kahrs", written over a horizontal line.

MICHAEL C. KAHRS, WSBA #27085  
Attorney for Petitioner/Appellant Jones



**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on November 7, 2016, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S PETITION OF REVIEW

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**FILED**  
**OCTOBER 6, 2016**  
 In the Office of the Clerk of Court  
 WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JOSEPH L. JONES,	)	No. 33920-3-III
	)	
Appellant,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
WASHINGTON STATE DEPARTMENT	)	
OF CORRECTIONS,	)	
	)	
Respondent.	)	

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 August 18, 2106, is hereby denied.

PANEL: Judges Fearing, Lawrence-Berrey, Pennell

FOR THE COURT:

  
 GEORGE B. FEARING, Chief Judge



FILED

AUGUST 18, 2016

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

JOSEPH L. JONES,	)	
	)	No. 33920-3-III
Appellant,	)	
	)	
v.	)	
	)	
WASHINGTON STATE DEPARTMENT	)	UNPUBLISHED OPINION
OF CORRECTIONS,	)	
	)	
Respondent.	)	

FEARING, C.J. — This appeal poses the question: when a government agency loses a document that becomes the subject of a public records request, does the government hold the burden to prove it lost the document before receiving the request in order to avoid liability under the Public Records Act, chapter 42.56 RCW? Joseph Jones, a prisoner at Coyote Ridge Corrections Center, requested, from the state Department of Corrections, a Classification Hearing Notice/Appearance Waiver form (notice form or form) that he signed. When the department looked for the form, it could not find the form. Jones filed suit for an alleged violation of the Public Records Act. The parties

No. 33920-3-III  
*Jones v. Dep't of Corr.*

agreed that the department lost the form, but neither party presented evidence establishing the date of the loss. The trial court held in favor of the Department of Corrections and dismissed the suit at a show cause hearing. Because the purpose of the Public Records Act is not to subject a government entity to liability for lost records, we affirm the trial court. We hold the department has no burden to show when it lost a requested document.

#### FACTS

Joseph Jones resides at the Coyote Ridge Corrections Center. On November 3, 2014, Jones met with Classification Counselor II Jennifer Lynch to review his custody facility plan in advance of a Facility Risk Management Team meeting on November 5. The correction facility's Facility Risk Management Team periodically conducts a classification hearing to update an offender's security ranking. Lynch handed Jones a Classification Hearing Notice/Appearance Waiver form for his review prior to their meeting. A signature on the notice form confirms the prisoner's notice of the hearing time. Jones signed the form after striking the language that he waived his right to appear at the hearing.

During the November 3, 2014 meeting, Joseph Jones requested from Jennifer Lynch a copy of the notice form signed by him. Lynch explained that he must submit a formal public records request to the department's Public Disclosure Unit in Olympia in

No. 33920-3-III  
*Jones v. Dep't of Corr.*

order to obtain a copy. Jones told Lynch he would send a request to Olympia the following day.

After her meeting with Joseph Jones and pursuant to Department of Corrections' policy, Jennifer Lynch delivered Jones' signed notice form to Classification Counselor III Mr. Westfall. We do not know what became of the notice form thereafter. Under department policy, Westfall should have forwarded the document to Gina Penrose and Penrose to the correctional program manager. Lynch did not retain a copy of the notice form.

On November 3, 2014, the same day as the meeting between Joseph Jones and Jennifer Lynch, Jones prepared and mailed a public records request to the Public Disclosure Unit of the Department of Corrections in Olympia. The request sought a signed copy of Jones' notice form.

On November 7, 2014, the Department of Corrections' Public Disclosure Unit received Joseph Jones' public records request and sent, by e-mail, the request to Lori Wonders, Coyote Ridge's Public Disclosure Coordinator. On November 10, Wonders sent Jones a letter acknowledging receipt of his public records request and informing Jones that the department would respond by December 10, 2014.

On December 8, 2014, Lori Wonders e-mailed Jennifer Lynch and asked if the latter had the notice form signed by Joseph Jones. On December 10, Lynch replied that she forwarded the form to the correctional program manager. On December 10, Wonders

No. 33920-3-III  
*Jones v. Dep't of Corr.*

e-mailed Correctional Program Manager Gena Brock and asked if she had the Jones' notice form. Brock responded, on December 11, that she had not received the form. On December 12, 2014, Wonders sent Jones a letter, which read:

After thorough review of Records, we have no documents in our possession that relate to your Public Disclosure Request received on November 7, 2014, requesting a copy of your Classification Hearing Notice/Appearance Waiver, dated November 3rd, 2014.

Clerk's Papers (CP) at 39.

After Joseph Jones filed suit, Lori Wonders again unsuccessfully searched for Jones' signed form. Jennifer Lynch is unaware of the date on which the form was lost and was unaware of the loss at the time she learned that the Department of Corrections' Public Disclosure Unit in Olympia received Joseph Jones' public records request.

#### PROCEDURE

On March 10, 2015, Joseph Jones filed suit and alleged that the Department of Corrections violated the Public Records Act by its failure to produce the signed copy of his notice form. The department filed a motion to show cause to determine whether it violated the act. The department argued, in part, that no evidence supported a finding that it purposefully destroyed the requested document in order to avoid production once the department received the records request. Jones argued, among other contentions, that his oral request, on November 3, 2014, to Jennifer Lynch constituted a binding public records request that obligated the department to preserve the document under RCW

No. 33920-3-III  
*Jones v. Dep't of Corr.*

42.56.100. According to Jones, Lynch, like any other department employee, served as a custodian for department records.

The trial court wrote a letter decision dismissing Joseph Jones' suit. The trial court reasoned:

. . . There is no dispute that the requested record was not preserved. There is inadequate evidence to establish that the document was lost after the Public Records Act request was properly submitted.

Therefore, the DOC can be found to have violated the Public Records Act only if the notice to Ms. Lynch of the intention to make a Public Records Act request was imputed to the Department. . . . As Ms. Lynch had no authority in the area of Public Records Act requests, the Department was not bound by the notice given to her.

CP at 336.

On October 13, 2015, the trial court entered an order dismissing the suit and entered findings of fact and conclusions of law. In the conclusions of law, the trial court concluded:

Defendant did not violate the Public Records Act when it lost the DOC 05-794 Classification Hearing Notice/Appearance Waiver form. Plaintiff was required to submit his public disclosure request to the Public Disclosure Unit in Tumwater, Washington. There is no dispute that the requested record was not preserved. There is inadequate evidence to establish that the document was lost after the Public Records Act request was properly submitted.

CP at 341.

In a motion for reconsideration, Joseph Jones asserted two new arguments. First, the Department of Corrections failed to show it reasonably searched to find the signed

No. 33920-3-III  
*Jones v. Dep't of Corr.*

notice form once the department received the public records request in Olympia. Second, the court should impose on the department the burden of showing the loss or destruction of the requested document before receipt of the request in Olympia. The trial court denied Jones' motion for reconsideration.

#### LAW AND ANALYSIS

The focus of Joseph Jones' argument on appeal is that the trial court should have imposed the burden on the Department of Corrections to prove that the department lost his signed notice form before it received his public records request. Otherwise, according to Jones, the department violated the Public Records Act by failing to deliver him a copy of the form. In support of this contention, Jones argues: (1) this court should apply a rebuttable presumption that the government entity lost the requested document after its receipt of the records request, (2) the court should employ the doctrine of *res ipsa loquitur* in the context of a lost public record, and (3) a Public Records Act case poses a special situation in that the State had sole possession of the evidence regarding loss of a document such that this court should apply the rationale announced in *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981). On appeal, Jones has abandoned his contention that Jennifer Lynch was an authorized agent of the department for purposes of receiving oral requests for public records. Although amicus may argue such, Jones does not contend that the department failed to take reasonable steps to find the signed waiver.



Although Joseph Jones argued, in a motion for reconsideration, his position that the government entity should establish when it lost his signed waiver, Jones did not posit, in the trial court, the three discrete contentions he now asserts on appeal. Under RAP 2.5, this “court may refuse to review any claim of error which was not raised in the trial court.” Despite this rule, we do not address whether Jones raises any new “claim of error” by refocusing his arguments on appeal. We agree to address all three contentions because the Department of Corrections does not maintain that Jones waived any of the three updated arguments by failing to assert them below. RAP 2.5(a) states that an appellate court “may” refuse to review a claim of error not raised in the trial court. *State v. Kindell*, 181 Wn. App. 844, 849, 326 P.3d 876 (2014). This rule allows, but does not require, us to refuse to review certain claims that an appellant failed to raise below. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007).

The Public Records Act is a strongly worded mandate for broad disclosure of public records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Agencies must promptly disclose any requested public record unless it falls within a specific, enumerated exemption. RCW 42.56.070(1); RCW 42.56.520.

An agency is not required to produce a document that does not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 133, 96 P.3d 1012 (2004). Nevertheless, the Public Records Act does not allow agencies to destroy records that are subject to a pending

No. 33920-3-III

*Jones v. Dep't of Corr.*

records request. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010).

The concluding paragraph of RCW 42.56.100 declares:

If 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.

The parties litigate this appeal on the assumption that the Department of Corrections violated the Public Records Act if it inadvertently lost Joseph Jones' signed waiver form after the Public Disclosure Unit in Olympia received Jones' Public Records Act request on November 7, 2014. We question the legal validity of this supposition, and, primarily for this reason, do not publish our decision. Nevertheless, we proceed on this assumption.

### Presumption

The trial court found, and the record supports, that neither party presented evidence of when the Department of Corrections lost Joseph Jones' signed notice form. Of course, the department was best situated to discover and present the evidence. The issue before this court is: who prevails in a Public Records Act suit when the trial court hears no evidence of when a document subject to a request is lost?

Joseph Jones advocates for a rebuttable presumption against Washington government entities whenever a document is lost that the loss occurred after the agency received the public records request. Jones contends that, if we adopt the rebuttable

No. 33920-3-III

*Jones v. Dep't of Corr.*

presumption, the Department of Corrections failed to overcome it. The department responds that adopting a rebuttable presumption would conflict with existing law. The department argues that, because a requestor must do more than assert a claim, this court should decline to hold Jones is entitled to a rebuttable presumption that the department destroyed the notice form after receiving his request.

Joseph Jones contends that courts apply all presumptions under the Public Records Act in favor of the records requestor and against the government entity. Jones only identifies one presumption, however, that being the presumption that all public records are subject to disclosure. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015). This presumption helps little in resolving the question of which party should bear the burden of showing when a government agency loses a disclosable document. The presumption forwarded by Jones only concerns exemptions under the act.

No Washington decision directly addresses Joseph Jones' argument. The department heavily relies on *West v. Department of Natural Resources*, 163 Wn. App. 235, 258 P.3d 78 (2011) and *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009). Both cases are illustrative.

In *West v. Department of Natural Resources*, Arthur West submitted multiple Public Records Act requests to the Washington Department of Natural Resources (DNR). The documents requested included all of Bob Van Schoorl's e-mail over a two-year

No. 33920-3-III

*Jones v. Dep't of Corr.*

period. Over the subsequent months, DNR searched to find all responsive records. DNR's public records officer did not provide West with all of Bob Van Schoorl's 2006 e-mail because Van Schoorl had relied on backup tapes to capture e-mail he did not retain. DNR upgraded to a new e-mail system in late 2006 and, as a result of the upgrade, DNR no longer could locate or access Van Schoorl's old e-mail.

Arthur West filed a complaint against DNR alleging, among other things, the improper destruction of records. This court held that DNR did not violate the Public Records Act. In so ruling, the court rejected West's accusation that DNR "destroyed" requested records. The court substituted the phrase "inadvertently lost" for "destroyed" when characterizing DNR's conduct. *West*, 163 Wn. App. at 244. We wrote:

West first argues that the DNR unlawfully destroyed Van Schoorl's 2006 e-mails. Despite this argument, there is simply no evidence in the record of any unlawful destruction of e-mails. Instead, the record shows that the DNR inadvertently lost Van Schoorl's e-mail almost one year before West made his request. Thus, the e-mail did not exist at the time of West's request.

*West*, 163 Wn. App. at 244. Of course, *West* is distinguishable because the state agency showed that it lost the e-mail before the records request. Nevertheless, the case hints that the agency should not be penalized for unintentional loss of public records.

Throughout his brief, Joseph Jones claims the Department of Corrections "destroyed" the notice form. Jones also argues that a loss equates to destruction. Under the reasoning of *West v. DNR*, we reject this claim and contention.

No. 33920-3-III

*Jones v. Dep't of Corr.*

In *Building Industry Association v. McCarthy*, 152 Wn. App. 720 (2009), Pierce County Auditor Pat McCarthy reported problems with voter registration forms from the Association of Community Organizations for Reform Now (ACORN) to State Assistant Elections Director Pam Floyd. As a result, Floyd sent a global e-mail to all of the county auditors in Washington informing them of reports of problems with ACORN. Later the same day, Floyd sent a second e-mail to all county auditors. McCarthy, already aware of the content of these e-mails, likely deleted them the same month she received them. Over five months later, the Building Industry Association of Washington (BIAW) submitted public records requests to Pierce County. McCarthy and her staff found responsive records and provided them. The records handed to BIAW did not include the informational e-mail from Floyd. BIAW sued, alleging a violation of the Public Records Act. The trial court dismissed BIAW's Public Records Act claim. On appeal, this court concluded that McCarthy did not unlawfully destroy the e-mail and her failure to provide the e-mail did not violate the Public Records Act because they did not exist at the time of request. We wrote, in part: "[t]he plaintiff cannot rely on allegations in the pleadings or assertions, but must present competent evidence by affidavit or otherwise." 152 Wn. App. at 735.

Like *West v. Department of Natural Resources*, *Building Industry Association v. McCarthy* differs from our appeal in that the government agency proved destruction or loss of the records before receipt of the public records request. Nevertheless, the quoted

No. 33920-3-III

*Jones v. Dep't of Corr.*

portion of *BIAW* suggests the records requestor has the burden to show a records act violation.

Joseph Jones cites RCW 42.56.100, which prohibits a government entity from destroying or erasing a record after the public records request. Nevertheless, he forwards no statutory provision expressly declaring that the inadvertent loss of a public record violates the Public Records Act.

Joseph Jones cites no case law that proclaims a government agency to have violated a public records or freedom of information act because the government lost a document after receiving a request or when the government could not establish when it lost the document. Although the federal Freedom of Information Act (FOIA) contains important differences from the Washington Public Records Act, cases interpreting FOIA are relevant to interpreting the Washington act. *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993); *Servais v. Port of Bellingham*, 72 Wn. App. 183, 192-93, 864 P.2d 4 (1993), *aff'd*, 127 Wn.2d 820, 904 P.2d 1124 (1995). Although the courts did not address the timing of the loss, federal courts have declared the government agency in compliance with the freedom of information act when it performed a reasonable search despite evidence that some requested records were accidentally lost. *Dueñas Iturralde v. Comptroller of the Currency*, 345 U.S. App. D.C. 230, 315 F.3d 311 (2003); *Maynard v. Cent. Intelligence Agency*, 986 F.2d 547 (1st Cir. 1993); *Judicial Watch, Inc. v. Department of State*, No. 15-CV-690, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 1367731 (D.D.C.

No. 33920-3-III  
*Jones v. Dep't of Corr.*

Apr. 6, 2016); *Hall & Assocs. v. U.S. Envtl. Prot. Agency*, 83 F. Supp. 3d 92 (D.D.C. 2015); *Rollins v. U.S. Dep't of State*, 70 F. Supp. 3d 546 (D.D.C. 2014); *Island Film, S.A. v. Dep't of Treasury*, 869 F. Supp. 2d 123 (D.D.C. 2012); *Ramstack v. Dep't of Army*, 607 F. Supp. 2d 94 (D.D.C. 2009); *Clark v. Exec. Office of U.S. Att'ys*, 601 F. Supp. 2d 170 (D.D.C. 2009); *Fischer v. U.S. Dep't of Justice*, 596 F. Supp. 2d 34 (D.D.C. 2009); *Christmann & Welborn v. Dep't of Energy*, 589 F. Supp. 584 (N.D. Tex. 1984).

Since Joseph Jones does not contend the Department of Corrections engaged in an inadequate search, we will presume the department conducted an adequate search. An inadequate search is tantamount to a denial of the public records request. *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Applying this logic, an adequate search, despite a missing document, might then be considered conformance to the Public Records Act.

The Public Records Act is a landmark act adopted by Washington's citizenry to effectuate the noble goal and indispensable virtue of government transparency. Nevertheless, in *West v. Department of Natural Resources*, 163 Wn. App. 235 (2011) and *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720 (2009), this court refused to presume that an agency acted in bad faith or nefariously on the discovery that a requested record was lost or even destroyed. The Public Records Act is not intended to penalize inadvertent loss, a phenomenon endemic to a large organization. In this case on appeal, the Department of Corrections had no reason to purposely destroy

No. 33920-3-III  
*Jones v. Dep't of Corr.*

the signed notice form.

### Res Ipsa Loquitur

Joseph Jones next contends that the doctrine of res ipsa loquitur should apply because the Department of Corrections had exclusive control over the evidence. Jones cites no authority employing res ipsa loquitur in the context of a Public Records Act suit. We refuse to apply the doctrine in these circumstances.

Res ipsa loquitur, Latin for “the thing speaks for itself,” applies when:

(1) The accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone’s negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

*Pacheo v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Res ipsa loquitur allows an inference of negligence. *Ripley*, 152 Wn. App. at 308. Whether res ipsa loquitur applies is a question of law, reviewed de novo. *Ripley*, 152 Wn. App. at 308.

A Public Records Act suit does not involve a physical injury to the plaintiff and the question of negligence is not at issue. In this appeal, both sides agree the form was lost. The question framed by the parties is not who is at fault or whether the form was lost negligently, but rather *when* it was lost.

### Special Obligation

Joseph Jones finally argues that, in allocating evidentiary burdens, courts must



No. 33920-3-III

*Jones v. Dep't of Corr.*

consider whether a party has sole access to information necessary to meet that burden. He argues for an extension of the Washington Supreme Court's holding in *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85 (1981) to the Public Records Act. The department does not directly address this argument.

In *U.S. Oil*, the Washington Department of Ecology imposed penalties on U.S. Oil, pursuant to RCW 90.48.144, for illegally discharging pollutants. In response, U.S. Oil argued that the statute of limitations bars some of the penalties. The Department of Ecology advocated for the court to adopt the "discovery rule" and for the court to hold that the department's claim for penalties did not accrue until it discovered the discharge violations. The department emphasized that the oil company solely possessed the evidence of wrongdoing. Our state high court adopted the discovery rule for actions brought by the department to collect fines for unlawful waste discharges.

*U.S. Oil* is a case solely about the statute of limitations and the rule to apply when a cause of action is predicated on self-reporting and the failure to self-report causes the statute to run. The case on appeal has no statute of limitations question.

Joseph Jones cites no authority to support his argument that *U.S. Oil & Refining Co. v. Department of Ecology* should apply in a Public Records Act suit. This third argument of Jones essentially repeats his two prior arguments. For the same reasons that we reject his other arguments, we reject Jones' third argument.

No. 33920-3-III  
*Jones v. Dep't of Corr.*

Attorney Fees

Joseph Jones asks this court for an award of reasonable attorney fees and costs. RCW 42.56.550(4) directs us to grant any person, who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record, fees and costs. Because Jones does not prevail, we deny his request for attorney fees and costs.

CONCLUSION

We affirm the trial court's dismissal of Joseph Jones' suit. The Department of Corrections did not violate the Public Records Act.

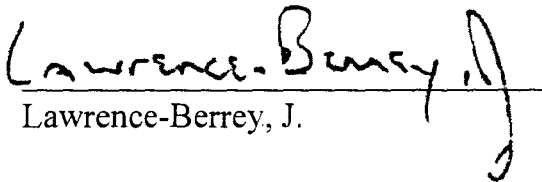
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



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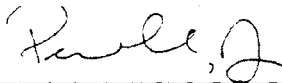
Fearing, C.J.

WE CONCUR:



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Lawrence-Berrey, J.



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Pennell, J.