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SUPREME COURT
STATE OF WASHINGTON
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SC No. 99232-1
COA No. 53627-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOEL ZELLMER,
Appellant/Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,
Respondent.

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STATE OF WASHINGTON
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DEPUTY

FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge

PETITION FOR REVIEW

JOEL ZELLMER
Pro Se

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TABLE OF CONTENTS

1. IDENTITY OF MOVING PARTY	1
2. STATEMENT OF RELIEF SOUGHT	1
3. ISSUES PRESENTED FOR REVIEW	1
4. STATEMENT OF THE CASE	1
1. Substantive Facts	1
(a) First Request, July 3, 2016 (Request ID 112075)	5
(b) Second Request, October 4, 2016 (Request ID 113598)	6
(c) Third Request, February 4, 2017 (Request ID 115355)	7
(d) Later-Produced Responsive Records	7
(i) MIPS Payment Records	7
(ii) MIPS Billing Records	8
2. Procedural Facts	9
5. ARGUMENT	11
1. This Is An Issue Of Substantial Public Interest	12
6. CONCLUSION	20

TABLE OF AUTHORITIES

WASHINGTON CASES

Belenski v. Jefferson County,
186 Wn.2d 452, 378 P.3d 176 (2016) 19

Hangartner v. City of Seattle,
151 Wn.2d 439, 90 P.3d 26 (2004) 13

Hearst Corp v. Hoppe,
90 Wn.2d 123, 580 P.2d 246 (1978) 15, 18

Millay v. Cam,
135 Wn.2d 193, 955 P.2d 791 (1998) 19

Neighborhood Alliance v. Spokane County,
172 Wn.2d 702, 261 P.3d 119 (2011) 1, 11, 17-18

Resident Action Council v. Seattle Hous. Auth.,
177 Wn.2d 417, 300 P.3d 600 (2013) 18

Yousoufian v. King County Exec.,
152 Wn.2d 421, 98 P.3d 463 (2014) 18

Yousoufian v. Office of Ron Sims,
168 Wn.2d 444, 229 P.3d 735 (2010) 18

STATUTES

RCW 42.56.030 12, 13, 15, 17

RCW 42.56.070(1) 13, 19

RCW 42.56.080(1) 11, 13

RCW 42.56.080(2) 13

RCW 42.56.100 13, 17

RCW 42.56.520 13

RCW 42.56.550(4) 13

TABLE OF AUTHORITIES (CONT'D)

COURT RULES

RAP 12.1(c) 20
RAP 14.1 et seq 20

ADMINISTRATIVE CODE

WAC 44-14-04002(2) 13

1. IDENTITY OF MOVING PARTY

Joel Zellmer, Appellant/Petitioner, files this petition for review.

2. STATEMENT OF RELIEF SOUGHT

Petitioner seeks review of the Court of Appeals decision filed on September 15, 2020. Orders denying separate motions for reconsideration and to publish the decision were denied on October 14, 2020. The opinion and orders are attached as Appendix A.

3. ISSUES PRESENTED FOR REVIEW

1. Must an agency construe or interpret a request for identifiable public records broadly under the state public records act in order to then conduct an adequate search for potentially responsive records under the reasonable search standard announced in Neighborhood Alliance v. Spokane County.

4. STATEMENT OF THE CASE

1. Substantive Facts

Joel Zellmer had previously filed injured worker compensation claims with the Department of Labor & Industries ("L&I") for job-related injuries sustained between 1999 and 2004. Three of his claim numbers are N767257 (skin condition from toxic chemical exposure), Y154479 (lung condition from toxic chemical exposure), and Y480253 (wrist damage from heavy machinery usage). CP 3, 155. As part of L&I's investigation of his claims, an examination was performed by a licensed medical

provider in each of his three claims. CP 3. These examinations were initially thought to have been termed "independent medical examinations" or "IMEs" by Mr. Zellmer based on his earlier interactions with L&I and his limited knowledge, but turned out to be for examinations of records, or a "record review." CP 3, 77 (¶ 13), 422-23. This fact is critical to this review.

In early to mid 2010, Lori Rigney, a medical treatment adjudicator with L&I in the Health Services Analysis division and who processes various types of medical bills submitted by medical vendors, processed four bills received by four separate medical providers: doctors Steven Fey, H. Berryman Edwards, Alfred Blue, and Dennis Stumpp, under claim numbers N767257, Y154479, and Y480253. CP 75-76, 183-87, 189. Separate payments for the examinations were made to each of the four medical providers. CP 3, 185-86.

Medical vendor bills received by L&I in industrial insurance claims are retained in the MIPS (medical information payment system) portion of the ORION (organized information online integrated document management) database, and can be accessed by a workers' compensation claim number or an internal control number assigned by L&I. CP 194-95. Those bills are not stored in the industrial insurance claim file. CP 193.

Various divisions within L&I have direct access to the ORION database where medical bills are stored, including the Claims Administration & Training Division, MIPS division, and

Health Services Analysis division. CP 190-91. All staff in L&I's public records unit also have direct access to the ORION database, and are trained in and have a working knowledge of that database. CP 212.

L&I also maintains MIPS records and reports in an electronic system called Enterprise Output Solution ("EOS"), which shows payments made to medical vendors by the claim number assigned to each industrially injured worker. CP 2, 117-18.

After L&I receives a public record request, a Forms and Records Analyst is assigned to respond to the request. A level 3 analyst requires more training than a level 1. CP 207. The analyst may route the request to a point-of-contact (POC) in another division within L&I who might have access to or have possession of the requested records. CP 208. The analyst is trained to know which point-of-contact to route a request to based on the function of each division. L&I also has a POC list which can be used by the analyst. CP 209-10.

When searching for records, analysts are trained to follow obvious leads as they are uncovered, and to search additional locations in order to locate records. CP 210, 238, 262-63. They are also trained to construe and interpret requests broadly. CP 222.

Before L&I closes a request, the request may be subjected to a second review which, among other things, is intended to catch responsive records that were missed by the analyst. CP

210. A second review is typically performed by a co-worker or a supervisor. CP 271.

L&I creates a tracking sheet for each request which contains information related to L&I's response including requestor and request details, actions taken, and point-of-contact routing information. See e.g., CP 146-155. Staff involved in responding to the request are designated on the tracking sheet by alphanumeric codes. CP 290.

Mr. Zellmer became aware of the four doctors and the amounts paid to each by emails he received through an earlier public record request to L&I. CP 103, 106-08. Piecing the information together from the emails and other sources, Zellmer made his first request to L&I for the billing and related payment records (Request ID 112075). When that request failed to obtain the billing and payment records, he made a second request (Request ID 113598), then a third request (Request ID 115355). CP 3, 103. Details of these three requests at issue, see CP 49 (first), 60 (second), 41 (third), are described individually below. Critical to this review by this Honorable Court is how L&I narrowly construed Zellmer's requests.

Taking a shot-in-the-dark, Mr. Zellmer made a fourth request (Request ID 115317) after receiving a copy of L&I's record retention schedule. CP 110, 116-18. By that request, Zellmer finally obtained some MIPS payment records from L&I's EOS system. CP 111-15. The records reflect the four payments

made to the four named doctors in the very amounts that Zellmer had provided to L&I in his earlier requests. CP 49, 60, 103-04, 119-144 (MIPS payment records). Details of these later-produced responsive records are described below.

After suit was filed and in support of its motion for summary judgment, L&I filed a declaration from Lori Rigney. CP 75-77. Attached to her declaration were the billing records of the four doctors sought by Mr. Zellmer in his earlier requests. CP 80-84 (Dr. Fey), 86-87 (Dr. Edwards), 89-91 (Dr. Stumpp), 93-94 (Dr. Blue). Details of these later-produced responsive records are described below.

(a) First Request, July 3, 2016 (Request ID 112075).

Mr. Zellmer made his first request to L&I on July 3, 2016 seeking the billing and payment records for the examinations performed by doctors Fey, Edwards, Blue, and Stumpp in his three claim numbers. He made his request for the types of records he sought using commonly used terms such as: billings, invoices, statements, warrants of payments, and orders of authorization. He also used the term "IME" or "independent medical examination" based on what service he thought each of the doctors performed. CP 3, 49 (July 2016 request), 147, 232-33.

The request was assigned to Laurel Chastain, a Forms & Records Analyst 3. CP 146, 232, 290. Ms. Chastain routed the request to two other divisions, the Claims Administration and the MIPS divisions. CP 46, 146-47. Both divisions have direct

access to the ORION database where the medical bills are stored. CP 190-91.

After receiving the request, L&I narrowly interpreted the request by focusing only on the IME term and name of doctor. CP 240. L&I staff went only to the industrial claim file portion of ORION to determine if any IMEs had been performed; since none had occurred, L&I assumed no records existed and ended its search. CP 47, 74, 242.

Neither division produced any records. CP 4, 47. L&I closed the request after a second review. CP 47, 146-47.

(b) Second Request, October 4, 2016 (Request ID 113598).

Zellmer's second request was dated October 4, 2016, and sought the same financial records as his first request. On the relevant portion of his second request, Zellmer additionally gave L&I the specific amounts paid to each doctor, including the "\$35,000.00" paid to Fey, the "\$3,850.00" paid to Edwards, the "\$5,400.00" paid to Blue, and the "\$4,200.00" paid to Stump. He still thought the doctors had performed an IME service. CP 4-5, 60 (October 2016 request), 149-52, 290.

The request was initially assigned to Michelle Williams, then reassigned to Mara Osborn, a Forms & Records Analyst 3. CP 257. Ms. Osborn routed the request to two other divisions, including the Claims Administration and the Health Services Analysis divisions. CP 56-57, 267. Both divisions have direct access to the ORION database where the medical bills are stored.

CP 190-91. L&I staff knew Zellmer was making a second request for the same billing records. CP 57 (¶ 9), 219.

L&I again went to the claim file portion of ORION to determine if any IMEs had been performed; L&I again assumed no records existed and ended its search. CP 265.

Neither division produced any records. CP 5, 57. L&I closed the request after a second review. CP 57, 149-52.

(c) Third Request, February 4, 2017 (Request ID 115355).

Zellmer made his third request on February 4, 2017 seeking the same billing records. On this request he gave L&I the date range of what he thought were IME billings, that is, "between November 1, 2009 thru April 30, 2010." CP 6, 41 (February 2017 request). The request was assigned to Donna Desch, a Forms & Records Analyst 1. CP 38, 154-55, 290.

Ms. Desch was aware of Zellmer's two prior requests and knew he sought the billing records of the four doctors. CP 38. She searched Zellmer's claim file records to determine if any IMEs had occurred; none had, so she ended her search. CP 39.

Ms. Desch produced no records and closed the request the next day. CP 6-7, 39, 154-55.

(d) Later-Produced Responsive Records.

(i) MIPS Payment Records.

Zellmer made a fourth request on February 5, 2017; it was given a Request ID number of 115317, and was assigned to Ms. Chastain. CP 110-15. The request sought three categories of

financial records including an Annual Claimant History Profile, a Firm Statement of Awards, and Remittance Advices, to cover the period of 2007 through 2011 in Zellmer's three claim numbers. CP 7, 110. The three types of financial statements from L&I's EOS system provide the records of payments made to medical vendors by the claim number assigned to the industrial injured worker. CP 2, 117-18.

L&I produced records to Mr. Zellmer's fourth request in all three record categories. The records show the \$3,850 payment to doctor Berryman Edwards in the N767257 claim, the \$4,200 payment to doctor Stumpp in the Y154479 claim, the \$35,700 payment to doctor Fey in the Y154479 claim, and the \$5,400 payment made to doctor Blue in the Y480253 claim. CP 119-144, 157-162.

The 19 pages of MIPS statements were responsive to Mr. Zellmer's earlier requests at issue where he sought billing and payment records of each of those four doctors in those three claim numbers. See CP 49 (first request), 60 (second request). The MIPS reports were located in the EOS system where those payment records are typically stored. CP 114, 188-89.

(ii) MIPS Billing Records.

After suit commenced, a declaration was submitted by Ms. Rigney to support L&I's motion for summary judgment. CP 75-78. Attached as Exhibit A were the billing records (invoice and statements, etc.) for doctor Fey's bill for \$35,700 in the

Y154479 claim. Attached as Exhibit B were the billing records (invoice, statement) for doctor Berryman Edwards bill for \$3,850 in the N767257 claim. Attached as Exhibit C were the billing records (invoice, statement, etc.) for doctor Stumpp's bill for \$4,200 in the Y154479 claim. And attached as Exhibit D were the billing records (invoice, statement) for doctor Blue's bill for \$5,400 in the Y480253 claim. CP 79-94 (exhibits A-D).

Those 12 pages of original billing records were responsive to Zellmer's earlier requests at issue where he sought billing and payment records of each of those four doctors in those three claim numbers. See CP 49 (first request), 60 (second request). The records were located in the MIPS billing part of the ORION database where those billing records are typically stored. CP 183-85, 188-89.

2. Procedural Facts

Mr. Zellmer filed suit against L&I in the Thurston County superior court on January 12, 2018 for violations of the public records act related to Request IDs 112075, 113598, and 115355. CP 1-13. L&I appeared and filed its Answer. CP 14-22.

L&I later moved to dismiss the case on August 3, 2018, arguing generally that the first request was barred by the statute of limitations, and that no billing records existed because no IMEs were performed in any of Zellmer's claims. CP 23-37. L&I submitted multiple declarations supporting its summary judgment motion. CP 38-102. Zellmer filed a brief in

opposition, CP 287-303, with declarations in support. CP 103-175, 178-286.

A hearing was held on May 3, 2019 before the Honorable Erik Price. The trial court ruled that the first request was time barred and equitable tolling did not apply, and that L&I did not violate the public records act on the second or third requests. Judge Price granted L&I's motion and dismissed the case with prejudice. CP 438-39.

Zellmer moved the superior court to reconsider under CR 59(a) arguing that the court's decision was contrary to law based on the facts. CP 409-421, 422-437. After opposition by L&I, CP 440-451, Judge Price denied Zellmer's motion by a one page order. CP 452. Zellmer appealed to the Court of Appeals. CP 453-57.

On appeal, Division Two of the Court of Appeals affirmed the trial court's dismissal by an unpublished opinion. Appendix A (Slip Op.). In so holding, the appellate court agreed that "the records requested did not exist." In coming to that conclusion, the appellate court noted that, "once Zellmer ceased asking for records relating to IME's, L&I produced the records he requested." Appendix A (Slip Op. at 7).

Mr. Zellmer moved Division Two to reconsider its decision based on its misapprehension of material facts, and that it had overlooked pertinent cases. At the same time, Zellmer moved to have the decision published arguing that it favored public

agencies because it allowed narrow interpretations of public record requests which would benefit the public agency rather than the citizen requestor. Division Two denied both motions. Appendix A. This petition for review follows.

5. ARGUMENT

This Honorable Court is asked to decide under the public records act (PRA) how an agency must construe or interpret a public record request, whether narrowly or broadly, in order to conduct an adequate search for records under the reasonable search standard this Court announced in Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011).

This is an important question that needs to be answered because while we know a requestor is required to make a request for "identifiable records", RCW 42.56.080(1), and we also know that an agency must perform a reasonable search for records under Neighborhood Alliance, what is unclear, however, is how an agency must construe a request when it interprets what records a requestor is seeking? The standard this Court enunciates will determine whether a record "exists" or not based on the information given in the request.

For example, in the case at bar, Mr. Zellmer asked L&I for billing and payment records of four doctors who billed L&I for services in three of his industrial insurance claims. But while he made clear the types of records he sought, and gave L&I the names of the four doctors and the three claim numbers, and

even gave the specific payment amounts, he got wrong the actual service the doctors' had performed. If construed narrowly, as L&I did here, the billing and payment records of those four doctors do not in fact "exist" and L&I's search was adequate. Conversely, construed broadly (as Mr. Zellmer argues it should), see e.g., RCW 42.56.030 ("This chapter shall be liberally construed"), L&I violated the PRA by not performing an adequate search as soon as they knew that none of the doctors had performed IMEs but had still billed L&I for services because the billing and payment records did in fact exist. See CP 80-94 (billing records); CP 119-144 (payment records). This Court has yet to determine how agencies should construe requests made under the PRA.

1. This Is An Issue Of Substantial Public Interest.

The issue presented by this petition is an issue of substantial public interest that should be determined by this Court because it will affect how every state and local public governmental agency is required to respond to a public record request under the PRA in order to perform an adequate search. It will also provide a more objective standard as to whether a record is ultimately responsive to the request, i.e., whether it "exists" based on the descriptive information given by the requestor. And, further, it will ultimately affect whether violations of the PRA have occurred, and what response a citizen can expect from an agency based on the information he or she

gives in the request.

In November 1972, the public records act (formerly known as the "public disclosure act") was passed by Initiative Measure 276 by the people of the State of Washington. Its purpose was so that Washington's citizens could "remain[] informed" so as to "maintain control over the instruments that they have created." RCW 42.56.030. To accomplish this, full public access to nonexempt public records is the underlying theme of the PRA. See RCWs 42.56.070(1), 42.56.080(2), 42.56.100, and 42.56.520. Further, to incentivise agencies to provide "full public access to public records," penalties can be levied against the agency for violations of the PRA. RCW 42.56.100; 42.56.550(4).

Under the PRA, there is no official format required for making a request for public records held by a public agency. RCW 42.56.080(2) ("No official format is required for making a records request"). However, a requestor is obligated to request "identifiable records." RCW 42.56.080(1). To do that, a requestor "must identify with reasonable clarity those documents that are desired." Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). Those aspects of the PRA are clear. But, while "[a]n 'identifiable record' is one that is existing at the time of the request and which agency staff can reasonably locate," WAC 44-14-04002(2), this case presents the problem of a record's existence conditioned on the agency's interpretation of the request based on how it is construed--

that is, whether narrowly or broadly.

To illustrate this problem (which could occur with any other citizen requestor), when Mr. Zellmer made his requests to L&I he asked for all "billing(s), invo[i]ces [and] statements by each of the providers", as well as "warrants of payments" for providers Fey, Berryman Edwards, Blue, and Stumpp. CP 49 (first request). He later gave L&I the additional information of the payments made to each of the providers: "Fey \$35,700.00", "Edwards \$3,850.00", "Blue \$5,400.00", and "Stumpp \$4,200.00." CP 60 (second request). And at the time of Zellmer's requests, L&I possessed billing statements and invoices from each of those medical providers in the very amounts given by Zellmer. See CP 80-84 (Dr. Fey), 86-87 (Dr. Edwards), 89-91 (Dr. Stumpp), and 93-94 (Dr. Blue). But L&I, the trial court, and Division Two of the Court of Appeals all agreed that those billing records do not exist. Why? Because those four doctors actually performed a review of Zellmer's medical records (a "record review", CP 77 (¶ 13)), instead of the "IME" that Mr. Zellmer thought it was. One can only draw that conclusion if the agency is allowed to narrowly construe a request as L&I did here. This was evident by the testimony of Ms. Chastain:

Q: So you just honed in on just IME only"?

A: Well, no. I honed in on IME and those doctors' names. And we didn't find an IME with those doctors.

Q: Okay. And so - and then you just stopped searching Then?

A: Yes.

CP 240.

The "existence" of an identifiable record should not be conditional based on the agency's interpretation and how it construes the request, that is, if it narrowly construes the request. That should never be so, especially in light of the PRA's mandates for broad disclosure of public records. See Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978) (the Act "is a strongly worded mandate for broad disclosure of public records"); RCW 42.56.030.

The gravamen of Division Two's unpublished opinion is this: while not binding, it does create an incentive (or an allowance, if you will) for all public agencies across the state to narrowly construe and interpret a request for records in such a way which will result in (1) an exclusion of the existing records from inspection and copying by the citizen requestor, and (2) an insulation of the agency from penalties for PRA violations because it can claim that no records exist when, like here, the requestor gives one incorrect piece of descriptive information to the agency.

Consequently, if the requestor gets one piece of information wrong when attempting to obtain a record he or she has never laid eyes on, then the agency can always claim the record "does not exist" because the actual existing record does not match exactly with the information given by the requestor; the agency therefore saves time and taxpayer dollars by closing

the request without having to conduct an adequate search--all because it was allowed to narrowly interpret the request.

Here is a real world hypothetical example of this point: Citizen requestor Joe Green makes a record request to the local sheriff's office for "the incident report by Officer Blue about the vehicle accident which occurred on the 2100 block of Main Street on January 9, 2020." But, although he didn't know it, Citizen Green was incorrect about which officer wrote the report; it was actually Officer Red. So after an initial search of the police database for that day, the agency determines that Officer Blue wrote no reports on that day so it responds to Citizen Green telling him the record does not exist based on the information he provided. By narrowly construing the request this would be so. But had the agency broadly construed the request and used the other descriptive information given by Citizen Green, they would have easily located the record he identified.

Now, granted, there will be some occasions where the record identified will be located by the agency regardless of how narrowly or broadly the agency construes the request; for example, asking an agency for an employee's time card for a specified day. But in most cases, the requestor will give as much information as he or she can, with the potential that one or two pieces of that information might be inaccurate. The agency should be tasked, then, with broadly construing the

request in order to then conduct an adequate and reasonable search for records under the standard previously enunciated by this court in 2011 in Neighborhood Alliance, supra.

Review of this issue is necessary. The public importance of this issue is evident when you consider the amount of public agencies across the state, some of which process many thousands of public record requests each year. The PRA itself is silent on the specific issue of whether an agency should construe the request itself broadly, but the legislative statement in RCW 42.56.030 that the PRA "shall be liberally construed" infers that agencies should in fact do so. Here, L&I failed to do that in Zellmer's case, thrice.

At the time of Zellmer's first request, there existed tangible billing and payment records of each of the four doctors in the three claim numbers given by Zellmer, all of which were in the same exact amounts as indicated by him. The Court of Appeals' conclusion that "the requested records did not exist" simply because Zellmer was misinformed about the service the doctors performed (i.e., record review instead of an IME) does not comport with the intent of the PRA "to provide full public access to public records." RCW 42.56.100.

Further, the appellate court's basis for its conclusion, namely, that "once Zellmer ceased asking for records relating to IME's, L&I produced the records he requested," Appendix A (Slip Op. at 7), is illogical considering the fact that regardless of

whether the doctors had billed for an IME service or other non-IME service, all of those bills are stored in the same location: the MIPS part of the ORION database. CP 194-95. L&I does not store medical billing records in any other system. Compare CP 193 (medical bills not stored in claim file). Likewise, the records of payments made to medical vendors (regardless of what service the doctor performed) is stored in L&I's EOS system. CP 117-18. Because L&I narrowly construed Zellmer's request, it did not search either of those locations. Instead, it went into the industrial claim file part of ORION--where medical bills and payment records are not stored. This should not be viewed as a proper response under the PRA.

Historically, this Court has defined terminology and has enunciated procedural standards for citizen requestors, public agencies, and reviewing courts to follow when the PRA itself is not so clear or is silent on the topic. See e.g., Hearst, 90 Wn.2d at 131-32 (PRA requires strict compliance); Yousoufian v. King County Exec., 152 Wn.2d 421, 433, 98 P.3d 463 (2004) (PRA penalties mandatory; amount discretionary); Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 460-63, 229 P.3d 735 (2010) (announcing three categories of factors for mandatory penalty determinations); Neighborhood Alliance, 172 Wn.2d at 719-725 (defining adequate search); Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 436-438, 300 P.3d 600 (2013) (establishing steps agency should take to properly respond to

PRA request); and Belenski v. Jefferson County, 186 Wn.2d 452, 378 P.3d 176 (2016) (defining when PRA one-year statute of limitations begins).

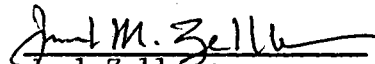
Along those same lines, this Court is respectfully asked to accept review of this case in order to establish the standard a public agency must follow when it reviews a request for public records under the PRA, namely, whether it is required to construe and interpret the request narrowly or broadly (or by some other standard) in light of the PRA's mandate of full public access to public records.

The unfortunate consequence of L&I's actions have been to deprive Mr. Zellmer, a citizen no different than any other, his right to "public inspection and copying" of the requested billing and payment records. RCW 42.56.070(1). Moreover, L&I's response that it had no records based on the information in Zellmer's request was false and given in bad faith. Equitable tolling should have been applied to Zellmer's first request. Millay v. Cam, 135 Wn.2d 193, 205-06, 955 P.2d 791 (1998) (holding equitable tolling doctrine should be applied when the circumstances show bad faith, deception, or false assurances by the defendant, and the exercise of due diligence by the claimant). And, violations of the PRA should have been found as to all three requests, including for an inadequate search.

6. CONCLUSION

The decision of the Court of Appeals should be reversed and this case remanded back to the superior court for further proceedings, to include the issue of an award of costs and penalties, including those incurred on review. RAP 12.1(c); RAP 14.1 et seq.

Dated this 9th day of November, 2020.


Joel Zellmer
Appellant/Petitioner

CERTIFICATE OF SERVICE/FILING

(Pursuant to GR 3.1)

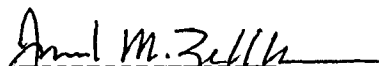
I, Joel Zellmer, certify that on the date below I deposited the foregoing document in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 pursuant to GR 3.1, and made arrangements for postage, addressed to:

Clerk, Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Alexander Jourevlev, WSBA #44640
Attorney for Defendant
800 5th Ave., Suite 2000
Seattle, WA 98104-3188

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

Dated at Walla Walla, Washington this 10th day of November, 2020.


Joel Zellmer

Appendix A

Appendix A

October 14, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOEL ZELLMER,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 53627-7-II

ORDER DENYING MOTION
FOR RECONSIDERATION


Appellant, Joel Zellmer, moves this court to reconsider its September 15, 2020 opinion.

After consideration, we deny the motion. It is

SO ORDERED.

Panel: Worswick, Melnick, Crusier.

FOR THE COURT:


Melnick, J.

October 14, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOEL ZELLMER,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 53627-7-II

ORDER DENYING MOTION
TO PUBLISH

Appellant, Joel Zellmer, moves this court to publish its September 15, 2020 opinion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Worswick, Melnick, Crusier.

FOR THE COURT:


Melnick, J.

September 15, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOEL ZELLMER,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 53627-7-II

UNPUBLISHED OPINION

MELNICK, J. — Joel Zellmer appeals the summary judgment dismissal of his lawsuit alleging that the Department of Labor and Industries (L&I) violated the Public Records Act (PRA), chapter 42.56 RCW, in regard to three of his records requests. Because his complaint is time barred pertaining to Zellmer’s first request and because L&I did not violate the PRA regarding his other two requests, we affirm.

FACTS

Zellmer collected workers’ compensation benefits for several years due to work-related injuries. Suspecting fraud, L&I started an investigation into Zellmer’s claims.¹ In 2010, L&I

¹ As background information, in 2010 a jury found Zellmer guilty of second degree murder for the drowning death of his 3 year old stepdaughter. *State v. Zellmer*, noted at 175 Wn. App. 1003, 2013 WL 2325665, at *3. The alleged motive of the drowning was to collect life insurance proceeds. *Zellmer*, 2013 WL 2325665, at *2. The State presented evidence that Zellmer had a history of fraudulent insurance claims. *Zellmer*, 2013 WL 2325665, at *2-3. The State also presented evidence that Zellmer was fraudulently collecting workers’ compensation benefits from L&I. *Zellmer*, 2013 WL 2325665, at *1. Zellmer’s former wife testified that he told her he had a doctor “in his back pocket” who would write anything Zellmer wanted to help him get L&I benefits. *Zellmer*, 2013 WL 2325665, at *1.

requested that four doctors review Zellmer's medical records; L&I did not request that the doctors perform an Independent Medical Examination (IME) on Zellmer.² Dr. Steven Fey and Dr. Dennis Stumpp performed a records review regarding one claim, Dr. H. Berryman Edwards performed a records review regarding another claim, and Dr. Alfred Blue performed a records review regarding a third claim.

I. ZELLMER'S RECORDS REQUESTS

Zellmer made four records requests to L&I.

A. First Request

On July 3, 2016, Zellmer requested:

1. All order(s) for the authorization of (4) Independent Medical Examinations by: Steven G. Fey, Ph.D., H. Berryman Edwards, M.D., Alfred I. Blue, M.D., Dennis Stumpp, M.D., M.S. These IMEs would of been authorized under one of these claims possible N767257, Y154479, Y480253.
2. All billing(s), [invoice] statements by each of the providers for the IMEs as [described] above in section 1 of this request.
3. All warrants of payments for each of the IMEs as [described] above in section 1 in this request. (Copy of check sent to provider for IMEs).

Clerk's Papers (CP) at 49. L&I sent a letter to Zellmer, seeking clarification whether his request related to "Independent Medical Examinations" performed by the four doctors. CP at 52. Zellmer did not respond when L&I tried to clarify what he was requesting.

Nevertheless, L&I began searching for the records. Laurel Chastain, a staff member in the public records unit, searched for responsive records. She sent the records request to the two L&I divisions that she determined would be most likely to have responsive records: The Insurance

² An IME is "[a]n objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition." WAC 296-23-302. IMEs "may only be conducted by department-approved examiners." WAC 296-23-302.

Services Claims Administration and Training Division and the Insurance Services Medical Information and Payment System Division. Neither division could locate the requested documents. The searches showed that none of the four providers conducted IMEs in the three claims Zellmer identified in his request.

L&I notified Zellmer on August 26, 2016, that it could not locate the records and that it closed his request. Zellmer did not respond.

B. Second Request

On October 6, 2016, Zellmer requested copies of "each pdf³ file . . . of each of the four forensic investigations under claims of Joel Martin Zellmer." CP at 60. Zellmer listed the names of the four doctors and the PDF files he was requesting. He also requested:

[I]tems beyond this to include authorization orders for each of these IMEs listed above doctors. I would also like a copy of any payments made to each of them.

The IMEs were done as part of a[n] L&I criminal investigation. Some of the claim numbers are the following N767257, Y154479, and Y480253. These payments to each of these doctors are:

1. Fey \$35,700.00
2. Edwards \$3,850.00
3. Blue \$5,400.00
4. Stumpp \$4,200.00

I would like a copy of each payment made and the order authorizing each payment/IME.

CP at 60.

L&I again asked Zellmer to clarify that his request was for documents relating to IMEs performed by the four doctors. Zellmer did not respond.

On December 23, 2016 L&I sent Zellmer another clarification letter, stating:

[Y]our request is being interpreted to be for paper copies of the following:

³ Portable Document Format.

Item 1: A copy of the following PDF files provided in public record request (PRR) number 76369:

- a. fey_20100804153223 .pdf
- b. edwards_20100804153654.pdf
- c. blue_20100804153836.pdf
- d. stumpp_20100804153259.pdf

Item 2: A copy of the following records from each Independent Medical Exam (IME) provider on your claims listed below:

- a. Authorization orders
- b. A report of any payments made

List of IME providers:

- Steven G. Fey
- Berryman Edwards
- Alfred Blue
- Dennis Stumpp

List of your claim numbers:

- N767257 • P196690 • X225608
- Y154479 • T108247 • Y110136
- Y480253 • X464295
- P124792 • Y453494

In response to **Item 1:** PRR 76369 is past retention and has been destroyed per our retention schedule. We only keep these types of records for two years. In order to search for the records with the programs, please identify what kind of records each of these files are and what kind of file they are a part of. For example: a Notice of Assessment in a claim investigation.

Please note that depending on the record type, these records may also be past retention with the business programs and may no longer be available.

Please provide the requested clarification by **January 10, 2017**, if I have not received a response regarding this item by this date, I will assume you want to cancel your request for this item.

In response to **Item 2:** We require time to locate, assemble, and scan any identified records. We will also be checking these materials, pursuant to the Revised Code of Washington (RCW) 42.56, to determine whether any of the information requested is statutorily exempt from disclosure and therefore unavailable for public inspection under Washington Law.

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We expect to mail the records to you by **January 27, 2017**.

CP at 66-67.

Zellmer responded that he was seeking “records that demonstrate authorization (by L&I) and payment of monies to the four Independent Medical Examiners listed in my request for public records.” CP at 69.

Public records unit staff member Mara Osborn reviewed the request and clarifications, and routed the request to the two divisions within L&I that she determined would be most likely to have responsive records: The Insurance Services Claims Administration and Training Division and the Insurance Services Health Services Analysis Division. She chose these divisions based on her knowledge and experience in searching for records in response to requests. She also wanted

to be sure there wasn't a document that maybe didn't live in MIPS^[4] or within that MIPS program. We have—the agency has a program titled MIPS as well as a system and they live within the health services analysis group. And so I had routed to them specifically so that if—because I had seen they'd pulled bills before. So I wanted to be very thorough and those were stretching out beyond just a copy of the claim file or what was in an automated system.

CP at 267.

A staff member from Insurance Services Claims Administration informed Osborn that employees in the program had checked multiple areas for records and stated that they had no responsive records. A Health Services Analysis employee stated that there did not seem to be any bills for any IMEs for the doctors or claims listed in Zellmer's request. Both divisions responded that they could not locate any responsive records.

On January 26, 2017, L&I mailed Zellmer a closing letter informing him that it had conducted a search but could not find responsive records because no IMEs existed and all but one

⁴ Medical Information Payment System.

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of the claim investigations for his claims had been destroyed per L&I's retention schedule. Zellmer did not respond.

C. Third Request

On February 4, 2017, Zellmer requested records on "[a]ny IMEs done between November 1, 2009 thru April 30, 2010." CP at 41. L&I assigned Forms and Records Analyst, Donna Desch, to Zellmer's request. Through prior searches for the same records by L&I, Desch was aware that there were no records relating to IMEs performed from November 1, 2009 through April 30, 2010. Nonetheless, Desch searched L&I's database and found no IMEs for this period.

L&I notified Zellmer on February 10, 2017 that it had searched L&I's records and found no responsive records. Zellmer did not respond.

D. Fourth Request

On February 5, 2017, Zellmer sent a fourth records request, asking for the following records:

- 1) Annual Claimant History Profile. I would like it for the years of 2007 thru 2011.
- 2) Firm Statement of Awards. I would like it for the years of 2007 thru 2011.
- 3) Remittance Advices. I would like it for the years of 2007 thru 2011.

I would like these records from any claim number that is assigned to Joel M. Zellmer. These reports are maintained in your electronic system called Enterprise Output Solution (EOS). The claim numbers are N767257, Y154479, and Y480253.

CP at 110. In this request, Zellmer removed any reference to IMEs. L&I provided Zellmer with 158 pages of records, including records relating to Drs. Fey, Berryman, Stumpp, and Blue.

II. TRIAL COURT PROCEEDINGS

On January 12, 2018, Zellmer filed a complaint against L&I, alleging L&I violated the PRA in how it responded to his first three records requests. L&I moved for summary judgment,

arguing it timely responded to Zellmer's requests, conducted thorough and adequate searches, and found no responsive records to Zellmer's requests. L&I further argued that Zellmer's complaint relating to his first request was barred by the statute of limitations. Zellmer responded that the statute of limitations should be tolled based on the equitable tolling doctrine.

The trial court granted L&I's motion for summary judgment, dismissing all of Zellmer's claims. The court also denied Zellmer's subsequent motion for reconsideration. He appeals.

ANALYSIS

Zellmer contends the trial court erred in granting L&I's motion for summary judgment because L&I violated the PRA by failing to conduct an adequate search of responsive records in response to his first three requests. We disagree. L&I properly responded to Zellmer's three requests by attempting to clarify what Zellmer was requesting and then determining the records requested did not exist. In coming to this conclusion, we are mindful that once Zellmer ceased asking for records relating to IME's, L&I produced the records he requested.

I. STANDARD OF REVIEW

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment is appropriate "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We also review agency actions under the PRA de novo. RCW 42.56.550(3).

II. LEGAL PRINCIPLES

"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)). Its purpose is to increase governmental transparency and accountability by making public records accessible to Washington's citizens. *John Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). We liberally construe the PRA to promote the public interest. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); RCW 42.56.030.

Under RCW 42.56.070(1), a government agency must disclose public records upon request unless a specific exemption in the PRA applies or some other statute applies that exempts or prohibits disclosure of specific information or records. *Ameriquest Mortg. Co. v. Office of the Att'y Gen.*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013). "A public records request must be for identifiable records." RCW 42.56.080(1). A person requesting records must identify or describe the documents with reasonable clarity to allow the agency to locate them. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004), *superseded by statute on other grounds as stated in John Doe ex rel. Roe*, 185 Wn.2d 363. The PRA does not "require public agencies to be mind readers." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). It is not a PRA violation when an agency does not provide a requester a record that does not exist. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 739, 218 P.3d 196 (2009).

To adequately disclose documents, an agency must conduct "a sincere and adequate search for records." *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). An adequate search is one that is "reasonably calculated to uncover all relevant documents." *Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). "[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered." *Neigh. All.*, 172 Wn.2d at 720. "What will be considered reasonable will depend on the facts of each case." *Neigh. All.*, 172 Wn.2d at 720. The agency

bears the burden of showing its search was adequate. *Neigh. All.*, 172 Wn.2d at 721. Because the PRA considers the failure to properly respond as a violation, the failure to adequately search is also considered a violation. *Neigh. All.*, 172 Wn.2d at 721.

III. FIRST REQUEST

Zellmer first argues that L&I did not conduct a reasonable search for the records in his first request. L&I responds that this argument is time barred. We agree with L&I.

A. Statute of Limitations

The PRA establishes a one-year statute of limitations for judicial review of agency actions. RCW 42.56.550(6) provides, “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” *Belenksi v. Jefferson County*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016), clarified that the statute does not limit triggering events to those listed in RCW 42.56.550(6), recognizing “the legislature intended to impose a one year statute of limitations beginning on an agency’s final, definitive response to a public records request.” This final response includes a letter sent to the requester notifying him or her that the request has been closed. *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 471, 464 P.3d 563 (2020).

L&I notified Zellmer on August 26, 2016, that it could not locate the records and that the request was closed. Zellmer did not file his complaint until January 12, 2018. Because the complaint was filed more than one year after the matter was closed, Zellmer’s claim regarding his first request is time barred.

B. Equitable Tolling

Zellmer argues the statute of limitations was tolled based on equitable tolling. “Equitable tolling permits a court to allow an action to proceed when justice requires it, even though a

statutory time period has nominally elapsed.” *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 760, 183 P.3d 1127 (2008) (internal quotation marks omitted) (quoting *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653 (2001)). A statute of limitations may be tolled for equitable reasons when the circumstances show bad faith, deception, or false assurances by the defendant, and the exercise of due diligence by the claimant. *Millay v. Cam*, 135 Wn.2d 193, 205, 955 P.2d 791 (1998). The party asserting that equitable tolling applies bears the burden of proof. *Price v. Gonzalez*, 4 Wn. App. 2d 67, 77, 419 P.3d 858 (2018). “Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect.” *Price*, 4 Wn. App. 2d at 76.

Zellmer alleges L&I did not adequately search for records. But “the failure to conduct a reasonable search or the failure to follow policies in a search does not necessarily constitute bad faith.” *Faulkner v. Dep’t of Corr.*, 183 Wn. App. 93, 102, 332 P.3d 1136 (2014). “[B]ad faith incorporates a higher level of culpability than simple or casual negligence.” *Faulkner*, 183 Wn. App. at 103. Zellmer presents no evidence that L&I acted in bad faith or engaged in any deception. For this reason, we conclude equitable tolling did not toll the statute of limitations. Zellmer’s allegations regarding to his first request were time barred and properly dismissed.

IV. SECOND REQUEST

Zellmer next argues that L&I did not conduct an adequate search for the records requested in his second request. We disagree. L&I complied with the PRA when it discovered no records existed in response to Zellmer’s second request.

Zellmer requested PDF files for investigations from Drs. Fey, Edwards, Blue, and Stumpp. He specifically requested “items . . . to include authorization orders for each of these IMEs listed above.” CP at 60. L&I attempted to clarify if Zellmer wanted IME information on the four

doctors. Zellmer responded that he was seeking “records that demonstrate authorization (by L&I) and payment of monies to the four Independent Medical Examiners listed in my request for public records.” CP at 69.

L&I mailed Zellmer a closing letter informing him that it had conducted a search but could not find responsive records because there were no IMEs on file and all but one of the claim investigations for his claims had been destroyed per L&I’s retention schedule. This response satisfied the PRA.

In addition, L&I performed an adequate search. Zellmer repeatedly informed L&I that he wanted IME records from the four doctors. L&I attempted to clarify Zellmer’s request. After searching multiple divisions and multiple locations, L&I found no IMEs records from the four doctors. “[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.” *Neigh. All.*, 172 Wn.2d at 720. L&I did so in this case. Thus, L&I met its burden to show that its search was adequate, and the requested records did not exist. The trial court did not err by dismissing in summary judgement Zellmer’s allegations regarding his second request.

V. THIRD REQUEST

Zellmer next argues that L&I did not conduct an adequate search for the records requested in his third request. We disagree. L&I complied with the PRA when it discovered no records existed in response to Zellmer’s request.

On February 4, 2017, Zellmer requested records on “[a]ny IMEs done between November 1, 2009 thru April 30, 2010.” CP at 41. Again, L&I searched for IME records, but since there were no IMEs performed, there were no records to be found. L&I did not violate the PRA. In

addition, L&I's search was adequate. The trial court did not err in dismissing in summary judgment allegations relating to Zellmer's third request.

VI. MOTION FOR RECONSIDERATION

Zellmer contends the trial court erred in denying his motion for reconsideration. We disagree.

We review a trial court's decision on a motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In light of our conclusion that the trial court properly dismissed all of Zellmer's claims, we conclude that the court's denial of Zellmer's motion for reconsideration was based on tenable grounds and was therefore not an abuse of its discretion.

VII. ATTORNEY FEES AND COSTS

Zellmer requests an award of attorney fees and costs on appeal. He cites no authority supporting an award of attorney fees for a pro se litigant. Instead, he cites the PRA's attorney fee provision, which provides for an award of costs, including attorney fees, to any person who prevails against an agency in a PRA action and RAP 18.1. But a nonlawyer litigating a PRA action incurs no attorney fees and is not entitled to a fee award under RCW 42.56.550(4). *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011). Moreover, Zellmer is not the party who has substantially prevailed on review; therefore, he is not entitled to an award of fees or costs incurred on appeal.

VIII. COSTS BELOW AND PENALTIES

Lastly, Zellmer asks this court to remand with instructions for the trial court to award him his costs incurred below and penalties. Because we conclude that L&I did not violate the PRA, no such award is warranted.

CONCLUSION

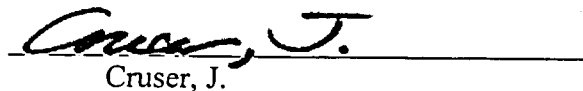
Because Zellmer's complaint is time barred pertaining to his first records request and because L&I did not violate the PRA regarding his other two requests, the trial court did not err in dismissing Zellmer's complaint. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Melnick, J.

We concur:


Worswick, P.J.


Cruiser, J.