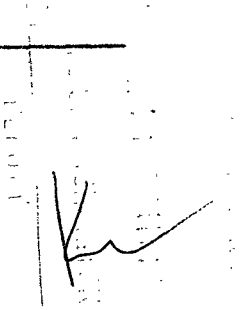
No. 42774-5-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DEREK E. GRONQUIST,

Appellant/Plaintiff,



V.

DEPARTMENT OF CORRECTIONS,

Respondent/Defendant.

CORRECTED OPENING BRIEF

On appeal from the Clallam County Superior Court
The Honorable S. Brooke Taylor

Derek E. Gronquist
#943857 C-404-U
Monroe Correctional Complex
P.O. Box 888/TRU
Monroe, WA 98272

pm 4/9/12

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STATUTES & RULES

ASSIGNMENT OF ERROR

1. The trial court erred in denying Mr. Gronquist's motion to vacate based upon the Department of Corrections misrepresentations and misconduct.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a trial court abuse its discretion by denying a motion to vacate without weighing the factors required by Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968), and instead deferring to the presumptive correctness of an order that rests entirely upon intentional deception and false statements of fact?

2. Did the trial court abuse its discretion by concluding that the Public Records Act authorized the Department of Corrections to "categorically" refuse to search for and disclose requested public records?

3. Did the Department of Corrections have standing to claim, or the trial court to find, that one of the Public Records Act's exemptions applied to information contained in a public record that neither of them ever reviewed?

4. Whether substantial justice requires this case to be decided upon its real merits regarding

the Department of Corrections failure to search for, disclose, and subsequent destruction of, a requested public record; when the Department of Corrections and its attorney withheld those facts from Mr. Gronquist and obtained a judgment based upon a fictitious statutory exemption defense?

STATEMENT OF THE CASE

On August 9, 2007, Appellant Derek E. Gronquist submitted a public records request to the Department of Corrections (DOC or Department) Clallam Bay Corrections Center (CBCC). CP 366. That request sought, in relevant part:

> the following records concerning an assault and/or extortion attempt that happened in me at the Clallam Bay Corrections Center on June 17, 2007:
>
> . . .
>
> 4. The surveillance video of C-Unit from 6:00 a.m. to 2:00 p.m. of June 17, 2007; [and]
>
> 5. The surveillance video of the chow hall used for C-Unit inmates on and for the Breakfast meal on June 17, 2007; . . . .

Id.

Michael Holthe, CBCC's Public Disclosure Coordinator, responded to the request by acknowledging its receipt, and informing Mr. Gronquist that:

> It is anticipated that it may take up to twenty (20) business days to **review and assemble** the documentation requested. . . . You will be notified of the copying charges once the documentation is assembled.

CP 369-370 (emphasis added).

Twenty days later, Denise Larson, another CBCC Public Disclosure Coordinator, informed Mr. Gronquist that it may take an additional 20 business days "to **review and assemble**" the records requested, and that he "will be notified . . . once the documentation is assembled." CP 376 (emphasis added). On September 24, 2007, Mr. Holthe notified Mr. Gronquist that responsive records had been assembled, and requested $23.80 for copies of the records and mailing charges. CP 378. Mr. Gronquist tendered payment in full. CP 380.

On October 26, 2007, Mr. Holthe mailed 96 pages of records to Mr. Gronquist. CP 382. Included with the mailing was a "Denial of Disclosure of Public Records" form stating that the requested video surveillance recordings had been determined to be exempt under RCW 42.56.420(2). CP 383.

The Department's withholding of the requested video surveillance recordings resulted in the

filing of this lawsuit seeking to compel disclosure and sanction the agency. CP 435-439. The Department's Answer to the complaint "further allege[d]" that the video recordings were determined to be exempt under RCW 42.56.240(1). CP 432. As an affirmative defense, DOC claimed that it "acted in good faith **in responding to** Plaintiff's public disclosure requests . . . [and] [a]ny documents not produced were withheld under **lawfully cited** exemptions." CP 432-433 (emphasis added).

Mr. Gronquist filed a motion to show cause claiming that the surveillance recordings were not exempt under RCW 42.56.420(2). CP 348-349. The Department did not respond to that motion. On July 17, 2009, the Clallam County Superior Court entered on Order to Show Cause requiring DOC to establish why "[d]isclosure of the video surveillance recordings requested by Plaintiff's August 9, 2007, public records request should not be compelled." CP 326-327. DOC responded to the order by claiming that the surveillance recordings contained a plethora of sensitive "intelligence information" that is exempt from disclosure under RCW 42.56.240(1)'s "law enforcement" exemption.

CP 185-187 & 191-194.

On December 18, 2009, the superior court entered an order finding that the "Defendant **properly claimed** 42.56.240(1) as an exemption for disclosing surveillance video tapes to the Plaintiff." CP 125-126 (emphasis added). Based upon that finding, the court held that the "Defendant **properly withheld** surveillance video tapes from disclosure pursuant to RCW 42.56.240(1)." Id.

The June 17, 2007, assault of Mr. Gronquist resulted in the filing of a separate action alleging that DOC and CBCC officials failed to protect Mr. Gronquist from foreseeable or known harms. Derek E. Gronquist v. Faye Nicholas, et al., United States District Court, Western District of Washington at Tacoma, No. C10-5374 RBL/KLS. Because the video surveillance recordings at issue in this case were also relevant to the failure-to-protect case, Mr. Gronquist requested the Department to produce them through discovery in that case. CP 37 & 41. Like this case, DOC refused to produce the tapes without stating its reasons therefore. Ids. DOC then moved for summary judgment. The federal

court found that the requested video surveillance recordings were relevant to the action, and entered an order staying summary judgment through the discovery process. CP 44-51. Thereafter, the Department revealed -- **for the first time ever** -- that the surveillance recordings "were not preserved" and had been "recorded over in the normal course of business . . . ." CP 54 & 58-59. The revelation that the surveillance recordings had been destroyed prompted the taking of depositions.

Denise Larson testified that CBCC officials and representatives from the Attorney General's Office had several conversations regarding the surveillance videos; some of which occurred around the time of the show cause hearing in this case. CP 67-71. They discussed whether the surveillance recordings had been searched for, located, and secured in response to Mr. Gronquist's public records request. Id. No determination could be made of whether Mr. Holthe made any attempt to locate, review, or secure the video recordings. CP 62-67. Officials were unable to locate any records indicating that a search had been done for the recordings, and no copy of the recordings was

ever placed in the agency's public records file as required by Department policy. Id. The only determination that was conclusively made was that the requested surveillance recordings had been destroyed. CP 69-70.

Two CBCC officials reviewed the surveillance recordings pursuant to the internal investigation of the June 17, 2007, assault of Mr. Gronquist. CP 77-79, 81 & 87-89. Both officials testified that the surveillance video came from a single static overhead camera that did not contain **any** of the special capabilities asserted by DOC's Prison Division Director in response to the trial court's order to show cause. Compare CP 81-83 & 89-90 with 289-292.

On August 5, 2011, Mr. Gronquist filed a motion to vacate the trial court's December 18, 2009, order; arguing that the Department's misrepresentations regarding the content of the surveillance recordings, and its failure to search for, locate, review, identify, and preserve the requested recordings required vacation of the order. CP 19-96. The Department opposed Mr. Gronquist's motion to vacate, asserting that the order was not based upon any misrepresentation,

and that the Department is under no legal duty to search for, identify, review, or preserve prison surveillance recordings based upon the agency's belief that the records are categorically exempt under RCW 42.56.240(1). CP 14-17. On September 28, 2011, the trial court entered an order denying Mr. Gronquist's motion to vacate, holding that its previous "[o]rder was correct, in that video recordings are categorically exempt from disclosure." CP 11. A timely notice of appeal was filed on October 28, 2011. CP 8.

ARGUMENT

The Public Records Act (PRA or 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); RCW 42.56 et seq. The PRA requires state agencies to disclose any public record upon request. RCW 42.56.070. When an agency fails to properly respond to a public records request, or refuses to permit inspection of a public record, the requester may maintain an action to compel disclosure and penalize the agency. RCW 42.56.550; Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 727, 261 P.3d 119 (2011).

The court is required to conduct **de novo** review of the agency's actions "tak[ing] into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to the public official or others." RCW 42.56.550(3). The Act mandates that its provisions "be liberally construed to promote this public policy." RCW 42.56.030. The burden of proof rests upon the agency to establish that its conduct complies with the Act. RCW 42.56.550(1).

CR 60(b) authorized the trial court to vacate any order obtained by "misrepresentation, or other misconduct of an adverse party." CR 60(b)(4). Appellate review of a trial court's denial of a motion to vacate is for abuse of discretion. Mitchell v. Wash. Inst. of Pub. Policy, 153 Wn.App. 803, 821, 225 P.3d 280 (2009). A trial court abuses its discretion when its decision is "manifestly unreasonable, based on untenable grounds, or based on untenable reasons." Id. (Citation omitted). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or

was reached by applying the wrong legal standard." Id. "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' and arrives at a decision 'outside the range of acceptable choices.'" Id.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO VACATE A PRIOR ORDER BASED ENTIRELY UPON THE MISREPRESENTATIONS OF THE DEPARTMENT REGARDING THE FACTS OF THIS CASE

The trial court's refusal to vacate its December 18, 2009, order constitutes an abuse of discretion. The decision was based upon the untenable conclusion that the previous "[o]rder was correct, in that video recordings are categorically exempt from disclosure." CP 11.

By focusing only upon the presumptive correctness of its previous ruling, rather than the nature and degree of the Department's misconduct, the trial court applied the wrong legal standard. Washington law requires that any "determination [of a motion to vacate] **must be based upon** "weighing of factors and values such as the complexity of the issues, the length of the trial, the degree and nature of the prejudicial

incidents, the nature and amount of the verdict, the cost of retrial, the probable results, the desirability of concluding litigation, and such other circumstances as may be apropos to the particular situation."" Roberson v. Perez, 123 Wn.App. 320, 341, 96 P.3d 420 (2004), aff'd on other grounds, 156 Wn.2d 33 (2005) (quoting Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968)) (emphasis added).

Rather than apply the Olpinski factors to the facts of this case, the trial court abused its discretion by simply deferring to the presumptive correctness of an order that rests entirely upon these deceptive and false statements of fact:

> 1. The Department searched for the requested video recordings;
>
> 2. The Department reviewed the video recordings and determined they contained potentially exempt information;
>
> 3. The surveillance recordings existed at the time of the Department's claim of exemption or the show cause hearing; and
>
> 4. That disclosure of the specific video recordings requested would reveal a plethora of highly sensitive intelligence information regarding the location, capabilities and weaknesses of the Department's video surveillance system.

When a party intentionally withholds facts relevant to an action, or obtains a judgment based

upon deception and false statements of fact, vacation of that order is clearly warranted. See Mitchell, 153 Wn.App. at 825 (holding that a trial court properly granted a motion to vacate based upon a party's intentionally deceptive and false statements of fact "without considering the probable effect of the misconduct on the trial's outcome."); Roberson, 123 Wn.App. at 342 (nondisclosure of facts relevant to action warrants vacation of judgment); Marriage of Maddix, 41 Wn.App. 248, 253, 703 P.2d 1062 (1985) (same).

The trial court also applied the wrong legal standard to conclude that public records can ever be "categorically exempt from **disclosure**." CP 11. The Supreme Court has clearly and repeatedly held that public records are **never** exempt from disclosure:

> Records are either "disclosed" or "not disclosed." A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.
>
> Disclosed records are either "produced" (made available for inspection and copying) or "withheld" (not produced). A document may be lawfully withheld if it is "exempt" under one of the PRA's enumerated exemptions. A document not covered by one of the exemptions is, by contrast,

> "nonexempt." Withholding a nonexempt document is "wrongful withholding" and violates the PRA.
>
> **A document is never exempt from disclosure**; it can be exempt only from production.

Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010) (citation omitted, emphasis added).

To properly disclose a public record, the agency must search for the record and identify it "with particularity" to the requester.[1] Neighborhood Alliance, 172 Wn.2d at 721; Sanders, 169 Wn.2d at 854-856. Failure to properly disclose a requested public record constitutes a "silent withholding" that is "clearly and emphatically prohibited by the PRA." Progressive

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[1] In PAWS the Supreme Court held that "identifying information need not be elaborate, but should include the type of record, it's date and number of pages, and unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence." PAWS, 125 Wn.2d at 271 n.18. Recently, the Court expanded this standard to require agencies to provide detailed privilege logs. Rental Association v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009). The Department's response fails to comply with these mandates. See CP 383.

Animal Welfare Society (PAWS) v. University of Washington, 125 Wn.2d 243, 270, 884 P.2d 592 (1994). The trial court applied the wrong legal standard and, not surprisingly, reached the erroneous conclusion that public records can be "categorically exempt from disclosure." CP 11.

The trial court's decision also improperly assumed that the Department could assert, or the court could find, a statutory exemption for a record that neither of them ever reviewed. In DeLong v. Parmelee, 157 Wn.App. 119, 160-162 & 167, 236 P.3d 936 (2010), this Court held that it is impossible to determine if an exemption applies without a review of the record at issue. Here, neither the superior court nor the Department ever reviewed the actual surveillance tapes requested. The trial court, therefore, could not have found that an exemption applied to a record it never reviewed.

For similar reasons, the Department lacked any good faith basis to claim that an exemption applied to a record it never reviewed, and had actually destroyed prior to the assertion of that exemption. Rental Association, 165 Wn.2d at 540 (concluding that failure to provide an indication

of "whether there is a **valid basis** for a claimed exemption for an individual record" would "defeat[] the very purpose of the PRA.") (Emphasis added); CR 11 (requiring defenses to be "well grounded in fact"); RCW 4.32.170 (authorizing courts to strike "sham, frivolous and irrelevant answers and defenses"). The trial court applied an incorrect and unprecedented standard to conclude that it was "correct" in finding that a statutory exemption applied to information in a public record that neither it, nor the Department, ever reviewed, and which had -- **prior to that decision** -- been destroyed by the agency.

Application of the correct legal standards to the facts of this case demonstrates that substantial justice has not been served; requiring vacation of the December 18, 2009, order. First and foremost, the nature and degree of the Department's misconduct is extreme:

> * The Department lied when it informed Mr. Gronquist that it was "assembling and reviewing" the surveillance recordings;
>
> * The Department lied when it claimed that, based upon its review of the surveillance recordings, it had determined they contained exempt information;

* The Department failed to properly identify the requested recordings;

* The Department failed to provide a proper explanation of how an exemption applied to the records;

* The Department destroyed the surveillance recordings after receiving Mr. Gronquist's public records request;

* The Department withheld the fact that it had destroyed the surveillance recordings; and

* The Department and Attorney's employed by the Washington State Attorney General's Office manufactured a false statutory exemption defense in a -- **successful** -- attempt to escape liability for its conduct.

The above referenced facts -- **the real facts of this case** -- clearly entitle Mr. Gronquist to a judgment as a matter of law and the imposition of substantial penalties against the Department. See Neighborhood Alliance, 172 Wn.2d 702 (2011) (inadequate search for and subsequent destruction of public records requires award of costs and penalties); PAWS, 125 Wn.2d 243, 270-271 (1994) (failure to properly identify withheld records violates the PRA); Sanders, 169 Wn.2d 827, 860 (2010) (failure to properly explain claim of exemption to requester requires award of costs, fees, and increased penalty); O'Neill v. City of Shoreline, 145 Wn.App. 913, 936 n.64, 187 P.3d 822

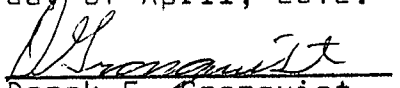
(2008) (destruction of requested public records requires award of penalties); Yacobellis v. Bellingham, 55 Wn.App. 706, 710, 715-716, 780 P.2d 272 (1989) (same). Mr. Gronquist's probability of success on these claims is high.

Deciding the real merits of this case will have only a slight impact on judicial resources. The previous order was decided through a brief show cause hearing; there was no trial, witnesses, or jurors. Any new hearing will be similarly brief, especially considering the facts as we now know them. Basic notions of fairness and justice should allow this case to be decided upon its real merits, and require vacation of a judgment that is based exclusively upon deception and lies.

CONCLUSION

For the foregoing reasons, Mr. Gronquist requests this Court to reverse the trial court, vacate the December 18, 2009, order, and remand this case to the superior court for a hearing upon the real facts and issues in this case. Mr. Gronquist also requests the award of costs incurred on appeal.

Dated this 2nd day of April, 2012.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed envelope in the internal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Corrected Opening Brief.

Said envelope(s) was addressed to:

Brian J. Considine
Assistant Attorney General
P.O. Box 40116
Olympia, WA 98504; and

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

Dated this 6th* day of April, 2012.

Derek E. Gronquist
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Monroe Correctional Complex
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*On April 6, 2012, I presented this mailing to MCC/TRU officers Patton and Kemp for processing as legal mail. They refused to process it until April 6, 210R, which is a violation of DOC policy.