COA No. 33163-6-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
HONORABLE JAMES M. TRIPLET

OPENING BRIEF OF APPELLANT

STEVEN P. KOZOL
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INTRODUCTION

Under the Public Records Act, an agency must produce an identifiable record in its entirety when requested, unless all or a portion of the record is claimed to be exempt from production. When an agency repeatedly confirms that a specific record is requested, and it knows the record is comprised of more than one page, the agency cannot silently withhold some pages of the record and then claim to have produced the record.

An agency must conduct an adequate search for the requested records, which includes searching locations where the record could reasonably exist. Once an agency confirms a request for an identifiable record, but fails to produce the entirety of the record, the agency cannot modify the specific record request after the fact in an attempt to insulate itself from a violation of the Public Records Act.

An agency violates the Act by destroying original responsive records after they were requested, but before the request has been resolved through completion of judicial review.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in granting dismissal of Plaintiff's claims and denying Plaintiff's CR 59 motion for reconsideration.

Assignment of Error No. 2: The trial court erred in denying Plaintiff's motion for CR 56(f) continuance.

Assignment of Error No. 3: The trial court erred in failing to grant Plaintiff's motion to strike Defendant's irrelevant evidence.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

Issue No. 1: Did the agency's production of silently withheld records after litigation commenced vitiate the agency's violation of the PRA?

Issue No. 2: Did the agency silently withhold records in violation of the PRA?

Issue No. 3: Did the agency's failure to claim an exemption on withheld records violate the PRA?

Issue No. 4: Did the agency's failure to conduct an adequate search for records violate the PRA?

Issue No. 5: Did the agency's unauthorized modification of Plaintiff's records requests violate the PRA?

Issue No. 6: Did the agency's destruction of requested records violate the PRA?

Issue No. 7: Did a genuine dispute of material fact of 23 records destructions preclude summary judgment?

Issue No. 8: Did a genuine dispute of material fact as to usage of records preclude summary judgment?

Issue No. 9: Should Plaintiff be permitted to conduct discovery as to the agency's possible bad faith?

Assignment of Error No. 2:

Issue No. 1: Should Plaintiff's motion for CR 56(f) continuance have been granted?

Assignment of Error No. 3:

Issue No. 1: Should Plaintiff's motion to strike Defendant's evidence have been granted?

STATEMENT OF THE FACTS

On February 8, 2012, Plaintiff/Appellant Steven P. Kozol submitted 31 separate Public Records Act requests to Defendant/Respondent Washington Department of Corrections (DOC) seeking any and all records of 31 different, individually numbered inmate grievances filed within the Department. Each separate written request specifically asked for the original grievance/complaint form. Clerk's Papers (CP) 42-71.

On February 17, 2012, DOC Public Disclosure Specialist Terry Pernula responded to Mr. Kozol by letter, acknowledging receipt of the 31 separate requests and assigning them tracking numbers PDU-18880 through PDU-18910. CP 72-73.

On April 2, 2012, the DOC notified Mr. Kozol that there were no records responsive to request no. PDU-18880, and closed the request. CP 77. As to the remaining 30 requests, the DOC produced between April 2, 2012 to April 16, 2012 what it purported to be all responsive records in their entirety by emailing the records to Mr. Kozol's designated email account, and memorializing each record production in 30 separate letters sent to Kozol via

U.S. Mail. Specifically, each of DOC's production letters expressly confirmed that Mr. Kozol had sought "the original complaint form." CP 80-150.

With assistance of a third party, Mr. Kozol had the e-mailed records forwarded directly to his attorney, Michael C. Kahrs, for review. It took several months of conferring with his attorney, but Plaintiff eventually learned through conversations with Attorney Kahrs that the Department had not identified or produced all responsive pages in all 31 requests. CP 177-95.

Mr. Kozol submitted follow-up requests to the Department on November 22, 2013 and February 1, 2014 notifying the DOC that it had not produced, at a minimum, the second/back page of each original grievance/complaint form he had requested. Despite Mr. Kozol's specific follow-up requests, the Department never produced the records pages, never indicated it would search for the record pages, and never identified that the pages had been destroyed. CP 222-26.

Needing these records, Mr. Kozol filed suit, followed by a first amended complaint on January 8, 2014 to compel production of these records. CP 11-16. On April 10, 2014, the Department produced four (4) record pages that had been silently withheld in request no. PDU-18880. CP 78. However, the Department never produced any of the silently withheld second/back pages of the 31 original grievance/complaint forms specifically requested by Mr. Kozol. CP 232.

PROCEDURAL HISTORY

On January 30, 2014, the Defendant filed its Answer. CP 17-22. On May 28, 2014, the Defendant filed a motion for Mr. Kozol to "show cause" that the DOC had violated the Public Records Act. CP 23-156. In its motion, Defendant argued that it did not violate the PRA, that it conducted an adequate search, and that it did not violate the PRA in bad faith. CP 23-32.

Plaintiff filed its opposition to Defendant's "show cause" motion on June 5, 2014 (GR 3.1). Mr. Kozol argued that the DOC violated the PRA by (a) silently withholding the second/back page of each requested original complaint/grievance form, and (b) by unlawfully destroying the silently withheld records. CP 204-08. Mr. Kozol also argued that the court should not make any determination as to agency bad faith or adequacy of its records search until discovery had been completed; and he moved for a CR 56(f) continuance to complete discovery. CP 208-12. Further, Mr. Kozol argued that DOC's failure to adequately search for the requested records could not be vitiated by now modifying Mr. Kozol's clear records requests. CP 212-15. Mr. Kozol also filed a supplemental memorandum arguing further authority for the court to find DOC silently withheld and failed to adequately search for the requested records. CP 164-65.

Plaintiff filed a supplemental memorandum on his CR 56(f) motion, arguing that DOC's claim of not using the withheld second/back pages was unavailing, as prima facie evidence showed

the record pages were in fact used, and thus were public records responsive to the 31 requests for original grievance/complaint forms; Kozol also argued he should be afforded time to conduct adequate discovery to rebut DOC's evidence. CP 300-05.

The Department responded by reasserting its argument that the second/back pages of original grievance forms are never used by inmates or agency staff and therefore were not responsive to Mr. Kozol's requests. CP 326-28.

On October 17, 2014, the court issued a letter opinion finding that the DOC did not violate the PRA, denying Plaintiff's CR 56(f) motion for continuance, and declining to address -- due to lack of PRA violation -- whether the agency acted in bad faith. CP 354-64. On November 21, 2014, the court entered an order granting Defendant's motion to show cause, dismissing Plaintiff's claims with prejudice, and denying Plaintiff's motion for continuance. CP 457-61.

Plaintiff filed a timely CR 59 motion for reconsideration in which he argued (1) Defendant's production of responsive records after litigation commenced rendered Plaintiff the prevailing party; (2) Defendant's admission that it knew it overlooked responsive pages precluded dismissal; (3) Defendant's unlawful destruction of responsive records violated the PRA; (4) Defendant was required to produce the entirety of the requested records absent a claimed exemption; (5) Defendant's search for records was inadequate; (6) a genuine dispute of

material fact of records destruction precluded summary judgment; (7) a genuine dispute of material fact of records usage precluded summary judgment; (8) Plaintiff's injunctive relief claim should not have been dismissed. CP 365-91.

On February 4, 2015, the court issued a memorandum decision denying reconsideration. CP 462-67. On March 13, 2015 the court entered an order on reconsideration, denying Mr. Kozol's CR 59 motion. CP 468-69. Mr. Kozol appeals.

ARGUMENT

A. The Trial Court Erred In Granting Dismissal Of Plaintiff's 31 Separate PRA Claims

1. CR 12(c) / summary judgment / CR 59 standard of review

The Department filed a motion to "show cause", supported by evidence outside the pleadings. CP 23-156. The trial court considered this evidence outside the pleadings. CP 457. Therefore, the show cause motion, which was essentially a dispositive CR 12(c) motion, was converted to a motion for summary judgment. Civil Rule 12(c). See St. Yves v. Mid State Bank, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988); P.E. Systems, LLC v. C.P.I. Corp., 176 Wn.2d 198, 206, 289 P.3d 638 (2012).

On appellate review, agency actions challenged under the PRA are reviewed de novo. Cornu-Labat v. Hospital Dist. No. 2 Grant County, 177 Wn.2d 221, 228, 298 P.3d 741 (2013). In a PRA case, when the record consists of only affidavits, memoranda of law, and other documentary evidence, the appellate court is

not bound by the superior court's factual findings. West v. Port of Olympia, __Wn.App.__, 333 P.3d 488, 490 (2014).

As part of the summary judgment proceedings, the ruling denying CR 59 reconsideration is also reviewed de novo. Rodriguez v. City of Moses Lake, 158 Wn.App. 724, 728, 243 P.3d 552 (Div.3 2010) ("Where a trial court grants summary judgment and then denies reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review.") (citing Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 675 n.6, 911 P.2d 1301 (1996)). See also Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1988)(de novo review standard applies to "all trial court rulings made in conjunction with a summary judgment motion.").

2. Defendant's Production of Responsive Records After Litigation Commenced Rendered Plaintiff the Prevailing Party, Precluding "Show Cause" Dismissal

The Defendant produced responsive records to Plaintiff's request no. PDU-18880 only after this lawsuit was commenced. CP 78. As a matter of law, this action cannot be dismissed merely because the DOC produced silently withheld records after Mr. Kozol filed suit. A PRA claimant "prevails" against an agency if the agency wrongfully withheld the documents. Germeau v. Mason County, 166 Wn.App. 789, 811, 271 P.3d 932, review denied, 174 Wn.2d 1010, 281 P.3d 686 (2012).

Under the PRA, an agency cannot preclude a requestor from attaining prevailing party status by merely voluntarily producing the requested documents after a lawsuit was filed. "Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties." West v. Thurston County, 144 Wn.App. 573, 581, 183 P.3d 346 (2008).

As the prevailing party compelling disclosure, Plaintiff is entitled to all costs. RCW 42.56.550(4); Robbins, Geller, Rudman & Dowd, LLP v. State, 179 Wn.App. 711, 736, 328 P.3d 905 (2014). Additionally, Plaintiff would be allowed statutory penalties upon his showing the DOC acted in bad faith. Francis v. Dep't of Corr., 178 Wn.App. 42, 313 P.3d 457 (2013), review denied, 180 Wn.2d 1016, 327 P.3d 55 (2014); Faulkner v. Dep't of Corr., 183 Wn.App. 93, 332 P.3d 1136 (2014).

As a matter of law Defendant's motion to dismiss should not have been granted. Plaintiff is entitled to resume and complete his discovery in this case to allow him to make a showing of DOC's bad faith. See Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 718-19, 261 P.3d 119 (2011)(all reasons for an agency's withholding of records are relevant and therefore are not only discoverable under the civil rules, but are also necessary in a PRA case.)

3. Silent Withholding of Records Pages Violated the PRA

The PRA requires agencies to respond to requests for only "identifiable public records." RCW 42.56.080. See Hangartner v. City of Seattle, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004). A party seeking public records under the PRA must "at a minimum...identify the documents with reasonable clarity to allow the agency to locate them." Hangartner, 151 Wn.2d at 447. "[A] proper request under the [PRA] must identify with reasonable clarity those documents that are desired." Id. at 448.

"A '[p]ublic record' is any writing containing information relating to the conduct of government...regardless of physical form or characteristics." Beal v. City of Seattle, 150 Wn.App. 865, 872, 209 P.3d 872 (2009)(citing RCW 42.56.020(2)). "An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." Id.

Here, there is no question that each of Plaintiff's 31 separate requests expressly requested, by separate sentence, "the original complaint form." CP 42-71. The Department repeatedly confirmed that Plaintiff's requests each sought the original complaint/grievance form. CP 72-150. "[If] the agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance, 172 Wn.2d at 727.

Defendant did not seek clarification. Rather, Defendant admitted that it knew each original complaint form is a double-

sided, two-page public record, comprised of pages "DOC 05-165 Front" and "DOC 05-165 Back". CP 228. Declaration evidence further establishes DOC's knowledge of this fact. CP 152-53.

The PRA "requires all state and local agencies to disclose any public record upon request, unless the record falls within certain specific exemptions." Progressive Animal Welfare Society v. Univ. of Wash., (PAWS II) 125 Wn.2d 243, 250, 884 P.2d 592 (1994). Failure to provide an explanation is a "silent withholding" which occurs when "an agency...retain[s] a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld." Id. at 270 (emphasis added). "An agency must explain and justify any withholding, in whole or in part, of any requested records." Resident Action Council v. Seattle Housing Authority, 177 Wn.2d 417, 432, 300 P.3d 376 (2013)(emphasis added)(citing RCW 42.56.070(1), .210(3), .520).

Providing the required explanation is important not only because it informs the requestor why the documents are being withheld, but also because failure to provide the explanation "vitiates the reviewing court's ability to conduct the statutorily required de novo review." Resident Action Council, 177 Wn.2d at 432. See Gronquist v. Wash. St. Dep't of Licensing, 175 Wn.App. 729, 754, 309 P.3d 538, 550 (2013) (WDOL "failed to give any kind of explanation when it sent the redacted application

to Gronquist. Clearly, failure to provide any of the information required by RCW 42.56.210(3) was a violation of the PRA.")

Defendant has admitted it did not identify or produce each of the 31 second/back pages of original grievance forms requested by Plaintiff. CP 232. Nowhere in the record does it show Defendant claimed any exemptions from producing these 31 separate pages. This constitutes 31 silent withholdings, as Defendant admitted that each of the 31 original grievance forms were not produced in their entirety. CP 232. Moreover, Defendant silently withheld all responsive records in request no. PDU-18880. Silently withholding records is prohibited. Resident Action Council, 177 Wn.2d at 432.

Plaintiff's 31 requests expressly sought an identifiable record of original (double-sided) complaint/grievance forms. Plaintiff never requested partial documents or limited pages of a document. The PRA requires these requested records to be produced in their entirety. "The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records." PAWS II, 125 Wn.2d at 270 (emphasis added). See Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 445 n.3, 98 P.3d 463 (2004) (Sanders, J., dissenting, in part) ("However, the agency's failure to include pages of a single record would undeniably lead to a 'refus[al] to allow inspection or copying of a specific public record or class of records.'")(quoting RCW 42.56.550(1)).

There is no question that in each of Plaintiff's 31 separate requests, Defendant's silent withholding of responsive records violated the Public Records Act.

4. Failure to Claim Exemption Violated the PRA

The PRA "requires all state and local agencies to disclose any public record upon request, unless the record falls within certain specific exemptions." PAWS II, 125 Wn.2d at 250. When an agency withholds or redacts records, in whole or in part, its response "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." City of Lakewood v. Koenig, 2014 WL 7003790 *3 (citing RCW 42.56.210(3)).

Despite the statutory mandate for disclosure absent a claimed exemption, the DOC here did not claim any exemption from producing the entirety (including the second page) of the clearly identified original grievance/complaint forms. These failures to claim exemption violated the PRA.

5. Defendant's Inadequate Search Violated the PRA

"The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Neighborhood Alliance, 172 Wn.2d at 720. "What will be considered reasonable will depend on the facts of each case." Id. "[W]hether the search was

reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found." Id.

> "Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, the agency cannot limit its search to only one record system if there are others likely to turn up the information requested."

Id.

When utilizing a motion for show cause or summary judgment concerning the adequacy of a PRA search, "the agency bears the burden, beyond material doubt, of showing its search was adequate." Id. at 721. To do so, the agency may present "reasonably detailed, nonconclusory affidavits submitted in good faith." Id.

> "These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched."

Id. at 721.

i. Defendant's evidence was insufficient to carry its burden of showing it conducted adequate searches

The evidence presented to the trial court was insufficient to establish how the Department conducted each of its 31 searches for responsive records. In fact, the only information provided to date was in Defendant's Answer to Interrogatory No. 9, where the DOC speculatively offered that former employee Therese Pernula

"would likely have" checked one database for the records in each of the 31 separate requests.[1] CP 239.

In this case the 31 separate requests pertained to records at three different prison facilities. Eight (8) of the requested records originated from the Airway Heights Corrections Center (AHCC), twenty-one (21) of the requested records originated from the Stafford Creek Corrections Center (SCCC), and two (2) of the requested records originated from the Washington State Penitentiary (WSP). CP 253-56.

Amazingly, while the DOC argued its 31 searches were adequate, it failed to produce even a scintilla of admissible evidence establishing to a sufficient degree how any of these requested records were searched for.

DOC's "show cause" motion was supported with only two declarations: the Declaration of Denise Vaughan, and the Declaration of Lee Young. Denise Vaughan's declaration, at paragraphs 7-9, scantily attempts to identify how the agency searched for records. However, this is nothing more than inadmissible and hearsay evidence, because the "Public Disclosure Coordinator assigned to the requests" is not only never identified in Ms. Vaughan's declaration, but Ms. Vaughan does not attest that either she or the unidentified employee personally searched for any of the records at issue. CP 14-15.

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[1] Notably, the DOC objected to Interrogatory No. 9 on the grounds that it "calls for speculation." Ostensibly, the DOC has no idea how it searched for these 31 separate records.

These ultimate facts, speculations, or conclusions of fact are insufficient for summary judgment purposes; likewise, conclusory statements of fact will not suffice. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). The trial court below cannot consider inadmissible evidence when ruling on a summary judgment motion, nor can the court consider conclusory affidavits. Kenco Enterprises N.W. LLC v. Wiese, 172 Wn.App. 607, 615, 291 P.3d 261 (2013).

Under Evidence Rule 602 and Civil Rule 56(e), Denise Vaughan could only attest to what she personally knows, and in the absence of evidence by way of declaration from the DOC employee(s) who personally conducted the search for records in Mr. Kozol's 31 separate requests, Ms. Vaughan's declaration is nothing more than hearsay and speculation, and this lack of foundation is insufficient as a matter of law under the standard set forth in Neighborhood Alliance.

Likewise, the declaration of Lee Young is of no probative value. First, Ms. Young, at best, could only testify to facts regarding the two (2) requested records originating from the WSP, as she did not declare she worked at either AHCC or SCCC, nor that she handled/processed any of those twenty-nine (29) original inmate grievances. CP 152-53.

Second, Ms. Young does not even establish that she processed and/or scanned either of the two (2) sets of grievance records at the WSP. Instead, she merely offers purely speculative and conclusory evidence: "It would not be scanned", "Normally, this should occur", and "the hard paper copies may be retained longer." CP 152-53 (emphasis added).

As a result, the DOC established virtually nothing as to how or where the searches for responsive records were conducted, and the Department failed to establish "the search terms and the type of search performed, and...that all places likely to contain responsive materials were searched." Neighborhood Alliance, 172 Wn.2d at 721.

The DOC certainly has not established beyond a genuine material fact that its searches were adequate. For summary judgment purposes, "[a] fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." Woodward v. Lopez, 174 Wn.App. 460, 468, 300 P.3d 417 (2013) (citing Grimwood, 110 Wn.2d at 359). CR 56(e) requires that affidavits on summary judgment shall be made on personal knowledge and set forth such facts as would be admissible in evidence. Yet all of the evidence relied upon in the Young and Vaughan declarations as to any searches for records are inadmissible as hearsay, improper opinion, and/or speculation. Evidence Rule (ER) 602, 701, 802.

Evidence submitted on summary judgment must be admissible. Unauthenticated or hearsay evidence does not suffice. Sentinel C3, Inc. v. Hunt, 181 Wn.2d 127, 141, 331 P.3d 40 (2014). A court cannot consider inadmissible evidence when ruling on a motion for summary judgment. Kenco Enterprises, 172 Wn.App., at 615. Hearsay is inadmissible. Id. (citing ER 802). A court does not consider conclusory affidavits. Id. When such evidence is presented, there is no need for the opposing party to file a motion to strike, as the court simply will disregard such evidence without having to "strike" it from the record. Id.

The Vaughan declaration arguably establishes only two remotely material facts as to adequacy of the searches. First, DOC issued response letters to Mr. Kozol's 31 requests on February 17, 2012. CP 36. Second, the purportedly complete responsive documents for requests nos. PDU-18881 to PDU-18910 were e-mailed to Mr. Kozol's designated e-mail account on April 2, 2012, April 9, 2012, and April 16, 2012. CP 37. However, this proves absolutely nothing as to what was searched for, how, or where. Fairing no better, the Young declaration does not even indicate any searches were conducted for the 31 separate requests. CP 152-53.

Under the standard set forth in Neighborhood Alliance, the DOC failed to show that its searches for these 31 requests were adequate.

ii. Location of any searches was inadequate

Despite having failed to establish the elements of an adequate search under Neighborhood Alliance, Defendant still argued that its searches were adequate. Even if, arguendo, a search had been established, it would have still been inadequate under the standard in Neighborhood Alliance.

Here, Defendant established that its practice is to specifically not scan or retain the second/back page of each original paper grievance form "DOC 05-165" when scanning documents to create the grievance record in the OMNI or Liberty database system. CP 152-53. After electronically scanning the front page of each grievance form filed by an inmate, the original (double-sided) paper grievance forms are retained at least six (6) months, and are eventually destroyed. CP 247-48 (First Supplemental Answer to Interrogatory No. 2). In responding to other similar grievance records requests, Defendant has previously reviewed the original (double-sided) paper grievance forms it retained as scheduled for destruction. CP 153.

Upon these uncontroverted facts, Defendant knew that the original (double-sided) paper grievance forms existed, or could have reasonably existed, in its paper file system. In fact, the Department has previously searched for paper grievance records to ensure all records were produced in other grievance records requests. CP 153.

Accordingly, because the Department knew the original paper grievance forms were retained for at least six months or longer, and it previously had searched its paper grievance files to ensure full disclosure in other past records requests, the agency's complete failure to search its paper file system in these 31 requests constitutes inadequate searches under the standard set forth in Neighborhood Alliance.

In fact, this is virtually the same scenario as that reviewed by the Supreme Court in Neighborhood Alliance, where that agency's argument was that the location of responsive records retained in one computer did not have to be searched because the computer had been moved, and replaced with a new computer, and the agency's search was limited to the new computer that did not contain the records. Neighborhood Alliance, 172 Wn.2d at 721-23.

The Supreme Court squarely rejected the agency's argument that its search was adequate, stating, "[i]f the agency, after establishing the primary source of requested information, finds that the information is not there, it may not assert the information has been moved so as to avoid its duty to search." Id. at 723. Rather, "the agency must determine where the information has been moved and conduct a search there, where reasonable." Id.

Neighborhood Alliance is controlling to the instant case. Not only do both cases involve requestors seeking evidence of agency misconduct, but, similar to Spokane County's action in

Neighborhood Alliance, here the DOC had taken both the front and back pages of each requested original paper grievance form and placed the documents into a secondary paper file system to await destruction. With this express knowledge that the original two pages of each paper grievance existed in the paper file system, DOC's claimed ignorance by purposely limiting its searches to only a database of scanned documents is inadequate.

As the Court in Neighborhood Alliance determined, "[b]ecause the County produced nothing to show the old computer was wiped of all data before August 8, 2005, it should reasonably have searched that computer when the Alliance's PRA request was received in May." Id. at 723. Identically, the DOC here produced no evidence to show that eight original paper grievance forms were destroyed prior to conducting its searches for records, and there is at least a genuine dispute of material fact as to whether the remaining twenty-three original grievance forms were destroyed prior to Mr. Kozol's requests. Therefore, the DOC was required to search its paper files for the original grievance records that it knew existed there, and that it knew consisted of two pages each. See Neighborhood Alliance, 172 Wn.2d at 723 (rejecting agency's argument that it should not be required to search the old computer for requested documents, comparing the old computer to a trash can or recycle bin, because the County maintained control over the computer following its transfer to its Information Services Department, unlike trash or recycling that is hauled away).

Here the DOC destroyed at least eight separate existing original (double-sided) paper grievance forms after it received Mr. Kozol's requests on February 10, 2012.[2] Because at least eight original grievances existed, were prohibited from destruction pursuant to RCW 42.56.100, see, infra, and were located in the paper file system DOC had previously relied upon to locate records in other searches for grievance forms, the Defendant's complete failure to search the paper file system was an inadequate search as a matter of law.[3]

6. Defendant's Improper Modification of Specific Requests Violated the PRA and Caused Inadequate Search

While the DOC did not present any evidence to sufficiently establish the method, scope, or locations of its 31 separate records searches, the Department did argue that it would not have considered the second/back pages of the 31 original offender grievance/complaint forms to be responsive to Mr. Kozol's requests. CP 29-30.

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[2] Defendant destroyed the original (double-sided) paper grievances in requests nos. PDU-18880, 18881, 18896, 18907-18910, after receiving Mr. Kozol's requests on February 10, 2012. CP 251-57, 397. Thus, the records existed in the paper file system at the time of each request.

[3] As established below, inmates often use the second/back pages of original grievance forms to complete the submission of their substantive grievance issue. As such, DOC still knew the back pages could certainly contain substantive content of the requested grievances, and therefore had a duty to search the paper file system.

This argument fails for several reasons. First, as established above, the Declaration of Lee Young fails to establish that she was involved in any way in responding to, or searching for records, in these 31 requests. Ms. Young never declared that she did not consider the second/back pages of these 31 requested original complaint/grievance forms to not be responsive to Mr. Kozol's requests. Instead, Ms. Young declares that in the abstract, the second/back pages "would not have been considered to be part of the grievance packet and therefore would not have been provided in reponse to a request for all documents related to a particular grievance." CP 153 (emphasis added). Thus, as a purely conclusory and speculative declaration, this evidence does not attest to what any DOC employee actually considered, interpreted, or clarified about these 31 separate requests. Based on this argument, summary judgment was improper.

Second, as perhaps the most glaring deficiency, it is immaterial what "would" be, or even what perhaps was, considered to be "responsive to a request for all documents related to a particular grievance." CP 153. Each of Plaintiff's 31 requests expressly requested, by separate sentence, the original complaint/grievance form. CP 42-71. Defendant repeatedly confirmed that each original complaint form was requested. CP 72-73, 80-150. Defendant admitted that it knew each original complaint form was comprised of two pages. CP 228. Yet these

specific records were not produced in their entirety, with certain pages withheld.

Defendant's attempt to escape accountability to the citizens of Washington State by claiming that it only would have considered Kozol's 31 requests to be limited to seeking a "grievance record" cannot be countenanced under the Public Records Act. CP 29-30, 152-53. This is a far-fetched, painfully obvious attempt to shirk agency accountability under the law.

Even if Defendant's strained assertion was to be believed, that it did not consider second/back pages of original grievance/complaint forms to be part of a "grievance packet" because the second/back pages are never used by inmates or agency staff -- which, as shown below, is patently false -- such a misplaced reliance does not ameliorate the stark factual reality that the Department silently withheld the very record pages it repeatedly confirmed had been requested.

Because Defendant's argument states its searches were only for "documents related to grievances", and that it only considers the first/front page of each filed original paper grievance to be part of a "grievance record", this at most, as a matter of law, could only show the agency may have adequately searched for what it exclusively compiles as "grievance records."[4] CP 29.

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[4] However, even this position fails. As previously established, there is no evidence in the record showing how any search was conducted, or for what records, as pertaining to these specific 31 separate requests.

There exists no statutory language in chapter 42.56 RCW, nor in any judicial interpretation thereof, that allows an agency to modify, shorten, substantively change, or disregard a request for an identifiable record without such direction or consent from the requestor.

"The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties." Resident Action Council, 177 Wn.2d at 431 (emphasis added). An agency must "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.520 (emphasis added).

Here, the Department's eleventh-hour claim to have only understood Mr. Kozol's requests to be seeking grievance records (as compiled, conveniently, upon the DOC's exclusive interpretation in an effort to obtain summary judgment) is not to be believed.[5] Not only did the agency repeatedly confirm that Mr. Kozol requested the original complaint/grievance forms (CP 50, 80-150), but, Defendant never sought clarification of any part of the requests. "If [an] agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance, 172 Wn.2d at 727.

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[5] Most importantly, the agency's claimed interpretation of the PRA request is legally immaterial on de novo review, as courts are to give no deference to agency interpretation, as this would "be the most direct course to (the PRA's) devitalization." Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 238, 189 P.3d 139 (2008) (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978)).

Moreover, because the DOC declared to make the distinction between its interpretation of what it compiles as a scanned "grievance record" -- which it may very well be permitted to do under the PRA -- and the original (double-sided) paper grievance forms, this actually establishes that each original (double-sided) grievance constitutes a distinct, different record. Because Plaintiff expressly requested, by separate sentence, this distinctly different paper record, the failure to establish that this (as determined by DOC) distinct record was searched for constitutes an inadequate search in each request.

Therefore, even if the DOC had in fact presented evidence showing that it only searched for "grievance packets," this improper modification or disregard of each of the 31 clear requests would/did violate the Public Records Act, denying access to the entirety of the clearly requested record when no exemption were claimed.

7. Defendant's Unlawful Destruction of Withheld Records Violated the PRA

Under RCW 42.56.100, an agency is prohibited from destroying records scheduled for destruction if the agency receives a public record request "at a time when such record exists." Fisher Broadcasting - Seattle TV LLC v. City of Seattle, 180 Wn.2d. 515, 541, 326 P.3d 688, 701 (2014) (en banc). "Destruction of a requested record violates the PRA and can lead to imposition

of penalties." Neighborhood Alliance, 172 Wn.2d at 750 (Madsen, C.J., concurring).

Here, the Department identified in sworn discovery responses that it shredded at least eight (8) of the double-sided orignial paper grievance records at a time after it received Mr. Kozol's requests for the records on February 10, 2012. CP 253-56. Defendant's Answer to Request for Admission No. 8 admitted these destructions occurred after Mr. Kozol requested the records. CP 397.

Because each of these original forms is a double-sided page (CP 228), it is physically impossible to shred, or otherwise generally destroy, only one side of the form. It is therefore immaterial whether the Department may have thought that it did not have to produce the back pages of each requested grievance, because the DOC's destruction of the front, as well as the back, sides of the 31 original forms, after they had been requested, directly violated the Public Records Act.

Because each of Plaintiff's 31 separate requests expressly requested the original complaint/grievance form, any destruction of the requested "original" paper forms after the agency received Mr. Kozol's requests violated the PRA.

This case illustrates the precise reason why such prohibitive language was written into RCW 42.56.100 by the legislature, as even when operating under the Department's incredulous and false assertion that it did/would not consider

the 31 back pages to be identified by Mr. Kozol's requests for the "original" grievance forms, Mr. Kozol still had the right to clarify or expand his requests as necessary, including having a third-party representative personally inspect the double-sided original paper documents he requested. See Sappenfield v. Dep't of Corrections, 127 Wn.App. 83, 88-89, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006) (When a requestor cannot inspect records -- because of incarceration, for example -- the agency should allow a representative of the requestor to inspect them.)

Moreover, no requestor could ever challenge or obtain judicial in-camera review of records under the PRA, if an agency provides a copy of an original record, yet then destroys the requested original. This is the polar opposite of the strong public policy behind transparency of government activity that the Act was intended to ensure to interested parties.

There is no confusion, Mr. Kozol specifically requested "the original" records, not a third-generation copy of a second-generation computer scan of the original record.[6] While the

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[6] DOC's Grievance Program Manual requires that: (1) each original (local) paper grievance will be reviewed to ensure it has been entered in the Liberty database, and (2) written authorization is required for the disposal of each original paper file. CP 402. DOC failed to conform to these requirements. Despite admitting each original grievance is two pages, DOC staff never ensured the second/back pages were copied prior to destruction, and no written authorization was obtained before it destroyed the original paper records. CP 396-97 (Answers to Request for Admission Nos. 2, 5).

copy of each original complaint provided by the DOC may or may not be an accurate reproduction of the front page, no court can ever determine this, and it is impossible for Mr. Kozol to have a third-party representative now follow up by personally inspecting the "original" grievance forms to see what was contained on the second/back pages, or to see if any improper redactions occurred on the front pages, e.g., agency staff "whiting out" embarrassing, inculpatory, or prejudicial information before they scanned the pages. When the Department stated that it alone determined what was to be made part of any particular "grievance record", apparently this was not just a figure of speech. As shown in the record, this is not the DOC's first dance with unlawfully destroying grievance records to prevent disclosure of agency misconduct. Appendix A. In fact, it is reasonable to conclude that the DOC has cultivated an environment in which employees can act with immunity in covering up agency misconduct by illegally destroying public records.

As a matter of law, full access to public records can never be provided under the PRA when an agency provides a copy of a requested record, and upon a requestor challenging that the copy is inaccurate, improperly redacted, or incomplete, there exists no means for judicial in-camera review under RCW 42.56.550(3) because the agency proceeded to destroy the original records after receiving the records requests. See Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 744 n.14, 174 P.3d 60 (2007) (court noted

it could determine disclosability of records without remanding to trial court because the trial court had the records available in camera when it made its conclusions).

Because the PRA expressly permits a private cause of action for a requestor to enforce/compel agency production of records withheld in whole or in part, the DOC was prohibited by RCW 42.56.100 from destroying the original (double-sided) paper grievance forms, because the requests could not, as a matter of law, be considered "resolved" under RCW 42.56.100 until all judicial review was completed.

Here, the DOC violated the PRA by destroying at least eight (8) original grievance forms, because "[w]hen a PRA request is made, a government agency must hold onto the records, including their metadata; they cannot be [destroyed]." O'Neill v. City of Shoreline, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010).

Further, while the DOC purported that its actions were "consistent with DOC's Grievance Program Manual," its Records Retention Schedule, its Records Management Policy DOC 280.525, and RCW 40.14.060 (CP 247-48), such assertion is fatally false. Because of the prohibition against destruction in RCW 42.56.100, "an agency must show that any recently destroyed documents were not wrongfully destroyed." Neighborhood Alliance, 172 Wn.2d at 723 n.13. The Department cannot make such a showing.

Contrary to DOC's assertion, its actions are not "consistent with the DOC's Grievance Program Manual", because the Grievance Program Manual requires the DOC to (a) ensure each original (double-sided) paper grievance was entered into the Liberty database, and (b) obtain written authorization before destroying any pages of the original grievance forms requested by Mr. Kozol. CP 402.

Defendant admitted there was no written signature approval for destruction of these eight original grievances, nor were any DOC 01-089 Records Destruction Request forms completed by staff and submitted to the agency's Records Officer as required by DOC Policy 280.525 (III)(D). CP 397 (Answer to Request for Admission Nos. 4, 5).

The record also shows that, despite being required to do so by RCW 40.14.060(1)(c), the DOC did not copy or reproduce the original second/back pages of the eight requested original grievances before destroying them (after receiving Mr. Kozol's requests). CP 238. Because each of these original records were known by the DOC to be comprised of two pages, the DOC wrongfully destroyed these record pages by not making copies prior to their destruction.[7]

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[7] Nor does it appear the DOC even abides by its DOC Records Retention Schedule, which under Disposition Authority Number (DAN) 86-06-36802 requires all grievance documents to be retained for six (6) years. CP 282.

When compounded with Defendant's discovery answers and admissions that these eight records were destroyed after Mr. Kozol requested them, DOC's destruction of these eight original records not only violated the PRA, but also violated RCW 40.14.060(1)(c), and DOC Policy 280.525(III). As such, the destructions were clearly "wrongful".

8. Genuine Dispute of Material Fact of 23 Records Destructions Precluded Summary Judgment

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. A material fact is one upon which the outcome of the litigation depends in whole or in part. Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A court should grant summary judgment only if reasonable persons could reach but one conclusion from all the evidence. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

While DOC's discovery answers identified that eight (8) of the requested original grievances had been destroyed after Mr. Kozol's requests were received, the DOC stated that the remaining twenty-three (23) original grievances had been destroyed prior to when DOC received Mr. Kozol's requests on February 10, 2012. These include request nos. PDU-18882 to 18895, 18898, and 18906. CP 253-56. In its dispositive motion, the Department argued that the 31 requested records were "not...maintained." CP 29. The Department's declaration evidence stated that "the

hard paper copies of the grievance packets are eventually destroyed." CP 152-53.

However, Defendant has failed to establish beyond a genuine material fact that any of these 23 original records were destroyed prior to being requested, if at all. As a matter of law, the DOC's lone answer in the table to Interrogatory No. 1 (CP 253-56) is not sufficient to establish that the DOC does not have to produce these records because they did not exist. Contrary to DOC's bald assertions, there is not sufficient evidence in the record to establish when or if these records were destroyed.

First, the DOC failed to copy or reproduce any of the "DOC 05-165 Back" pages before allegedly destroying them prior to receiving Mr. Kozol's requests. CP 238-39 (Answer to Interrogatory Nos. 7 and 10; Response to Request for Production No. 4). Because DOC admitted that the "DOC 05-165 Back" page is part of the original grievance/complaint forms as requested by Mr. Kozol (CP 228), all statutory and policy requirements applied to the complete requested "original" records, including the second/back pages.

Second, DOC Policy 280.525 (III)(D) required DOC to obtain written signature approval before destroying each of these twenty-three original front and back pages that DOC claimed to have destroyed prior to Mr. Kozol's requests. CP 279. Here, the Department admitted that no such mandatory authorization was obtained for each of these twenty-three alleged destructions

of the original (double-sided) paper records. CP 397 (Answer to Request for Admission Nos. 4, 5).

Third, the DOC Grievance Program Manual requires written authorization to be obtained before any of these 23 original (double-sided) paper grievance forms could be destroyed. CP 402. But no written authorization was sought or obtained before the 23 destructions allegedly occurred, as DOC stated that no "authorizations acquired" existed.[8] CP 248 (Answer to Interrogatory No. 5; Response to Request for Production No. 2).

As such, DOC's purported "fact", that these twenty-three original records could not be produced because they had already been destroyed, is supported by only a bare, uncorroborated, conclusory answer to Plaintiff's Interrogatory No. 1. CP 251-56. DOC failed to prove beyond all material doubt that these twenty-three "destructions" actually occurred, because not only does its lack of statutory and policy compliance with destruction authorization, records retention, and record duplication go to show that no destructions occurred, but the record is completely devoid of sworn declaration evidence establishing that these twenty-three original records were actually destroyed.

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[8] In response, the DOC merely produced hard copies of a statute, DOC policy, and a records retention schedule. However, such empirical evidence does not establish whether authorization for these twenty-three destructions occurred.

At best, this Court could only possibly conclude that these destructions occurred on the dates prior to Kozol's requests, based upon the agency's self-serving discovery answer which has not been subjected to deposition questioning or other judicial scrutiny. These ultimate facts, or conclusions of fact are insufficient for summary judgment purposes; likewise, conclusory statements of fact will not suffice. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Further, the lone discovery answer is directly contradicted by the lack of signature authorization required before destruction could occur. This express lack of mandatory signature authorization for the purported twenty-three destructions create a genuine issue of material fact precluding summary judgment; there was not even authorization to destroy the front pages of these grievances, which DOC stated was the only material part of the record.

Just as courts are not entitled to weigh evidence on summary judgment, see Flemming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964), similarly the court should not grant summary judgment when there is some question as to the credibility of a witness whose statements are critical to an important issue in the case. See Powell v. Viking Ins. Co., 44 Wn.App. 495, 502-03, 722 P.2d 1343 (Div.3, 1986).

Upon this record, there is not even any declaration evidence to establish the twenty-three records were destroyed prior to being requested. Because all facts and reasonable inferences

therefrom are to be viewed in the light most favorable to Mr. Kozol, the express lack of compliance with all statute and policy requirements, and the lack of specific declaration evidence, create a genuine dispute of material fact as to whether the twenty-three original records were destroyed before or after being requested by Mr. Kozol. This issue must be remanded for trial.

9. Genuine Dispute of Material Fact as to Usage of Records Precludes Summary Judgment

Defendant argued that it did not produce the "DOC 05-165 Back" page in each of Plaintiff's requests because it did not consider the second/back pages responsive to the requests because the pages are never used by inmates or agency staff in the grievance process. CP 29-30. Defendant's declaration evidence states the back pages are never used by inmates or staff in the grievance process. CP 152-53.

However, while the Lee Young declaration fails to establish she was involved in any search for these 31 records at either of the three prison locations, and also improperly limited Mr. Kozol's requests to only "grievance packets", it nevertheless is primarily deficient in justifying the Department's argument because Ms. Young's declaration is factually false.

There is no question that DOC staff and inmates use the second/back pages of original grievance forms in the grievance process within the Department of Corrections. Use occurs in

multiple categories. Inmates use the back page of the grievance forms to state the substantive grievance issue continued from the front page of the form, and to identify potential witnesses to the grieved action or issue. CP 403-19.

As part of submitting the grievance, inmates carefully work through the worksheet/checklist on the second/back page to indicate what information was provided, and what remains to be presented or investigated by grievance staff. CP 420-32.

DOC staff use the back page of original grievance forms by writing various processing/routing information, identifying grievance issues, and numerical computation. CP 433-56.

Thus, a genuine dispute of material fact precludes summary judgment dismissal. The "DOC 05-165 Back" pages are either used, or, according to the DOC's sole piece of evidence -- the Declaration of Lee Young -- they are never used.[9] Substantial evidence submitted by Plaintiff on reconsideration evinces the back pages are used in the grievance process. Not only does this overwhelming evidence show these record pages are "used", but the DOC still expectantly has thousands of other similar pages for a six-year period to produce in record requests nos. PDU-28154 to 28156. CP 260-71, 313-15.

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[9] Amazingly, the name "Lee Youn[g]" and "L. Young" appears on the back pages of several original grievance forms. CP 405, 434-39. Lee Young is the DOC employee who declared under penalty of perjury that these very pages are never used by inmates or staff in the grievance process.

As the party moving for summary judgment, it is the DOC's burden "to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against [it]." Lokan & Assoc. Inc. v. American Beef Processing, LLC , 177 Wn.App. 490, 311 P.3d 1287, 1288 (2013) (citing Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)). Under the PRA, the burden is on the agency to prove all elements of its claim to not have violated the act. RCW 42.56.550.

The Department's assertion as to why it did not produce the requested second/back pages is a material issue. Because there is a genuine dispute of this material fact as to "usage", summary judgment was precluded as a matter of law.

10. Remand is Necessary to Conduct Discovery as to Any Agency Bad Faith

In its dispositive motion, the Department asked the court to find that any violation of the Public Records Act did not amount to bad faith for purposes of RCW 42.56.565(1). CP 31-32. While the DOC asserted that the "facts are devoid of any evidence to indicate the DOC acted with bad faith in response to Plaintiff's PRA request," (CP 32), Plaintiff established that discovery was not complete in the case, and that additional discovery was necessary for Plaintiff to be able to present evidence on the insufficiency/inadequacy of DOC's responses in the 31 separate requests. CP 214, 220.

Ultimately, the trial court stated that, "[s]ince the Court has found that a PRA violation has not occurred, the question whether the Defendant acted in bad faith does not need to be addressed." CP 363.

Because this Court's de novo review will find multiple violations of the PRA in each of the 31 record requests, Plaintiff is entitled to conduct discovery to obtain evidence to make the necessary showing of agency bad faith pursuant to RCW 42.56.565(1). See Neighborhood Alliance, 172 Wn.2d at 718-19 (all reasons for an agency's withholding of records are relevant and therefore are not only discoverable under the civil rules, but are also necessary in a PRA case). As the Division Two Court of Appeals recognized in Francis v. Dep't of Corr., 178 Wn.App. 42, 313 P.3d 457, 467 (2013), review denied, 180 Wn.2d 1016, 327 P.3d 55 (2014), "it is notoriously difficult to prove agency intent, particularly from inside a prison cell."

Because the trial court expressly did not find a PRA violation upon which to find bad faith, and due to Plaintiff's need to conduct the necessary discovery to carry his statutory burden under RCW 42.56.565(1), this case should be remanded so as to allow Plaintiff to complete discovery before any finding of agency bad faith may or may not be found.

B. Plaintiff's Motion for CR 56(f) Continuance Should Have Been Granted

Civil Rule 56(f) allows a party to move for a continuance so that it may gather evidence relevant to a summary judgment proceeding. Appellate courts review a trial court's decision to deny a motion for a continuance on these grounds for an abuse of discretion. Old City Hall LLC v. Pierce County AIDS Foundation, 181 Wn.App. 1, 15, 329 P.3d 83 (2014).

Civil Rule 56(f) provides that the court may order a continuance to allow a nonmoving party to obtain discovery needed to respond to the motion "[s]hould it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition." CR 56(f).

The trial court may deny a motion for continuance if:

> "(1) The requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact."

Farmer v. Davis, 161 Wn.App. 420, 430-31, 250 P.3d 138 (Div.3, 2011); Tellevik v. Real Property Known as 31641 West Rutherford Street, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).

Plaintiff moved for a CR 56(f) continuance so as to allow him time to conduct the necessary discovery as to any agency usage of the second/back pages of original grievance forms.

CP 211-12. Plaintiff filed a second CR 56(f) motion, before the trial court made any initial ruling on the Defendant's summary judgment motion. CP 351-53. Plaintiff filed supplemental memoranda in support of his motion. CP 300-325, 346-49.

The trial court abused its discretion in denying a continuance. Mr. Kozol's prima facie evidence, and all reasonable inferences therefrom, when viewed in the light most favorable to him, established that additional evidence could be obtained through discovery that disproved DOC's claim that the second/back pages of original grievances were never used by inmates or agency staff. CP 220, 258-71, 308-20. This included a prima facie showing that second/back pages contained other offender's official grievance information. CP 267.

Based upon the evidence presented, the trial court abused its discretion in denying Mr. Kozol's CR 56(f) motion. A trial court abuses its discretion if its decision is manifestly unreasonable, or rests on untenable grounds, or if it bases its ruling on an erroneous view of law or involves incorrect legal analysis. Dix v. ICT Corp., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Here, not only did the trial court err in disregarding the materiality of prima facie evidence that second/back pages contained grievance information, and thus were "used" (CP 267), but the court also acted untenably when it failed to consider that Mr. Kozol had not completed discovery in the case, and more importantly, it was the agency, the DOC, that possessed all

evidence as to whether these record pages were used. Denying this continuance was tantamount to the court permitting the Department to produce any modicum of evidence, no matter how implausible, as a basis to grant dismissal, while flatly refusing to allow Plaintiff to gather any evidence to refute the Department's arguments and proferred evidence. Refusing Plaintiff any opportunity to muster additional evidence in this situation was an abuse of discretion.

"The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one." Keck v. Collins, 325 P.3d at 316 (citing Coggle v. Snow, 56 Wn.App. 499, 508, 784 P.2d 554 (1990)). With Mr. Kozol making a prima facie showing that additional discovery would likely lead to admissible evidence material to the issue of "usage" by inmates or staff of the record pages in question, and upon Mr. Kozol's meeting the other necessary criteria, see Tellevik, supra; CR 56(f), it was an abuse of discretion to not grant the CR 56(f) motion.

C. Plaintiff's Motion To Strike Should Have Been Granted

Plaintiff's evidence clearly established to the trial court that (a) Defendant improperly modified clear, unambiguous requests for identifiable records, (b) Defendant failed to conduct an adequate search, (c) Defendant unlawfully destroyed responsive records it had silently withheld, (d) Defendant had a history

of unlawfully destroying identical records when requested by others, (e) Defendant filed knowingly false evidence to escape being held accountable under the law. In response, the Department attempted to introduce evidence of e-mail communications sent both to and from Plaintiff by a third-party individual. Supplemental Clerk's Papers _____.

Appropriately, Plaintiff objected to the evidence and filed a motion to strike. CP 287-93. While there was no indication in the trial court's rulings that it actually considered any of the irrelevant e-mail evidence, Defendant has designated these papers in its May 5, 2015 Supplemental Designation of Clerk's Papers. Accordingly, because this Court is conducting de novo review, it was error for the trial court to not grant Plaintiff's motion to strike.

1. Standard of Review

While ordinarily the Court's review of evidentiary rulings made by the trial court is for an abuse of discretion, appellate courts review de novo such rulings when they are made in conjunction with a summary judgment motion. Taylor v. Bell, 2014 WL 7387790 *6 (citing Wilkinson v. Chiwawa Comm. Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The de novo standard of review is applied when ruling on a motion to strike evidence from consideration on summary judgment because it contained inadmissible evidence. Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 416, 420-21, 150 P.3d 545 (2007) (citing Folsom

v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998)). See also Keck v. Collins, 181 Wn.App. 67, 325 P.3d 306, 312 n.2 (Div.3, 2014) (citing collective cases).

Error may not be predicated on a ruling that admits or excludes evidence unless a substantial right of the party is affected and a timely objection or motion to strike is made, stating the specific ground for objection. ER 103(a)(1).

2. Evidence Inadmissible Under ER 402

As presented in Plaintiff's motion and reply, the email evidence was not relevant and therefore inadmissible under ER 402. CP 288, 290-93; CP 167-71. "A party is entitled to admit relevant evidence, except as limited by constitutional requirements or as otherwise provided by statute, by the evidence rules." State v. Loutham, 158 Wn.App. 732, 748, 242 P.3d 954 (2010) (citing ER 402).

"Relevant evidence" is any evidence which tends to show a disputed issue is more or less probable and encompasses elements of both probative value and materiality. ER 401; Davidson v. Muni. of Metro. Seattle, 43 Wn.App. 569, 573, 719 P.2d 569 (1986). Evidence is probative if it tends to prove or disprove some fact and is material if that fact is of consequence to the ultimate outcome. Davidson, 43 Wn.App. at 573. "Evidence which is not relevant is not admissible." ER 402.

While the Department wishfully argued that the e-mail evidence was material, it failed to offer any proof that such e-mails affected the agency's understanding of the request, ability to seek clarification, or that the e-mails affected the agency's unlawful destruction of requested records. The Department consistently confirmed that each of the 31 requests sought the original complaint/grievance form. CP 72, 80-150. The DOC squarely admitted that it knew all original complaint/grievance "DOC 05-165" forms were comprised of two pages. CP 228. "[If] the agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance, 172 Wn.2d at 727. No clarification was sought by the Department.

Not only do the e-mails have no probative value as to the agency's statutory burden in responding to PRA requests, but dispositive is the fact that such evidence is irrelevant per statutory language in RCW 42.56.080.

While crafty attorneys often employ such tactics to attempt to divert a court's attention from agency PRA violations by advancing the absurd argument that a requestor could influence how an agency violated the statute in responding to a PRA request, the Washington Supreme Court and the Court of Appeals have repeatedly rejected such unprofessional and discourteous approaches resorted to by PRA violators.

Under RCW 42.56.080 it is legally immaterial why a requestor requests certain public records, and "agencies may not inquire into the reason for the request." Cornu-Labat v. Hospital Dist. No. 2 Grant County, 177 Wn.2d 221, 240, 298 P.3d 741 (2013). The "statute specifically forbids intent [of a requestor]...from being used to determine if records are subject to disclosure." DeLong v. Parmelee, 157 Wn.App. 119, 146, 236 P.3d 936 (2010). See Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 461 n.8, 229 P.3d 735 (2010). Specifically, the Department knows as a matter of law that its actions cannot be affected by a requestor. Livingston v. Cedeno, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008) ("in its capacity as an agency subject to the [PRA], [DOC] must respond to all public disclosure requests without regard to the status or motivation of the requestor.")

Because the Department's attempt to introduce this evidence (much of which was merely received by Mr. Kozol, and thus not materially imputable to him) was intended for a statutorily irrelevant purpose (RCW 42.56.080), the evidence is inadmissible under ER 402, and Plaintiff's motion to strike should have been granted.

3. Evidence Inadmissible Under ER 403

Even if the e-mail were somehow relevant, and not legally irrelevant under RCW 42.56.080, the evidence should nevertheless have been striken under ER 403. ER 403 controls the exclusion of relevant evidence. "Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

> "ER 403 contemplates a balancing process. The balance may be tipped toward admissibility if the evidence is highly probative or if the undesirable characteristics of the evidence are minimal. Conversely, the balance may be tipped towards exclusion if the evidence is of minimal probative value or if the undesirable characteristics of the evidence are very pronounced."

State v. Rice, 48 Wn.App. 7, 13, 737 P.2d 726 (1987); Karl B. Tegland, Vol.5 Washington Practice - Evidence Law and Practice (5th ed. 2014) §403 at 700.

"In determining whether or not there is prejudice, the linchpin word is 'unfair'". Rice, 48 Wn.App. at 13 (quoting State v. Bernson, 40 Wn.App. 729, 736, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985)). "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." Id. "However, 'unfair prejudice' is caused by evidence that is likely to arouse an emotional response rather that a rational decision." Id.; State v. Barry, __Wn.App.__, 339 P.3d 200, 206 (Div.3, 2014).

Here, the virtually nonexistent probative value of the evidence is substantially outweighed by the danger of unfair prejudice. This is the sole basis for the Defendant's presentation of the material. There was no other faulty explanation or strained interpretation of fact or law for Defendant to argue, so it simply turned to its evidence of last

resort, arguing that some e-mail communications between Mr. Kozol and a third party, about mostly unrelated issues, caused the DOC to unlawfully destroy requested records, improperly modify the 31 requests, and violate the Public Records Act. Again, the Department even unlawfully destroyed the "DOC 05-165 Front" record pages that it argued was the only record page it considered responsive to the requests. DOC's argument, that random e-mails control the actions of the second largest agency in the State, is not only far-fetched -- it is currently orbiting Saturn.

In sum, the e-mails should have been striken under ER 402 or ER 403. See Miller v. Peterson, 42 Wn.App. 822, 827, 714 P.2d 695 (1986) (in a medical malpractice action, the trial court properly excluded as irrelevant defense evidence that someone had told the plaintiff that he "should sue the doctor that did it"); Tumelson v. Todhunter, 105 Wn.2d 596, 716 P.2d 890 (1986) (in personal injury action, medical history was irrelevant to the issues as framed by the complaint); Outley v. City of New York, 837 F.2d 587, 591-95 (2nd Cir. 1988) (court properly rejected argument that the evidence was relevant to show the plaintiff was a chronic litigant or held animosity toward the defendant; discussing at length unfair prejudice from evidence of a plaintiff's litigation motivations or activity).

D. Appellant Should Be Awarded All Reasonable Costs and Fees on Appeal

Pursuant to RAP 18.1 and Title 14, Appellant asks that he be awarded all costs/expenses/fees in litigating this appeal. RCW 42.56.550(4) allows prevailing requestors to be awarded all costs and fees. A party is entitled to attorney fees/costs on appeal if a contract, statute, or recognized ground of equity permits recovery of costs/fees at trial, and the party is the substantially prevailing party. Hwang v. McMahill, 103 Wn.App. 945, 954, 15 P.3d 172 (2000). See O'Connor v. Wash. St. Dep't of Social & Health Services, 143 Wn.2d 895, 25 P.3d 426 (2001) (party who successfully appealed order in party's action against state agency that quashed requests under the Public Records Act was entitled to reasonable attorney fees and costs on appeal.) Should Appellant prevail in this appeal, it is proper to award him all costs and expenses, and attorney fees if counsel is retained, to be enumerated in the Cost Bill.

CONCLUSION

For all the foregoing reasons, Appellant respectfully submits that the trial court erred in denying Plaintiff's motion for continuance and motion to strike. The court also erred in granting summary judgment dismissal to the Respondent. Summary judgment should be reversed, and the case remanded to allow Appellant to complete the necessary discovery.

RESPECTFULLY submitted this 27th day of May, 2015.

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APPENDIX – A

Washington DOC Pays Pro Se Prisoner $110,043 For Illegally Withholding Records

The Washington State Department of Corrections (WDOC) will pay former Airway Heights Corrections Center prisoner Derek E. Gronquist $110,043 for mishandling his requests for public records. This represents the largest payout the WDOC has ever paid to a prisoner who represented himself.

The dispute began when Gronquist submitted a request to inspect public records to the Airway Heights Corrections Center (AHCC) on October 21, 2001. The WDOC denied the request pursuant to Policy 280.510(III)(F), which prohibits incarcerated prisoners from inspecting any public record not contained within their own Central or Health Care Files. On August 29, 2003, the Spokane County Superior Court held that Policy 280.510(III)(F)'s "incarcerated offender" exclusion violated the Public Records Act's requirement of free and open inspection of public records. WDOC was ordered to disclose all requested records and to pay Gronquist $2,543 in penalties and costs.

(*PLN* readers should note that Division Three of the Washington State Court of Appeals has since ruled to the contrary. See *Sappenfield v. Department of Corrections*, 127 Wn.App. 83, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006)).

The WDOC subsequently disclosed records where the names of prisoners had been blacked out under a claim of exemption under Washington Administrative Code 137-08-150, and claimed to have made a full and complete disclosure. WDOC then subjected Gronquist's monetary award to a 35% seizure for cost of incarceration, crime victim's fund, and savings pursuant to House Bill 1571 and the newly amended RCW 72.09.480(3). A lawsuit was later filed in Thurston County Superior Court challenging the constitutionality of HB 1571.

Approximately three years later, Gronquist discovered the existence of at least one record that the WDOC neither disclosed nor claimed to be exempt: a grievance filed by AHCC prisoner Todd Wixon. On October 4, 2006, Gronquist filed a Motion for Contempt and/or to Compel Public Disclosure alleging that the WDOC had silently withheld requested inmate grievance records and had improperly subject other records to redaction. The Court ordered the WDOC to "conduct a thorough and complete search for all records responsive to Plaintiff's public disclosure request", "to produce . . . all records responsive . . . without any redaction", and to "[p]ay Plaintiff $50.00 a day [from August 29, 2003] . . . until the Defendant demonstrates to the Court's satisfaction that a thorough and complete search for all responsive documents has been made and that all responsive and un-redacted records have been disclosed to Plaintiff."

On May 11, 2007, the WDOC filed a Motion for Entry of Judgment arguing that the Public Records Act "does not require the grievance coordinator to hand search 2793 grievances filed at AHCC in 2001 to determine if there might be another document responsive to this part of Plaintiff's request." The Court denied WDOC's motion, increased the penalty to $100 a day, and ordered the WDOC to "conduct a hand search of and/or for grievance records responsive to Plaintiff's public disclosure request . . ." Reconsideration of the penalty assessment was denied. After conducting its search, the WDOC disclosed three previously withheld responsive grievances.

On July 26, 2007, the WDOC filed a second Motion for Entry of Judgment, arguing that it had fully complied with the Court's orders. Within this filing, the WDOC disclosed for the first time that it had "disposed of" almost all grievance records filed between 1993 and 1999. WDOC's motion was stayed pending discovery into the destruction of grievance records. On April 18, 2008, the WDOC agreed to settle this case for $79,000. It also agreed to pay Gronquist $1,000 to resolve litigation over the monies seized from the August 29, 2003, penalty award. See *Gronquist v. Department of Corrections*, Spokane County Superior Court No. 02-2-05518-9; and *Gronquist v. Barshaw*, Thurston County Superior Court No. 05-2-01941-4.

A second lawsuit was filed over WDOC's mishandling of a separate records request submitted to AHCC on December 28, 2005, seeking employment and misconduct records concerning AHCC Correctional Officer, Jeffrey Ward. Within five weeks of receiving this Public Records Act request, WDOC began destroying its grievance records. After all grievance records filed between 1993 and 1999 had been destroyed, WDOC asserted that it would begin searching for responsive records. The WDOC then filed a Motion for Summary Judgment claiming full compliance with the Public Records Act. After WDOC's motion was denied, it agreed to settle this case for $27,500. As part of the agreement Gronquist agreed not to pursue two other unrelated cases upon appeal. See: *Gronquist v. Department of Corrections*, Spokane County Superior Court Case No. 07-2-00562-0.

Commenting upon this litigation, WDOC Secretary Eldon Vail stated "clearly how we respond to public disclosure requests needed some attention and we've made a lot of changes since then to be better stewards of the taxpayer's money in these kinds of cases." For an agency with a history of never admitting fault, Vail's comments may sound a shift in how the WDOC responds to Public Records Act requests in the future. Gronquist is skeptical that WDOC's practices will change, believing that "these cases demonstrate the lengths that DOC and the Washington State Attorney General's Office will go to withhold records of governmental misconduct from public knowledge." In Washington State it is a Class B felony punishable up to ten years in prison and a $20,000 fine to destroy public records following a citizen's request for those records. Nevertheless, no WDOC official has ever been charged with a crime or subject to any discipline for unlawfully destroying the grievance records in these cases. Mr. Gronquist represented himself in each of these cases. The state's response was predictable: it obtained legislation to allow state agencies to seek injunctions against prisoners who file public records requests.

[Editor's Note: Gronquist has been a long time PLN subscriber. During the course of the above litigation he contacted PLN and asked for assistance locating counsel to represent him in the above cases. Despite our best efforts we were unable to find an attorney in Washington to take the cases. The moral to this story is just because a lawyer won't take a case does not mean it lacks merit. With counsel the payout in fees alone would have been much higher. PW]