NO. 92792-8

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN P. KOZOL,

Plaintiff/Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITIONER'S MOTION TO STRIKE §§ III AND IV(D) OF RESPONDENT'S BRIEF

STEVEN P. KOZOL
DOC# 974691
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520
Ph:(360)537-1800

www.FreeSteveKozol.com

I. REPLY

Petitioner Steven Kozol moved to strike portions of the Department's brief that improperly cited to submitted evidence that is statutorily immaterial under RCW 42.56.080, is inadmissible under ER 402 or 403, and that use of violates Mr. Kozol's First Amendment right to protected free speech. In its answer to the motion, the Department now concedes that the offending material was never considered by the Department when it was responding to Mr. Kozol's record requests. Respondent's Answer to Motion, at 2. Further, the Department now adds that the email evidence was "solely submitted" to establish that Mr. Kozol did not request identifiable records. Id.

Based upon this important concession, this Court should absolutely grant Mr. Kozol's motion to strike, as the only purpose for the Department's use of the emails is to improperly violate Mr. Kozol's First Amendment right to free speech and to use such protected speech to prejudice the Court against granting Mr. Kozol's Petition for Review. Simply, the Department is attempting to divert the attention away from its violations of the Public Records Act. However, the Department's argument has no basis in law, and for the following reasons should be rejected.

First, based upon its concession that it never considered the email contents in any aspect of responding to Mr. Kozol's 31 requests, this fact squarely precludes the Department's

argument that the emails are probative to whether the Department considered the requests to be seeking identifiable records.

As the Department correctly points out, there is no evidence that the Department considered the emails as part of any of the agency actions under judicial review. It was not until June 2014 that the Department began researching Mr. Kozol's protected speech communications that occurred in 2011. CP 478-479. Based upon this undisputed fact, it was factually impossible for the Department when responding to the requests in February through April 2012 (CP 72-150) to be determining that the requests did not seek "identifiable records" based upon the content of the emails first reviewed in June 2014.

It is unexplained why it even would be taking the extraordinary yet pointless steps to review years' worth of protected free speech that criticized the Department's abysmal history of violating the law. Rifling through thousands of inmate emails some two years after the Department had already responded to and closed all of Mr. Kozol's requests, and unlawfully destroyed the withheld records, could not somehow magically establish post-hoc that Public Disclosure Unit staff considered Mr. Kozol's requests to be seeking "unidentifable records" as the Department now argues. There is no evidence in the record from any public records staff attesting that they viewed or perceived Mr. Kozol's requests to be seeking "unidentifiable" records.

Because the Department has conceded that its staff who responded to the requests never considered the content of the emails, the only thing being presented here is the mere post-hoc opinion by the Department's attorney, two years later, baselessly arguing that the emails caused the Department staff to view Mr. Kozol's requests as not seeking "identifiable records." Of course, therein lays the fatal flaw in the Department's argument. An agency's attorney arguing how the agency allegedly perceived the requests in the past does not somehow render deficient the requests specifically seeking the complete "original complaint form" by name and log i.d. number. Again, there is no evidence that any DOC staff treated the requests as such. The rule is well settled - argument of counsel does not itself constitute competent evidence. Lemond v. Dep't of Licensing, 143 Wn.App. 797, 807, 180 P.3d 829 (2008). If attorney arguments could constitute evidence, then parties would simply keep substituting counsel until they found one who could offer the "evidence" needed to prevail in the litigation. The Department's efforts to this effect are of course preposterous.

However, even with no DOC staff considering the emails as part of responding to the requests, the Department is nevertheless admitting through its own words that it is considering the emails to argue the withheld second/back pages of each requested "original complaint form" are not subject to disclosure because Mr. Kozol having requested each "original complaint form" by

name and specific log i.d. number did not seek an "identifiable" record. By DOC's clear admission, the emails were "soley submitted" for this purpose. Answer to Motion, at 2.

Therefore, under the rule of law pertaining to Public Records Act cases, RCW 42.56.080 "specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure." DeLong v. Parmelee, 157 Wn.App. 119, 146, 236 P.3d 936 (2010). While agencies are prohibited from considering a requestor's alleged intent when initially responding to PRA requests, the agencies cannot, once litigation commences, suddenly begin considering an alleged intent when arguing to defend its initial agency action of denying records. RCW 42.56.080's prohibition from considering intent behind requests does not whimsically expire upon an agency being sued to compel production of records it withheld. Otherwise, once agencies were sued for wrongfully withholding records, they would begin en masse conducting extensive depositions of all requestors seeking to obtain their mental impressions behind seeking records, and then use this evidence to argue a way to avoid being found in violation of the PRA.

The second reason the Department's arguments are meritless is because the law does not permit de novo appellate review to include new consideration of evidence that was inadmissible on summary judgment. "A court cannot consider inadmissible evidence when ruling on a summary judgment motion." Kenco Enters. N.W.

v. Wiese, 172 Wn.App. 607, 615, 291 P.3d 261 (2013).

The Department's assertion that "Kozol filed no motion to strike the use of the emails in the appellate court briefing" is nothing more than an exercise in sophistry. Answer to Motion, at 2. The appellate briefing shows that Kozol repeatedly argued the issue that the trial court should have granted his motion to strike the inadmissible emails. Opening Brief of Appellant, at 42-48; Reply Brief of Appellant, at 12-13. This relief would necessarily preclude any use of the emails by the Department. However, the Court of Appeals never reached this issue, instead stating that Mr. Kozol's "motion to strike is moot as those materials did not play a role in the trial court's decision [on summary judgment]." Published Opinion, at fn. 3.

Therefore, because the inadmissible emails were expressly found to **not** be included in the evidence material to summary judgment, the Department's argument, that the emails are now somehow probative to the summary judgment issues of whether "identifiable" records were requested, is spurious. While the Department hopes to drown out its PRA violations by continuing to bang its drum, speculating a supposed parade of horribles pertaining to the emails (Answer to Motion, at 1), the facts squarely belie such contentions.

First, Mr. Kozol never stated in any emails that he planned to bring, or was involved in bringing an "avalanche of lawsuits." Mr. Kozol **never** stated this, and the Department's quotations

are knowingly false. The record shows Mr. Kozol brought these 31 claims all in one single lawsuit. Second, the need to request grievances written on new (double-sided) forms, that the Department now asserts as nefarious in design, was clearly explained to the trial court as being necessary because the older style NCR "carbonless" multi-copy forms were less likely to contain the handwritten evidence of DOC misconduct that Mr. Kozol was seeking to obtain.[1] CP 304.

Third, common sense dictates that obviously Mr. Kozol had to get grievance numbers from other "passers by" inmates who had grievances processed by the DOC staff making the racially derogatory commentary on the second/back pages of the grievance forms, and other misconduct; otherwise, without this specificity, is the Department asserting that Mr. Kozol should have burdened the agency by requesting every single original grievance form in existance? Fourth, the DOC would not permit Mr. Kozol to receive and review grievance documents via public disclosure, as the prison mail room rejected Kozol's receipt of other inmates' grievance documents. CP 266-267. So of course he could "review none of the contents of the documents produced" to him, as the Department now attempts to portray in a scandalous light. Answer to Motion, at 1. As proven without dispute, this is why Mr. Kozol had the records forwarded to his attorney to review on his behalf. CP 177-195.

---

1 DOC unlawfully destroyed the records Kozol needed, so he was unable to file suit against DOC on the misconduct issues he had planned.

Finally, Mr. Kozol never filed vague complaints in multiple counties to ensure none of these claims were consolidated, as the Department mendaciously purports. Answer to Motion, at 1. Here, all 31 claims were brought in a single, specific complaint providing full and fair notice to the Department of its PRA violations. CP 11-17. Clearly, the Department's belabored reliance on the immaterial emails is nothing more than a tautology, completely irrelevant to the issues on review.

The legislature's intent is for appellate review in a PRA action to be squarely focused on and limited to "[j]udicial review of **agency** actions." RCW 42.56.550(3) (emphasis added). Therefore, as a matter of law, because the Department has conceded that DOC public disclosure staff **never** reviewed or considered the email content as part of **any** agency action in responding to these requests, the content of Mr. Kozol's protected speech in the emails is factually and legally irrelevant to the review of the agency's actions.

However, there exists a far more fatal deficiency in the Department's argument. When taking the Department's argument as true that it "solely submitted" the emails to show that Mr. Kozol allegedly knew he was asking for "records that would not be identifiable as responsive to his request" (Answer to Motion, at 2), then it must also follow as a matter of law that, had the emails never existed and the mental thoughts remained inside the minds of Mr. Kozol and those communicating with him, the

record requests would then be deemed to clearly be seeking identifiable records. Therefore, as distilled, the Department's argument can only mean that the agency's determination, of whether the withheld records were subject to disclosure, was exclusively based upon consideration of the email content by DOC public disclosure staff. Yet as the Department has conceded, the responding public records staff have never reviewed these emails.

Under the Department's argument, any other requestor who submitted the same record requests, but who did **not** have discussions containing protected speech criticizing governmental violations of the PRA, would ostensibly have been given the requested **complete** "original grievance forms," because such individuals would not be trying to allegedly "trick" the Department. Ergo, all the Department is doing is treating Mr. Kozol differently based upon his identity as a party to the email communications. This is emphatically prohibited by the Public Records Act, as "[a]gencies shall not distinguish among persons requesting records." RCW 42.56.080. As such, the Department has now admitted to additional violations of the PRA.

The central issue in this case which the Department is desperately trying to avoid, is that it unlawfully altered Mr. Kozol's requests, which led to the the DOC conducting legally inadequate record searches, which, in turn, led to silent withholding, and was then punctuated by DOC unlawfully destroying the withheld responsive records.

Mr. Kozol's 31 requests sought copies of "any and all records for inmate/offender grievance [log i.d.#]. This includes the original complaint form" (CP 42-71), but the Department improperly altered these requests and dropped the separate sentences that requested each specifically numbered "original complaint form." This improper alteration is manifest because the Department stated that it only conducted a search for "documents related to grievances." CP 29.

It is undisputed that the Department repeatedly confirmed each request sought a complete "copy of the original complaint form." CP 72-73. It is undisputed that the DOC admitted it knew each original complaint form was comprised of two pages, a front and a back. CP 228. It is undisputed that the DOC never sought clarification of Mr. Kozol's requests for each complete "original complaint form." The Department cannot now claim post-hoc that the specific requests were deficient in seeking unidentifiable records. Stare decisis requires that, "if the agency was unclear about what was requested, it was **required** to seek clarification." Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 727, 621 P.3d 119 (2011) (emphasis added).

The Court of Appeals' interpretation of an "identifiable record" as applied to Mr. Kozol's requests is contrary to RCW 42.56.080 and interprets the statute in a manner that leads to absurd results, as every time a requestor specifically requests a document by its listed name and by an identifying number

designator, the requestor must now further tell the agency that he wants the "complete" version of every specified record, or how many pages each requested document is comprised of, and where all the responsive pages are located at. This is contrary to the PRA, as it requires requestors to be "mind readers" as to what records exist. See Daines v. Spokane County, 111 Wn.App. 342, 349, 44 P.3d 909 (2002). Agencies must search for and produce the complete records that exist. Requiring requestors to now specify how many pages they want of each complete specific record is contrary to this Court's holding that,

> "a party does not know with certainty that a document in its possession is the public record it seeks until the agency responds....The fact that the requesting party possesses the documents does not relieve an agency of its statutory duties."

Neighborhood Alliance, 172 Wn.2d at 727. "Records requests are not required to use the exact name of the record, but requests must be for identifiable records." Fisher Broad. v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). Mr. Kozol's specific requests for each complete, numbered "original complaint form" requested identifiable records as a matter of law.

II. CONCLUSION

The emails are immaterial and the motion should be granted.

RESPECTFULLY SUBMITTED this 15th day of May, 2016.

STEVEN P. KOZOL
191 Constantine Way
Aberdeen, WA 98520
Ph:(360)537-1800

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 15th day of May, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 92792-8:

Reply on Petitioner's Motion to Strike;

;

;

.

addressed to the following:

Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Candie M. Dibble, AAG
Attorney General's Office
1116 W. Riverside Ave., #100
Spokane, WA 99201-1194

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

DATED THIS 15th day of May, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol

Signature

STEVEN P. KOZOL

Print Name

DOC# 974691 UNIT# H6-A86
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520