No. 93365-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION II

STEVEN P. KOZOL

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

APPELLANT'S PETITION FOR REVIEW REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Stephen Kozol hereby replies to the Department of Corrections Answer to his Petition for Review.

II. SUMMARY OF THE ARGUMENT

Kozol shows that the Public Records Act makes no distinction between "boilerplate" and "non-boilerplate" documents. He then responds by showing that the requested documents are public records and the Department of Correction's (Department) argument seconded by the Court of Appeals is nonsense. He then shows how the Department's failure to cite a statutory exemption claim goes to the heart of the issue. Kozol then shows that his spoliation argument is nothing new under the sun. He then asks for attorney fees and costs on appeal if he should prevail.

III. ARGUMENT

A. THE PUBLIC RECORDS ACT MAKES NO DISTINCTION BETWEEN "BOILERPLATE" AND "NON-BOILERPLATE DOCUMENTS.

The court below ruled that because the back page of the requested documents were "boilerplate instructions" that the Department was not obligated to produce the records. This ruling is in conflict with prior decisions of our courts and the facts of this case.

Each of Kozol's requests sought "the original complaint form." CP 256-277. The Department repeatedly confirmed Kozol sought the original form. CP 282-324, 330-71. Kozol's request was for an identifiable public record. He provided notice it was sought pursuant to the PRA and identified the documents sought with sufficient clarity for the Department to locate them. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004). If the Department had felt the request was unclear, it was "required to seek clarification." *Neighborhood Alliance of Spokane v. Spokane County*, 172 Wn.2d 702, 727, 261 P.2d 119 (2011). This it did not do. The original grievance form consists of two pages. CP 501. Kozol provided sufficient information for the Department to provide both sides of the form. After all, the Department keeps the complete document in its hard copy file system.

The Department's failure to search for the completed grievance form and instead search in the electronic file for "any and all documents related to 22 separate grievances" resulted in the violation of the PRA. CP 442. If the Department had search for the original complaint forms, it would have searched in a completely different location – the paper files.[1]

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[1]Kozol had asked for other grievance forms and had been provided them. CP 854-65.

Then there is the Department's claim that the second page of the grievance forms only contain boilerplate instructions and are therefore non-responsive. There is no exemption in the PRA which permits an agency to disregard a request because it considers the language on the document to be strictly boilerplate. Under this theory, the Department could not provide any of its policies and procedures under the theory that the language is only boilerplate and it is not processed in any way.

And even assuming, *arguendo*, that documents containing boilerplate language are exempt, the Department failed to provide evidence showing what was on the back of the grievance forms asked for by Kozol. Any employee of the Department could have written comments on the second page and such comments would still be considered boilerplate under the Department's argument. The Court of Appeals using the nature of the document without citing to an exemption to deny liability will open the slippery slope to eviscerating the Public Records Act.

B. THE GRIEVANCE FORMS ARE PUBLIC RECORDS BECAUSE THEY ARE WRITINGS PERTAINING TO A GOVERNMENTAL FUNCTION PREPARED, OWNED, USED AND RETAINED BY THE DEPARTMENT.

In determining whether the PRA applies, courts must determine the threshold matter of whether the record sought constitutes a public record. See *Dragonslayer, Inc. v. Wash. State Gambling Cmm'n.*, 139 Wn. App. 433,

444, 161 P.3d 428 (2007). In order for something to be considered a public record, it must be (1) a writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function and (3) be prepared, owned, used or retained by any state or local agency. RCW 42.56.010(3); *Dragonslayer*, 139 Wn. App. at 444. A record must meet all three elements to be considered a public record. *Dragonslayer*, 139 Wn. App., at 444.

1. The Requested Documents Are Writings.

The Public Records Act defines "writing as:

> ...handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4). There can be no question that a form with writing on it is a writing as defined by the PRA.

2. The Requested Records Contain Information Relating To The Performance Of A Governmental Function.

The second element of the definition of "public record" in RCW 42.56.010(3) requires that information contained in the record must "[relate]

to the conduct of government or the performance of any governmental or proprietary function ..." RCW 42.56.010(3). Grievances are a critical aspect of prison life, necessary to provide the inmate the means of raising issues with the Department with the end result of preventing conflict. The Department's own policy states that it "seeks to reduce tension and provide a stable correctional environment by providing a formal mechanism to address conflict through the administrative resolution of complaints." DOC Policy 550.100.[2]

In establishing the Department of Corrections, the legislature provided for a "system of corrections for convicted law violators ... designed ... to provide the maximum feasible safety for the persons and property of the general public." RCW 72.09.010(1). Among the powers and duties the legislature assigned the secretary of the Department is the authority to adopt standards for the operation adult correctional facilities" that are "within appropriation levels authorized by the legislature." RCW 72.09.050; RCW 72.09.135. Functions that"relate to the ... performance of any governmental or proprietary function," has been interpreted broadly. *See Nissen v. Pierce County*, 183 Wn.2d 863, 880, 357 P.3d 45 (2015) (citing *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 739-43, 958 P.2d

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[2]http://www.doc.wa.gov/policies/showFile.aspx? name=550100.

260 (1998), *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980)). Under any interpretation, the grievance process is related to the Department's governmental function. The second *Dragonslayer* element is met because the records relate to the performance of a governmental function.

3. The Department Prepared, Owned, Used, and Retained the Grievance Forms.

The PRA defines a public record as a writing that relates to the performance of a governmental function, "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). The grievance forms meets all these requirements. It was prepared by the Department and it owns them. After they are used, its retains them. Therefore, the grievance forms meet the third Dragonslayer prong. Therefore, under the three-part test set forth in *Dragonslayer*, the copies of all grievance forms are public records. Thus the fact that a page was not modified during its usage does not control whether or not it was a public record. If such a determination was permitted, then any agency could claim that all documents not used to record new information are not responsive, resulting in more litigation as requesters attempt to see the complete record. This Court has made it abundantly clear that "[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246

(1978). By permitting agencies to withhold otherwise disclosable records because they are "boilerplate" eviscerates the PRA.

C. THE DEPARTMENT'S FAILURE TO PROVIDE ALL REQUESTED RECORDS THROUGH ITS CLAIM THAT IT HAS THE ABILITY TO DISREGARD A SPECIFIC REQUEST GOES TO THE HEART OF THE ISSUE.

The Department claims that Kozol failed to raise the issue of whether the Department had statutory authority to modify or disregard a request with the requester's consent. However, this issue has always been before the various reviewing courts because it is the heart of the Department's claimed defense. After Kozol claimed that he was not provided the full grievance forms, the Department claimed that it did not need to provide the backside of the forms because they contained boilerplate instructions. This argument relies on the claim it has the ability to disregard the specific request without citing to statutory authority. Kozol addressed this issue in his opening brief as issue four. Court of Appeals Opening Brief, p. 39. The heart of any exemption claim and defense is statutory authority. it is not a new issue.

D. KOZOL RAISED THE SPOLIATION ISSUE PRIOR TO THIS PETITION.

After the Department admitted it had destroyed the original forms, Kozol argued the Department violated the PRA when it destroyed the records he requested. He argued this before the trial and appellate courts. Before

Division II, the Department continued to justify its destruction because the second page allegedly contained "only boilerplate instructions" or "were merely instructional." Court of Appeals Brief of Respondent, p. 34. In his reply, Kozol argued that "[t]he true information on these specifically withheld pages will never be known because they were illegally destroyed after Mr. Kozol requested them," and that the Department knew that the second pages of the original grievances contained more than just boilerplate instructions" Court of Appeals Reply Brief of Petitioner, p. 13. He then stated that the law of spoilation should apply. *Id.* pp. 14-17. Spoliation was a part of the record before Division II and it is the logical way to view the Department's actions. The Department's argument that the destroyed pages only contained "boilerplate" instructions raised the spoliation issue. That Kozol chose to provide for a separate argument in his petition was merely the consequence of the Department's defense. Spoliation is another way of addressing destruction of records and is not a new context for the PRA. RCW 42.56.100.

RAP 10.3(c) permits an appellate to respond to issues raised in the respondent's response brief. This is exactly what Kozol did. He raised the destruction of the records in all his briefs. In his petition, he cited this Court for the proposition that "[d]estruction of a requested record violates the PRA." *Neighborhood Alliance*, 170 Wn.2d at 750 (Madsen, C.J., concurring).

The fact he gave it the name, spoliation, does not change the issue. "What's in a name? That which we call a rose ... By any other name would smell as sweet. William Shakespeare, Romeo and Juliet, Act. II, Scene II.

E. KOZOL IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS.

If this Court finds the Department in violation of the PRA when it responded to Kozol's request, Kozol asks that reasonable attorneys fees and cost be granted. This Court had determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. RCW 42.56.550(4) grants this right. Kozol also asks this Court order the trial court to grant reasonable attorney fees and costs on remand.

IV. CONCLUSION

For the reasons stated above, Kozol asks this Court to accept review of whether or not the Department violated the Public Records Act. If he prevails, Kozol asks this Court to award appellate attorney fees and costs and remand this case back to the trial court for determination of penalties, and fees and costs.

Respectfully submitted this 8th day of August, 2016.

KAHRS LAW FIRM, P.S.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on August 8, 2016, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

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Reply brief for Kozol v. Dept. of Corrections, No. 93365-1

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