No. 33920-3-III

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JOSEPH JONES

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. THE DEPARTMENT OFFERED NO EVIDENCE OF WHEN THE DOCUMENT WAS LOST OR DESTROYED AND IS LIABLE FOR NOT PROVIDING JONES A COPY OF THE REQUESTED DOCUMENT.. 1

B. BOTH THE PURPOSE OF THE PUBLIC RECORDS ACT AND THE DEMANDS OF JUSTICE REQUIRE A REBUTTABLE PRESUMPTION THAT THE RECORD EXISTED AT THE TIME IT WAS REQUESTED. 3

III. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 130, 580 P.2d 246 (1978) 4

Predisik v. Spokane Sch. Dist. No. 81, 182 Wn.2d 896, 346 P.3d 737 (2015) 3

Sperr v. City of Spokane, 123 Wn. App. 132, 96 P.3d 1012 (2004) 1

West v. Dept. of Natural Resources, ... 2, 3

Statutes

RCW 42.56.550(4) 4

RCW 42.56.565(1) 5

I. INTRODUCTION

Jones replies to the Department by showing how the Department's position is unsupported by the record and legal argument.

II. ARGUMENT

A. THE DEPARTMENT OFFERED NO EVIDENCE OF WHEN THE DOCUMENT WAS LOST OR DESTROYED AND IS LIABLE FOR NOT PROVIDING JONES A COPY OF THE REQUESTED DOCUMENT.

Jones does not dispute the Department's assertion that it has "no duty to create or produce a record that is non-existent." Response at 5, (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)). However, Jones takes issue with the Department's central argument – that absence of evidence is evidence of absence. The Department fails to cite to any evidence on the record showing when or whether the record had been lost or destroyed when it received Jones's request. If the Department had evidence of such an act before it received Jones' formal request on December 7, 2014, it would have certainly provided it. That the agency with absolute control over the evidence fails to provide that evidence in support of its argument only supports Jones's argument that there must be a rebuttable presumption that his request was received before the record was lost or destroyed. This is especially true in light of the case cited by the Department in its defense.

West v. Dept. of Natural Resources, the case law on which the Department bases its Response, is easily distinguishable from the case at hand. 163 Wn. App. 234, 258 P.3d 78 (2011). This is because, in *West*, the agency provided actual evidence showing that the requested records were destroyed *prior* to the date they were requested. No such evidence is provided here.

In citing to *West*, the Department implies that the records were destroyed before Jones's request was received. *See* Response at 5-7. However, *West* is factually distinguishable because the Dept. of Natural Resources provided evidence showing that emails West asked for were no longer accessible due to a software upgrade and, thus, not in existence when the request was made. 163 Wn. App. at 240-41. Division II was thus persuaded that the "emails West requested...did not exist when he made his request." *Id.* at 245.

The Department also attempts to use a straw man to divert this Court's attention from the issue in this case – that the destruction of records in violation of a retention schedule is not a violation of the PRA. Response, p. 6. Jones has never claimed that Department is liable for untimely destruction of the record he requested. Nor does he argue that the one month delay in searching for the records was unreasonable. What he is arguing is that the Department does not know when the document was

destroyed and, consequently, may not now claim that it does to avoid liability.[1] It could have been destroyed December 11, 2014, over a month after the request. However, the Department has never provided evidence showing whether or when the record was lost or destroyed. Thus, *West* is clearly distinguishable because evidence in the record established exactly when the documents West had requested were destroyed – before he requested them.

B. BOTH THE PURPOSE OF THE PUBLIC RECORDS ACT AND THE DEMANDS OF JUSTICE REQUIRE A REBUTTABLE PRESUMPTION THAT THE RECORD EXISTED AT THE TIME IT WAS REQUESTED.

Jones wishes to remind this Court that the purpose of the PRA (free and open examination of records by citizens) established by the legislature is served by requiring reviewing courts to "start with the presumption that all public records are subject to disclosure." *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015). This purpose would be undermined if the Court establishes a presumption against Jones when evidence required to rebut that presumption was available to the Department and not Jones. This is in line with the burden of proof being on the agency to establish that a specific exemption applies

[1] The parties have used the word lost and destroyed in various ways. Jones wishes this Court to understand that he uses both words interchangeably because the bottom line is that he did not receive the public record he requested.

to the withholding or redacting of a document. *Hearst Corp. v. Hoppe,* 90 Wn.2d 123, 130, 580 P.2d 246 (1978) (citing RCW 42.56.550(2)).

Jones also wishes to remind this Court that justice demands that he be relieved of the burden of proving that the record was not destroyed before it was properly requested. This is because the evidence with which Jones might make such a showing is in the exclusive control of the Department, and Jones in no way contributed to its purported destruction or loss.

Sound public policy and the purpose of the PRA are served by finding liability when an agency fails to rebut the presumption that a record existed when it was requested. This does not mean agencies will have to pay penalties for such a failure. However, placing the burden of proof on the agency preserves the enforcement mechanism enacted by the legislature in RCW 42.56.550. This is because requestors who challenge an agency's claim of loss or destruction could recover reasonable attorney's fees and costs incurred to that end if awarded pursuant to RCW 42.56.550(4), even if no penalties are awarded.

The Department also argues that Jones failed to provide evidence supporting a claim of purposeful or wrongful destruction. The Department attempts to conflate a penalty argument with the argument before this Court – a liability argument. Whether or not the agency acted in bad faith

pursuant to RCW 42.56.565(1) is an issue for the trial court to determine if this Court decides to remand this case. The Department has failed to rebut either of Jones's arguments, and a finding for Jones aligns with all precepts of the PRA and is good public policy.

III. CONCLUSION

For the reasons stated above, this Court must find that agencies must produce evidence to rebut the presumption that the document existed when it was requested. The Department, having failed to do so, must be found liable for violating the Public Records Act. This case must be remanded back to the trial court for a determination of penalties and attorney fees and costs. Jones also asks this Court to award reasonable attorney fees and costs on appeal.

Respectfully submitted this 21st day of March, 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 March 21, 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:

1. APPELLANT'S REPLY BRIEF

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