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NO. 63489-5-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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RONNIE HICKS,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS, JANE MCKENZIE, CATHY  
KOPOIAN AND KAY WILSON-KIRBY,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Mr. Hicks, an inmate formerly housed at the Monroe Correctional Complex, was a participant in the Sex Offender Treatment Program<sup>1</sup> (Treatment Program) when he made two records requests pursuant to RCW 42.56, *et. seq.* for the document used to track his participation in the program, titled "SOTP Termination Form". At the time he made his initial request, in August, 2007, he had not been terminated from the program; therefore a responsive document did not exist. He clarified that request for the form used to track his participation that had notes made in July, 2007. That form was given to him after submitting payment.

After that request was made, but before he paid for it, Mr. Hicks again requested his termination form. He did not provide any other identifying information. The Records Coordinator at the institution, Cathy Kopoian, believed that the document had already been provided to him in response to the previous request and did not offer the document to Mr. Hicks again. Mr. Hicks failed to clarify in his second request for the form

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<sup>1</sup> SOTP is the Sex Offender Treatment Program offered to inmates while they are incarcerated. There is one two-sided form that is used by DOC staff to track an offender's participation in the program. CP 19. The front of the form, as it existed when Mr. Hicks was in the program, was titled "SOTP Movement Form". *Id.* The back side of the form is titled "SOTP Termination/Decline". The same document is used to track an offender's progress through the program and through each review or decision additional notes are added with corresponding dates. There has only been one document in Mr. Hicks' file titled "SOTP Termination" that has had additional notes added over time. For Mr. Hicks, information was added on July 13, 2007 and again on September, 12, 2007. It is assumed that these changes prompted Mr. Hicks' multiple requests for the same document.

that he was seeking the version that had notes added on September 12, 2007. During the litigation over these requests, Ms. Kopoian discovered that the form was altered in September, 2007. Staff hand delivered the document to Mr. Hicks in September, 2008.

## **II. COUNTER-STATEMENT OF THE ISSUE<sup>2</sup>**

The trial court judge properly found that the Department of Corrections (“the Department”) provided all responsive records to Mr. Hicks. The only identifiable document requested, and provided, was Mr. Hicks’ termination form. Did the court properly conclude that the Department complied with the Public Records Act?

## **III. STATEMENT OF THE CASE**

### **A. Factual Background**

#### **1. Mr. Hicks’ August 16, 2007 records request**

##### **a. Mr. Hicks’ first request for the termination form**

On August 16, 2007, Mr. Hicks mailed a public disclosure request to Monroe Correctional Complex, Twin Rivers Unit’s former Public Disclosure Coordinator, Jane McKenzie, requesting one copy of his termination form. CP 191. Ms. McKenzie responded within five days on

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<sup>2</sup> Mr. Hicks is also challenging the lower court’s denial of his request for the court to review the responsive document *in camera*. This issue is moot as all the documents that he wished to have reviewed *in camera* were provided to support the briefing submitted by the Department in response the Motion to Show Cause and the supplemental information provided. CP 80.

August 21, 2007, stating that there was no form responsive to his request and providing a tracking number of PD #7-301. CP 151. Because Mr. Hicks had not yet been terminated from the Treatment Program, no such document existed at that time. CP 102. Consequently, no identifiable record was requested or provided.

**b. Mr. Hicks' clarification submitted August 24, 2007**

On August 24, 2007, Mr. Hicks again submitted a request for "1 SOTP Termination Form" on a Department standard public records request form. CP 193. Ms. McKenzie considered this to be duplicative of the one he submitted on August 16 and was given the same tracking number. CP 156. On the same day, Mr. Hicks sent a letter to Ms. McKenzie asking for the termination form and explaining in greater detail the document he was requesting. CP 100. Specifically, he stated:

"On June 20, 2007 in the Director's Office Dr. Hover presented me with a form clearly marked 'Termination Form' at the top. I signed this form requesting an Appeal Hearing. On July 13, 2007 at my Appeal Hearing this form was right in front of me on the desk next to the Director of SOTP, Anna Aylward".

*Id.* With this additional description of the document requested, Ms. McKenzie identified the record and provided it to Mr. Hicks. CP 203. Within five days, Ms. McKenzie notified Mr. Hicks the document was available and requested payment for the production of the document. *See*

CP 103. Mr. Hicks did not provide the necessary forms or money to pay for this document until October 2, 2007. CP 106. On October 4, Mr. Hicks was given the one responsive page as it existed on August 29, the date it was made available in response to his August 24, request.

**2. Mr. Hicks' September 13, 2007 records request**

**a. Mr. Hicks' second request for the termination form**

On September 13, 2007, Mr. Hicks sent another public disclosure request to the new Public Records Coordinator, Cathy Kopoian, and again included a request for “[m]y SOTP Termination Form”. CP 197-198. Mr. Hicks did not make any further specifications regarding the termination form he wanted in this later request. He did not explain that the document he was requesting contained additional information – information added to the form after the previous form had been requested. The September 13, request was given a tracking number of PD #7-326. CP 207. Without knowing that any changes had been made to the termination form, Ms. Kopoian properly processed the portions of the request not seeking the other documents. As to the termination form again requested, she informed him that it had been produced to him, upon receipt of payment, on October 4. CP 209.

At that time, Ms. Kopoian did not know that this public records request was seeking a record different from the record provided in response to Mr. Hicks' August 24, 2007, request. CP 80. Specifically, Mr. Kopoian did not know changes had been made to the termination form on September 12, 2007. *Id.* After a review of all of the documents responsive to the other portion of the September 13 request, Ms. Kopoian determined that Mr. Hicks was simply asking for another copy of the same termination form. *Id.* It was not clear to her that the second request for the form was for the later notations that had been made to it after it had been gathered in response to the August 24, 2007 request.

**b. The appeal of his September 13, 2007 request<sup>3</sup>**

Mr. Hicks appealed the response to this request to Kay Wilson-Kirby, the Department Appeals Officer, on November 27, 2007. CP 120-126. He did not assert in his appeal that this specific document was improperly withheld in response to the request. CP 120-126. He did not reference his termination form in the appeal for this request, nor did he state that there were alterations made to the document after he requested it

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<sup>3</sup> Mr. Hicks also indicates in his brief that he requested his SOTP Termination form with the September 12, 2007, notes on November 11, 2007. Opening Brief at 2. The evidence does not indicate that this request was properly made to the Public Disclosure Unit at his institution, as required by *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008), *review denied*, 166 Wash.2d 1017, 210 P.3d 1019 (2009). Mr. Hicks indicates he sent this letter to Ms. Aylward; however, the Public Disclosure Coordinator at his institution was Cathy Kopoian. CP 153. He was aware that this person was the Public Disclosure Coordinator, as he had previous correspondence with her regarding his public records request. His November 11, 2007 request was improper.

the second time. At no time did Mr. Hicks indicate he was seeking a termination form with notations made on September 12, 2007. If he had so indicated, the document could have been identified sufficiently to provide a response to his public records request.

After Ms. Kopoain discovered what Mr. Hicks was requesting and that the form had additional changes added to it in September, staff hand delivered a copy of the SOTP termination form to Mr. Hicks on September 16, 2008.

**B. Procedural Background**

Mr. Hicks filed a motion to show cause regarding the public records request on June 9, 2008, without first filing a complaint. CP 131-139. He later filed a complaint on August 11, 2008, alleging the Department failed to properly provide a document he had twice requested and that he was entitled to penalties and costs. *Id.* The matter was heard in Snohomish County on September 10, 2008, and Mr. Hicks argued that he was, in effect, denied a copy of the requested document because the document he ultimately received did not include the notes and signatures that were added subsequent to his original request. CP 79. He argued that he knew there were additional notations made to his termination form because the Treatment Program Director referenced it in a letter to him explaining his termination from the Treatment Program. *Id.* Because this

was new information, the court requested supplemental briefing to explain it. CP 79. The briefing explained that the additional notations were not responsive to the request made on August 16 because they had not yet been made and that Mr. Hicks did not sufficiently identify which termination form he wanted in his September, 2007 request. CP 81. Finally, the court was notified that the form with the notations made on September 12 was hand delivered to Mr. Hicks on September 18, 2008. *Id.*

The superior court ruled that the Department provided sufficient responses to Mr. Hicks' public records requests; although an incorrect date of disclosure was noted in the court's ruling. CP 147. Mr. Hicks filed a motion for reconsideration regarding the mistaken date of release of records and argued that there were additional forms used by the Department to terminate someone from the Treatment Program. The court again requested additional information about the termination form requested and whether there were any other documents used when an offender is terminated from such a program. CP 19-29. After considering responsive briefing from the Department, the court denied Mr. Hicks' motion for reconsideration on April 16, 2009, without further explanation, and this timely appeal followed.

#### IV. STANDARD OF REVIEW

This Court is asked to consider whether the Department produced the requested records and whether Mr. Hicks properly identified a record that the Department could produce. In reviewing a documentary record to determine whether an agency provided the requested records in response to a public records request, the Court reviews the trial court's decision *de novo*. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001) (when the record consists only of affidavits, memoranda of law, and other documentary evidence the appellate court stands in the same position as the trial court).

#### V. ARGUMENT

##### A. **The Department Timely Provided a Response to Mr. Hicks' Request Dated August 16, 2007, and Clarified on August 24, 2007**

It is well-settled that the Legislature intended, and the courts construe, the Public Records Act ("the Act") liberally in favor of disclosure of documents maintained by public agencies. *See e.g.*, RCW 42.17.030.<sup>4</sup> Under the Act, "[p]ublic records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person." RCW

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<sup>4</sup> The portions of 42.17 RCW dealing specifically with the production of public records were recodified as 42.56 RCW effective July 1, 2006.

42.56.080. An agency must respond to a public records request within five business days of receipt. RCW 42.56.520.

The Act requires agencies to produce only “identifiable public records. RCW 42.56.080. A record is identifiable if there is a reasonable description enabling the agency to locate the requested records. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004); see also, *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998) citing *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, 938 (D.C. Cir. 1970), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

The Act does not require the agency to research or explain its records but only to make those records accessible to the public. *Smith v. Okanagon County*, 100 Wn. App. 7, 12 (2000). A person seeking documents under the Act must “identify the documents with reasonable clarity to allow the agency to locate them.” *Hangartner*, 151 Wn.2d at 447. A record that does not exist at the time of a request cannot logically be responsive to a request for “identifiable public records.” *Smith*, 100 Wn. App. at 12; *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004) (“An agency has no duty to create or produce a record that is non-existent.”) RCW 42.56.080; see also WAC 44-14-04004(4)(a) (Advisory Model Rules for Public Records Act) (“An agency must only provide access to public records in existence at the time of the request.”).

At the time Mr. Hicks made his initial request, August 16, 2007, a document regarding his termination from the Treatment Program did not exist, as he had not yet been terminated from the Treatment Program as of that date. The Department acted within the requirements of the Act by responding to the initial request within five days and informing Mr. Hicks that there were no responsive documents available because he had not been terminated from the Treatment Program. On August 24, 2007, Mr. Hicks again requested the form and included some clarification to his request, asking for the form that was signed in his presence and was at the program hearing he attended in July, 2007. Upon receiving that clarification, the Department was able to locate an identifiable document. The requested records were made available within five days, in accordance with the Act. Because Mr. Hicks did not pay for this record for over a month, the records were not sent to him until October 4, 2007, two days following payment.

Mr. Hicks appears to be suggesting that because he paid for his record a month after it was requested, the Department was obligated to re-search, upon receipt of payment, for responsive records that were made in the interim once payment was received. No such obligation exists under the Act. RCW 42.56, *et. seq.* The Department discharged its obligations under the Act when Mr. Hicks was provided the document responsive to

his August 24, 2007, request. Concluding otherwise would require an absurd application of the Act, requiring agencies to continuously supplement responses to requests *ad infinitum* when requesters like Mr. Hicks refuse to timely pay for their documents.

The Department provided a timely and proper response to Mr. Hicks' public disclosure requests dated August 16 and August 24, 2007. This Court should affirm the superior court's ruling.

**B. The Department Provided All Identifiable Documents Responsive to Mr. Hicks' Second Request For His Termination Form Submitted On September 13, 2007**

This Court has previously considered a repeated request for a document and found that the document has to be sufficiently identified to indicate what is being sought. *O'Neill v. Shoreline*, 145 Wn. App. 913, 926-927, 187 P. 3d 822, 828 (2008). In *O'Neill*, an individual repeatedly requested, both orally and in writing, an email that was referenced in a city counsel meeting. *Id.* Initially, O'Neill simply requested a copy of the email, but through subsequent requests, she clarified that she was asking for additional information regarding the email, including the metadata and the header information that indicated who sent the email. *O'Neill*, 145 Wn. App. at 829. This Court considered O'Neill's multiple requests specifically to determine whether she had requested an identifiable record in each request. *Id.* It determined that a simple request for an email did not include

a request for the metadata or other identifiable information about the email or specify that it be produced electronically. *O’Neill*, 145 Wash. App. at 831. Specifically this Court ruled that an agency “is not required to be a mind reader when responding to public records requests. The PRA only requires providing a public record when it is identifiable”. *Id.* This Court found that the initial requests from O’Neill were not for the email in electronic format or for the metadata, but only for a hard copy of the requested document. Later requests were specific enough to indicate O’Neill was seeking more information about the email that could be obtained, like the metadata.

The *O’Neill* case is akin to the case presently before the Court. Before Mr. Hicks paid for the record responsive to his August 24, 2007, request, he submitted a second request asking for the same document. In this second request, submitted on September 13, 2007, he did not provide any additional information about the form but simply again requested “My SOTP Termination Form” in a request for a number of other records. CP 197-198. Without further specifying that he was seeking a subsequently modified version of the record already made available (and not yet paid for), the person tasked with providing a response to the request could not identify what record was sought. The Department would have had to read Mr. Hicks’ mind to know that he was referring to the same document, but

with additional notations. A straightforward reading of the September 13, 2007, request reveals it to be for a document already requested and previously made available.

Similar to the request made in *O'Neill*, Mr. Hicks again identified a document that had been provided, but unlike *O'Neill*, did not include any additional identifying information. The Department may have been able to identify the record that was actually being sought if Mr. Hicks had clearly indicated that he was seeking the later version of the termination form that included additional notations from September 12, 2007. Instead, the Department considered the request to be a repeat request for the document already made available on August 27, 2007. Mr. Hicks failed to bring the alleged discrepancy to the Department's attention. Although he appealed the response to this records request regarding the numerous other records requested on September 13, 2007, he did not assert that the response to the request for the termination form was in any way incorrect. Once it was discovered what specific document Mr. Hicks actually meant to ask for in his September 13, 2007 request, it was provided to him<sup>5</sup>.

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<sup>5</sup> It was not clear what Mr. Hicks was requesting in his September 13, 2007, request until this extensive litigation had commenced. Mr. Hicks' requests were confusing, as were his pleadings in this matter. It appeared that he was requesting documents that indicated some sort of fraud, but the true nature of his concerns regarding the responses to public records requests did not become clear until the multiple hearings conducted on this matter. The document was ultimately provided to him on September 18, 2008.

Because Mr. Hicks failed to request an identifiable record in his September 13, 2007, public records request, this Court should affirm the lower court's decision.

**C. The Trial Court Properly Denied Mr. Hicks' Request For Penalties and Costs**

Mr. Hicks asserts that the Department should have been assessed a penalty in light of the Washington State Supreme Court's recent decision in *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (*Yousoufian IV*). That decision is the fourth in a series of opinions regarding a 1997 request for public records from King County. A motion to recall the mandate in that case was granted on June 12, 2009, but a new opinion has not yet been issued. In light of this development, this Court may not rely upon *Yousoufian*, 165 Wn. 2d 439, at this time as precedent for determining any penalty in this case.

The superior court did not make any findings regarding penalties, as it found that the Department properly provided all identifiable documents when requested. In the event this Court decides that penalties should be awarded for failure to properly respond to Mr. Hicks' public records request, the matter should be remanded to the superior court to determine the penalties in the first instance.

**VI. CONCLUSION**

For the foregoing reasons, the Department respectfully requests that the superior court's order be affirmed.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January, 2010.

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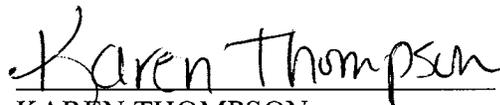
**CERTIFICATE OF SERVICE**

I certify that I served a copy of the foregoing BRIEF OF RESPONDENTS on all parties or their counsel of record as follows:

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EXECUTED this 14<sup>th</sup> day of January, 2010, at Olympia, Washington.

  
KAREN THOMPSON