

COA NO38731-0-11
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 OCT 24 A 11:24

NO. 81434-I
BY RONALD R. CARPENTER
[Signature]

SUPREME COURT OF THE STATE OF WASHINGTON

VIRGINIA CARRERA-AMARO and FERNANDO R. SANTANA on
behalf of all similarly situated persons,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

JODY LEE CAMPBELL
Assistant Attorney General
WSBA No. 32233
JERALD R. ANDERSON
WSBA No. 8734
Senior Counsel
P.O. Box 40110-0110
(360) 664-2475

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF CASE.....2

III. STATEMENT OF ISSUES.....4

IV. ARGUMENT5

 A. The Information Request Was Not A Public Record
 Request.....5

 B. At The Time Of The Information Request, No Abstract
 Existed.....7

 C. The Public Records Act Is Not Designed To Enforce The
 Financial Responsibility Act.....8

V. CONCLUSION9

TABLE OF AUTHORITIES

Cases

Smith v. Okanogan Cy.,
100 Wn. App. 7, 994 P.2d 857 (2000)..... 7

Wood v. Lowe,
102 Wn. App. 872, 10 P.3d 494 (2000)..... 6, 7

Statutes

RCW 34.05.570(4)(b)..... 8

RCW 42.56 4

RCW 42.56.520 4

RCW 42.56.550 4

RCW 46.29 4

RCW 46.29.050 2

RCW 46.29.050(2)..... passim

RCW 49.12.250 6

I. INTRODUCTION

Carrera-Amaro was involved in a traffic accident with an uninsured driver. Through her legal counsel, she requested the Department of Licensing collect information it had on file regarding the at-fault driver's ability to pay Carrera-Amaro's damages and provide her with an abstract of that information. Her request was made pursuant to RCW 46.29.050(2), which is part of the Financial Responsibility Act.

The Department accidentally misfiled Carrera-Amaro's information request, placing it with collision reports received by the Department which were awaiting processing. As a result, the Department responded to her request approximately fifteen months later. During this time, Carrera-Amaro made no inquiries of the Department regarding the status of her request.

Carrera-Amaro sued the Department, asserting a cause of action under the Public Records Act. The superior court dismissed the Public Records Act claim on the basis that Carrera-Amaro did not make a request under the Public Records Act, and she did not request a public record in existence at the time of the request.

II. STATEMENT OF CASE

A few times per year, the Department receives requests for information pursuant to RCW 46.29.050(2).¹ CP 52, ¶ 4. These requests for information, typically called abstract requests, require the Department to collect information and compile it in a process mandated by statute. RCW 46.29.050. When the Department receives a request for an abstract pursuant to RCW 46.29.050(2), the request goes first to Accounting. CP 53, ¶ 5. Accounting then sends the abstract request to the Accident Processing Unit. On receiving the abstract request, the Accident Processing Unit researches the file, looking at the drive record of the person for whom insurance information is being requested and the accident report that law enforcement sends to the Department. CP 53, ¶ 5. Depending on the outcome of the research, the Department sends a letter to the requester, either providing the insurance information requested, or informing the requester that the Department does not have information about the at-fault driver's insurance. CP 53, ¶ 5. The Department responds to the vast majority of abstract requests within five business days. CP 54, ¶ 10.

¹ RCW 46.29.050(2) provides as follows:

The department shall upon request furnish any person who may have been injured in person or property by any motor vehicle, with an abstract of all information of record in the department pertaining to the evidence of the ability of any driver or owner to respond in damages.

On March 1, 2006, Carrera-Amaro's attorney wrote to the Department, citing RCW 46.29.050(2), requesting information in the form of an abstract under that statute. CP 55, ¶ 13. His letter stated in pertinent part:

Pursuant to RCW 46.29.050(2) counsel for client named above requests all information of record in the department pertaining to the evidence of ability of the driver and owner listed above to respond to damages.

CP 64. The Department received the March 1, 2006 letter, but accidentally misfiled the letter. CP 55, ¶ 14. Contrary to the Department's usual practice, the letter was placed among the accident reports that the Accident Processing Unit had not yet processed.² CP 55, ¶ 14). Neither Carrera-Amaro nor her attorney contacted the Department during this time. CP 55, ¶ 15.

On May 29, 2007, the Department discovered Carrera-Amaro's information request and wrote to her attorney, "in response to [his] request for information." CP 55, ¶ 16. The Department included information about the upcoming suspension hearing of the uninsured at-fault driver who caused Carrera-Amaro damage. CP 66. The Department did not

² The Department receives approximately 140,000 accident collision reports from law enforcement per year and the backlog to process accident collision reports is about eighteen months. CP 52, ¶ 2; CP 54, ¶ 8. The Department has asked the Legislature for resources to process accident collision reports more quickly, and the Legislature granted some, but not all, of the resources the Department requested. CP 56, ¶ 20. With the current resource allocation, it will take about one year before the Department can reach its goal of processing accident collision reports within 180 days from when they are received. CP 54, ¶ 8.

know, at that time, that Carrera-Amaro had already settled with the at-fault driver. CP 55, ¶ 18.

About six months later, in late November 2007, Carrera-Amaro filed the complaint in this case, alleging in part that the Department violated the Public Records Act, RCW 42.56, for its failure to respond to her information request within five days. Carrera-Amaro seeks penalties and fees pursuant to RCW 42.56.550. CP 3-10. The trial court dismissed Carrera-Amaro's Public Records Act claim, and she appealed, seeking direct review from this Court.

III. STATEMENT OF ISSUES

1. In response to a request for information pursuant to the Financial Responsibility Act, RCW 46.29, the Department compiled information in an abstract and provided it. Does the agency's failure to meet the requirements of the Financial Responsibility Act within 5 days of receipt of the request create a cause of action for penalties and fees under the Public Records Act, RCW 42.56?

2. RCW 42.56.520 requires that agencies respond "[w]ithin five business days of receiving a public record request." Was Carrera-Amaro's request for information pursuant to RCW 46.29.050(2) a public record request?

IV. ARGUMENT

Carrera-Amaro made a request for information pursuant to the Financial Responsibility Act. The Department complied with all of its statutory obligations under the Financial Responsibility Act in providing a response to Carrera-Amaro. The Financial Responsibility Act does not require the agency to provide the abstract within 5 days, though that is the Department's usual practice. Unfortunately, the response was mistakenly delayed. Carrera-Amaro now wants to capitalize on that delay by seeking remedies available only under the Public Records Act, even though the Public Records Act has no application to the request or the response.

A. **The Information Request Was Not A Public Record Request**

Carrera-Amaro's information request was not a public record request because it specifically requested information, not an existing identifiable public record. Citing to RCW 46.29.050(2), Carrera-Amaro asked for "all *information* of record in the department pertaining to . . . the uninsured driver's ability to pay damages." (emphasis added). She did not ask for any documents, nor did she identify or describe any documents. Only the Financial Responsibility Act, not the Public Records Act, requires the Department to create an abstract in response to such an information request.

Established precedent provides that a public record request must request an identifiable public record. See *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000) (a request for “information” is not a request for an “identifiable public record”).

As in *Wood*, Carrera-Amaro made a request for information, citing to a specific statute which entitles her to the information. In *Wood*, one request was for a document, a personnel file. Even in that circumstance, the court noted that Wood’s request was ambiguous and did not put the agency on notice that it was a public record request because her request for her personnel file could have been interpreted as a request by a public employee for her own personnel file under RCW 49.12.250.

Here, there is no ambiguity. Carrera-Amaro’s information request was plainly made pursuant to the Financial Responsibility Act. In addition, she did not request the records the Department used to create an abstract; she only requested information in the form of an abstract.

The Court of Appeals in *Wood* further stated:

We do not think it a fair application of the PDA to require Mr. Lowe to pay statutory costs and fees for failure to respond in five days to a letter that did not appear to be a public records request.

Id., at 881-82. Likewise, it would not be fair to apply the Public Records Act in this case because Carrera-Amaro did not make a request for an identifiable public record.

B. At The Time Of The Information Request, No Abstract Existed

The Public Records Act does not require an agency to create a record that is otherwise nonexistent. *Smith v. Okanogan Cy.*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000). There is a difference between a request for information *about* records and a request for the records *themselves*.

An important distinction must be drawn between a request for information about public records and a request for the records themselves. The [Public Records] Act does not require agencies to research or explain public records, but only to make those records accessible to the public.

Smith, 100 Wn. App. at 12.

A public record is a writing that is in existence at the time the request is made.

A public record subject to disclosure under the Act includes (1) any writing, (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function, (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Id. At the time Ms. Carrera-Amaro made her information request, the abstract she requested had not yet been created. Abstracts produced

pursuant to RCW 46.29.050(2) do not exist at the time the Department receives a request for one. Instead, upon receipt of a request for an abstract, a Department employee reviews the Department's records and creates the abstract for the requester. Here, the abstract took the form of a letter of response from the Department.

Since the abstract requested by Ms. Carrera-Amaro did not exist at the time of her information request, the Superior Court did not err in deciding that her information request was not a request for a public record.

C. The Public Records Act Is Not Designed To Enforce The Financial Responsibility Act

The Public Records Act is designed to provide the public with access to identifiable records already in existence at the time of the request. That is not the case here. Carrera-Amaro made an information request, asking the Department to create a record pursuant to the Financial Responsibility Act. Carrera-Amaro may have had other legal remedies available to her if she needed the insurance information for the at-fault driver immediately, but she did not pursue them.³ She did not even follow-up with the Department regarding her information request for the fifteen months it was pending. The Public Records Act is not the appropriate legal vehicle for Carrera-Amaro to seek a remedy.

³ RCW 34.05.570(4)(b) allows judicial review when a person's rights are violated by an agency's failure to perform a duty that it is required by law to perform. A person may file a petition for review seeking an order requiring performance.

V. CONCLUSION

Because Carrera-Amaro did not request an identifiable record in existence at the time of her request, she has no remedy under the Public Records Act. The superior court's decision dismissing her claim on summary judgment should be upheld.

RESPECTFULLY SUBMITTED this 24th day of October, 2008.

ROBERT M. MCKENNA
Attorney General


JODY LEE CAMPBELL
Assistant Attorney General
WSBA No. 32233
1125 Washington St. SE
P.O. Box 40110
Olympia, WA 98504-0110
(360) 664-2475


GERALD R. ANDERSON
Senior Counsel
WSBA No. 8734
1125 Washington St. SE
P.O. Box 40110
Olympia, WA 98504-0110
(360) 753-6987

NO. 81434-1

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

2008 OCT 24 A 11: 24
BY RONALD R. CARPENTER
CERTIFICATE OF
SERVICE

VIRGINIA CARRERA-AMARO and
FERNANDO R. SANTANA on behalf
of all similarly situated persons,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Respondent.

I, Rain Dineen, certify that I served a copy of **Respondent's Brief**
on all parties or their counsel of record on the date below via US Mail
Postage Prepaid via Consolidated Mail Service to:

Russell M. Odell
251 153rd Pl. SE
Bellevue, WA 98007

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 24th day of October, 2008, at Olympia, Washington.

Rain Dineen

RAIN DINEEN, Legal Assistant