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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 6

DEPUTY

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

KEVIN MICHAEL MITCHELL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S OPENING BRIEF

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ORIGINAL

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I. COUNTER-STATEMENT OF THE ISSUES

1. Mr. Mitchell made two requests for exactly the same documents. Did the Department of Corrections (the Department) fulfill both requests when it produced the documents?

2. After finding that the Department acted in good faith in opting to respond to improperly filed requests for records, and finding that the delay was caused by simple negligence, did the trial court judge properly exercise his discretion in determining the amount of the penalty?

II. STATEMENT OF THE CASE

A. STATUTORY AND RULE BACKGROUND.

RCW 42.56.040(1)(a) requires each state agency to publish rules stating the established location at which, and employees to whom, public records requests may be submitted. Each agency must make public records available to the public according to its published rules. RCW 42.56.070. The Department's rule regarding the submission of public records requests is WAC 137-08-090. The rule states that most public records requests must be submitted in writing to the Department of Corrections Public Records Officer, in Olympia, or submitted electronically to the Department's public disclosure unit.¹

¹ The rule provides that inmate requests for their health records or central file may be submitted to the to the records manager at the facility in which they are incarcerated. WAC 137-08-090(1).

Within five business days of “receiving” a public records request, the agency must produce the record, deny the request, or provide a reasonable estimate of the time required to respond. RCW 42.56.520. If an individual prevails in showing that an agency failed to respond to a public records request within a reasonable amount of time, “it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day” the individual was denied access to the record. RCW 42.56.550(4).

B. FACTUAL BACKGROUND.

On May 2, 2007, Mr. Mitchell sent a letter to an employee at Stafford Creek Corrections Center, asking to inspect his “continuous written mail record” including:

The source of all mail; destination of all mail; date received/sent of all mail; description of all mail; printed name and initials of staff person distributing the mail; and signature and printed name of offender receiving/sending legal mail.

CP 40. Mr. Mitchell further stated that the information he sought included the chronological mail record of items identified with him, and all documents, files, notes, memorandums, and e-mails pertaining to his mail records. *Id.* He did not state the time period covered by the records request.

The request was not mailed to the Department's public records officer in Olympia, or emailed to the Department's public records unit, as required by WAC 137-08-090. However, the Stafford Creek employee, who received the request on May 7, 2007, processed the request and assigned it a tracking number. CP 42. The next day, on May 8, 2007, the Department sent a letter to Mr. Mitchell acknowledging the request, and asking if he would like to designate a non-incarcerated individual to view the records.

Mr. Mitchell replied on May 23, and four business days later, the Department sent him a letter asking him to specify the mail logs he sought. CP 48. Mr. Mitchell responded that he wished to "amend" his request, and obtain:

ALL mail log entries to include incoming, outgoing and legal mail from January 9, 2007 to the present date....

CP 50 (emphasis in original). His letter, dated June 14, 2007, was received on June 19, 2007. *Id.*

On July 1, 2007, Stafford Creek Corrections Center received a second request for records from Mr. Mitchell, seeking records related to selected mail logs regarding interception of mail by the Department's Intelligence and Investigations Unit (I&I), between January 10, 2007 and July 1, 2007. The second request specifically asked for:

The log of incoming and/or outgoing mail that is/was intercepted and routed to the I&I unit that lists the sender, addressee, date sent to I & I, and date returned to I&II request copies of this log pertaining to ALL incoming and outgoing mail that was routed to I&I as it relates to KEVIN M. MITCHELL, Doc # 880933.

CP 52. Mr. Mitchell did not send the second request to the Department's public records officer in Olympia, or email the request to the public records unit, as required by WAC 137-08-090. As a courtesy, the request was forwarded to the Department's Public Disclosure Unit for processing.

Id.

The Public Disclosure Unit received the second request on July 9, 2007, and assigned it a tracking number. CP 52 and 54. Five business days later, on July 16, 2007, the Department responded to Mr. Mitchell's request, and informed him that the records would be made available in 15 business days. CP 54.

Fifteen calendar days later, on July 31, 2007, the Department sent Mr. Mitchell a letter notifying him that there were two pages of incoming and outgoing mail logs responsive to his request, and that the copies would be mailed to him after the Department received payment. CP 56. Although the letter stated it was a response to the second request, the letter addressed the material sought in both the first and second records requests.

The letter informed Mr. Mitchell that there were no records responsive to his request for mail going to the I&I Office. *Id.*

By letter dated September 10, 2007, and received on September 13, Mr. Mitchell asked the Department to search the I&I records again, “to be absolutely certain there is no log of mail being routed to the I&I Office”. CP 58. Five business days after receiving his letter, the Department responded that although I&I stated that there are no responsive records, another search would be conducted. CP 59. A follow up letter was sent to Mr. Mitchell five business days after the initial response, stating that there are no logs of I&I, mail room staff, “or anyone else” intercepting Mr. Mitchell’s mail. CP 60. The letter reiterated that the incoming and outgoing logs responsive to the first request would be provided upon payment.

On November 21, 2007, Mr. Mitchell remitted payment for the documents. CP 58-60. Seven business days later, on November 30, 2007, Mr. Mitchell was provided with the two pages of incoming and outgoing mail logs for January 10, 2007 through July 1, 2007. CP 62-64. Although not noted in the November 30, 2007 letter, these two pages of documents also were responsive to the amended first request, provided by Mr. Mitchell in his June 14, 2007 letter. *See* CP 40 and 63-64. There are no

additional documents responsive to the amended first request. CP 37 and CP 65-66.

Mr. Mitchell moved for an order to show cause why he should not be awarded penalties for the Department's violations of the Public Records Act. CP 2-26. The Department appeared and provided documentation that after paying for the records, Mr. Mitchell received the documents responsive to his amended first request. CP 27-64. The trial court judge found that the Department produced all responsive records. CP 65-66. However, the Department's response was delayed by 42 days. *Id.* In exercising his discretion, the judge concluded that the Department acted in good faith and the delay constituted simple negligence. *Id.* He therefore ordered the Department to pay a penalty of \$5.00 per day for 42 days, plus costs. *Id.*

III. STANDARD OF REVIEW

There are two standards of review applicable in this case. First, the Court is asked to consider whether the Department produced the requested records. In reviewing a documentary record to determine whether an agency provided the requested records, the Court conducts a de novo review of the trial court decision. *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).

The second issue the Court is asked to consider is whether the trial court properly exercised its discretion in determining the appropriate penalty. The Washington Supreme Court has held that the trial court's determination of the daily penalty is reviewed for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 452, 200 P.3d 232 (2009). The trial court decision is a proper exercise of discretion unless it is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

IV. ARGUMENT

A. THE DEPARTMENT PROVIDED ALL DOCUMENTS RESPONSIVE TO MR. MITCHELL'S AMENDED FIRST REQUEST AND SECOND REQUEST.

The Department provided all of the requested public records. Mr. Mitchell's first request was to inspect his "continuous chronological written mail record." CP 40. He amended the first request and asked for all mail log entries for the period January 9, 2007 to "the present", or June 14, 2007. CP 50. Mr. Mitchell's second request, on July 1, 2007, requested the same documents requested in the first amended request – the incoming and outgoing mail logs for Mr. Mitchell from January 10, 2007 through July 1, 2007. CP 37, CP 50, CP 52, and CP 63-64. Although the amended request stated January 9, 2007, and the second request stated

January 10, 2007, all responsive documents for both requests were provided on July 31, 2007, when Mr. Mitchell was notified responsive records had been located. CP 56. The documents provided were responsive to both requests. CP 37, CP 50, CP 52, and CP 63-64.

Contrary to Mr. Mitchell's assertions, the Department provided all responsive documents. *Id.* Mr. Mitchell's assertions that his letter dated June 14, 2007, did not amend the first request, is without merit. In that letter, Mr. Mitchell explicitly stated:

Secondly, in my initial request, I request inspection of ALL mail log records. I hereby amend this to only state: "I request electronic transfer of ALL mail log entries to include incoming, outgoing and legal mail from January 9, 2007 to the present date and I request the electronic copies by sent via email to: patrick.a.mitchell@gmail.com.

CP 50 (emphasis in original). He was provided all mail logs, including incoming, outgoing, and legal mail for January 10, 2007 through July 1, 2007. CP 63-64. The trial court properly found that Mr. Mitchell amended his first request, and received all of the documents responsive to the amended request.

B. THE COURT APPROPRIATELY EXERCISED ITS DISCRETION IN ASSESSING A PENALTY OF FIVE DOLLARS PER DAY.

Mr. Mitchell asserts that the penalty assessed against the Department was insufficient 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*). This is the fourth in a series of cases regarding a 1997 request for public records from King County. There has been a motion filed to recall the mandate in that case. See *Yousoufian*, 165 Wn.2d 439, Motion to Strike, filed on April 9, 2009. In light of this fact, this Court should not use *Yousoufian*, 165 Wn. 2d 439, as precedent for changing the penalty in this case until the Washington Supreme Court rules on the pending motion.

Assuming, *arguendo*, the Court applies the recent *Yousoufian IV* decision, the penalty awarded is supported by the record. In *Yousoufian IV*, the Court reiterated its earlier analysis. The trial court's determination of the daily penalty will be overturned only if its exercise of discretion is "manifestly unreasonable or based on untenable grounds or reasons." *Id.* at 452, citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The trial court's decision is manifestly unreasonable if it "adopts a view that no reasonable person would take." *Id.*, citing *Mayer*, 156 Wn.2d at 684, (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

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1. **The Trial Court Correctly Found That The Department Acted In Good Faith.**

In *Yousoufian IV*, the Court reiterated that “the existence or absence of an agency’s bad faith is the principle factor” the trial court considers in exercising its discretion. *Yousoufian IV*, 165 Wn.2d at 453, citing *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997).

The trial court’s finding of good faith is supported by the effort the Department took to respond to Mr. Mitchell’s letter, despite the fact that Mr. Mitchell never filed a proper public records request. Pursuant to the Department’s published rules, all public records requests must be submitted, in writing, to the Department’s Public Records Officer in Olympia. WAC 137-08-090. Despite the fact that Mr. Mitchell was informed of the correct procedure, he did not submit his original request, amended first request, or his second request in accordance with WAC 137-08-090. As such, the Department was not required to respond to his requests. *Parmelee v. Clarke*, 147 Wn. App. 1035, 2008 WL 4967968 at 6. The Department displayed good faith in choosing to treat Mr. Mitchell’s letters as if they were proper public records requests.

Mr. Mitchell presented no evidence in the trial court that would indicate that the Department acted other than in good faith. The record

demonstrates that the Department and Mr. Mitchell engaged in extensive correspondence regarding his original request, his amended request, and his second request. CP 40-64. The record demonstrates the Department engaged in good faith communication with Mr. Mitchell, responding to his letters in a professional and timely manner. *Id.* Additionally, once the records were gathered, they were immediately made available to Mr. Mitchell.

2. **There Were No Aggravating Factors Present That Would Compel The Judge To Elevate The Penalty.**

In *Yousoufian IV*, the Court offered a list of aggravating factors a trial court may consider in determining whether a more severe penalty is appropriate, including: 1) a delayed response, especially in circumstances making time of the essence; 2) lack of strict compliance with all of the Public Records Act's procedural requirements and exceptions; 3) lack of proper training and supervision of personnel and response; 4) unreasonableness of any explanation for noncompliance; 5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the Public Records Act; 6) dishonesty; 7) potential for public harm, including economic loss of governmental accountability; 8) personal economic loss; and 9) a penalty amount necessary to deter future misconduct considering

the size of the agency and the facts of the case. *Yousoufian*, 165 Wn.2d at 458. None of these factors is present here.

The Department promptly sent a polite, professional response to each of Mr. Mitchell's letters. In compliance with the Public Records Act, the Department's employees properly undertook a full search for all responsive records. When Mr. Mitchell asked the Department to repeat the search to ensure that nothing was missed, the Department did so, confirming nothing had been missed. CP 60.

Unlike the facts presented in the series of *Yousoufian* decisions, Mr. Mitchell's inmate request does not present a case in which information relating to government accountability and transparency is at issue. There was no potential for public harm or personal economic loss. There were simply no aggravating factors present which would justify issuance of a harsher penalty.

3. **Mitigating Factors Support The Trial Court's Decision Not To Elevate The Penalty.**

The *Yousoufian IV* decision also offered mitigating factors that may "guide trial court discretion" in determining that a lower penalty is appropriate, such as: 1) the lack of clarity of the PRA request; 2) an agency's prompt response or legitimate follow-up inquiry for clarification; 3) good faith, honest, timely, and strict compliance with all of the Public

Records Act's procedural requirements and exceptions; 4) proper training and supervision of personnel; 5) reasonableness of any explanation for noncompliance; 6) helpfulness of the agency to the requestor; and 7) the existence of systems to track and retrieve public records. *Yousoufian*, 165 Wn.2d at 458.

In the present case, Mr. Mitchell's amended request was clear; however, it was not filed in accordance with the Department's policy 280.510 or WAC 137-08-090. The Department promptly responded to the improperly submitted request and followed all PRA procedural requirements by engaging in good faith, honest, and timely communication with Mr. Mitchell. The Department properly trains and supervises public records personnel and provided ample assistance to Mr. Mitchell. CP 35-64. Additionally, the Department's explanation as to why the letter producing the responsive documents did not reference the first amended request, as well as the duplicative second request, is entirely reasonable. Finally, the communication that went back and forth between the Department and Mr. Mitchell demonstrates a thorough tracking system.

The Department responded in good faith to letters that were not properly submitted as public records requests, produced all requested information, and performed a second search to confirm that all requested

records were produced. The delay was caused by simple negligence. Therefore, the superior court properly exercised its discretion in setting the penalty.

C. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN NOT ADDRESSING MR. MITCHELL'S UNSUPPORTED ALLEGATION THAT THE DEPARTMENT ENGAGED IN FRAUD.

Mr. Mitchell presented no evidence, other than his own speculation, that the Department back-dated its May 8, 2007, response letter. The record is clear that the Department engaged in consistent, timely correspondence with Mr. Mitchell. The Department readily admitted that it was untimely in providing documents responsive to Mr. Mitchell's June 14, 2007 amended request, under the timeframes of the PRA. Mr. Mitchell's assertion that the Department engaged in fraud, by back-dating the May 8, 2007, letter is not supported by the record. The only document Mr. Mitchell offers in support of his claim is an envelope post-marked May 16, 2007 with his own handwritten notes on it. CP 16. There was no evidence before the trial court that this was the envelope the May 8, 2007, response letter was sent in to Mr. Mitchell. As such, the trial court properly exercised its discretion in not addressing this meritless claim.

D. MR. MITCHELL HAS BEEN PAID COSTS AND STATUTORY ATTORNEY FEES AND NO FURTHER FEES SHOULD BE AWARDED.

Mr. Mitchell requests attorney fees and costs be awarded to him pursuant to the Public Records Act, RCW 4.84.080(2), RAP 14.3, and RAP 18.1. In accordance with the trial court's order, Mr. Mitchell was paid statutory attorney fees and costs for his proceeding in the trial court. Pursuant to RAP 14.2, costs may be awarded to the party who "substantially prevails on review". The trial court ruled against the Department, in Mr. Mitchell's favor. This appeal is being made for the sole purpose of reviewing the award of penalties. Assuming, *arguendo*, Mr. Mitchell is awarded a higher penalty by this Court, he will not have substantially prevailed on review. As such, he is not entitled to costs for this appeal.

Mr. Mitchell is similarly not entitled to recovery for attorney fees on appeal. Pursuant to RAP 18.1(a) a party may be entitled to attorney fees if the applicable law grants him the right to recover on review. The PRA makes no mention of awarding of attorney fees on review. Rather it refers to the awarding of attorney fees at the trial court level, fees which Mr. Mitchell has already been paid in this case. As a result, he is not entitled to attorney fees for this appeal.

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Mr. Mitchell's appeal be denied and that the trial court's order be affirmed.

RESPECTFULLY SUBMITTED this 9th day of June, 2009.

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CERTIFICATE OF SERVICE

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

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EXECUTED this 9th day of June, 2009, at Olympia, Washington.

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