

NO. 42478-9-II

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

George Bartz,

Plaintiff,

v.

Department of Corrections,

Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This Public Records Act (PRA) case involves two separate requests for records made by an inmate to the Washington State Department of Corrections (Department)¹. In the first complaint, the inmate had received copies of two emails concerning Glucosamine/Chondrotin from the Health Care Manager at Airway Heights Corrections Center. The inmate then filed a formal public disclosure request to the Department wherein he requested documents relating to the inclusion of the herbal supplement, Glucosamine/Chondrotin as a saleable item in the inmate store. In response to the request, the Department provided the inmate with 66 pages of responsive documents which did not include the two emails. The inmate informed the Department of the two missing emails but refused to give them specific information to assist the Department in locating these emails. After an additional search, the Department was unable to locate any additional records and informed the inmate they were closing his request.

In his second complaint, the inmate filed a formal records request with the Department seeking six groups of documents related to offender personal clothing. In response to the request, the Department produced

¹ On September 2, 2011, the Clerk issued an order consolidating the two separate cases into one single case pursuant to RAP 3.3(a).

two installments of records. The inmate indicated he did not believe the request was complete and had been provided with blank and duplicate records resulting in another search for responsive records wherein no additional documents were located. The inmate was informed that the request was considered to be closed as there were no additional outstanding documents responsive to his request. The inmate then filed another public records request with the Department seeking four groups of documents related to tort claims filed against the Department from 2007 to the date of his request. Subsequently, the inmate was provided with records in two installments with notification the Department had a third installment to produce. The inmate never paid for the third installment of records.

When presented these undisputed facts, the superior court dismissed the inmate's complaints with prejudice, correctly finding no violation of the PRA. This Court should affirm that decision. The superior court further found the inmate's case was frivolous in regards to his first complaint. The Department concedes, that due to intervening case law, that decision should be reversed.

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II. STATEMENT OF THE ISSUES

1. Whether the first complaint was necessary to obtain the records?
2. Whether the first complaint amounted to a frivolous action pursuant to House Senate Bill 1037?
3. Whether the first complaint was time barred?
4. Whether the superior court's dismissal of the first complaint must be upheld because the Department conducted a reasonable search under the circumstances?
5. Whether the superior court's dismissal of the first complaint must be upheld because Mr. Bartz failed to meet his burden of proof?
6. Whether the Department produced all responsive records in regards to the request for documents related to offender personal clothing?
7. Whether the Department provided timely responses to the request for tort claim information?

III. COUNTER STATEMENT OF THE CASES

A. **PDU #8623/Thurston County Superior Court Cause No. 11-2-00712-7**

Appellant, George Bartz, is an inmate in the custody of the Department. On October 7, 2009, the Department's Public Disclosure Unit (PDU) received a letter from Mr. Bartz, making a public records

request for “all documents, in the form of emails, faxes, letters, or memo’s dealing with the inclusion of the herbal supplement, Glucosamine/Chondrotin. Sub No. 15, Defendant’s Responsive Brief, Exhibit 1, Declaration of Virginia B. Shamberg, ¶ 4; *see also Id.*, Attachment A, copy of PDU #8623 correspondence section. On October 14, 2009, the PDU responded to Mr. Bartz’s request, informing him that his request was received, it had been assigned a tracking number of PDU #8623, reiterated the documents he requested, and indicating he would receive a further response from the PDU. *Id.*, ¶ 5. On December 17, 2009, the PDU sent notice indicating there were 66 of responsive records and upon \$15.61 in payment the records would be sent. *Id.*, ¶ 6; *see also Id.*, Attachment A. On December 31, 2009, the PDU received Mr. Bartz’s check in the amount of \$15.61 and mailed the documents to him on January 4, 2010. *Id.*, ¶¶ 6-7. On January 8, 2010, Mr. Bartz sent a letter to the PDU alleging that his record request was incomplete as he had requested “for ‘all’ documents relating to the sale of Glucosamine/Chondrotin and all documents relating to the sale of oils.” *Id.*, ¶ 8. Mr. Bartz also informed the PDU that he was in possession of emails between two Department employees that were not included in the responsive documents. *Id.* Mr. Bartz further complained that he received duplicate records. *Id.* On January 19, 2010, the PDU responded to Mr.

Bartz's letter, reiterating his original request for records and requesting Mr. Bartz provide the staff names and dates of the emails that he alleged were not provided so that another search could be conducted. *Id.*, ¶ 9. Mr. Bartz was also informed the documents he perceived to be duplicates were in fact email strings that may seem similar but contained different information. *Id.* In his response, Mr. Bartz refused to provide any identifying information regarding the emails. *Id.*, ¶ 10; *see also Id.*, Attachment A. On January 28, 2010, the PDU responded to Mr. Bartz, once again setting out his request, and again informing him that although the email strings may have the same information, the pages were different. *Id.*, ¶ 11. The PDU received no further correspondence from Mr. Bartz pertaining to this request. *Id.*, Attachment A.

On March 8, 2011, Mr. Bartz filed his complaint alleging violations of the PRA. On June 6, 2011, the superior court issued an Order Setting Case Schedule. Sub No. 13, Order Setting Case Schedule. The order set that Mr. Bartz's brief was due on June 17, 2011. *Id.* Mr. Bartz did not file a brief. The Department did file their brief, and Mr. Bartz filed a reply.

On July 22, 2011, after conducting a show cause hearing, the Thurston County Superior Court orally dismissed his complaint with prejudice. CP 36-37. In its ruling, the superior court concluded the

Department did not violate the PRA. Specifically, the court found Mr. Bartz was provided with the two emails he was seeking in the lawsuit by Department personnel; he was in possession of the emails prior to filing his action; when he was asked to provide the staff names and dates of emails he claimed were not provided so that a further search could be conducted, he refused to provide the information; the action was not reasonable regarded as necessary to obtain the records; his action was frivolous; and he filed his action after the one-year statute of limitation. *Id.* The Court set a hearing for August 19, 2011 to have the order presented. *Id.* at 46. On August 16, 2011, Mr. Bartz's filed his notice of appeal. Sub No. 19, Notice of Appeal to Court of Appeals. On August 19, 2011, the Court entered its order of dismissal. CP 36-37.

B. PDU #7362/Thurston County Superior Court Cause 10-2-002314-1

On June 17, 2009, the PDU received Mr. Bartz's public records request in which he requested six groups of documents related to offender personal clothing. CP 51-80. (Declaration of Virginia Shamberg, Attachment A, Letter dated June 12, 2009). On June 24, 2009, the PDU responded to Mr. Bartz's request indicating it had been assigned a tracking number of PDU #7362, reiterating the documents he requested and informing him that he would receive a response on or before July 30,

2009. *Id.* (Letter dated June 24, 2009). On July 8, 2009, the PDU sent Mr. Bartz notice they had located 250 pages of responsive records as part of the first installment to production of his request and that once payment for \$52.07 was received for this installment, the PDU would send his records. *Id.* (Letter dated July 19, 2009). Mr. Bartz sent a response to the PDU indicating he had an issue with the installment “piece meal” response on July 13, 2009. *Id.* (Letter dated July 13, 2009). On August 6, 2009, the PDU sent Mr. Bartz a letter indicating that in response to his complaint of receiving duplicate and blank pages on a public records request, they would agree to deduct \$18.09 from his balance thereby adjusting the amount he owed to \$33.98. *Id.* (Letter dated August 6, 2009). On August 24, 2009, the PDU received Mr. Bartz’s payment for the first installment of records of \$33.98. *Id.* On the same day, the PDU sent Mr. Bartz notice that the second installment of his public records request had been gathered and there were 231 pages located. (Letter dated August 24, 2009). Mr. Bartz was informed that once payment had been received for \$52.45, the PDU would send out his records. *Id.* On September 2, 2009, the PDU received correspondence from Mr. Bartz indicating the documents he received were full of duplicates and blank pages. *Id.* (Letter dated August 28, 2009). Then on September 8, 2009, the PDU received Mr. Bartz’s check for \$52.45 for the second installment of records. *Id.* The PDU

mailed Mr. Bartz's documents the following day. (Letter dated September 9, 2009). The PDU considered the request to be complete as there were no outstanding documents responsive to PDU #7362 which had not been provided to the Plaintiff as part of the two installments. *Id.*

On October 26, 2009, the PDU received another public records request from Mr. Bartz asking for four groups of documents and information related to tort claims filed against the DOC from 2007 to the date of the request. CP 81-86. (Declaration of Jerome Wilen, Attachment A, Letter dated October 22, 2009). A response was mailed to Mr. Bartz on October 30, 2009 assigning the request PDU #8827 and indicated he would be receiving a response on or before December 23, 2009. *Id.* (Letter dated October 30, 2009). On November 3, 2009, the PDU sent a follow up letter to Mr. Bartz requesting clarification of his request due to the large amount of documents located. *Id.* (Letter dated November 3, 2009). The PDU received Mr. Bartz's response on November 12, 2009 wherein Mr. Bartz clarified which documents and information he was wanting to access. *Id.* (Letter dated November 9, 2009). Subsequently on December 21, 2009, Mr. Bartz was informed the Department did not track the information he was requesting and provided contact information for the Office of Financial Management, which handles tort claims. *Id.* (Letter dated December 21, 2009). Mr. Bartz was also informed records that were

received by the PDU would need to be reviewed for any possible exemptions and if Mr. Bartz wanted the PDU to proceed with that review, he needed to notify them. *Id.* Mr. Bartz notified the PDU he wanted the records. *Id.* (Letter dated January 4, 2009). On January 12, 2010, Mr. Bartz was then informed the review would take an additional 35 business days and he would receive a response on or about March 4, 2010. *Id.* (Letter dated January 12, 2010). Mr. Bartz responded that he would “allow” the PDU to take that amount of time for review but no more time would be permitted. *Id.* (Letter dated January 15, 2010). On March 4, 2010, Mr. Bartz was informed that an additional 15 business days were needed for further review of the documents and he would receive a response on or before March 25, 2010. *Id.* (Letter dated March 4, 2010). On March 9, 2010, Mr. Bartz was informed that all 176 documents were reviewed and deemed responsive to his request, and once payment of \$40.10 was received, the PDU would mail out Mr. Bartz’s documents. *Id.* (Letter dated March 9, 2010). Mr. Bartz was also informed that additional records were located and there would be other installments of records as they became available. *Id.* On March 30, 2010, the PDU received Mr. Bartz’s payment along with correspondence indicating he believed the PDU’s response to his request was far beyond a reasonable time frame. *Id.* After payment was received, Mr. Bartz’s first installment of

responsive records under PDU #8827 records were mailed to him on April 6, 2010 in addition to informing Mr. Bartz the PDU was in the process of attempting to locate and identify additional records. *Id.* (Letter dated April 6, 2010). On May 24, 2010, Mr. Bartz was informed that the second installment of his records was gathered and included 268 additional pages of documents. *Id.* (Letter dated May 24, 2010). Once payment was received for \$59.30, the records would be mailed to Mr. Bartz. Mr. Bartz's payment was received on June 9, 2010 along with a request for an estimated time of completion. *Id.* On July 16, 2010, Mr. Bartz was notified the third installment of his request under PDU #8827 was completed and an additional 382 pages of documents would be mailed once \$72.05 was received. *Id.* (Letter dated July 16, 2010). Mr. Bartz's response was received by the PDU on July 26, 2010 indicating he was taking legal action as he believed the installments were not provided in a reasonable amount of time. *Id.* (Letter dated July 20 2010). To date, the PDU has never received Mr. Bartz's payment for installment three. *Id.*

On October 19, 2010, Mr. Bartz filed a motion for judicial review and to show cause. Sub No. 4, Petition for Judicial Review. On January 19, 2011, Mr. Bartz filed his complaint alleging violations of the PRA. Sub No. 13, Complaint. On July 22, 2011, after conducting a show cause hearing, the Thurston County Superior Court dismissed his complaint with

prejudice. Sub No. 21. In its ruling, the superior court concluded the Department did not violate the PRA. Specifically, the court found Mr. Bartz did receive the requested documents assigned PDU #7362 as part of two installments and that he did not appeal the response or give the Department any other indication he believed there were outstanding documents yet to be produced. CP 23-24. Therefore, the Department reasonably believed they had provided all responsive documentation under PDU #7362 and closed the file. *Id.* The court also found Mr. Bartz then began the process of requesting additional records from the Department under PDU #8827, that Mr. Bartz had paid and received the first two installments of records and a third installment had been made available to Mr. Bartz on July 16, 2010 for which he never paid. *Id.* On August 16, 2011, the Court received Mr. Bartz's notice of appeal. Sub No. 23, Notice of Appeal to Court of Appeal. On August 19, 2011, the Court entered its order of dismissal. CP 23-24.

IV. ARGUMENT

A. The Fact Mr. Bartz Already Possessed The Two E-Mails At Issue In PDU #8623 Did Not Preclude His Ability To File A PRA Complaint

The Department concedes there has been intervening case law overruling *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002). In its decision, the superior court noted Mr. Bartz already

possessed the two e-mails which he argued were not provided to him in response to his request for records regarding Glucosamine/Chondroitin. Therefore, the court found Mr. Bartz's action was not necessary to obtain the records he was seeking as a basis for its dismissal of his complaint pursuant to the court's decision in *Daines*. The Washington Supreme Court overruled *Daines* noting, "The fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties." However, while the court relied on *Daines* as a basis for dismissing Mr. Bartz's complaint, it was not the sole basis of the court's dismissal decision and the superior court's decision should be upheld.

B. The Superior Court Properly Applied RCW 42.56.550(6) In Determining That Mr. Bartz's Claim Was Barred By The One-Year Statute Of Limitations Thereby Dismissing Mr. Bartz's Complaint Filed Under Cause No. 11-2-00712-7

Mr. Bartz filed his complaint one year and 3 months after he received his documents under PDU #8623. Therefore, the court found Mr. Bartz's complaint was time barred and dismissed his claim with prejudice. Mr. Bartz argues he was never provided with an exemption or privilege log; thus, the one-year period for filing his claim under RCW 42.56.550(6) does not apply. However, Mr. Bartz's argument is misplaced as the one-

year statute of limitations is not solely triggered on the date of an agency's claim of exemption.

The PRA requires plaintiffs to file any action under the Act within one year of the date of an agency's "claim of exemption or *last production of a record* on a partial or installment basis." RCW 42.56.550(6). As a statute of limitations, the effect of RCW 42.56.550(6) is to eliminate a plaintiff's right to maintain a cause of action beyond the time period specified in the statute.

Statutes of limitations are intended to promote finality. *Reading Co. v. Koons*, 271 U.S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835 (1926); *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007); see also *Janicki Logging & Const. Inc. v. Schwabe, Williamson & Wyatt*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The "obvious" purpose of such statutes is to set a definite limitation on the time available to bring an action, without consideration of the merit of the underlying action. *Dodson v. Continental Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930) (quoting *Reading Co.*, 271 U.S. 58); see also *Atchison*, 161 Wn.2d at 382. Statutes of limitations exist "to shield defendants and the judicial system from stale claims;" plaintiffs are not permitted to "sleep on their rights" because of the risk that "evidence may be lost and

witnesses' memories may fade.” *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).

Statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the legislature. *E.g.*, *Huff v. Roach*, 125 Wn. App. 724, 732, 106 P.3d 268 (2005); *Bennett v. Dalton*, 120 Wn. App. 74, 85-86, 84 P.2d 265 (2004); *Janicki*, 109 Wn. App. at 662. Washington courts have also consistently rejected interpretations that would allow a party to manipulate the date an action accrues or the tolling of a statute of limitations. *E.g.*, *Atchison*, 161 Wn.2d at 381-82 (choice of personal representative should not be allowed to govern accrual of wrongful death action); *Huff*, 125 Wn. App. at 732 (rejecting an interpretation that would allow manipulation of accrual of legal malpractice claims). This is particularly true in cases governed by explicit statutory directives such as the PRA and not by the common law. *See Elliott v. Dep't of Labor and Indus.*, 151 Wn. App. 442, 447, 213 P.3d 44 (2009) (declining to apply the discovery rule to modify the accrual date of an industrial insurance claim where the plain language of the statute specified that a claim had to be brought within one year of the injury/accident).

Further, this Court is not bound by Division I of the Court of Appeals' recent decision in *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d

906 (2010). There, Division I held that production of a single record that was the entirety of a records request did not trigger the one-year statute of limitations set out in RCW 42.56.550(6). *Id.* at 513. Stating that it must give effect to the plain meaning of the provision “as an expression of legislative intent,” Division I held that the one-year statute of limitations can only be “triggered by one of two occurrences: (1) the agency’s claim of an exemption or (2) the agency’s last production of a record on a partial or installment basis.” *Id.* Consequently, Division I reasoned that an agency’s production of “a single document that is the entirety of the requested record” does not trigger the statute of limitations. *Id.* at 514.

However, Division I’s reading of RCW 42.56.550(6) renders the statute of limitations a nullity if an agency responds to a public records request by producing all responsive records in their entirety at one time. This nonsensical result cannot have been what the Legislature intended when it amended RCW 42.56.550(6) to shorten the limitations period from five years to one year.

In 2005, the Legislature amended RCW 42.56.550(6) for the purpose of shortening the limitations period for actions brought under the PRA to one year. *Tobin*, at 512 *citing* RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). In *Tobin*, Division I essentially concluded that the Legislature, in so doing, also intended to eliminate the

statute of limitations entirely for situations in which an agency responded to a public disclosure request by providing the sole record responsive to the request, without redacting or claiming any exemptions. Such a result is absurd. The Legislature clearly did not intend for this result when it reduced the statute of limitations from five years to one year.

The logical conclusion is that the Legislature intended situations in which a single record is produced with no exemptions to fall within the scope of “last production on a . . . partial basis.” To conclude otherwise would yield unreasonable, illogical and absurd consequences.²

Primary among these consequences is that state and local agencies would be discouraged from responding in full to records requests in a single production. Rather, to obtain a limitation period and to avoid the risk of excessive penalties associated with ancient claims, a prudent agency would be motivated to produce records in installments regardless of the size of the production or the capacity to rapidly assemble the full production. While this approach is permitted by the PRA, it would engender additional administrative costs and inconvenience requestors by

² Courts must construe statutes to avoid “unlikely, strange or absurd consequences.” *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); *see also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986) (courts should avoid statutory interpretations that “would render an unreasonable and illogical consequence”).

requiring multiple inspections or delaying receipt of copies that might otherwise have been made immediately available.

Another consequence would be the impossibility of agencies being able to defend stale—or even ancient—claims. An agency has the burden of proof to establish its compliance with the PRA, no matter how stale or ancient the claim. RCW 42.56.550(1), (2). However, public agencies do not retain all of their records indefinitely; they are authorized to destroy records that have reached the end of their designated retention period. *See generally* RCW 40.14. The reasoning of *Tobin* effectively nullifies retention schedules adopted under RCW 40.14, since any agency that failed to permanently retain all public records would be unable to defend itself against a claim filed years later alleging that not all records were properly located, assembled, and provided. This interpretation of RCW 42.56.550(6) would permit a requestor who receives a single, ostensibly final production of records to sue years, if not decades later, on an allegation that not all records were located, assembled and provided.³ The untenable consequence of that interpretation is not that agencies complying in good faith with RCW 40.14 would lose these suits, but that they would be unable to even attempt a defense.

³ RCW 42.56.100 precludes an agency from destroying a record, in compliance with the applicable retention schedule, until a public record request is “resolved.” Without a statute of limitations, a public records request can never be “resolved.”

In this matter, it is undisputed the final production of records under PDU #8623 was made available to Mr. Bartz on December 17, 2009. Sub No. 15, Defendant's Responsive Brief, Exhibit 1, Declaration of Virginia B. Shamberg, ¶ 6. Therefore pursuant to RCW 42.56.550(6), Mr. Bartz's cause of action accrued on December 17, 2010. It is further undisputed that Mr. Bartz failed to file his complaint until 16 months after he was provided with the final production of documents. Accordingly, his action is barred by the statute of limitations and the dismissal should be upheld.

C. In Light Of The Court's Recent Decision In Neighborhood Alliance, The Department Concedes Mr. Bartz's Complaint Was Not Frivolous

The Department concedes there has been intervening case law overruling *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002). In its decision, the superior court noted Mr. Bartz already possessed the two e-mails which he argued were not provided to him in response to his request for records regarding Glucosamine/Chondroitin. Therefore, the court found Mr. Bartz's action to be frivolous pursuant to the court's decision in *Daines*. However, the Washington Supreme Court overruled *Daines* noting, "The fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties."

Therefore, as Mr. Bartz had an adequate basis for filing his PRA claim, the Department concedes the complaint was not frivolous.

D. The Superior Court's Decision Dismissing The Complaint Filed Under Cause No. 11-2-00712-7 Must Be Affirmed, As The Department Conducted A Reasonable Search For Records Relating To Glucosamine/Chondroitin and Mr. Bartz Failed To Meet His Burden Of Showing A PRA Violation

An appellate court may affirm a trial court decision's affirm on any grounds supported by the record. "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)); *State v. Bryant*, 97 Wn. App. 479, 490-491, 983 P.2d 1181 (1999).

1. The Superior Court Order Must Be Affirmed Because The Department Conducted a Reasonable Search Under The Circumstances

When focusing on whether an agency has conducted an adequate search, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 719-720, 261 P.3d 119 (2011) (citing *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir.1995); *Weisberg v. U.S. Dep't of Justice*, 240 U. S. App. D.C. 339, 745 F.2d 1476, 1485

(1984)). The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. *Id.* at 720 (citing *Weisberg*, 745 F.2d at 1351). What will be considered reasonable will depend on the facts of each case. *Id.* (citing *Weisberg*, 745 F.2d at 1351). When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found. *Id.* (citing *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (1990); *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 395, 790 F.2d 942, 956 (1986) (“a search need not be perfect, only adequate”)). Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Id.* (citing *Valencia–Lucena v. U.S. Coast Guard*, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999)).

In this matter, the Department made several efforts to identify and find the two emails which Mr. Bartz claims he received but refused to identify⁴. In this case, after conducting a search in the relevant locations, the Department turned over 66 pages of documents. Sub No. 15, Defendant’s Responsive Brief, Exhibit 1, Declaration of Virginia B. Shamberg, ¶¶ 6-7; *see also Id.*, Attachment A, (Letter dated December 17,

⁴ Mr. Bartz never identified or produced the two emails either in his correspondence with the Department or at trial.

2009). When Mr. Bartz complained that these 66 pages failed to contain two alleged emails in his possession, the Department asked him to provide identifying information so that it could conduct another search and produce the records to Mr. Bartz. *Id.*, (Letter dated January 19, 2010). However, Mr. Bartz refused to assist the Department in ensuring all responsive records were located. *Id.*, CP 36-37. Despite Mr. Bartz's refusal to provide them with additional information, the Department attempted to again conduct another search, yielding no additional documents responsive to his request. *Id.*, ¶ 11.

Although Mr. Bartz may not have a duty under the statute to identify records he believes are missing, this lack of cooperation must be taken in account when assessing whether the Department conducted an adequate search. The Department informed Mr. Bartz that it was willing to conduct additional searches based on any additional information, such as staff names and the dates of the email that Mr. Bartz would give. As Mr. Bartz failed to provide such information, the Department did not have any leads to pursue which it had already not searched.⁵ In his briefing to this Court, Mr. Bartz states that he “refused to surrender” a copy of the emails. Motion for Discretionary Review at 4. His sole explanation is

⁵ As Mr. Bartz himself admits, when under a second public disclosure request, he provided the Department more detailed information including staff's name, the Department was able to locate additional documents. VPR at 22; *see also* Motion for Discretionary Review at 2.

that the documents should have been turned over originally. *Id.* However, this is a recycling of his previous argument. As the superior court noted, Mr. Bartz was attempting to “hide the ball.” CR 38. Therefore, the superior court was not in error when it found that the Department fully complied with his request. Therefore, under the circumstances of this case, this Court should find that the Department conducted an adequate search and uphold the court’s dismissal.

2. The Superior Court Order Must Be Affirmed Because Mr. Bartz Failed To Meet His Burden That There Was A Document At Issue

Under the PRA, public agencies are required to provide inspection or copying of public records. RCW 42.56.070. The purpose of the PRA is to provide full access to public records. RCW 42.17.010(11). If an agency denies a requestor “an opportunity to inspect or copy a public record” a requestor may proceed to court to require the agency to comply with the Act. RCW 42.56.550(1). Under certain circumstances, the PRA shifts the burden of proof onto the Agency to justify the actions taken. *See, e.g.*, RCW 42.56.550(1) (“ The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”) and 42.56.550(2) (“The burden of proof shall be on the agency to show that the estimate it

provided is reasonable.”). However, the statute does not alleviate a plaintiff’s burden of proof to show that there is a controversy at issue. In this case, Mr. Bartz alleges that he was not provided with two emails which were allegedly in his physical control. Yet, Mr. Bartz never provided the emails in any of his pleadings or at the show cause hearing. Mr. Bartz provided nothing more than mere argumentative assertions. In essence, Mr. Bartz placed the Department in the position of having to prove the unprovable. Regardless of what document would be produced, Mr. Bartz could simply just assert that it was not the correct document. As the superior court stated in its ruling, Mr. Bartz was attempting to hide the ball. CP 36-38. As Mr. Bartz never produced the documents he asserted were allegedly at issue and that he possessed, he never shifted the burden onto the Department. Therefore, the superior court ruling must be affirmed as Mr. Bartz failed to meet his burden of showing there was even a controversy in issue.

E. The Department Conducted A Reasonable Search And Produced All Responsive Records Regarding Mr. Bartz’s Request For Documents Related To Offender Personal Clothing Under Cause No: 10-2-02314-1

Mr. Bartz argues the Department has failed to fully produce the six separate records he sought relating to offender personal clothing. Mr. Bartz specifically notes that five of the six groups were not addressed nor

referred to. In furtherance of his argument, Mr. Bartz indicates that as part of his research regarding the validity of statements made by the former Department Secretary, he has concluded there must be additional documents yet to be produced as part of his request under PDU #7362. However, other than the allegations, Mr. Bartz failed to produce any evidence indicating the Department did not perform a reasonable search for the documents or that any additional documents existed. Pursuant to the superior court's scheduling order, Mr. Bartz had the ability to submit initial briefing on the issues and failed to do so. Sub No. 18, Order Setting Case Schedule. In reply to the Department's briefing, Mr. Bartz made the allegation he was not provided the responsive documents and then provided no additional evidence to support his claim. Sub No. 20, Response of Plaintiff. The Department contended that a search was conducted and they fully responded to all groups of records Mr. Bartz sought under PDU #7362, providing him with 481 pages of records. CP 51-54. Therefore, the Department considered Mr. Bartz's request to be closed. CP 53. Other than his conclusory allegations, Mr. Bartz failed to show there were even any additional documents responsive to his request which were not produced. Therefore, as Mr. Bartz failed to meet his burden of showing a controversy at issue or that the search for responsive records was not reasonable, the superior court's decision should be upheld.

F. The Department Provided Timely Responses To Mr. Bartz's Request For Tort Claim Information Through Installment Production Of Records Under Cause No. 10-2-02314-1

Mr. Bartz argues the court erred in determining the “prolonged piecemeal disclosure of the TORT claims falls within the intent of the PRA.” However, Mr. Bartz has failed to cite to any authority indicating production of records on an installment basis is a violation of the PRA. On the contrary, it is clear the Legislature intended the option for such production be available to agencies as there are statutes specifically addressing the production of records on a partial or installment basis. *See* RCW 42.56.520(6). As noted from Mr. Bartz's requests for records, the documentation and information for which he sought was quite voluminous. In order to provide the requester with access to records as they become available, it is clear that production may be made on an installment basis.

Further, Mr. Bartz has failed to show the Department did not provide the records requested within a reasonable amount of time. The PDU received Mr. Bartz's request on October 26, 2009 and provided him with a response within five business days indicating it had begun the process of searching for responsive records. CP 82. Due to the amount of possible responsive records it had received, the Department then sent Mr. Bartz a clarification request within about a week of its initial response. *Id.*

See also CP 95. After correspondence between the parties regarding clarification of documents sought, which agency may be able to provide Mr. Bartz with information he requested and whether he wanted the Department to continue the search for records, Mr. Bartz was informed on January 12, 2010 the PDU would follow up with a status of the search by March 4, 2010. CP 99. Subsequently on March 4, 2010, Mr. Bartz was informed that an additional 15 business days was needed to review the documents with eventual production of the first installment made available to Mr. Bartz on March 9, 2010. CP 107-108. After payment was received, the records were sent to Mr. Bartz and the process started for gathering documents as part of the second installment which was made available to Mr. Bartz on May 24, 2010. CP 118. The third installment of records was made available to Mr. Bartz on July 16, 2010 to which the PDU has never received payment. CP 127.

As with this other public records request, Mr. Bartz sought a large number of documents including “fees paid for adjudication of all valid TORT claims.” CP 87. There is nothing to indicate the Department’s response time was unreasonable as it is clear the Department followed its duties pursuant to RCW 42.56.520 as it is clear the information sought was voluminous. Other than conclusory allegations, Mr. Bartz has failed to provide any argument or evidence indicating the Department’s

installment production and its response time violated the PRA. Therefore, the superior court's dismissal on this claim should be upheld.

G. Mr. Bartz Has Failed To Show The Department Acted In Bad Faith In Its Response To Any Of His Requests

Mr. Bartz asks the Court to make a determination the Department's responses to his public records requests were negligent and in bad faith. However, Mr. Bartz fails to allege any facts which are indicative of the Department's willful withholding of records or any other behavior which would amount to bad faith.

Pursuant to RCW 42.56.565(1), a court shall not award penalties to a person serving a criminal sentence **on the date his request was made**, unless the court finds the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record. However at the superior court, Mr. Bartz failed to put forth any evidence in either of his complaints or any other documents that the Department's response to his public records request amounted to bad faith.

There is nothing to indicate Department's response was untimely, they willfully failed to provide records or that providing additional documentation amounts to bad faith behavior. In fact, the record reflects the Department even reached out to Mr. Bartz after he alleged he was in receipt of specific emails which were not provided, to obtain that

information so they could locate the documents for him. Instead, Mr. Bartz chose to “hide the ball,” in an effort to impede the Department’s ability to provide the fullest assistance to him in response to his requests for records. This is also shown as Mr. Bartz chose to again not reveal such information to the superior court when he had the opportunity at his show cause hearing. In fact, Mr. Bartz admits that when he eventually provided further information on the emails he alleged were missing, in a subsequent public records request, he received those emails. Motion for Discretionary Review at 2, 7. Other than his conclusory statements, nothing in Mr. Bartz’s Motion for Discretionary Review evidences that the Department acted in bad faith and intentionally withheld records. Therefore, Mr. Bartz has failed to show any evidence of bad faith and he is not entitled to penalties.

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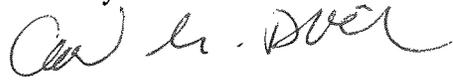
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V. CONCLUSION

The Department complied with the PRA in responding to the requests at issue in this case. The Court should affirm the superior court's dismissal of this matter.

RESPECTFULLY SUBMITTED this 13th day of January, 2012.

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CERTIFICATE OF SERVICE

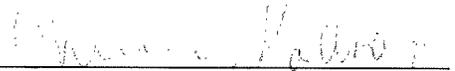
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TO:

GEORGE BARTZ #985210
MONROE CORRECTIONAL COMPLEX-WSR-MSU
PO BOX 7001
MONROE WA 98272-7001

EXECUTED this 13th day of January, 2012, at Olympia,
Washington.



CHERRIE KOLLMER
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

January 13, 2012 - 4:22 PM

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