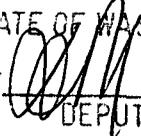


FILED
COURT OF APPEALS
DIVISION II

2015 APR 10 PM 1:08

STATE OF WASHINGTON

BY  DEPUTY

NO. 47062-4-II

In the Court of Appeals of the State of Washington
Division 2

STEVEN CANHA, Appellant

v.

DEPARTMENT OF CORRECTIONS, Respondent

APPELLANT'S BRIEF

Christopher Taylor
Attorney for Appellant
FT Law, P.S.
402 Legion Way SE Ste 101
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@ftlawps.com

TABLE OF CONTENTS

A) ASSIGNMENTS OF ERROR.....1
B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....1
C) STATEMENT OF THE CASE.....1
D) ARGUMENT.....5
E) CONCLUSION.....17

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases:

- *Building Indus. Assn. of Wash. v. McCarthy*, 152 Wn. App. 720 (2009).....7
- *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702 (2011).....6
- *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS I)*, 114 Wn.2d 677 (1990).....16
- *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243 (1994).....6
- *Reed v. City of Asotin*, 917 F.Supp.2d 1156 (E.D. Wash. 2013).....8
- *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009).....12-13
- *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85 (1981).....8-9

Rules:

- CR 56.....7, 11
- RAP 18.1.....16

Statutes:

-
- RCW 42.56.070.....9
- RCW 42.56.210.....9
- RCW 42.56.520.....9
- RCW 42.56.550.....5-7

A) ASSIGNMENT OF ERROR

The trial court erred by granting respondent-defendant Washington State Department of Correction's CR 56 motion for summary judgment and dismissing *Canha v. Department of Corrections*, Thurston County Superior Court Case No. 14-2-00711-3 with prejudice.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Discovery Rule Applies, and Thus Claim re PDU-22455 Not Time-Barred.

2. Genuine Issues of Material Fact Exist Regarding Meaning of PDU-24889 Request.

3. Costs, Including Reasonable Attorney Fees, Should Be Awarded.

C) STATEMENT OF THE CASE

1. On October 16, 2012, Appellant Steven L. Canha (hereinafter "Mr. Canha") sent a Request for Public Records Disclosure to Respondent Department of Corrections (hereinafter "DOC"). CP 43. Specifically, Mr. Canha requested "information on inmate banking, specifically on the monditery [sic] inmate savings[.] Where are these funds deposited ie what bank what account. I need a copy of the banking agreement between the Department of Corrections and the Bank for inmate specific funds[.] Is there any

interest earned on it for 2009 thru [sic] 2011.” *Id.* DOC received that request on October 19, 2012, and assigned it “tracking number PDU-22455.” CP 38.

2. On February 12, 2013, DOC mailed “2 pages” of records responsive to PDU-22455, along with a two-page cover letter dated February 12, 2013; an “Agency Denial Form / Exemption Log” dated February 12, 2013; a blank “Appeal Form,” with an indication the form was “Last Updated 4/17/12;” and a document entitled “Exemptions Section,” with an indication the form was “Last Updated 4/17/12.” CP 51-57.
3. Mr. Canha never received the February 12, 2013 mailing. Instead, Mr. Canha received a “Mail Rejection Notice” dated February 20, 2013, indicating the mailing “contain[ed] banking information for WA St Dept of Corrections, account Employer Identification Number, signature card,” and therefore constituted contraband consisting of “[o]ther items that threaten the security and order of the facility or the offender's treatment and/or are identified by the Superintendent/designee or facility operational memorandums.” CP 110.
4. On April 21, 2013, Mr. Canha sent a letter to DOC “RE: PDU-22455 + 22386.” CP 62. In that letter, Mr. Canha wrote, “I am

sorry about the confusion of my last letter. I am not seeking multiple copies of the requests. I am seeking to receive the ones that have already been sent due to me not receiving them. They were confiscated by the DOC. So I wish to pay for them again and have them sent to another address please.” *Id.*

5. On May 1, 2013, DOC acknowledged receipt of the letter described in paragraph 4 on April 24, 2013. CP 64-66.

Furthermore, DOC described the letter as a “public records request” and “assigned it [tracking] number PDU-24889.” *Id.* Also, DOC “interpret[ed Mr. Canha's] request to ask for records that show the following: 1. In which bank and which account inmate savings funds are deposited. 2. Records showing which banking agreement between DOC and the bank identified in item one. 3. Amount of interest inmate savings accounts earned from January 1, 2019 thru December 31, 2011. 4. Information showing that offenders at CRCC have sent money from their savings account to their immediate family members as according to DOC policy 200.000 for medical needs for those family members.” *Id.*

Additionally, DOC indicated it had “gathered 11 pages responsive to item numbers 1, 2, and 4.” *Id.*

6. On July 1, 2013, DOC re-verified internally the non-existence of records responsive to the “amount of interest” portion of Mr. Canha's requests under PDU-22455 and PDU-24889. CP 124-125.
7. On July 1, 2013, DOC mailed “11 pages [of records] responsive to” PDU-24889,” along with a two-page cover letter dated July 1, 2013; an “Agency Denial Form / Exemption Log” dated July 1, 2013; a blank “Appeal Form,” with an indication the form was “Last Updated 4/3/13;” and a document entitled “Exemptions Section,” with an indication the form was “Last Updated 4/3/13.” CP 72-87. That mailing did not include a copy of the February 12, 2013 cover letter re PDU-22455; the “Agency Denial Form / Exemption Log” dated February 12, 2013 re PDU-22455; the “Appeal Form” last updated April 17, 2012; or the “Exemptions Section” record last updated April 17, 2012.
8. On April 15, 2014, Mr. Canha filed a Complaint for Disclosure of Public Records in *Canha v. Department of Corrections* in Thurston County Superior Court, Case No. 14-2-00711-3. CP 4-8. The Complaint alleged DOC had violated its statutory obligations under the Public Records Act regarding its handling of “PDU-22455” and “PDU-24889” by, *inter alia*, “[f]ailing disclose responsive records.” *Id.*

9. On July 24, 2014, DOC filed Defendant's Motion for Summary Judgment in *Canha v. Department of Corrections* in Thurston County Superior Court, Case No. 14-2-00711-3. CP 14-19. DOC argued (1) "Plaintiff's claims related to PDU-22445 are time barred by the statute of limitations;" and (2) DOC "did not violate the PRA with respect to PDU-24889" because it produced all responsive records. *Id.*
10. On December 19, 2014, the Court "granted" DOC's "motion for summary judgment" and ordered that Mr. Canha's "claims are dismissed with prejudice." CP 137-138. The Court considered "Defendant's Motion for Summary Judgment," "Plaintiff's Response to Defendant's Motion for Summary Judgment," and "Defendant's Reply," as well as "the court file in this matter." *Id.*
11. On December 29, 2014, Mr. Canha filed a Notice of Appeal to Court of Appeals, Division II. CP 139-142.

D) ARGUMENT

"Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class

of records.” RCW 42.56.550. “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.” *Id.*

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.” RCW 42.56.550(3).

“The court may conduct a hearing based solely on affidavits.” *Id.*

“[W]here the record consists only of affidavits, memoranda of law, and other documentary evidence,” “the appellate court stands in the same position of the trial court.” *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 252 (1994). “Under such circumstances, the reviewing court is not bound by the trial court’s findings on disputed factual issues.” *Id.* at 253. Also, more particularly, “[g]rants of summary judgment are reviewed de novo.” *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715 (2011).

Here, the trial court “considered the court file in this matter,” “Defendant’s Motion for Summary Judgment,” “Plaintiff’s Response to Defendant’s Motion for Summary Judgment,” and “Defendant’s Reply.” CP 134-135. That is, no live testimony was taken by the trial court. Thus,

this Court is not bound by the trial court's findings on disputed factual issues, and should review issues of law de novo.

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). The court must consider “facts and reasonable inferences in the light most favorable to the nonmoving party.” *Building Indus. Assn. of Wash. v. McCarthy*, 152 Wn. App. 720, 735 (2009). “A material fact is a fact upon which the outcome of the action depends.” *Id.* “The moving party bears the initial burden of showing the absence of an issue of material fact.” *Id.* “If a defendant movant meets this burden, the plaintiff must respond by making a prima facie showing of the essential elements of its case” in the form of “competent evidence by affidavit or otherwise.” *Id.*

1. Discovery Rule Applies, and Thus Claim re PDU-22455 Not Time-Barred.

In general, judicial review of an agency's refusal to permit public inspection and copying of public records “must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). However, the discovery

rule arguably does, and in any event ought to, apply in cases brought under the Public Records Act. *See e.g. Reed v. City of Asotin*, 917 F.Supp.2d 1156, 1166 (E.D. Wash. 2013) (“Although there do not appear to be any reported cases directly applying the so-called 'discovery rule' to PRA cases, applying the rule to the circumstances presented here is entirely reasonable”).

“The discovery rule states that a statute of limitations does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action.” *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 92 (1981). “In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action.” *Id.* at 93. “That balancing test has dictated the application of the rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed.” *Id.* “Thus, the rule has been applied, for example to cases involving professional services and products liability...[or where] a defendant[] unlawful[ly] fail[s] to report an...accident...while, as a result of such failure, there is inability to prosecute the cause of action” *Id.* “Statutes of limitations operate upon the premise that when an adult person has a justifiable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts.” *Id.* (internal quotation omitted). In

U.S. Oil & Refining, the Washington Supreme Court found the discovery rule applied to an action to “collect[] penalties...for illegally discharging pollutants” because the enforcement agency, Department of Ecology, had to “rely upon the defendant's self-reporting.” *Id.* at 87, 93. “Where self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it.” *Id.* at 93. “Like other cases which have employed the rule, this is a case where if the rule were not applied the plaintiff would be denied a meaningful opportunity to bring a suit.” *Id.* at 93-94. “Neither the purpose for statutes of limitation nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands.” *Id.* at 94.

The Public Records Act is analogous, for the purposes of a discovery rule analysis, to the waste regulatory scheme described in *U.S. Oil & Refining*. Specifically, under the PRA, the agency bears the burden of “mak[ing] available for public inspection and copying all public records, unless the record falls within [a] specific exemption.” RCW 42.56.070(1). And if an agency denies a request by withholding or redacting a particular record, the agency bears the burden of notifying the requester with “a written statement of the specific reasons” for the denial. RCW 42.56.520; *see also* RCW 42.56.210(3). In other words, under the

PRA, an agency is a self-reporting entity. And the requester is unable to determine if he has been wrongfully denied an opportunity to inspect and copy public records unless the agency-defendant self-reports in a manner that provides requester with knowledge of the denial and the specific circumstances surrounding that denial.

Here, regarding PDU-22455, DOC did send Mr. Canha “a letter...enclosing the responsive documents [and] an Agency Denial Form/Exemption Log” on February 12, 2013. CP 39. But Mr. Canha never received that letter or its enclosures. CP 62, 110. More specifically, Mr. Canha never received the letter because of a separate policy of DOC that prevented him from receiving the letter. *Id.* In other words, through no fault of his own, Mr. Canha did not receive the records he requested, did not received notice that some exemptions were claimed, and did not have an opportunity to inspect the records the Department deemed responsive to evaluate whether any records were silently withheld.

Had Mr. Canha had an opportunity to inspect the two records DOC actually produced, he would have been able to determine the probable existence of additional silently withheld responsive records. One of the records produced—the “signature card”—reads, in part, “The deposit agreement we give you is part of your agreement with us regarding use of your account and tells you the current terms governing your account. We

may change the deposit agreement at any time and will inform you of changes that affect your rights and obligations. By signing below, you acknowledge receipt of the deposit agreement.” CP 57. This strongly indicates DOC is in possession of at least one additional record responsive to PDU-22455—a “deposit agreement”—separate from and in addition to the “signature card” produced. Furthermore, the “signature card” does not appear to have been signed by anyone, which strongly indicates DOC is in possession of another responsive record—a *signed* “signature card”—as yet undisclosed.

Under the circumstances, the balancing test tips in favor of Mr. Canha in finding the discovery rule applies to toll the statute of limitations. More particularly, the one-year statute of limitations should be tolled until some time after June 17, 2013, when DOC requested clarification as to what third party address it should resend the records. CP 68. Because Mr. Canha filed suit on April 15, 2014, less than one year after June 17, 2013, his claims regarding PDU-22455 are not time-barred.

2. Genuine Issues of Material Fact Exist Regarding Meaning of PDU-24889 Request.

Summary judgment should only be granted if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

On April 24, 2013, the Department received another letter from Mr. Canha dated April 21, 2013. CP 39, 62. Specifically, the letter concerned “PDU-22455 + 22386.” CP 62. Mr. Canha indicated he was “not seeking multiple copies of the requests,” but was instead “seeking to receive the ones that have already been sent due to [him] not receiving them [because t]hey were confiscated by the DOC.” CP 62. DOC “treated” “[t]his letter” “as a new public records request and assigned [this request tracking number] PDU-22889.” CP 39.

This request is ambiguous; was Mr. Canha requesting (1) copies of the records DOC previously mailed to him, but were confiscated; or (2) copies of the records DOC should have produced to him, i.e. those records actually responsive to his earlier requests under PDU-22455 and PDU-22386? There is evidence in the record—detailed below—that support both interpretations, and that ambiguity means there is a genuine issue of material fact that precludes summary judgment as to PDU-24889.

(a) If PDU-24889 Is a Request for Confiscated Records, DOC Failed To Produce All Records Mailed in Responding to PDU-22455.

“The Public Records Act does not allow silent withholding of entire documents or records....[or] silent editing of documents or records.”

Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 537 (2009). “Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the specific request have been disclosed.” *Id.*

DOC responded to PDU-22455 by mailing six records, consisting of seven pages. CP 51-57. Specifically, DOC mailed two one-page records responsive to PDU-22455: “651accounts.txt” and the “Deposit Account Documentation Signature Card.” CP 56-57. Both of these records were Bates stamped “PDU-22455.” *Id.* DOC also mailed a two-page cover letter dated February 12, 2013. CP 51-52. DOC also mailed an “Agency Denial Form / Exemption Log” dated February 12, 2013, with the form “Last Updated 4/17/12. CP 53. DOC also mailed a blank “Appeal Form,” “Last Updated 4/17/12.” CP 54. And DOC also mailed the “Exemptions Section” record, “Last Updated 4/17/12.” CP 55.

DOC responded to PDU-24889 by mailing 15 records, consisting of 16 pages. CP 72-87. Specifically, DOC mailed two one-page records responsive to PDU-22455 and PDU-24889: “651accounts.txt” and the “Deposit Account Documentation Signature Card.” CP 77-78. Both of these records were Bates stamped “PDU-24889,” but not “PDU-22455. *Id.* DOC also mailed nine one-page records responsive to PDU-22386 and PDU-24889. CP 79-87. Both of these records were Bates stamped “PDU-

24889,” but not “PDU-22386. *Id.* DOC also mailed a two-page cover letter dated July 1, 2013. CP 72-73. DOC also mailed an “Agency Denial Form / Exemption Log” dated July 1, 2013, with the form “Last Updated 4/3/13. CP 74. DOC also mailed a blank “Appeal Form,” “Last Updated 4/3/13.” CP 75. And DOC also mailed the “Exemptions Section” record, “Last Updated 4/3/13.” CP 76.

That the mailings contained similar but ultimately different records (at least with respect to PDU-22455) either indicates (1) DOC silently withheld public records; or (2) DOC actually interpreted Mr. Canha's request under PDU-24889 as one for records responsive to PDU-22455 and PDU 22386. If the former, DOC was not entitled to judgment as a matter of law (and to the contrary, Mr. Canha would be). If the latter, see below.

(b) If PDU-24889 Is a Request for Records Responsive to PDU-22455, DOC Silently Withheld Responsive Records.

Mr. Canha's request under PDU-24889 should be, and indeed was, treated as one for records responsive to PDU-22455 and PDU-22386. Specifically, as discussed above, DOC responded to PDU-24889 by producing records that were similar to, but ultimately different from, the records produced in response to PDU-22455. *Compare* CP 51-57 with CP 72-78. Furthermore, DOC “treated [Mr. Canha's letter] as a new public

records request. CP 39. And DOC actually redacted records, and claimed exemptions. CP 74, 76. Had DOC produced the already-mailed records, those records would have already existed in a redacted form, providing no opportunity to redact. Rather, DOC apparently gathered the original records, applied the redaction, and added new Bates stamping. *See* CP 74, 76; *compare* CP 77 with CP 56. Finally, DOC again investigated as to whether there were records responsive to PDU-22455. CP 124-125. Had DOC only intended to produce the already-mailed records, no additional investigation would have occurred. That DOC conducted additional investigation to determine whether other responsive records existed means DOC interpreted Mr. Canha's request for those records responsive to PDU-22455 and PDU-22386, not as a request for those records already mailed.

And if Mr. Canha's request under PDU-24889 was a request for all records responsive to PDU-22455 and PDU-22386, DOC silently withheld records. Specifically, one of the records produced—the “Deposit Account Documentation Signature Card”—reads, in part, “The deposit agreement we give you is part of your agreement with us regarding use of your account and tells you the current terms governing your account. We may change the deposit agreement at any time and will inform you of changes that affect your rights and obligations. By signing below, you

acknowledge receipt of the deposit agreement.” CP 78. Thus, DOC is probably in possession of at least two additional records responsive to PDU-24889: a “deposit agreement” and a signed “signature card.” To the extent DOC disputes the existence of these records, that constitutes a genuine issue of material fact that precludes summary judgment. To the extent DOC admits it silently withheld these records, DOC was not entitled to judgment as a matter of law, and therefore summary judgment should not have been granted.

3. Costs, Including Reasonable Attorney Fees, Should Be Awarded.

“Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). A prevailing party must also be awarded costs, including reasonable attorney fees, incurred in bringing an appeal. *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS I)*, 114 Wn.2d 677, 690 (1990).

Here, Mr. Canha will ultimately be determined to be the prevailing party. Thus, he is entitled to costs, including reasonable attorney fees. An affidavit of fees and expenses will be filed pursuant to RAP 18.1.

E) CONCLUSION

DOC silently withheld records regarding both PDU-22455 and PDU-24889. The trial court should not have granted summary judgment regarding the claim involving PDU-22455 as time-barred because the discovery rule tolled the applicable statute of limitations. Moreover, the trial court should not have granted summary judgment regarding the claim involving PDU-24889 because either (1) if the request was for the previously-mailed records, DOC silently withheld records from that mailing; or (2) if the request was for the originally-responsive records, DOC probably silently withheld records responsive to PDU-22455. For those reasons, Appellant Steven Canha requests the Order Granting Defendant's Motion for Summary Judgment be reversed, and this action be remanded to the trial court for further proceedings.

DATED this 9th day of April, 2015.



Christopher Taylor, WSBA # 38413
Attorney for Appellant

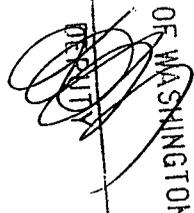
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was delivered this 9th day of April, 2015 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

Timothy J. Feulner
Attorney General of Washington
Corrections Division
2425 Bristol Ct SW
Olympia, WA 98502



Christopher Taylor

FILED
COURT OF APPEALS
DIVISION II
2015 APR 10 PM 1:08
STATE OF WASHINGTON
BY  DEAN