

FILED  
COURT OF APPEALS  
DIVISION II

No. 50364-6-II  
Pierce County Superior Court No. 16-2-04684-9

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STATE OF WASHINGTON THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

BY MS  
DEPUTY

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DONALD HERRICK,

Plaintiff/Appellant,

v.

SPECIAL COMMITMENT CENTER,

Defendant,

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge

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APPELLANT'S REPLY BRIEF

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DONALD HERRICK  
(Pro se) Appellant

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## INTRODUCTION

Appellant (pro se)<sup>1</sup> submits this “Reply Brief” to Appellee’s “Response Brief” (“RB”). To be concise and for simplicity Appellant would like to maintain his position regarding the facts as outlined in his own previous filings rather than go line by line through Appellee’s Response contradicting their errors and misrepresentations yet again.

## REPLY ARGUMENT

- I. THE PRIMARY ISSUE IN THIS CASE IS NOT WHETHER THE PRA REQUIRES AN ADEQUATE SEARCH, WHICH IT MOST CERTAINLY DOES, BUT RATHER WHETHER SCC’S MARGINAL EFFORTS SATISFY THE ADEQUACY REQUIREMENT OF THE PRA ESTABLISHED THROUGH BOTH STATE AND FEDERAL CASE LAW

Appellee’s are correct that the test for adequacy of a search under the PRA is the same as under the FOIA. See *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wash.2d 702, 708, 261 P.3d 119 (2011) “We hereby adopt Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search, consistent with the Court of Appeals’ decision.” *Neighborhood* goes on to state that agencies from whom records have been requested under the Public Records Act (PRA):

**“are required to make more than a perfunctory search and to follow obvious leads as they are uncovered... The search should not be limited to one or more places if there are additional sources for**

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<sup>1</sup> Pro se litigants pleadings are to be construed liberally and held to less stringent standards than formal pleadings (that are) drafted by lawyers; if the court can reasonably read pleadings to state a valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant’s unfamiliarity with pleading requirements. *Gomez-Diaz v. U.S.*, 433 F.3d 788 (11<sup>th</sup> Cir. 2005); *Taylor v. US Probation Office*, 409 F.3d 426 (D.C. Cir. 2005); *McCormick v. City of Chicago*, 230 F.3d 319 (7<sup>th</sup> Cir. 2000); *Boag v. MacDonald*, 454 U.S. 364, 70 L. Ed. 2D 551, 102 S.Ct. 700 (1982); *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed. 2D 652, 92 S.Ct. 594 (1972).

**the information requested... Indeed the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested...** This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found...The PRA treats a failure to properly respond as a denial... Thus, an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations". (emphasis added)

*Neighborhood* at 720-721.

*Neighborhood* still further expounds on "How a requester may rebut the agency's showing of an adequate search":

First, if the "agency fails to establish through reasonably detailed affidavits that its search was reasonable, the FOIA requester may defeat summary judgment merely by showing that the agency might have discovered a responsive document had the agency conducted a reasonable search."<sup>2</sup> *Maynard*, 986 F.2d at 560 (emphasis added).

Second, if the requester identifies "specific deficiencies in the agency's response,"<sup>3</sup> summary judgment should not be granted. *CareToLive*, 631 F.3d at 341-42. For example, if the agency's own responses show another place where responsive records might be found<sup>4</sup> without an unreasonable burden on the agency, summary judgment should not be granted. See, e.g., *Valencia-Lucena*, 180 F.3d at 326-27 ("if a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials'<sup>5</sup>, summary judgment is

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2 Appellant identified and pointed out numerous missing and obviously duplicate NAP's pertaining to his request for New Arrival Profiles (PRR-677) this is important because in Appellee's Declaration of DeMarco she states that "A New Admission Profile is done when there is a new admission to the SCC" and also that "After a resident is admitted to the SCC, a folder is established in the records Department for that resident and the NAP is placed in the resident's file" Appellant further offered evidence in his filings that on the living units at the SCC where each resident resides there are the residents individual files that contain each of their NAP's for staff reference and that SCC could have gone there to locate missing NAP's

3 Appellant identified and pointed out numerous missing and duplicate NAP's pertaining to his request for New Arrival Profiles (PRR-677) and Mr. Podriznik's purported consolidated request (PRR-927); and as well missing documents pertaining to Alder Meeting Minutes (PRR-720)

4 Appellee's own Declaration from Cheryl Medina (CP 226) proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the "two" known missing missing NAP's

5 Appellant's request was "well defined" and and as well there were "positive indications of overlooked materials" given Appellee's own Declaration from Cheryl

inappropriate”; here, the search was inadequate because the record itself revealed “ ‘positive indications of overlooked materials’ ” (quoting Founding Church of Scientology, 610 F.2d at 837)); Campbell, 164 F.3d at 28 (search held inadequate where it was evident from the records disclosed by the agency that a search of another records system would be apt to turn up requested documents<sup>6</sup>). ..

Third, if the agency has made a prima facie showing of adequacy, as described, then the burden shifts to the plaintiff-requester to provide “ ‘countervailing evidence’ as to the adequacy of the agency’s search.” Iturralde v. Comptroller of Currency, 315 F.3d 311, 314 (D.C.Cir.2003). For example, if the requester “is able to show circumstances indicating that further search procedures were available without the [agency’s] having to expend more than reasonable effort<sup>7</sup>, then summary judgment would be improper.” Miller, 779 F.2d at 1385. An agency “cannot limit its search” to only one or more places if there are additional sources “that are likely to turn up the information requested.”<sup>8</sup> Oglesby, 920 F.2d at 68; see also Campbell, 164 F.3d at 28. A requester might also produce countervailing evidence that places the agency’s identification or retrieval procedure genuinely at issue, thus making summary judgment improper<sup>9</sup>. Founding Church of Scientology, 610 F.2d at 836.

*Neighborhood at 736-737*

Cited *Iturralde* overlaps and expounds yet further in stating:

At the summary judgment stage, the agency has the ***burden*** of showing that it complied with the FOIA, *id.*, and in response to a

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Medina (CP 226) which proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the two ***known*** missing missing NAP's

6 Appellee's own Declaration from Cheryl Medina (CP 226) proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the few known missing missing NAP's

7 Appellant met this burden when he pointed out that Appellee's own Declaration from Cheryl Medina (CP 226) proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the few known missing missing NAP's

8 Appellee's own Declaration from Cheryl Medina (CP 226) proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the few known missing NAP's Appellant and that “additional sources...are likely to turn up the information requested”

9 Appellant met this burden when he pointed out that Appellee's own Declaration from Cheryl Medina (CP 226) proves that they noticed some missing documents and had to simply communicate further with Dr. DeMarco to find and locate the few known missing missing NAP's

challenge to the adequacy of its search for requested records the agency may meet its *burden* by providing "a reasonably detailed affidavit, **setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials ... were searched.**"<sup>10</sup> Id. (quoting *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir.1990)). The plaintiff may then provide "countervailing evidence" as to the adequacy of the agency's search. *Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir.1979). "[I]f a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Valencia-Lucena*, 180 F.3d at 326 (quoting *Founding Church of Scientology*, 610 F.2d at 837) (citation omitted). (Emphasis added).

*Iturralde* at 313.

Appellee's state in their Response Brief (at 19) "Although Mr. Herrick now says, in hindsight, that Ms. Medina should have sifted through every resident's individual clinical file looking for additional NAP's, CP at 309, *there is no evidence indicating that was called for at the time*" (emphasis added). Appellees have never denied the existence of the NAP's in the resident file/folders as stated by Appellant in his own filings, and their own previous filings that were offered as evidence (CP at 131 (#s 3 & 4)) and now the Appellee's (emphasized) statement above further acknowledges the existence of such.

Beyond even the established evidentiary foundation and Appellee's acknowledgment of the known existence of the NAP's alternate locations is the fact that the burden is on the agency to set "**forth the search terms and the type of search performed, and averring that all files likely to**

<sup>10</sup> Affidavits submitted by Appellee failed to meet this standard/threshold as they never "averred" that all files likely to contain responsive materials were in fact searched etc.

**contain responsive materials ... were searched**” as stated in *Iturralde* (at 313) above quoting *Oglesby* (at 68). See also *Neighborhood*:

**The search should not be limited to one or more places if there are additional sources for the information requested... Indeed the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested...** This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, **but only those places where it is reasonably likely to be found** (emphasis added)

*Neighborhood* at 720-721.

a. NAP's (PRR-67, PRR-677, and PRR-927)

Resident folders are not simply a place where the NAP's are “likely” to be found but rather are the one place at the SCC where they are guaranteed to be found in order to quickly assist and inform staff of the residents specific treatment needs. CP at 131 (#s 3 & 4):

3. When the NAP is completed, it is placed in a separate folder with all of the other NAP's. After the resident is admitted to SCC, a folder is established in the records Department for that resident, and the NAP is placed in the resident's folder.

4. The purpose of the NAP is to inform staff about sex offender information they might find useful for the resident's treatment needs. The NAP is a synopsis of previous convictions, incarceration history, and any special problems that might pose a challenge to the resident's treatment providers. The NAP is not a formal psychological report but rather a snapshot of the resident's referral to SCC. It is designed to assist the staff providing treatment to the resident.

Declaration Of Dr. Carole DeMarco In Support Of Defendant's Motion For Summary Judgment at 3 & 4 (emphasis added).

Yet in their response, and despite having the burden to do so, SCC 1) never averred “*that all files likely to contain responsive materials ... were searched*” (*Iturralde* at 313) or 2) actually even searched the resident

folders. Especially confounding is the fact that even after Appellant brought the deficiencies of their response to their attention, SCC never looked further for the NAP's or offered any follow up communication whatsoever to Appellant (CP at 226 (# 3)) -all of which are contrary to the PRA, WAC Model Rules and state and federal (FOIA) case law.

Appellee's statement "Although Mr. Herrick now says, in hindsight, that Ms. Medina should have sifted through every resident's individual clinical file looking for NAPs, there is no evidence indicating that was called for at the time" (CP at 369) is fully contradicted by the requirements of the PRA.

When SCC was made aware that their NAP response(s) were deficient and inadequate they never further fulfilled the request or took any remedial actions to rectify the situation even though there is nothing in the PRA that would allow an agency to demand "evidence indicating that was called for at the time". To the contrary Appellee's are obligated to "follow obvious leads" etc. via clearly established case law, the PRA and RCW 42.56. "Government agencies from whom records have been requested under the Public Records Act (PRA) "are required to make more than a perfunctory search and to follow obvious leads as they are uncovered...The search should not be limited to one or more places if there are additional sources for the information requested...Indeed the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested...This is not to say, of

course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found...The PRA treats a failure to properly respond as a denial... Thus, an inadequate search is comparable to a denial". (emphasis added). See Neighborhood Alliance of Spokane County v. County of Spokane 172 Wash.2d 702, 724, 261 P.3d 119 (2011).

As well Appellee's also knew full well that the original database that they searched was not infallible and in fact did not contain all of the NAP's (CP at 226 (# 3)) thus further establishing that their search was inadequate per the applicable case law and that additional sources for the responsive materials should have been searched.

Second, if the requester identifies "specific deficiencies in the agency's response," summary judgment should not be granted. CareToLive, 631 F.3d at 341-42. For example, if the agency's own responses show another place where responsive records might be found without an unreasonable burden on the agency, summary judgment should not be granted. See, e.g., Valencia-Lucena, 180 F.3d at 326-27 ("if a review of the record raises substantial doubt, particularly in view of 'well defined requests and positive indications of overlooked materials,' summary judgment is inappropriate"; here, the search was inadequate because the record itself revealed " 'positive indications of overlooked materials' " (quoting Founding Church of Scientology, 610 F.2d at 837)); Campbell, 164 F.3d at 28 (search held inadequate where it was evident from the records disclosed by the agency that a search of another records system would be apt to turn up requested documents). ..

Third, if the agency has made a prima facie showing of adequacy, as described, then the burden shifts to the plaintiff-requester to provide "countervailing evidence" as to the adequacy of the agency's search." Iturralde v. Comptroller of Currency, 315 F.3d 311, 314 (D.C. Cir.2003). For example, if the requester "is able to show circumstances indicating that further search procedures were available without the [agency's] having to expend more than reasonable effort, then summary judgment would be improper."

*Miller*, 779 F.2d at 1385. An agency “cannot limit its search” to only one or more places if there are additional sources “that are likely to turn up the information requested.” *Oglesby*, 920 F.2d at 68; see also *Campbell*, 164 F.3d at 28. A requester might also produce countervailing evidence that places the agency’s identification or retrieval procedure genuinely at issue, thus making summary judgment improper. *Founding Church of Scientology*, 610 F.2d at 836.

*Neighborhood* at 736-737

Besides Appellant's NAP grid (CP 353-361) the record is replete with the Appellee's own filings and evidence showing and establishing “countervailing evidence”, “specific deficiencies in the agency’s response” and “positive indications of overlooked materials”. Here “the search was inadequate because the record itself revealed ‘positive indications of overlooked materials’” per *Neighborhood*.

Further the law on “adequacy” requires:

Quoted from SAI v. Transportation Security Administration (D.D.C. 2018) 2018 WL 2364290 @ 11:

“The adequacy of an agency's search for records 'is analyzed under the same standard' for purposes of both FOIA and the Privacy Act. *Thompson v. U.S. Dep't of Justice*, 146 F. Supp 3d 72, 82 (D.D.C. 2015). Under both statutes, the adequacy of the 'search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry [it] out'. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). **The agency 'cannot limit its search to only one record system if there are others that are likely to turn up the information requested'...**

**“The 'agency fulfills its obligation under FOIA'...'if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’”** *Valencia-Lucena v. U.S. Coastguard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) To prevail on summary judgment, the agency must submit affidavits (or declarations) that “denote which files were searched,” [and] by whom those files were searched, and [that] reflect a “systematic approach to document location.” *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 144 (D.D.C. 2015).”

(Emphasis added).

As outlined above Appellee's did not act diligently with this claim nor was their search adequate and instead they refused to produce all responsive materials to my request for NAP's (PRR-67, PRR-677, and PRR-927) to date. Beyond *Appellant's* filings and evidence for this claim is the fact that SCC's *own* filings and evidence throughout these PRA proceedings thoroughly establish that the the trial Courts granting of summary judgment on this claim was clearly an abuse of discretion.

**b. Alder Meeting Minutes (PRR-720)**

With regards to the specific claims of PRR-720 Appellee's correctly claim to have given me some responsive materials for my request but as well Appellee's also correctly state that the specific Alder Meeting Minutes (AMM) were not included as responsive to me "specifically under the public records request number PRR-720" ("RB" at 20). Appellee's then state that "upon filing of Mr. Herrick's complaint these materials were re-produced to him specifically under the public records request number PRR-720" ("RB" at 24) and make reference to "CP at 219" which actually establishes the date of Appellee's turning over the specific responsive materials and subsequently the earliest date of Appellant's receipt of the responsive documents specifically for PRR-720 at exactly the same date of "February 26, 2016" that Appellant has stated which is only (well) after Appellant: **1)** openly attempted communication, **2)** helped to locate the responsive materials, **3)** was told obstinately that I never submitted the

PRR-720 request, and 4) filed the PRR-720 PRA claim. It is *Appellee's* statements that are “demonstrably untrue”.

SCC continuously attempts to avoid accountability under the PDA/PRA regarding the AMM by stating that requested materials were available and/or provided from elsewhere. This position is untenable as “Availability of records from another source does not affect analysis under public disclosure act (PDA); PDA does not exempt records that requester has already received from another source.” Tacoma Public Library v. Woessner (1998) 90 Wash.App. 205, 951 P.2d 357, review granted, cause remanded 136 Wash.2d 1030, 972 P.2d 101, on remand 972 P.2d 932, and also “Under the public disclosure act, administrative inconvenience and expense, or the fact that particular information is available in another record, affects only the procedural aspects of disclosure, not its scope.” Hearst Corp. v. Hoppe (1978) 90 Wash.2d 123, 580 P.2d 246.

As outlined above Appellee's did not act diligently with this claim nor was their search adequate and instead they refused to produce responsive materials to my request for Alder Meeting Minutes (PRR-720) at all until **after** my PRA claim was filed. Beyond *Appellant's* filings and evidence for this claim is the fact that SCC's *own* filings and evidence throughout these PRA proceedings thoroughly establish that the the trial Courts granting of summary judgment on this claim was clearly an abuse of discretion.

**c. APPELLANT IS A PRO SE LITIGANT,  
ENTITLED TO SOME LEEWAY WITH  
REGARDS TO ALL FILINGS AND CLAIMS**

Appellant is a confined *pro se* litigant and should be treated as such. *See Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988); *Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998).<sup>11</sup>

**CONCLUSION**

Despite Appellee's talking in circles and outright obfuscation with the facts and chronological events of this case the inescapable conclusion, as presented by Appellant, is that the trial Court abused its discretion with regards to granting summary judgment on these claims.

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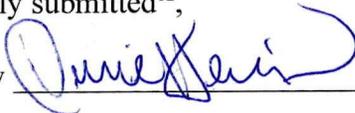
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<sup>11</sup> *See also Pro Se Litigants: Tips for Opposing Counsel, Courts*, Your ABA (July 2014), <https://www.americanbar.org/publications/youraba/2014/july-2014/pro-se-litigants--tips-for-opposing-counsel--courts.html>; *Judges Reflect on Dealing with Difficult Pro Se Litigants*, ABA Journal (July 31, 2015), [http://www.abajournal.com/news/article/judges\\_reflect\\_on\\_dealing\\_with\\_difficult\\_pro\\_se\\_litigants/](http://www.abajournal.com/news/article/judges_reflect_on_dealing_with_difficult_pro_se_litigants/).

I, the below signed, am 18 years of age or older, am competent, and have personal knowledge, to testify and swear under penalty of perjury that the foregoing statements made in the above are true and correct to the best of my own personal knowledge, and are sworn to in accordance with the laws of the state of Washington.

DATED this 10<sup>th</sup> day of December, 2018.

Respectfully submitted<sup>12</sup>,

By 

Signed at McNeil Island, Pierce County

Donald Herrick  
P.O. Box 88600  
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<sup>12</sup> Filed utilizing the mailbox rule consistent with GR 3.1.

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY NS  
DEPUTY

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

DONALD HERRICK

Plaintiff (Pro se),

v.

SPECIAL COMMITMENT CENTER

Defendant(s).

Appeal No. 50364-6-II

**DECLARATION OF SERVICE FOR  
APPELLANT'S REPLY BRIEF**

\*\* filed utilizing the mailbox rule consistent  
with GR 3.1\*\*

(Pierce County Superior Court

NO. 16-2-04684-9)

I, Donald Herrick, declare that, on December 6<sup>th</sup>, 2018, I deposited the foregoing:

**1. Appellant's Reply Brief**

into the internal mail system of the Special Commitment Center, consistent with GR 3.1,  
with prepaid postage via envelopes, addressed to:

Court of Appeals -Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

Office of the Attorney General  
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I, the below signed, swear under penalty of perjury that I am at least 18 years of age, with knowledge and ability to competently testify to the matters set forth herein, and that the the foregoing statements made in the above are true and correct to the best of my own personal knowledge and are sworn to in accordance with the laws of the state of Washington.

DATED this 10<sup>th</sup> day of December, 2018.

Respectfully submitted,

By 

Signed at McNeil Island, Pierce County Washington

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