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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 52744-8-II

Pierce County Superior Court No. 17-2-08077-8

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

DONALD HERRICK,

Plaintiff/Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS) and the
SPECIAL COMMITMENT CENTER (SCC),

Defendant(s),

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

The Honorable G. Helen Whitener, Judge

APPELLANT'S RESPONSE BRIEF

DONALD HERRICK
(Pro se) Appellant

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TABLE OF CONTENTS

A. INTRODUCTION.....1

B. PLAINTIFF'S COUNTERSTATEMENT OF ISSUES.....2

 1. Did the trial court err in finding that the SCC violated the PRA when the SCC refused to provide a copy of a personal mail log for Plaintiff? (201605-PRR-833 claims).

 2. As a result of other determined PRA violations should the trial court now be instructed to reconsider the appropriate deterrence and thus daily penalty determination for the SCC/DSHS. (201605-PRR-833 claims).

 3. Should Respondents be limited in their arguments going forward to only arguments previously submitted regarding the issue of the redaction of the photograph of an SCC employee? (201512-PRR-889 claims)

C. ARGUMENT.....2

 GROUND I.....The SCC Did Violate the PRA When It Refused to "Create", or otherwise provide, a Personal Mail Log For Plaintiff.....2

 GROUND II....The trial court should now be instructed to reconsider the appropriate deterrence and thus daily penalty determination for the SCC/DSHS.....5

 GROUND III...This Court Should Reverse the Order Granting Summary Judgment to the SCC on Mr. Herrick's Photograph Request, as Respondent/Cross-Appellant's Suggest, and Limit Respondent/Cross-Appellant's Positions to Only Those Previously Argued at the Trial Court.....6

D. CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

<u>Boag v. MacDougall</u> , 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982).....	1
<u>Hughes v. Rowe</u> , 449 U.S. 5, 9, 101 S. Ct. 173, 175, 66 L. Ed.2d 163, (1980).....	1
<u>Haines v. Kerner</u> , 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed.2d 652 (1972).....	1
<u>Noll v. Carlson</u> , 809 F.2d 1446, 1448.....	1
<u>Ashelman v. Poep</u> , 793 F.2d 1072, 1078, (9th. Cir 1986).....	1
<u>Smith v. Okanogan County</u> , 100 Wn. App. 7, 994 P.2d 857 (2000)	2
<u>Fisher Broadcasting-Seattle TV LLC v. City of Seattle</u> , 180 Wn.2d 515, 326 P.3d 688 (2014)	3, 4
<u>Sperr v. City of Spokane</u> , 123 Wn. App. 132, 96 P.3d 1012 (2004).....	3
<u>Yousoufian v. Office of Ron Sims</u> , 168 Wash.2d 444, 459-60, 229 P.3d 735 (2010).....	6

A. INTRODUCTION

Untrained Plaintiff pro se¹ Donald Herrick submitted a series of Public Records requests to the Department of Social and Health Services (DSHS) and Special Commitment Center (SCC) that were consistent with the both the PRA and RCW 42.56. These requests were variously mismanaged and responses were not fulfilled consistent with the PRA or RCW 42.56. Plaintiff then filed a PRA complaint. In Plaintiff's Opening Brief he articulated his position on the trial courts Order regarding the penalty determination and the also the granting of summary judgment to the SCC regarding a passport style photograph of an SCC employee. Plaintiff now responds to Respondent/Cross-Appellant's Brief on the issues of the actual finding of the SCC's PRA violation regarding "mail log" (201605-PRR-833) and as well Respondent/Cross-Appellant's acquiescence to the issue and (erroneous) granting of summary judgment to SCC regarding the passport style photograph of an SCC employee (201512-PRR-889).

Plaintiff, being an untrained pro se litigant, and out of an abundance of caution but also with a desire to be judicious with the courts time and resources, does not restate every previous filing but rather would simply

¹"Courts are to liberally construe the 'inartful pleading' of pro se litigants" Boag v. MacDougall, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982); "It is settled law that the allegations of (a pro se litigant's complaint) 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 175, 66 L. Ed.2d 163, (1980) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed.2d 652 (1972); see also Noll v. Carlson, 809 F.2d 1446, 1448 "Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel"; Ashelman v. Poep, 793 F.2d 1072, 1078, (9th. Cir 1986) "We hold [plaintiff's] pro se pleadings to a less stringent standard than formal pleadings prepared by lawyers."

like to emphasize and reference his position and previous filings as being an integral part of his overall position.

B. PLAINTIFF'S COUNTERSTATEMENT OF ISSUES

1. Did the trial court err in finding that the SCC violated the PRA when the SCC refused to provide a copy of a personal mail log for Plaintiff? (201605-PRR-833).
2. As a result of other determined PRA violations should the trial court now be instructed to reconsider the appropriate deterrence and thus daily penalty determination for the SCC/DSHS. (201605-PRR-833).
3. Should Respondents be limited in their arguments going forward to only arguments previously submitted regarding the issue of the redaction of the photograph of an SCC employee? (201512-PRR-889).

C. ARGUMENT

I. The SCC Did Violate the PRA When It Refused to "Create", Or Otherwise Provide, a Personal Mail Log For Plaintiff

The cases cited by Respondent/Cross Appellant's are not on point with the instant case. Specifically, in *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000), Mr. Smith asked for many dozens of absolutely informational and frivolous requests. Many of the requests would require the agencies involved to blend information from multiple varied sources

which is not comparable to the facts of the instant case. Plaintiff's request was for a distinct record that did exist in one database/file. As well it should be noted that digital records, as they are now utilized, were not available or in wide spread use at the time of *Smith v. Okanogan* and so surely would have made the then concept of records production anachronistic to today's digital era as conceptually noted in *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wash.2d 515 (2014).

“We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But “public record” is broadly defined and includes “existing data compilations from which information may be obtained” “regardless of physical form or characteristics.” RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. *Id.*; see also WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.

Whether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment. But for SPD's response to Rachner's request, this might well have been such a case. However, the uncontroverted evidence presented showed that a partially responsive response could have been produced at the time of the original denial. The failure to do so violated the PRA....

We hold that SPD violated the PRA when it incorrectly told Vedder it had no responsive records and affirm.”

(emphasis added) *Id.* at 523-24.

As well in *Sperr v. City of Spokane*, 123 Wn. App. 132, 96 P.3d 1012 (2004) the records did not exist either. In the instant case the record

absolutely did exist and as well the Respondent/Cross Appellant's knew specifically of the document Plaintiff was requesting as established and evinced by the email exchange in SCC resident Halvorson's own similar request (CP 509 & 519). Thus, Plaintiff's position, in regards to the creation of records, as stated in *Plaintiff's Reply To Defendant's Response To Plaintiff's Motion For Summary Judgment* (CP 450-52), is that *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wash.2d 515 (2014) is controlling and on point.

Respondent/Cross Appellant's contention that *Fisher Broadcasting* applies because the records "no longer exist" (as they seem to now claim in their Brief at p. 9) is factually incorrect as it has never been stated, argued or even hinted that the database no longer existed at the time of the request. Again the Halvorson email (CP 519), which was requested after my request, also refutes the position that the database was no longer in existence.

At one point in their brief the Respondent/Cross Appellant's go into a paragraph of nonsensical conjecture:

The specific facts of the present case establish that the SCC was not required to create and produce a personal mail log for Mr. Herrick. Unlike *Fisher Broadcasting*, there is no indication that the SCC could have produced a partially responsive record (i.e., a document that contains less than a complete personal mail log). While the SCC could have produced the entire general mail log, the specific facts of this case establish that this would not have been responsive to Mr. Herrick's request. Mr. Herrick had recently requested and received a copy of the complete mail log, CP 509. He then submitted this request for a different document, *a personal* mail log. Under the facts of this case, producing the complete mail log for a second time would not have been responsive to Mr. Herrick's request. (emphasis added)

at 10.

The statement “there is no indication that the SCC could have produced a partially responsive record” is contradicted by the evidence wherein SCC had provided Halvorson with a list that was only for the month of March 2016 and was not a *total* personal mail log. As well, Respondent/Cross Appellant's statement “While the SCC could have produced the entire general mail log, the specific facts of this case establish that this would not have been responsive to Mr. Herrick's request” is thoroughly contradicted by Plaintiff numerous times throughout these proceedings. (CP 305-306, 332-333, 452-454 etc.).

The undisputed facts of the case clearly show that (in addition to never providing Plaintiff with the requested documents) Respondent/Cross Appellant's never communicated or attempted in any way to clarify Plaintiff's request, nor gave the fullest assistance to Plaintiff, both of which are required by the PRA. Any attempts to do so would have obviated the need for this PRA claim. Instead the SCC/DSHS chose to shirk their responsibilities under the PRA and cavalierly dismiss Plaintiff's request. **The SCC did violate the PRA when it refused to provide a Personal Mail Log for Plaintiff.**

II. The trial court should now be instructed to reconsider the appropriate deterrence and thus daily penalty determination for the SCC/DSHS.

As well the trial court should now be instructed to reconsider the appropriate deterrence, and thus daily penalty determination, for the

SCC/DSHS based on Plaintiff's other PRA successes (in both this appeal and as well Court of Appeals Division II No: 50364-6-II) which clearly outline a pattern of actions/inactions that openly flaunt and contradict both the PRA and the spirit of the PRA and that both fully existed and were being litigated (but had not yet been determined) at the original time of penalty determination made by the trial court.

As Plaintiff originally articulated in his Motion For Penalty Determination there are a series of mitigating factors that do NOT apply and as well there is a series of aggravating factors (per *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 459-60, 229 P.3d 735 (2010)) that do apply. (CP 488-490).

III. This Court Should Reverse the Order Granting Summary Judgment to the SCC on Mr. Herrick's Photograph Request, as Respondent/Cross-Appellant's Suggest, and Limit Respondent/Cross-Appellant's Positions to Only Those Previously Argued at the Trial Court

Plaintiff requests that Respondent/Cross-Appellant's be barred from offering any new explanations not already articulated regarding the PRA request (and subsequent PRA violation) for the SCC employee's passport type photograph (201512-PRR-889). Consistent with this position Plaintiff seeks equitable relief through the doctrine of laches, equitable estoppel, estoppel by laches, and judicial estoppel etc. that Respondent/Cross-Appellant's cannot reserve the right or otherwise offer new, different or convoluted defenses to the trial court. Respondent/Cross-Appellant's were given the full panoply of the claims against them, had the

full resources of the state government at their disposal and thus failed to exercise due diligence in presenting alternate defenses that they now ephemerally float as potential defenses going forward. Alternate defenses should have been offered at the trial court level and in a timely and non-prejudicial manner.

D. CONCLUSION

Due to the numerous examples of the trial court clearly abusing its discretion this Court should reverse the trial court's summary judgment in that was in favor of the SCC and all other available relief that this Court deems just should be implemented and granted.

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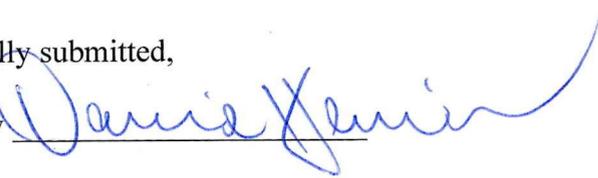
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I, the below signed, am 18 years of age or older, am competent, and have personal knowledge, to testify and swear under penalty of perjury that the foregoing statements made in the above are true and correct to the best of my own personal knowledge,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

DATED this 15th day of August, 2019.

Respectfully submitted,

By



Signed in King County

Donald Herrick
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Shoreline, WA 98155

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WASHINGTON STATE COURT OF APPEALS
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DEPARTMENT OF SOCIAL AND
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Appeal No. 52744-8-II

APPELLANT'S
DECLARATION OF SERVICE

(Pierce County Superior Court
NO. 17-2-08077-8)

(**filed utilizing the mailbox rule
consistent with GR 3.1**)

DONALD HERRICK declares under penalty of perjury, under the laws of the state of
Washington, that the following is true and correct:

1. I am an untrained Appellant pro se in a PRA violation action (per RCW 42.56).
2. On June 18th, 2019 I author and send copies of the following:
 - o Appellant's Reply Brief
 - o Appellant's Declaration of Service

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1
2
3 utilizing the United States Postal mail system (consistent with GR 3.1) to the following:
4

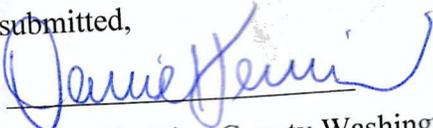
5 Court of Appeals -Division II
6 950 Broadway Suite 300
7 Tacoma, WA 98402

Office of the Attorney General
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Olympia WA, 98504-0124

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

DATED this 15th day of August, 2019.

13 Respectfully submitted,

14 By 

Signed in King County Washington

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