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NO. 52744-8

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

DONALD HERRICK,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
SPECIAL COMMITMENT CENTER,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S BRIEF

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I. INTRODUCTION

Donald Herrick submitted a Public Records Act (PRA) request for a record that does not exist. Contrary to settled law, the superior court held that the Department of Social and Health Services (Department) Special Commitment Center (SCC) violated the PRA when it declined to create a new record. This Court should reverse the trial court and hold that the SCC did not violate the PRA when it declined to create a personal mail log for Mr. Herrick. If this Court disagrees and concludes the SCC violated the PRA, it should affirm the daily penalty set by the trial court.

With respect to Mr. Herrick's PRA request for a photograph of an SCC employee, the SCC does not contest the application to this case of *Delong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010), *dismissed on remand on other grounds*, 164 Wn. App. 781, 267 P.3d 410 (2011). Under *Delong*, the SCC was not entitled to summary judgment based on the privacy exemption, and this Court should reverse the summary judgment order entered in favor of the SCC. On remand the Department reserves the right to assert other defenses to liability, including that the photograph was not responsive to Mr. Herrick's PRA request.

The SCC respectfully requests that this Court (1) reverse the trial court's order granting summary judgment to Mr. Herrick with respect to his personal mail log request, (2) reverse the trial court's denial of summary

judgment in favor of the SCC on Mr. Herrick's personal mail log request, and (3) reverse the trial court's order granting summary judgment to the SCC on Mr. Herrick's photograph request.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the trial court err in finding that the SCC violated the PRA where the SCC declined to create a personal mail log for Mr. Herrick?

2. In the alternative, did the trial court act within its considerable discretion in setting a penalty of fifteen dollars per day?

3. Did the trial court properly conclude that a photograph of an SCC employee was correctly redacted under the PRA's employee privacy exemption?

III. COUNTERSTATEMENT OF THE CASE

At the time of the underlying events, Appellant Donald Herrick was a civil detainee at the SCC, a secure facility for the confinement and treatment of sexually violent predators. CP 2, 11; *see also* RCW 71.09.020(19). During his time at the SCC, Mr Herrick created substantial work for the SCC's records staff, through both PRA requests and discovery. Mr. Herrick was a prolific requester of public records from the SCC. CP 33. In addition to his PRA requests, Mr. Herrick was also a frequent litigant against the SCC and, in two of cases, received over 10,000 pages of discovery. CP 29. Mr. Herrick's requests were frequently broad,

overlapping, and confusing. CP 29. Requests would sometimes seek records about requests that he had previously submitted, and his correspondence would sometimes refer to multiple requests. *Id.* This case involves the interplay of three PRA requests by Mr. Herrick.

The first relevant PRA request is Mr. Herrick's December 2015 request for a wide variety of records. CP 44. Among other things, that request sought "any documents in [SCC employee] Carol Olson's employment file." *Id.* The SCC promptly sent Mr. Herrick a letter estimating that it would take 30 working days to locate and copy any responsive records. CP 45. In February 2016, the SCC sent Mr. Herrick 48 pages of responsive records. CP 52. One of those pages was a redacted photograph of Ms. Olson. CP 61. The photograph reflected that the redaction was made pursuant to RCW 42.56.230. *Id.* Because Mr. Herrick's only argument with respect to this PRA request concerns the photograph, this brief refers to this request as the "photograph request." The SCC assigned this PRA request identification number 201512-PRR-889. CP 45.

The second relevant PRA request is Mr. Herrick's request for the mail log that contains entries of mail sent or received by *all* residents of the SCC. This brief refers to this as the "all-resident mail log request." Mr. Herrick made this request in April 2016. CP 33. The SCC assigned this

PRA request identification number 201604-PRR-1274 and provided him with responsive records. CP 33.

The final PRA request that is relevant to this case is Mr. Herrick's request for a *personal* mail log. In May 2016, Mr. Herrick requested "[a] complete copy of my (Donald Herrick #490391) SCC 'mail log.'" CP 39. This brief refers to this as the "personal mail log request." The SCC assigned this PRA request identification number 201605-PRR-833. CP 40. The SCC denied Mr. Herrick's request, explaining that it "does not have any responsive information" because it "doesn't keep individual resident mail logs." *Id.*

Mr. Herrick sued the SCC, contending that its responses for the photograph request and the personal mail log request both violated the PRA. CP 3-7.

This case was decided on summary judgment motions, though the procedural history is somewhat complicated. In February 2018, the SCC moved for summary judgment on both of Mr. Herrick's claims. CP 16. Following a hearing on the SCC's motion, in April 2018 the trial court issued an order that granted the SCC summary judgment with respect to Mr. Herrick's photograph request but denied summary judgment on Mr. Herrick's personal mail log request. CP 217-19. The order mistakenly indicated that Mr. Herrick had also filed a motion for summary judgment

and purported to grant Mr. Herrick's motion with respect to the personal mail log request. CP 217. The trial court denied the SCC's motion for reconsideration in April 2018. CP 262.

Later in June 2018, the trial court *sua sponte* issued a corrected order on the SCC's summary judgment motion that (1) removed references Mr. Herrick filing a motion for summary judgment and (2) did not grant summary judgment to Mr. Herrick on either of his claims, CP 293-95. Instead, the corrected order limited itself to granting in part and denying in part the SCC's motion for summary judgment. CP 294-95.

Mr. Herrick then filed a motion for summary judgment on his request for a personal mail log in July 2018. CP 324-34. The trial court granted Mr. Herrick's motion in August 2018. CP 440.

The trial court conducted a trial by affidavit with respect to the amount of the daily penalty. *See* CP 440. Both parties submitted briefing on the issue of penalties and included argument on the applicability of the *Yousoufian* factors. CP 482-504. The parties both submitted competing affidavits. CP 478-81, 505-58.

Following its consideration of the briefing and affidavits, the trial court issued a four-page Trial Decision. CP 589-92. The Trial Decision set forth a detailed description of the purposes of PRA penalties and the factors that guide a court's penalty determination. CP 590-91. Applying those

factors, the trial court awarded a \$15 per day penalty for the 806 days that the trial court determined Mr. Herrick had been denied the right to inspect or copy a personal mail log. CP 591. The trial court stated that this penalty was the amount necessary to deter future misconduct when considering the SCC's size and the facts of Mr. Herrick's case. CP 591.

Mr. Herrick filed a timely notice of appeal, and the SCC filed a timely notice of cross-appeal. CP 620-21, 633-34.

IV. STANDARD OF REVIEW

A. Standard of Review of PRA Decisions

This Court reviews de novo the question of whether an agency's response violates the PRA. RCW 42.56.550; *see also City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). An appellate court stands in the same position as the trial court when the record consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011).

This Court reviews a trial court's PRA penalty determination for abuse of discretion. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016). "A court abuses its discretion only when it adopted a view 'that no reasonable person would take' or when it bases its decision on 'untenable grounds or reasons.'" *Id.*

(quoting *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian II*)).

B. Summary Judgment Standard

A motion for summary judgment should be granted where “there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to the non-moving party.” *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992); *see* CR 56. On appeal, summary judgment orders are reviewed de novo considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Folsom v. Burger King*, 135 Wn. 2d 658, 958 P.2d 301 (1998).

V. ARGUMENT

A. The SCC Did Not Violate the Public Records Act When It Declined to Create a Personal Mail Log for Mr. Herrick

The trial court erred in concluding that the SCC violated the PRA when the SCC declined to create a personal mail log for Mr. Herrick. Because an agency is not required to create a new record, this Court should reverse the order granting summary judgment in favor of Mr. Herrick and the order denying the SCC’s motion for summary judgment. This Court should then remand this matter to the trial court to enter summary judgment in favor of the SCC with respect to the SCC’s response to Mr. Herrick’s public records request 201605-PRR-833.

In the alternative, if this Court concludes that the SCC violated the PRA by not creating a personal mail log for Mr. Herrick, this Court should hold that the trial court acted within its discretion when it established a penalty of \$15 per day.

1. An agency is not required to create a new record in response to a PRA request.

It is well-settled that, under the PRA, an agency “has no duty to create or produce a record that is nonexistent.” *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004); *see also, e.g., Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000). This is true even if another statute required the agency to create such a record. *Zink v. City of Mesa*, 162 Wn. App. 688, 718-19, 256 P.3d 384 (2011). An agency also has no obligation to produce records that previously existed but were no longer in the possession of the agency at the time that the request was made. *West v. Wash. State Dep’t of Nat. Res.*, 163 Wn. App. 235, 244-45, 258 P.3d 78 (2011).

The undisputed evidence in this record established that the SCC did not keep personal mail log for residents. CP 431, 509. A personal mail log for Mr. Herrick did not exist. As a result, the SCC had no duty to create or produce a personal mail log for Mr. Herrick.

The state supreme court's decision in *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014), is consistent with the conclusion that the SCC did not violate the PRA. *Fisher Broadcasting* is relevant to this case in two ways. First, it reaffirms the principle that an agency need not produce a record that does not exist. Second, it discusses an agency's responsibilities under the PRA with respect to electronic information in a database.

Fisher Broadcasting reaffirms the principle that an agency need not produce a record that does not exist. One of the categories of records in *Fisher-Broadcasting* was "log sheets." *Id.* at 522. The agency had responded that it did not have any relevant records. *Id.* Because the record established that the "log sheets" no longer existed, the state Supreme Court concluded that the agency's denial of the request for records complied with the PRA. *Id.* at 522-23. This supports the conclusion that the SCC was not required to create a new record in response to Mr. Herrick's PRA request.

Second, *Fisher Broadcasting* discusses an agency's obligations under the PRA with respect to electronic information stored within a database. In that context, the Court stated that "there will not always be a simple dichotomy between producing an existing record and creating a new one." *Id.* at 524. The court further recognized that the distinction "will likely often turn on the specific facts of the case." *Id.* In *Fisher Broadcasting*, the

requester sought a list of recordings with multiple types of information, including name, badge number, date, time, and location. *Fisher Broadcasting*, 180 Wn.2d at 519. The state Supreme Court held that the agency was not required to produce a document that contained all of the information requested because to do so “would have required mining data from two distinct systems and creating a new document. This is more than the PRA requires.” *Id.* at 523. However, the court also held that “the uncontroverted evidence . . . 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.” *Id.* at 524.

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.

The trial court's order was based on erroneous reasoning. The trial court reasoned that a personal mail log for Mr. Herrick existed because, on a separate occasion, the agency had "in fact *created* such a document for another Resident at the SCC." CP 218. The trial court was correct that the SCC chose to create and produce a new record in response to another resident's request. CP 509. Notably, that resident sought information for a period of less than one month, CP 519, while Mr. Herrick sought information for a period of multiple years, CP 516, 580. While the facts relied upon by the trial court were correct, the trial court's *reasoning* refutes itself. That reasoning reflects that the agency must "create[]" a personal mail log. The PRA does not require the creation of records. *E.g., Sperr*, 123 Wn. App. at 136.

In sum, Mr. Herrick requested a personal mail log. The unrebutted evidence establishes that personal mail logs did not exist. Accordingly, the SCC complied with the PRA when it informed Mr. Herrick that it did have any responsive records, and the SCC was entitled to summary judgment on this issue. This Court should reverse the trial court by (1) reversing the grant of summary judgment to Mr. Herrick and (2) reversing the denial of summary judgment to the SCC.

2. In the Alternative, the Trial Court Did Not Err in Setting a \$15 Per Day Penalty

This section of the brief applies only if this Court affirms the trial court's grant of summary judgment to Mr. Herrick.

The trial court acted well within its discretion in setting the PRA penalty at \$15 per day. Multiplied by the 806 day penalty period, this resulted in a total penalty of \$12,090. Mr. Herrick has not established that the trial court abused its discretion.

A trial court's penalty determination is reviewed for abuse of discretion. *Zink v. City of Mesa*, 4 Wn. App. 2d 112, 123, 419 P.3d 847 (2018). "An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Id.* The trial court's discretion is "considerable." *Wade's Eastside Gun Shop, Inc.*, 185 Wn.2d at 279.

Mr. Herrick has not demonstrated that the trial court abused its discretion. The trial court applied the correct legal standard. The Trial Decision includes discussion of relevant *Yousoufian* factors. These included discussion of "a lack of compliance with PRA procedural requirements," "a lack of proper training and/or supervision," "unreasonableness in any explanations given for noncompliance," and "an amount necessary to deter future misconduct when considering the Defendant agency's size and the

facts of this case.” CP 591-92. These factors are taken almost verbatim from *Yousoufian*. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010). As a result, Mr.Herrick is simply incorrect when he argues that the trial court did not address any of the *Yousoufian* factors that he presented.

Mr. Herrick’s remaining argument that the penalty is “manifestly inadequate” reflects little more than his strong disagreement with the trial court’s discretionary decision. Even if this Court were to conclude that the PRA requires the creation of a personal mail log, the SCC’s decision not to create one was based on a long line of case law that had consistently held that agencies are not required to create a new record. *E.g., Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004). Insofar as *Fisher Broadcasting* changed this result, the SCC should not be unduly penalized for its reasonable misunderstanding. In these circumstances, any adverse ruling, particularly one involving a monetary penalty, would be sufficient to alert the SCC to the change in the law.

Moreover, Mr. Herrick’s attempt to analogize this case to *Yousoufian* is flawed. One flaw is that at the time that *Yousoufian* was decided, trial courts were statutorily required to impose a penalty of at least five dollars per day. *Yousoufian*, 168 Wn.2d at 465-66. The Legislature has since amended the PRA to permit trial courts to award penalty of zero

dollars per day. Laws of 2011, ch. 273, § 1. Moreover, the facts of *Yousoufian* were substantially more egregious. They involved repeated failures by an agency over a period of years. *Yousoufian*, 168 Wn.2d at 456. By contrast, this case involves a single determination by an agency that Mr. Herrick could have challenged immediately had he desired records; instead he waited until shortly before the statute of limitations, thereby maximizing the potential penalty period.

The detailed four page Trial Decision demonstrates that the trial court conducted a thoughtful analysis of the applicable law and facts. The trial court's daily penalty of fifteen dollar per day was well within its discretion.

B. This Court Should Reverse the Order Granting Summary Judgment to the SCC on Mr. Herrick's Photograph Request.

The SCC has concluded that it was not entitled to summary judgment of Mr. Herrick's photograph claim on the legal basis that was argued to the trial court. Public records staff were reasonably concerned about the safety of SCC personnel. *See, e.g.*, CP 540 ("Staff should be forewarned that Mr. Herrick has a history of preying on female staff. His behavior was consistent with reports of predatory/stalking behavior."). Nonetheless, in light of this Court's decision in *Delong* and principle that agencies may not consider the identity of the requester when responding to

a PRA request, the SCC does not contest Mr. Herrick's argument that this Court should reverse the summary judgment order entered in favor of the SCC.

The SCC does not, however, concede that it has violated the PRA. On remand, the SCC reserves the right to advance alternative legal arguments. One potential argument is that the photograph was not in fact responsive to Mr. Herrick's PRA request. Because Mr. Herrick's PRA request was limited to "photographs . . . that have been used, or viewed, as part of [other] requests/investigations," CP 521, further factual development may be necessary, and the issue is not ripe for consideration by this Court. The SCC requests that this matter be remanded for further proceeding and without prejudice to the SCC's ability to assert any available defenses.

VI. CONCLUSION

Agencies are not required to create new records when responding to requests under the PRA. As a result, the trial court erred when it held that the SCC was required to create a personal mail log for Mr. Herrick. The Court should reverse the trial court's order granting summary judgment to Mr. Herrick and the order denying summary judgment to the SCC on Mr. Herrick's personal mail log request.

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Additionally, the SCC does not contest Mr. Herrick's request to reverse the summary judgment order in favor of the SCC with respect to the SCC's redaction of the photograph of an SCC employee. As a result, the SCC requests that this court reverse the order granting summary judgment to the SCC on Mr. Herrick's photograph request and remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 22nd day of May, 2019.

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PROOF OF SERVICE

I, *Malai Malawo*, state and declare as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On May 22, 2019, I served a true and correct copy of this **RESPONDENT/CROSS-APPELLANT'S Brief** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of May 2019, at Tumwater, Washington.



MALAI MALAWO
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