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STATE OF WASHINGTON

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COA NO. 53368-5-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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ERIC M. BACOLOD, Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.

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BRIEF OF APPELLANT.

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ERIC M. BACOLOD #760310, Appellant, Pro Se.

WASHINGTON CORRECTIONS CENTER  
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SHELTON, WA 98584

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## I. INTRODUCTION.

ERIC M. BACOLOD, pro se, appellant, is appealing the Honorable Christopher Lanese's ruling dated January 18, 2019, dismissing the appellant's Public Records Act claims against the respondent, the Washington State Department of Corrections (hereinafter titled DOC). CP 393-398. Appellant is also seeking de novo review by this court of his PRA claims.

## II. RECORDS TRANSMITTED FOR REVIEW.

The appellant has transmitted the following relevant records to this court for de novo review. Included in his clerk's paper's are: Summons; Complaint; Defedant's Answer; Plaintiff's Answer to Counterclaim; Plaintiff's Brief; Declaration of Denise Vaughan; Declaration of Alan Soper; Declaration of Kieth Deflitch; Declaration of Israel Gonzalez; Declaration of Daniel Lewis; Letter from Eric M. Bacolod; Letter from Eric M. Bacolod; Plaintiff's Motion for Reconsideration; Letter from Eric M. Bacolod w/attachments; Plaintiff's Declaration in support of Motion for Reconsideration; Supplemental Declaration of Plaintiff; Order on Motion for Reconsideration and Striking Hearing; Objection Opposition to Defendant's Motion for Sanctions; Proposed Order Findings; Objection Opposition; Order of Dismissal with Prejudice; and Cost Bill. In addition to the aforementioned records the appellant intends to expand the designation of clerk's paper's and supplement the record on review to include, Plaintiff's Reply Brief to WDOCs

Response," labeled as Index #64, with Declaration of Kathryn Kincaid attached thereto as "Appendix A;" Affidavit of Sopheap Chith and Health Services Kite response from Ms. J. Carley, OA3, attached as "Appendix B;" Declaration of Kevin J. Linder with attached response from Jodie M. Wright, Declaration of Brian David Matthews with attached response from CCII Andring, and Declaration of Raymond H. Hall with attached response from Ronnie L. Rucker, all attached as "Appendix C;" and Declaration of Eric M. Bacolod with attached response from Pamela R. Iverson, attached as "Appendix D."

### III. ASSIGNMENTS OF ERROR.

1. PURSUANT TO THE PUBLIC RECORDS ACT, RCW 42.56.ET.SEQ., SHOULD THE APPELLANT BE PERMITTED TO INSPECT AND VIEW ELECTRONIC AND DIGITAL PUBLIC RECORDS PERTAINING TO HIMSELF, WHICH THE DEPARTMENT OF CORRECTIONS CREATES, USES, AND MAINTAINS?
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6. DID DOC VIOLATE THE PRA WHEN IT FAILED TO CONDUCT A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO APPELLANT'S REQUEST UNDER PRU 48379?
7. DID DOC VIOLATE THE PRA WHEN IT FAILED TO DISCLOSE OR PRODUCE RECORDS RESPONSIVE TO APPELLANT'S REQUEST UNDER PRU 49030?
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9. ARE JPAY EMAILS, SCREENED, REVIEWED, AND REJECTED, BY DOC FOR BEING DEEMED SEXUALLY EXPLICIT ALONG WITH THEIR CORRESPONDING REJECTION NOTICES, PUBLIC RECORDS, PURSUANT TO THE PRA?

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13. ARE THERE GENUINE ISSUES OF MATERIAL FACT WHICH REQUIRE AN EVIDENTIARY HEARING, NAMELY TO DEVELOP FACTS PERTAINING TO WHY DOC'S FORMER PUBLIC RECORDS SPECIALIST, CARY NAGEL, FAILED TO PROPERLY CLASSIFY RECORDS AS PUBLIC RECORDS?

14. IS DOC, AS A STATE AGENCY, ELIGIBLE TO BE AWARDED COSTS AND ATTORNEY FEES PURSUANT TO THE PRA?

15. SHOULD THE APPELLANT BE AWARDED COSTS AND PENALTIES AND ANY OTHER RELIEF THE COURT DEEMS JUST AND EQUITABLE?

#### IV. FACTS RELEVANT TO APPEAL.

The appellant filed an Public Records Act Suit, in Thurston County Superior Court under cause number 18-2-04188-34, against DOC, for PRA violation it committed in the handling of the appellant's three separate PRA requests identified respectively as PRU 47690, PRU 48397, and PRU 49030. CP 1-24.

A merits hearing held on January 18, 2019, before the Honorable Christopher Lanese, resulted in the case being summarily dismissed in favor of DOC. The appellant filed a subsequent motion for reconsideration which was also dismissed. CP 317-338. The present appeal follows.

#### V. FACTS AND ARGUMENT PERTAINING TO PRU 47690.

The appellant has been incarcerated since April 24, 1996, after being falsely accused and wrongfully convicted of three counts of assault in the first degree while armed with a firearm.

On April 17, 1996, between 10:00-10:30pm, in the Lakewood, WA area, Michelle Ford and Kamara Chouap were giving the appellant a ride home from work when they passed by three pedestrians who were later discovered to be staying in the same apartment complex as the appellant. Although the appellant doesn't ever recall seeing the pedestrians prior to the incident, atleast two of them, Marshall Winston and Christopher Boles, recognized the appellant from previous occasions at the apartment complex and when passing by the Taco Bell where the appellant was employed. None of the pedestrians knew of or recognized Kamara Chouap, as he did not reside at the same apartments and only visited on occasion.

Upon driving by the pedestrians, menacing looks were exchanged and when the vehicle driven by Michelle Ford reached an intersection approximately 50-60 yards away from where the pedestrians were walking, Kamara Chouap jumped out of the car and fired shots in the direction of the pedestrians. Fortunately, no one sustained any bodily injuries. No bulletholes or projectiles from the weapon were recovered from the scene of the crime. No structures or objects within the vicinity of where the

pedestrians were located at the time of the shooting was damaged by gunfire. It is unclear if Kamara Chouap was aiming the gun into the air or some other direction.

The pedestrians identified the appellant as the shooter but oddly, the descriptions they provided matched more with Kamara Chouap. Hair length and style, stature, and clothing color were consistent with Chouap.

On April 24, 1996, the appellant initiated an interview with Detective Anthony Berger, who questioned him about the shooting. The appellant only intended to clear his name of any wrongdoing so that he could return to work but did not want to implicate or divulge Kamara Chouap's identity. The appellant subjected himself to the interview believing that because he was innocent he did not have to be concerned about being the suspect. Other than stating he was not the shooter, the appellant did not want to cooperate. The interview ended when the appellant invoked his right to an attorney. The appellant was arrested and has been incarcerated ever since.

Nineteen days after being arrested the appellant successfully passed a polygraph test proving he was not the shooter. CP 57-58. Defense counsel, May Opgenorth presented the polygraph results to the Deputy Prosecutor Edmund Murphy who laughed and replied, "this is inadmissible in court." No stipulated polygraph was offered. While awaiting trial the appellant received information that Kamara Chouap had confessed to two witnesses, one of which

was Kamara Chouap's girlfriend at the time, Wanda Ernsting and her friend Katie Johnson, that he was the shooter and that the appellant was innocent. CP 59-63.

Shortly before appellant's trial, during an interview with the State, Kamara Chouap confessed again to being the shooter but changed his truthful confession and falsely blamed the shooting on the appellant after what appears to be a coerced interrogation.

The appellant proceeded to trial and right before jury selection the State offered him a plea bargain for 42 months. Not wanting to plead to a crime he did not commit, the appellant refused the plea bargain and proceeded to trial.

During trial the three pedestrians made an in-court identification of the appellant being the shooter, however their description of the shooter once again matched that of Kamara Chouap, i.e. hair style, stature, and clothing. This was not pointed out to the jury by defense counsel despite color video footage clearly showing Kamara Chouap and the appellant seconds before the shooting. It was confirmed later that the pedestrians were doubtful about their identification of the shooter and even untruthful. One of the pedestrians, Christopher Boles, stated this in a recantation of his trial testimony. CP 64-66.

Needless to say, appellant was wrongfully convicted of three counts of assault in the first degree with firearm enhancements and sentenced to 500 months. Over 23 year's

later the appellant is still fighting for justice in hopes that the truth will somehow be acknowledged and his vindication and exoneration will follow.

Kamara Chouap was never charged for the shooting but has been in and out of prison for numerous unrelated offenses. In 2002, while serving one of his sentences at the Washington State Penitentiary he confessed to a fellow prisoner named Sam Prum that he was the shooter and that the appellant was innocent. CP 68-70. He also stated that a girl named Michelle was the driver of the vehicle at the time of the incident. In October of 2009, Kamara Chouap reiterated his confession(s) in an affidavit. CP 71-73.

The driver of the vehicle at the time of the shooting, Michelle D. Ford, despite being a material witness was never questioned by the State or defense counsel. Video footage shows her in the driver's seat seconds before the shooting. No material witness subpoena or warrant was ever issued to compel her presence in court and no attempts were made to locate her.

Throughout the year's she has expressed mixed emotions about coming forward with the truth. Most of her concerns stem from fear of prosecution and moreso, about possible harm to her or her family if she were to make a statement regarding Kamara Chouap. She has told several of her close friends who really did the shooting and about her concerns. Please see Declaration of Kenneth Levan, CP 74-75, and

letter from Manni Zahn, CP 76-82.

After almost a quarter of a century with an early release date of 2035, the whole experience is still a living nightmare for the appellant and his family. However, hope is on the horizon. Although the appellant's primary objective is exoneration, until a court will grant such relief, release from prison in the form of resentencing, clemency or pardon, or parole if pending legislation passes, are currently potential options.

In pursuing any of these options, the appellant's electronic and digital records pertaining to himself will be thoroughly examined and scrutinized by court's, law enforcement, prosecutor's, clemency and pardons board, parole board, and other government officials. The records that will have the most impact as to whether appellant's release from confinement should be granted are currently created, used, and maintained by the DOC on its electronic databases such as OMNI and OnBase. These records consist of behavioral entries, infractions, observations, emails, memorandums, chronos (any encounters with staff), education and employment, community support information, visitor applications, transfers, custody classifications, and many other records unbeknownst to the appellant. One of the most, if not the most important of these records, are the ones pertaining to how DOC evaluates and classifies the appellant. The current system DOC uses to do this is called the Washington One, which consists of 106 questions asked

by DOC Officials of the appellant whose corresponding answers are entered into the DOC database and further processed by proprietary software which uses algorithms and formulas to profile the appellant. Once profiled the appellant is classified as being at a risk level of low, moderate, high non-violent, and high violent, with low being the least likely to re-offend or pose a threat to the community, and likely to successfully transition and maintain upon release from custody or supervision. According to DOC Policy 320.400, Directive II, A, 3, it states, "Determine if the Department will retain jurisdiction based on risk."

All of these types of records which DOC creates, uses, and maintains electronically and their ramifications to the appellant are what prompted him to make a Public Records Act request to DOC for:

'The entire and any and all electronic files of myself (Eric Bacolod #760310) that has been and is currently maintained by The Washington State Department of Corrections [i.e. all information about me (Eric Bacolod #760310) found in OBITS; OMNI; LIBERTY; ON-BASE; and any other electronic file, format, or database.]' CP 19.

The appellant clearly stated that he only wanted to review and inspect the said records. Appellant's request to review and inspect these records were denied and he was only given the option to pay for them at 15¢ a page plus postage not knowing exactly what the records consisted of, or designating a third party in the community to inspect the records on his behalf. No exemptions or corresponding explanations were provided. CP 21-24. Being that these

records are wide-spread public records and highly relied upon, the appellant would like to know if there are any inaccuracies and if so, to have them rectified.

Before the advancement of technology which DOC took full advantage of and opted to change its practices as to how it creates, uses, and maintains its public records regarding prisoners, the majority of the aforementioned records were filed in a physical paper file called a "Central File." The central file was accessible by prisoner's upon making a PRA request to inspect and view it. The process was DOCs implementation of a regulation and system to allow inspection and viewing of public records by prisoners as mandated by the PRA. No fees were charged to inspect these records and the prisoner was able to inspect these records directly in-person.

Moving into the digital age, records that would have been accessible to prisoner's in the physical central file, are now maintained electronically. As a result, DOC no longer allows prisoners access to inspect these would be and should be inspectable records. Now prisoner's must cough up photo-copy fees to have direct access to these records. Most prisoner's cannot afford these fees as most are indigent or have an income well below 125% of the federal poverty guidelines. A prisoner is fortunate if he can earn 42¢ an hour at a prison job.

It is unclear what type of considerations DOC has given towards this issue as it is fully aware that physical

central file reviews are all but moot, in that hardly any current significant records are hard-copied. It obviously hasn't given it any thought and feels that prisoners aren't worthy of inspecting records regarding themselves and moreso, what is mandated by the PRA and its own policies. DOC 280-510, III, F., states, "the department does not charge a fee for inspecting and locating public records..." And 280.510. III, H., 1., states, "Incarcerated offenders will only be permitted to inspect their own central file..."

1. PURSUANT TO THE PUBLIC RECORD ACT, RCW 42.56.ET.SEQ., SHOULD THE APPELLANT BE PERMITTED TO INSPECT AND VIEW ELECTRONIC AND DIGITAL PUBLIC RECORDS PERTAINING TO HIMSELF, WHICH THE DEPARTMENT OF CORRECTIONS CREATES, USES, AND MAINTAINS?

It is undisputed that the electronic records in question are created, used, and maintained by DOC, which is the second largest Washington State agency. Wherefore, the PRA governs these records. The PRA is a strongly worded mandate for broad disclosure of public records. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). A requestor may wish to inspect records responsive to a request and is entitled to do so. RCW 42.56.120. A prisoner can request to view and inspect his own central file and health care records. Sappenfield v. Dept. of Corr., 127 Wn.App. 83, 88-90, 110 P.3d 808 (2005) review denied, 156 Wn.2d 1013 (2006). Gronquist v. Dept. of Corr.,

159 Wn.App. 576, 586, n. 7, 247 P.3d 436, review denied, 171 Wn.2d 1023 (2011), DOC Policy 280.510 Public Disclosure of Records III. H.

No fee can be charged for inspection of a public record. See RCW 42.56.120; WAC 44-14-0700(1). This is true even when the agency needs to make copies of records before an inspection, such as when a record must be redacted. If an agency is electronically redacting records, it will need to either print the records for inspection purposes or make them available for inspection electronically on an agency computer.

Records must be available for inspection during normal office hours. See RCW 42.56.090. A limit of one hour per day is a violation of the PRA. Zink v. City of Mesa (Zink I), 140 Wn.App. 328, 341, 166 P.3d 738 (2007). The right to inspect records includes the right to inspect electronic records. Such an inspection can be accomplished by providing the requestor access to the records on an agency computer or by posting the records on the agency website. See RCW 42.56.520.

An electronic copy of an agency record is distinct from a paper copy. WAC 44-14-050. A requestor therefore, has a right under the PRA to access the records in electronic format as long as it is reasonably and technologically feasible for the agency to provide electronic access. O'Niell v. City of Shoreline, 170 Wn.2d 138, 148, 240 P.3d 1149 (2010) (holding agency did not

comply with the PRA when it produced a paper copy of an email and the requestor had sought information only in the electronic version of that record).

In the present case, it is clear from the appellant's PRA request that inspection and viewing of the electronic records is what was being sought. Whether the DOC printed the records on paper, placed it on cd to inspect on a stand-alone computer, or via under the supervision of a DOC official to inspect the records in its natural state, electronically or digitally on a DOC computer.

2. DOES THE TERM "CENTRAL FILE," CONSIST OF SUBSTANCE OR FORM?

Throughout the proceedings DOC has shifted its position and tailor fitted the term "central file" in order to defend itself in the present case. There are no established definitions as to what central file actually means. The term is commonly understood by both DOC officials and prisoners as consisting of a class of records pertaining to a particular prisoner, whether the records are electronic or digital or hard-copy or paper.

For example, three different seasoned prisoner counselors stated that prisoners central file records consist of electronic records. An e-message from a prisoner named Kevin Linder, dated 5/27/17, to Counselor Jodie M. Wright, inquires: "Is OMNI a digital version of the central file where visitor info, write up... classification, and documents are stored for an offender?" On May 31, 2017, Counselor Wright responded: "Yes, not all of the

information is always in OMNI but most of it is." An e-message from prisoner Raymond H. Hall #311603, dated 5/27/17, to Counselor Ronnie L. Rucker inquires: "Can you explain to me what OMNI/Liberty is? Is it basically a digital version of the central file?" On June 1, 2017, Counselor Rucker responded: "OMNI is an extension of your central file. Basically it is like a computerized file cabinet that holds most of your material. Depending on what you need it would most likely be in OMNI..." An emessage from prisoner Brian David Matthews #796769, dated March 26, 2018, to Counselor Andring CCII, inquires: "Can you please inform me what DOC computer databases / systems my 'electronic central file' is comprised of? e.g. OMNI, OBTS, etc.? Thanks." On March 26, 2018, Counselor Andring responded: "We use OMNI, On-Base, CePrison, and OBTS." All three inquiries and responses are attached as "Appendix-C" to appellant's reply brief in the lower court, which will be available for this court's review upon supplementing the record on review.

In the Declaration of Denise Vaughan she states, "The term 'Central file' is a term used to refer to a physical file of documents with records related to an offender's incarceration." She further references a 2011 version of DOC Policy 280.510 which is Exhibit 1 to her declaration, in support of the term "central file." CP 106-17, CP 122-14. No where within DOC Policy 280.510, does it define what a central file consists of other than being records

a prisoner can request to inspect. Restricting the term "central file" to "a physical file of documents," was tailor fitted for litigation purposes in the present case.

To date, the appellant has not found any authority definitively stating what a central file consists of. All references including common understanding by both prisoners and prison officials point towards a central file being about a class of records or information about an prisoner and not just "a physical file of documents." The appellant asks this court to set precedence in defining the term "central file," rather than leaving it to DOC to arbitrarily define it which it already has and will do. Judicial oversight is necessary in defining what the term "central file" entails. For example, if left undefined, what does a record become when it is scanned from the physical file of documents into DOCs databases and transformed into an digital document, and the hard-copy is destroyed and no longer filed in the physical file of documents? This is occurring within DOC, as technology is allowing agencies to move away from paper records. Will DOC be permitted to claim which it already has, that a prisoner can no longer inspect this record despite it being, as defined by DOC, "records related to an offender's incarceration." CP 106-107, CP 122-124. The same holds true for records on the other end of the spectrum which are created digitally without ever becoming a hard copy. The majority of these records are never filed in the

"physical central file" in the first place. According to a statement by records specialist Ms. P. Iverson, most central file records are not even filed in a paper central file but are scanned into OnBase. "Appendix D" to appellant's reply brief in the lower court. Moreso, not only are prisoner's at odds about what a central file consists of but so are DOC Officials, or atleast its agent Denise Vaughan is.

The most plausible and harmonized definition of a central file, are undoubtedly that it is "records related to an offender's incarceration," whether paper or digital. The Washington One Assessment, among other records fits squarely into this definition. Even if the term "central file," is to include the term "physical file of documents," then DOC should be filing "all records related to an offender's incarceration," into that file, so that there can be proper and meaningful inspection, as there once was pre-technology. This inspection process was pursuant to the PRA and DOCs own policies. What is an electronic record that once was but is no longer contained in a physical central file, considered to be?

Lastly, the holdings in Sappenfield and Gronquist, id. at supra are not current with the times. These cases were decided before DOC changed its practices and started using advanced technology in creating, using, and maintaining central file public records, digitally and electronically. As mentioned, most documents are scanned

and not filed in the physical central file in the first place.

Wherefore, any part of the holdings in Sappenfield and Gronquist, that would have applied should be re-visited in light of the aforementioned changes in practices and technology.

3. ARE THE HOLDINGS IN THE SAPPENFIELD AND GRONQUIST CASES MISCONSTRUED AND MISAPPLIED IN THE PRESENT CASE?

The trial court and DOC relied heavily on the holdings in Sappenfield and Gronquist, cases id. at supra. A major aspect that was ignored by the trial court and DOC are that in both cases the prisoners requested to inspect records that did not pertain to themselves or what would otherwise be in their own central file or health care records. Sappenfield asked to inspect, Supply Inventory Tracking Requests (SITR) forms for unit C-4. He also made several additional requests to inspect records not in his own file. Gronquist, sought to inspect information regarding corrections center and staff member training and evaluation. Both cases are distinguishable from the present case as the appellant sought only to inspect records in his own file or about himself. Moreover, both cases hold that the only records a prisoner can request to inspect are records about himself. The appellant made this point clear in his opening brief. CP 43, and reply brief page 12.

Appellant contends that the pivotal part of the holdings in Sappenfield and Gronquist, are that an prisoner

can only request inspection and viewing of his own central file and healthcare information, and that prisoners are prohibited from inspecting records outside of those realms.

4. ARE THE CONCERNS EXPRESSED BY DOC UNDER THE GUISE OF SAFETY, SECURITY, AND LOGISTICAL REASONS, MISREPRESENTED AND OVERSTATED?

As with the term central file, for apparent litigation purposes, DOC contends that if forced to comply with the PRA, in allowing the appellant to inspect and view his electronic records, it would present significant safety, security, and logistical concerns, and would undermine the holdings in Sappenfield and Gronquist, id. at supra.

In support of its position DOC provided declarations from its designated agents summarily stating how allowing any type of access to the electronic records would pose a threat or interfere with the DOCs functions.

#### DECLARATION OF DENISE VAUGHAN.

Ms. Vaughan states in her declaration that the DOC does not have a centralized records system. CP 105. However, this is contrary to the statement made in the declaration of Alan Soper, in which he essentially states that the central file information which the appellant asked to inspect are contained on two systems called OMNI and OnBase, both of which are web-based on the State Government Network. CP 175-176. This implies that the electronic records are ubiquitous in that it can be accessed by anyone who can log onto the Network from any DOC facility or office and beyond, throughout Washington State. Prison counselors,

guards, administrators, medical personnel, law enforcement, courts, prosecutor's, and other officials can access this Network from almost any location at any time and/or simultaneously.

The importance of noting this are not only does it present credibility issues with contradictions between Ms. Vaughan's and Mr. Soper's declaration but also the concern about having to transfer prisoner's to the location of the records and vice-versa. CP 108. These electronic records can be accessed by any computer connected to the Network, such as a counselor's office which is located within the prisoner living units at each facility. Prisoner's only have to traverse on foot, merely feet from where they are housed. This is exactly what occurs when an prisoner is being asked the 106 questions of the Washington One Assessment. This information is being deposited into a computer in the counselor's office. As a matter of fact, if vested with the authority, a counselor can facilitate an electronic file review directly from the computer screen(s) in his/her office. Although it may seem insignificant, DOC has made it a point of emphasis that having to transfer records and prisoner's to facilitate inspection causes concerns.

The majority of concerns expressed by Ms. Vaughan seems to indicate that DOC, the second largest State Agency, lacks sufficient resources to comply with the mandates of the PRA. Therefore, prisoners whose lives and interests

are under constant government control and are greatly affected by its conditions and treatment, should lose their right to inspect their own records pursuant to the PRA and DOCs own policies. Any transparency and accountability which is what the PRA is designed for, will be nonexistent.

A lack of resources is not justification to disregard the mandates of the PRA. Zink v. City of Mesa (Zink I), 140 Wn.App. 328, 166 P.3d 738 (2007).

In the present case, Ms. Vaughan does not provide any accurate statistics and only makes conclusory statements that the number and complexity of file reviews would increase if inspection of electronic records were permitted. She fails to state that less than 5% of the Washington State prison population even requests to inspect their own central files. Most Public records requests are for records other than prisoner central files. There are 17,000 prisoner's incarcerated with another 15,000 on community supervision or probation. CP 105. In 2017, the DOC received a total of 11,776 public records requests, 5,347 for general records and 4,803 were assigned to the PRU. CP 106. Of these requests how many were only for central file reviews. Moreover, how many prisoners like the appellant, actually requested to inspect and view their electronic central file records? The appellant predicts that realistically the number is less than 1%. Potentially if every prisoner asked to inspect their "physical central file" of records DOC presently would be significantly

impacted with atleast 17,000 requests. However, potentially and realistically have two very different results.

**DECLARATION OF ALAN SOPER.**

The gist of Mr. Soper's declaration are that "under no circumstances are offenders allowed to access the State Government Network." CP 175. As valid as this may sound, numerous prisoners have been permitted to inspect their electronic records in OMNI and OnBase, which are both part of the State Government Network. CP 175.

On March 30, 2018, and April 3, 2018, prisoner Brian David Matthews #796769, was permitted to inspect his electronic central file records contained within OMNI. CP 91. This was facilitated by Keith Parris, Health Services Management 1 at SCCC. CP 94. Similarly, prisoner Jefferey Driver #880238 was permitted to inspect his records contained in OMNI on August 8, 2018, which was facilitated by RHIT, Niebert. Another prisoner, Sopheap Chith, was permitted to conduct the same inspection. CP 322.

Moreso, prison officials are themselves giving prior approval to prisoner's requests to inspect their own records contained in OMNI. On January 10, 2019, post suit, the appellant inquired about inspecting his electronic records. On January 17, 2009, J. Neibert, RHIT, responded in pertinent part, "During the chart review you can view any records in OMNI." CP 339-345.

Not only are the above instances notable but are in stark contrast to the picture painted by Mr. Soper.

Additionally, prisoner health care records which are located electronically in the OnBase and OMNI systems are available for patient review, according to the Declaration of DOC Forms and Records Analyst Supervisor, Kathryn Kincaid. CP 321.

This Court in an unpublished opinion held in part that the DOC is in violation of the UHCIA, in not allowing prisoners to inspect their electronic records containing medical information in OMNI. Bryan Lee Stetson v. WDOC, COA 50185-6-II (November 2018). If access by prisoners to OMNI, OnBase, and other systems within the State Government Network is not allowed "under no circumstances," how and why is being done, whether by law or on a preferential basis? Lastly, if DOC will permit such inspection of electronic records by prisoners for any reason including pursuant to the UHCIA, why won't it do so pursuant to the PRA which is just as imperative if not a stronger worded mandate than the UHCIA, as it relates to inspection of records.

#### DECLARATION OF ISRAEL ROY GONZALEZ.

The appellant in his plaintiff's brief in support of his claims, in the lower court, suggested that electronic records can be placed on a CD and viewed on a stand alone computer not connected to any network. Such process is already permitted within DOC regarding CDs relating to legal matters, and community custody revocation hearings. CP 282-283. As stated supra, DOC will only officially

allow the appellant to purchase photo-copies of his electronic records or designate a third party to view them on his behalf.

The more economic and environment friendly (paperless) option, would be to place the electronic records on a CD or other storage device and allow the appellant to view the CD in the same manner as it does with CDs of court proceedings and other legal matters. Each facility is already equipped with several stand alone computers used for such purposes. Plus this would meet the "under no circumstances" mandate stated by Mr. Soper. CP 175.

Despite being an ideal alternative, this too was met with fierce claims of safety, security, and logistical concerns. According to Mr. Gonzalez's declaration the DOC only has a limited number of computers without internet or network access. If the DOC were to implement such a process this would lead to atleast one less computer for prisoners to do legal research on at each facility. CP 252. Most of the computers DOC has for these purposes are either donated or purchased through the inmate betterment fund which is used to purchase among other things recreation equipment and to pay the TV cable fees which costs tens of thousands of dollars, for each facility. There is more than enough funds to purchase a dozen (one for each facility, if needed) basic laptops equipped just for viewing central file electronic records placed onto a cd.

Mr. Gonzalez also states that having cd's sent from DOCs own Public Records Department would pose numerous threats namely in the form of containing some type of contraband material. For example, he states that someone can upload coded messages onto a cd and send it to a prisoner under the guise of a DOC Public Records Officer. First, no cd's have to be sent from any other location, as stated supra the records are on a network and the Records Specialist at each facility can download the central file records respectively without ever using the conventional mail or courier system. Secondly, Mr. Gonzalez fails to correlate that this can happen to any cd being sent from any agency or even the courts, regardless if the information is digital on cd or physical on paper. CP 253.

Furthermore, he states cd's can be broken into two sharp shards and used as shanks. For one, as stated, cd's sent to a prisoner are considered media mail and will immediately be forwarded to the law librarian or other deisgnee for handling. CP 253. A prisoner won't even lay eyes on the cd let alone be able to physically touch it. Secondly, DOC policy 440.000, authorizes prisoners to retain in their possession up to 20 cd's at any given time. It appears that one cd, that will not even be handled or stored by a prisoner will pose a greater threat than 20 Duran Duran cd's he can purchase from an vendor, which are placed directly into his possession.

In regards to prisoners having access to computers

(which was another security issue raised by DOC), there are currently at the least, 227 computers at the Stafford Creek Corrections Center, which are devoted to prisoner access throughout education, chapel, job assignments, law library, and State Library. That's the equivalent of 1 computer for every 8 prisoners in a population close to 1900. Notably, the largest concentration of computers is located at Correctional Industries which has at least 62 of them. Prisoner access to computers doesn't appear to be such a threat when it's part of a multi-million dollar business whose majority of employees are prisoners. However, one or two computers for viewing electronic central file records is an insurmountable threat according to DOC, when being sued for not complying with mandates of the PRA.

The appellant does not intend to make a mockery of any safety, security, and logistical concerns, if they are legitimate (emphasis added). However, the concerns expressed by DOC in support of its defense in the present case, are clearly contradictory and contrived to appear credible. It is all a concerted effort to mislead the court to avoid liability and having to comply with the PRA, under the guise of safety and security.

5. DID DOC FAIL TO LIST ANY STATUTORY EXEMPTIONS OR CORRESPONDING EXPLANATIONS IN DENYING THE APPELLANT'S REQUEST TO INSPECT AND VIEW DIGITAL AND ELECTRONIC RECORDS PERTAINING TO HIMSELF?

In denying the appellant's request to inspect and view his electronic records, DOC violated the PRA when

it failed to list any statutory exemptions or corresponding explanations as to why it was denying the appellant's request.

The PRA provides, "Agency responses refusing, in whole or in part, inspection of any public records shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3). "When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld." Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539, 199 P.3d 393 (2009).

In the present case, DOC never stated any reasons as to why it was denying the appellant's request to inspect and view his electronic records. This is clearly in violation of the mandates of the PRA.

Also the DOC violated the PRA when it distinguished amongst requestor's by allowing other prisoner's to inspect their own electronic records. Id. at page 21 supra. The appellant argued this in his briefing to the lower court and quoted RCW 42.56.080, which prohibits agencies from treating requestors deifferently in responding to PRA requests. CP 46.

6. DID DOC VIOLATE THE PRA WHEN IF FAILED TO CONDUCT A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO APPELLANT'S

REQUEST UNDER PRU 48379?

Over the year's DOC has implemented stricter policies regarding what sexually explicit materials prisoners can have access to. These changes were made under the premise of safety and security. While the policies are well intentioned, DOC has not applied it in a consistent manner and moreso, has used it to arbitrarily censor mail and publications. Not only are these policies applied inconsistently and arbitrarily, but DOC has set a double standard in that it turns a blind eye towards pornographic or what would be deemed "sexually explicit material" being sold to prisoners via the JPay System. Such material is being sold as audio and visual albums that are downloaded digitally. Perhaps DOC has turned a blind eye towards the sales of this material because it receives a commission or kickback for every song or album sold. CP 193, 233-235.

Wanting to expose the irony of all this and to demonstrate a false safety and security concern, among other reasons, the appellant submitted a PRA request to DOC for:

"1. A list of any and all offender's who have downloaded any individual songs or the entire album titled, 'Isis Makes a Porn,' by Stephanie Love, from the WA State JPay System, during the time period of January 1, 2010, to the present date of this request."

On July 27, 2017, DOC received the appellant's request and responded to it on August 3, 2017, and stated that it needed clarification as to what specific facility he the records are being sought from. The appellant responded,

all facilities. The WDOC responded on September 15, 2017, acknowledging appellant's clarification and stated it would respond regarding the status of the request on or before October 30, 2017 (45 days). On October 30, 2017, the DOC sent appellant a letter stating that it is awaiting a response from the unit that is the custodian of those records and that it would respond further as to the status on or before December 13, 2017 (45 days). On December 13, 2017, DOC sent appellant a letter stating no responsive records could be located and referred the appellant to contact JPay about the records and closed the request. Close to 5 months elapsed since the initial request was submitted.

During the discovery process the appellant discovered that no searches into any retrieval or tracking systems or databases, for the actual records was conducted using any key terms or words. Instead, a series of routing slips were sent to and from DOC officials asking who would know where the records could be located. Even though no further action was taken to find the records after November 6, 2017, the DOC did not notify the appellant about the inconclusive search until over a month later, on December 13, 2017. CP 48. It took five months to handle this request without ever conducting any reasonable search for the requested records. The extensive amount of time it took using minimal effort equates to an unreasonable search.

Agencies have a duty to conduct a reasonable search

and may violate the PRA by not searching hard enough. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). The PRA is liberally construed, so to be adequate, a "search must be reasonably calculated to uncover all relevant documents." This "requires agencies to make more than a perfunctory search" and takes into account how the agency organizes its records and what tools it has to locate those records. Neighborhood Alliance, 172 Wn.2d at 720. An agency shall provide a reasonable time estimate to search for records. RCW 42.56.520 and WAC 44-14-04003(6). A requestor may challenge the reasonableness of the estimate under RCW 42.56.550(2). CP 49.

In its findings of fact and conclusions of law upon makings it order to dismiss the appellant claims, the court stated that the records requested pertaining to this matter were not for an identifiable record. CP 397. The appellant contends that the records were unable to be identified because DOC never conducted a reasonable search for them despite having the ability and means to do so. According to the Declaration of Kieth Deflitch, DOCs Security Specialist, the contract between JPay and DOC provides in pertinent part: [DOC has] an irrevocable right and license to access, record, and copy, the Recording Media

during the contract and 90 days following the termination of the contract. The Recording Media is defined as any data gathered as a result of JPays services. CP 192. The DOC also has access to the music catalog that JPay provides to prisoners for purchasing and downloading of songs or albums and has the ability to remove music from this catalog for objectionable content e.g. pornographic material. This is a necessary capability in order to monitor what prisoners have access to on the JPay system. CP 193.

Furthermore, per the contract between JPay and DOC, "Section 11.18 PUBLIC RECORDS ACT," page 1 of 2, ¶2, it states:

"If records in the custody of the Contractor are needed by the Department to respond to a request under the act, as determined by the Department, the Contractor agrees to make them promptly available to the Department. Upon request by the Department, the Contractor further agrees to provide a detailed index of records associated with its performance of the contract. This index will allow for more efficient and accurate identification of potentially responsive records."

CP 240. It is unfathomable to think that DOC with all its safety and security concerns would not have any way to find a list of prisoners who purchased what would be deemed pornographic or sexually explicit, yet it can locate a list of offenders purchases and refunds for music that was downloaded.

Lastly, no clarification was sought regarding the substance of the records requested, only what facilities the records are being sought from. When a defense for

"not an identifiable record" is made, some form of clarification must be requested. Requestors only need to request "identifiable" records, so agencies cannot play "hide the ball" and require requestors to identify an exact record. Violante v. King Cnty. Fire Dist. No. 20, 114 Wn.App. 565, 571 n.14, 59 P.3d 109 (2002) (agency could not deny request for "2001 Budget" when no such record existed, but a document entitled "2001 Spending Guidelines" did exist and contained the agency's 2001 budget. In the present case, had a keyword or term search been used regarding any aspect of the title of the album and its author, into any database within DOC or Jpay, the records may have been located. The DOC violated the PRA by not conducting a reasonable search for the records and taking an unreasonable amount of time to handle the request.

7. DID DOC VIOLATE THE PRA WHEN IT FAILED TO DISCLOSE OR PRODUCE RECORDS RESPONSIVE TO APPELLANT'S REQUEST UNDER PRU 49030?

In correlation to the reasons stated supra at page 27 of the present brief (DOCs implementation of stricter policies towards prisoners and its arbitrary, inconsistent, and double-standard, practices), appelllant submitted a PRA request to DOC for the following records:

"1. Any and all emails that were composed, sent or received by any WA State DOC offender, or any outside party, via the WA State DOC JPay system, that were rejected due to sexually explicit content, during the time period of January 1, 2010, to the present date of this request.

2. Any and all mail rejection or mail restriction notices that were composed or issued as a result of composing, receiving, or sending, E-mail messages containing sexually explicit content, via the WA State JPay system, during

the time period of January 1, 2010, to the present date of this request." CP 10.

On or about September 11, 2017, DOCs Communications Consultant 3, Cary Nagel, responded in pertinent part:

"The records you request from the JPay messaging system are not public records, created, used or maintained by the department and; therefore,, are not disclosable under the Public Records Act, RCW 42.56. You may submit your request directly to JPay at [www.jpays.com](http://www.jpays.com). The file for this request is now closed." CP 12.

Following the advice given, the appellant submitted a request to JPay Inc. for the exact same records on January 26, 2018. JPay or its representatives failed to respond and on February 13, 2018, appellant sent a follow up letter, which was still ignored. Appellant subsequently sent an identical request to JPay Inc. on April 10, 2018, which also was not responded to. CP 99-100.

On August 16, 2018, the appellant filed suit regarding DOCs response to this request. CP 3-24. JPay is contracted by DOC to provide among other services, emails, photos, videos, and music downloads, for prisoners.

When emails are sent to or from a prisoner it is screened for content by DOC mailroom officials. If it is deemed to contain prohibited content such as what may be deemed sexually explicit, the DOC will restrict its mailing and issue a rejection notice to the sender and recipient. This notice is created by DOC and is an fill-in the blank form in which the reasons for the rejection and corresponding regulations are filled in. The prisoner subject to a rejection notice can appeal the decision to

the Superintendent of the facility where he is confined. If upheld, the prisoner can seek review from DOC Headquarters in Olympia, WA.

Throughout these stages DOC uses and maintains the rejected email and reviews its contents which is disseminated through its networks to either the superintendent or an official at DOC Headquarters. As for the corresponding rejection notice it is handled the same way only unlike the email an DOC official authors it and even signs it. In addition, the notice is routed via the JPay system controlled by DOC, to the sender and recipient of the restricted email.

The way DOC creates, uses, or maintains these emails and rejection notices, causes them to be qualified as public records. The determination of whether a document is a public record is critical for the purposes of the PRA. Oliver v. Harborview Med. Ctr., 94 Wn.2d 559, 565 no.1, 618 P.2d 734, 746, 958 P.2d 260 (1998).

A "public record includes a writing "regardless of physical form or characteristics." Emails, text messages, websites, and social media postings are writings under the PRA. WAC 44-14-03001 (Attorney General's model rules on public records discussing definition of "public record"). If an email is a public record, then the entire file, including the metadata associated with the email and other electronic records, is subject to the PRA. O'Niell v. City of Shoreline (O'Neill II), 170 Wn.2d 138 at 143-46,

240 P.3d 1149 (2010). Electronic information that makes up a database retained by an agency may also be subject to a PRA request. Fisher Broad. Seattle TVLLC v. City of Seattle, 180 Wn.2d 515, 524, 326 P.3d 688 (2014). In the present case, the emails and corresponding rejection notices are writings and are retained in DOCs databases.

(2) A "public record" must relate to a governmental or proprietary function. The PRA's "broad interpretation" mandate applies to the scope of this requirement. Triberino v. Spokane County, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000); Sevais v. Port of Bellingham, 127 Wn.2d 820, 828, 904 P.2d 1124 (1995). Thus records that relate to conduct of government are subject to disclosure under the PRA. Whether an agency has ever had control of the records, where the records were generated, where they are stored, and how widely the records were circulated within the agency, are all relevant to determining whether a document relates to the conduct of government. In the present case, DOC takes control of the email, generates an mail rejection notice, stores both in its database, circulates both between the Mailroom, Superintendent's Office, and DOC Headquarters for review, and makes a decision based on safety, security, or any policies to allow or restrict its delivery to or from the designated prisoner.

(3) A public record must be "prepared," "owned," "used," or "retained." RCW 42.56.010(3); West v. Thurston County (West II), 168 Wn.App. 162, 183, 275 P.3d 1200

(2012). In the present case, the rejection notice meets all 4 elements while the restricted email meets at least 3.

Undoubtedly, the records requested by the appellant in the present case, should have been acknowledged by DOC as public records and should have been disclosed and produced. In misclassifying these records as "not public records," the DOC denied access to these records in violation of the PRA.

8. DID DOC SILENTLY WITHHOLD THE PUBLIC RECORDS PERTAINING TO THE APPELLANT'S REQUEST UNDER PRU 49030?

Silent withholding occurs when an agency causes the requestor to believe that all records responsive to a request have been disclosed and by not providing any exemptions or explanations as to any records that are not disclosed as required per RCW 42.56.210(3). In the present case, by telling the appellant the emails and corresponding restriction notices requested under PRU 49030, were not public records and failing to list any exemptions or explanations as to how they apply, when in fact they are public records, amounts to silent withholding in addition to a straight denial of records. The appellant was under the impression that any records responsive to his request would have been disclosed if not determined to be "not public records."

9. ARE JPAY EMAILS, SCREENED, REVIEWED, AND REJECTED, BY DOC FOR BEING DEEMED SEXUALLY EXPLICIT ALONG WITH THEIR CORRESPONDING REJECTION NOTICES, PUBLIC RECORDS, PURSUANT TO THE PRA?

As argued supra on pages 33-35, of the present brief, the records requested under PRU 49030, for sexually explicit emails and their corresponding rejection notices meet the elements of being classified as a Public Record. Oliver, 94.Wn.2d 559, 565, 618 P.2d 734, 958P.2d 260 (1998); O'Neill II, 170 Wn.2d 138, at 143-46, 240 P.3d 1149 (2010); Fisher Broad., 180 Wn.2d 515, 524, 326 P.3d 688 (2014); Triberino, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000); and West II, 168 Wn.App. 162, 183, 275 P.3d 1200 (2012).

The emails and corresponding notices in the present case are a "writing," "relating to a government function" (whether to censor emails); and are either "prepared," "owned," "used," or "retained," by DOC. RCW 42.56.010(3).

Furthermore, DOC collects a commission for each email sent or received by a prisoner, so in addition to screening each email, it uses the email for profit. CP 234-235.

10. DID THE SUIT FILED BY THE APPELLANT AGAINST DOC HAVE A CAUSATIVE EFFECT, IN THAT POST-SUIT, DOC PRODUCED RECORDS RESPONSIVE TO APPELLANT'S PRA REQUEST UNDER PRU 49030?

On August 5, 2018, the appellant made an separate yet identical request to DOC for the exact same records requested under PRU 49030, any emails rejected for sexually explicit content and corresponding notices. This request was given identification number P-717. Appellant filed the suit which is part of the basis for this appeal on August 16, 2018, after submitting the above records request but before it disclosed or produced any responsive records. On October 23, 2018, while the case was in the discovery

stage of the proceedings, DOC disclosed and produced 134 pages responsive to the appellant's request under P-717. CP 339-364 (it is unclear from the page numbers of the clerks papers exactly which number the letter is listed as. It is listed as "Appendix C, to appellant's motion for reconsideration in the lower court. CP 333.) The appellant subsequently paid for the requested records to be placed onto a cd.

"A plaintiff is the prevailing party if "prosecution of the action could reasonably be regarded as necessary to obtain the information" and "the existence of the lawsuit had a causative effect on the release of information." Coalition of Gov't Spying v. Dept. of Public Safety, 59 Wn.App. 856, 863, 810 P.2d 1009 (1990) (quoting Miller v. United States Dep't of State, 779 F.2d 1378, 1389 (8th Cir. 1985)). In the present case, the effect of the suit was evident. Prior to the suit, the DOC labeled the records, "not Public Records," and post suit 134 pages were produced.

11. DID DOC FAIL TO SEEK CLARIFICATION OF THE EASILY IDENTIFIABLE RECORDS?

12. ARE THE RECORDS REQUESTED BY THE APPELLANT UNDER PRU 49030, EASILY IDENTIFIABLE, AS IDENTICAL RECORDS WERE DISCLOSED AND PRODUCED PURSUANT TO THE PRA TO PREVIOUS REQUESTOR'S?

The DOC in its defense, claims that the appellant's request for records under PRU 49030 and PRU 48397, were not for identifiable records. The lower court agreed and dismissed the appellant's PRA claims regarding those

requests.

The dismissal occurred despite the lower court being aware of the aforementioned 134 pages of records produced under P-717, post suit, and despite opposing counsel being fully aware that identical records were produced to previous requestor's.

In DOCs response to the suit filed by the appellant it alleged in its counterclaims that the appellant was acting in concert with prisoners identified under cause number 15-2-00672-7, DOC v. BLAKE STERLING-COSWELL, et.al.. DOC in its counterclaims stated that the appellant in the present case is seeking the same records that were previously produced to the defendant's in the SterlingCoswell, case. CP 29-31.

On January 15, 2019, a day after appellant filed his reply brief in the lower court and 3 days before the merits hearing on his claims, opposing counsel after a 3 hour CR 26(i) conference, sent the appellant a declaration of Aimee Muul, with three exhibits attached that contained her PRA requests to DOC and DOCs' production, for, "Any and all JPay communication emails, video visitations and photo or video attachments that have been reviewed by DOC staff that have resulted in disciplinary actions, rejection notices or internal investigations..." for three different prisons.

This demonstrates that not only did DOC know that these were public records but also that it had produced

these records to other requestors three year's prior to the appellant's request. There were numerous other previous requestors who also received identical records from DOC. CP 330-333.

When appellant made his request under PRU 49030, he was told the records being sought are not public records and the request was promptly closed by DOC. No clarification was requested. PRA requests must be for indentifiable records. RCW 42.56.080(1). "An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." Beal v. City of Seattle, 15 Wn.App 865, 872, 209 P.3d 872 (2009). "[A] person seeking documents under the PRA must identify or describe the documents with sufficient clarity to allow the agency to locate them." Levy v. Snohomish County, 167 Wn.App. 94, 98, 272 P.3d 874 (2012). "If an agency is unclear about what was requested, it [is] required to seek clarification." This was not done in the present case yet DOC was allowed to prevail on a defense of the request was not for an "identifiable record." The records here are clearly identifiable and were previously and subsequently produced. DOC also violated the PRA in this request by distinguishing amongst requestor's in that in treated the appellant's request different in denying him the records that were produced to other requestors. RCW 42.56.080. Lastly, DOC knows that the records requested

by the appellant should have been treated as public records as its own NEWSBRIEF 11-04, directs its public records officers to handle such requests accordingly. CP 165-166, CP 114-115.

13. ARE THERE GENUINE ISSUES OF MATERIAL FACT WHICH REQUIRE AN EVIDENTIARY HEARING, NAMELY TO DEVELOP FACTS PERTAINING TO WHY DOC'S FORMER PUBLIC RECORDS SPECIALIST, CARY NAGEL, FAILED TO PROPERLY CLASSIFY RECORDS AS PUBLIC RECORDS?

Throughout discovery the appellant made numerous requests for information regarding the DOCs Records Specialist who handled the requests under PRU 49030, Mr. Cary Nagel. CP 328-331. Employment history and evaluations, reasons for deeming the records requested as not public records, current contact information, and other pertinent information, were requested via discovery by the appellant. These discovery requests were not answered by DOC and opposing counsel. Apparently, Mr. Cary Nagel was either terminated or resigned prior to or after the filing of the suit by the appellant. Mr. Nagel's reasons for claiming the records requested were not public records was never revealed. This is a genuine issue of material fact as his decision making process plays a critical role in the denial of access to the records under PRU 49030. If asked, perhaps he would admit that he utterly disregarded the appellant's request and the mandates of the PRA and lazily handled it by claiming what he did, that the records were "not public records." He may also admit that he did so with knowledge about guidelines that the records were public records. The DOC upon advisement

of the Attorney General's Office, issued an Newsbrief stating that records used in agency business (e.g. being screened and rejected for content) are public records and must be properly located and disclosed pursuant to the PRA. CP 164-166. It would be egregious to think Mr. Cary Nagel was handling PRA requests for DOC without knowledge of this Newsbrief. His potential answers to the appellant's discovery requests would demonstrate many variables that would amount to bad faith.

However, because there is no way for the appellant to substantiate this, the trial court should have reconsidered its dismissal of appellant's claims regarding the request under PRU-49030, and ordered an evidentiary hearing or some other process to compel Mr. Nagel to answer these critical questions, which if left unanswered presents a substantial controversy.

14. IS DOC, AS A STATE AGENCY, ELIGIBLE TO BE AWARDED COSTS AND ATTORNEY FEES PURSUANT TO THE PRA?

Upon the dismissal of appellant's PRA claims, opposing counsel, submitted a DEFENDANT'S COST BILL, totaling \$682.63, \$440 for attorney fees, and \$242.63, for a deposition it took of the appellant.

The appellant contends that there is no basis for a State Agency to recover costs in defending itself from a PRA suit. The Public Records Act requires an agency to pay a prevailing requestor's reasonable attorney fee's, costs, and daily penalty. Only a requestor can be awarded attorney fees or costs... under the act; an agency or a

third party resisting disclosure cannot. RCW 42.56.550(4), providing award only for "person" prevailing against "agency." Tiberino v. Spokane County, 103 Wn.App. 680, 13 P.3d 1104 (2000), and WAC 44-14-00003.

Furthermore, the DOC after realizing it could not substantiate its allegations against the appellant (that he was acting in concert with other prisoners in that he requested identical records which were previously produced to them) abandoned its counterclaims in pursuit of a more suitable defense that the records requested were not for an "identifiable record." Opposing counsel also chose to abandon its claims after the appellant made it clear during a hearing that the type of injunction being sought by the DOC, is an option to prevent existing public records from being disclosed or produced. It is obvious that DOC did not want to admit that the records requested existed, contrary to its later claims that they were "not identifiable."

The PRA already prevents agencies from being awarded costs in litigating PRA suits, however, assuming arguendo, that agencies can recover costs for prevailing on its counterclaims, the DOC, in the present case abandoned them.

15. SHOULD THE APPELLANT BE AWARDED COSTS AND PENALTIES AND ANY OTHER RELIEF THE COURT DEEMS JUST AND EQUITABLE?

The appellant asks this court that if and when, he is deemed to have prevailed on any issues regarding the present appeal, that he be awarded attorney fees and costs to include but not be limited to statutory attorney fees,

filing fees, document reproduction and photo-copying costs, postage costs, and any other costs satisfied by the appellant in pursuance of the present appeal and costs this court deems just and equitable. RAP 14.1(b) states: "Costs on review are determined and awarded by the appellate court which accepts review and makes the final determination of the case." The procedure outlined in RAP 18.1(b) is mandatory. Phillips Bldg. Co. v. Bill An. et.al., 81 Wn.App. 696, 705, 915 P.2d 1146 (1996). Pruitt v. Douglas County, 116 Wn.App. 547, 66 P.3d 1111 (2003).

In addition, if and when this court chooses, to award any penalties to the appellant, for any PRA violations that it deems has occurred in the present case. RCW 42.56.et.seq..

VI. CONCLUSION.

The appellant respectfully requests that the order dismissing his PRA claims under cause number 18-2-04188-34, be reversed and if necessary, be remanded back to the trial court for any proceedings consistent with any rulings made herein. The appellant also asks for any relief this court deems just and equitable.

August 15th, 2019.

Respectfully submitted,



ERIC M. BACOLOD  
Appellant, Pro Se.

CERTIFICATE OF SERVICE

I CERTIFY THAT I SERVED VIA US MAIL, BY PROCESSING AS PRISON LEGAL MAIL, THE FOLLOWING:

1. BRIEF OF APPELLANT;
2. IN ADDITION FOR THE CLERK ONLY, AN EXTRA COPY OF THE CERTIFICATE OF SERVICE TO BE STAMPED/CONFORMED/RETURNED, WITH ENCLOSED SASE.

TO:

MR. DEREK M. BYRNE, COURT CLERK  
THE COURT OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-3694

MR. TIMOTHY JOHN FEULNER  
OFFICE OF THE ATTORNEY GENERAL  
1125 WASHINGTON ST. SE  
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OLYMPIA, WA 98504-0116

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\*COA NO. 53368-5-II.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED THIS 15TH DAY OF AUGUST 2019, at Shelton, WA.

  
ERIC M. BACOLOD