

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

ERIC M. BACOLOD, Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.

REPLY BRIEF OF APPELLANT.

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

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I. ARGUMENT.

A. INCONSISTENT WITH PRIOR APPELLATE DECISIONS, THE PRA, AND ITS OWN POLICIES, THE RESPONDENT DENIED THE APPELLANT'S REQUEST TO INSPECT RECORDS PERTAINING TO HIS INCARCERATION THAT THE RESPONDENT ELECTRONICALLY MAINTAINS.

The respondent refuses to acknowledge the changes in technology and its own practices relating to how it digitally and electronically generates, uses, and maintains records pertaining to the appellant's incarceration. These records, barring the above mentioned changes, would otherwise be in hard-copy-paper format and would be placed in the appellant's physical central file where he would be permitted to inspect them free of costs, in accordance with DOC Policies implemented to comply with PRA mandates.

No administrative, judicial, or legislative, directives or mandates caused the respondent to change its practices. It simply did so on its own volition. In doing so, it failed or refused to bring its central file review process up to date. Central file reviews are no longer meaningful as most records are scanned and destroyed or not filed in hard-copy format in the first place. Other than outdated records that have yet to be scanned and very few recent records, the appellant is unable to view important records pertaining to his incarceration. Some records such as the Washington One risk level assessment are not accessible for inspection by the appellant. This and similar records can have important ramifications regarding the appellant's liberty interests and well-being. For example, release from confinement or DOC jurisdiction can

be denied based on risk levels calculated by the Washington One system. These records are also highly relied upon by all types of officials (DOC, clemency and pardons board, courts, law enforcement, etc.) in assessing, interacting, and decision making processes involving the appellant.

The appellant has healthy concerns and interests in knowing what these records consist of. Any inaccuracies or issues with the records cannot be rectified unless the appellant has knowledge of it. Access to the records not only keeps the appellant informed about his situation but also permits transparency and accountability regarding DOC and himself.

The respondent contends among other things, that allowing the appellant to inspect his electronic records would interfere with its functions and would threaten safety and security. While it sounds plausible in theory, realistically it is not the case. The respondent has allowed numerous prisoners to inspect their electronic records; allows prisoners to access hundreds of computers within its facilities; allows every prisoner to purchase and possess portable JP5 tablets to facilitate wi-fi emails, photo's, videos, and music downloads; and has a current system in place to allow prisoners to inspect their digital medical records, in both its so called prisoner prohibited systems (OMNI and OnBase). At one point, post-suit, the respondent stated that it would permit the appellant to inspect all of his digital records in OMNI and OnBase.

The respondent does not refute any of this yet continues with its contradictory assertions that allowing the appellant to inspect his digital records would present a significant threat to safety and security. Notably, the respondent also contends that the records the appellant requested to inspect are not contained within his central or medical files. This is untrue as his request encompassed all these records including digital medical records which are reviewable.

Even assuming arguendo that the respondent makes a semi-valid point, it should have forethought implementation of a procedure and process in which to facilitate the appellant's inspection of digital records, before it took the initiative to change its practices. The respondent utterly disregarded its duties pursuant to the PRA and its own policies as it relates to inspection of these records by prisoners. The respondent feels that it has a sufficient procedure in place in allowing the appellant to pay for photo-copies at 15¢ a page plus postage, for hundreds and possibly thousands of pages of records in order to access these records. This is more of a hindrance than access as the respondent knows most prisoners cannot afford to pay these costs. For example, the appellant was charged \$43.65 for 239 pages of records that were only part of a first installment. The appellant had no knowledge about the contents of these records and no way of determining if there are numerous duplicate

copies, yet he is expected to blindly purchase them. Some of the records are dynamic and change periodically which would require even more fees to be paid if the appellant wanted to inspect any updates.

The other option is to allow a third party to inspect the records or receive the records in electronic format on behalf of the appellant. Again this is an obstacle as the appellant may not know of a third-party willing or able to do this. If the appellant cannot afford photocopies and postage fees, or if he does not know of a third party willing to inspect the records on his behalf, he is for lack of a better term, "SOL" (sufficiently out of luck), and will not have access to the records pertaining to his incarceration and life. The current options are unconscionable.

The following alternatives are more sensible and feasible.

1. Allow the appellant to inspect his digital records as the respondent already has in numerous other cases;
2. Implement a procedure in which the digital records can be placed on CD and inspected on one of the hundreds of computers accessed by prisoners;
3. Utilize the JPay system to email the records to the appellant, as it currently does with administrative notices and memorandums both facility and State-wide; or
4. Revert back to its former practice of printing and filing these records into the appellant's "physical

central file." DOC has done this with certain records such as the Criminal Conviction Records (CCRs), which it updates by printing the records off of the NCIC web-site annually. James v. Adams v. DOC, 189 Wn.App. 925; 361 P.3d 749; 2015 Wash.App. LEXIS 2121, (No. 32012-0-III).

The respondent claims that there is no limiting principles on the appellant's theory of personal inspection. Respondent's Brief at page 23. This is absurd and goes off the deep end. The issue is exclusive to the respondent not allowing the appellant to inspect records pertaining to his incarceration, according to its own policies and the PRA. No other State agency has a policy in place that states a prisoner is permitted to inspect his own central file or health care records, while in confinement. If the court were to rule in the appellant's favor there is now way to interpret such a ruling to extend to any other agency besides DOC.

Another fallacy asserted by the respondent are that the transferring of records for inspection to a prison where the appellant is located would be implausible. This contradicts respondent's method of transferring these records to the prison where the appellant is located upon satisfying photo-copy and postage costs. The payment of fees somehow alleviates all logistical and safety and security concerns. Moreover, the respondent's digital records pertaining to the appellant can be accessed at any facility Statewide and if not, they are able to be

transferred within the DOC with minimal effort (subtle mouse clicks and keystrokes). This is done when records are requested and sent via email in response to PRA requests.

Rather than conjuring up ways to defy the mandates of the PRA under the guise of safety and security, the respondent should place more effort on how to implement a process to comply with the PRA and its own policies in allowing the appellant to meaningfully inspect records pertaining to his incarceration.

While the holdings in Sappenfield and Gronquist still apply to many aspects of prisoners being able to inspect records that are not contained within their central or medical files, both cases were decided before DOC changed its practices. Both cases clearly state that the only records a prisoner may inspect are records contained within that respective prisoner's central or medical file. Those courts stated this at a time when the majority of records pertaining to a prisoner were still hard-copied and placed in a "physical central file." These courts were never posed with the questions in the present case which is the very reason they should be revisited. If the respondent's contentions are permitted to stand, the respondent can and may already be arbitrarily removing records from this "physical central file," that it may want to conceal by transforming the records into digital format and making it difficult if not impossible for the appellant to access.

Government accountability and transparency which is what the PRA was intended for, will fail to exist in this regard.

B. THE RESPONDENT'S CLAIMS THAT IT DID NOT HAVE RECORDS RESPONSIVE TO PRU 48397, ARE THE RESULT OF AN UNREASONABLE SEARCH.

Upon receiving the appellant's request under PRU 48397, the respondent's public records officer contacted various other DOC officials about where to look for the responsive records. That was the extent of the search, a series of questions of who would know where to look without ever taking a look into any of its systems or databases.

No attempts were made using any keyword or term searches into any tracking or retrieval systems. It's no surprise that no responsive records could be found. The respondent did not even conduct a perfunctory search. At the very least, the respondent should have contacted its contracted vendor JPay, about where to locate the responsive records.

With the respondent's heightened sense of security, it would be egregious to think that it does not have the ability to monitor what its prisoners have access to e.g. pornographic material. These records were sought by the appellant to demonstrate a false security concern while exposing a double-standard, that the respondent arbitrarily censors mail by labeling it as sexually explicit yet allows the sales of such material via the JPay system.

C. THE RESPONDENT VIOLATED THE PRA IN ITS RESPONSE TO THE APPELLANT'S REQUEST FOR SEXUALLY EXPLICIT JPAY EMESSAGES AND CORRESPONDING REJECTION NOTICES (PRU 49030).

In its response to the appellant's PRA request for sexually explicit JPay emessages and corresponding rejection notices, the respondent claimed the records were not public records and promptly closed the request. The response did not state anything about the records not being identifiable nor did it seek clarification of the records requested. In fact, post suit the respondent disclosed 134 pages of records upon responding to an subsequent identical request. It was only during litigation in the present case that the respondent used the defense that the records sought were not identifiable due to its so called, inability to locate the records.

Also post-suit the appellant was informed that thousands of records deemed sexually explicit from the JPay system were previously produced to dozens of other requestors. Several are named in an injunction obtained by the respondent in the matter of DOC v. Aimee Muul, et.al., No. 15-2-00672-7. Coincidentally, counsel in both that case and the present case happens to be Timothy J. Feulner, WSBA #45396. Wherefore, Mr. Feulner was totally aware that his client, the respondent in both the aforementioned and present case, had the capability to identify the records at the time of the appellant's PRA request under PRU-49030. For opposing counsel and the respondent to purport in official court records and even declarations that it did not and does not have the capability to identify the responsive records, can be

equated with perjury and/or the subornation thereof.

Even assuming that the respondent is credible and reliable, the inability to identify the public records in question demonstrates a lack of compliance with indexing and records retention schedules along with the proper tracking and retrieval systems which could have been utilized to identify and locate the records. At a minimum, there should have been responsive identifiable records dating back 3 year's from the date of the appellant's request.

The requested records are also narrow and sufficiently particular and specific and not broad and sweeping, as purported by the respondent and adopted in the trial court's ruling. In fact, there was no clarification sought or any complexities in producing the records to the appellant, post-suit. DOC appears to all but concede to this in its respondent's brief.

However, in its apparent concession, the respondent claims that an injunction should be granted at any rate. This seems to be a bad faith - hail mary tactic. The request does not meet the proposed injunction requirements. There is a legitimate reason for the appellant's request, the investigation and gathering of evidence to establish arbitrary censorship of communication and hypocrisy by the respondent, in allowing prisoners to purchase material it otherwise prohibits. Matters that the respondent does not want exposed.

The respondent misquotes the appellant by claiming that he stated to a former prisoner that his JPay requests were "Golden," to somehow support its request for an injunction. This statement is used out of context by the respondent and is a bald assertion and conclusory allegation. There is no reference in this statement of any PRA requests to DOC made by the appellant. There is no evidence to substantiate the respondent's belated claims for an injunction. At best the respondent's improper use of this statement is manipulative.

Suing JPay for consumer fraud under the long arm statute is an option that was being explored by the appellant and the former prisoner the appellant made the "Golden" statement to. Figuring out what recourse prisoners had for JPay's business practices took alot of effort on behalf of the appellant and the above mentioned former prisoner. The appellant has contacted the secretary of Washington State several times about who to serve a complaint to on behalf of JPay, due to its base location in Miami, FL. The appellant also contacted the Thurston County Superior Court Clerk, about pleadings in a separate case which would show who was served on behalf of JPay. Being able to figure out that there is a viable option in suing JPay is why the appellant stated that, "JPay is golden." All this took place before appellant filed the present suit forming the basis of the appeal in the present case.

The respondent had several opportunities to seek an injunction against the appellant. It could have done so when the appellant initially made the requests for the records under PRU 49030; during the proceedings in which it brought its counterclaims; and when the appellant made the identical request in which DOC produced records post-suit, which did not pose any threats or concerns as purported by the respondent. The respondent chose to forego obtaining an injunction all three times and even abandoned its counterclaims. This demonstrates an abuse of the injunction process and a false concern over the production of these records. If the respondent's concerns were genuinely serious, the injunction would have been pursued at any of the above occurrences. Instead the respondent uses the injunction process in bad faith and only for litigation purposes to defend itself from its willful violations of the PRA. The respondent appears to feel as though it is impervious to the PRA mandates as it relates to the handling of prisoners requesting access to public records. Lastly, an injunction would appear to be moot since the records that would be subject to the injunction have already been produced to the appellant, by the respondent, post suit.

Not only does the appellant ask this court to find that the respondents request for an injunction are unsupported and moot, but also that the respondent should be estopped from seeking an injunction. Estoppel should

be a barrier at this stage because the respondent chose to forego its opportunities to seek an injunction, including litigation of its counterclaims.

D. THE COURT SHOULD CONSIDER ALL FACTUAL ALLEGATIONS AND ARGUMENTS IN THE APPELLANT'S BRIEF BECAUSE THEY ARE SUPPORTED AND WERE RAISED IN THE LOWER COURT.

The respondent claims that a number of arguments and facts presented by the appellant are not properly supported or raised. This assertion is untrue as all of the arguments and facts were properly before the trial court in either the "PLAINTIFF'S BRIEF IN SUPPORT OF HIS CLAIMS"; "PLAINTIFF'S REPLY BRIEF"; and "PLAINTIFF'S MOTION FOR RECONSIDERATION." All of which are records on appeal before the present court.

II. CONCLUSION.

The appellant respectfully requests that the court reverse the trial court's decision and issue any rulings it deems just.

Respectfully Submitted this 13th day of December, 2019.



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CERTIFICATION AND VERIFICATION.

I hereby certify under penalty of perjury and the laws of the State of Washington, based on records, experience, belief and observations, the preceding is true and correct to the best of my knowledge.

Signed at Shelton, WA, on December 13th, 2019.



Eric M. Bacolod

CERTIFICATE OF SERVICE

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

1. APPELLANT'S REPLY BRIEF (ORIGINAL AND ONE LEGIBLE COPY), IN REGARDS TO ERIC M. BACOLOD V. DOC, COA NO. 53368-5-II.

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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.

EXECUTED THIS 13TH DAY OF DECEMBER, 2019, AT SHELTON, WA.



ERIC M. BACOLOD