

FILED
Court of Appeals
Division II
State of Washington
10/23/2019 12:34 PM

NO. 53368-5-II

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

ERIC BACOLOD,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

TIMOTHY J. FEULNER
WSBA #45396
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504
(360) 586-1445

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	2
III.	STATEMENT OF THE CASE	3
	A. Bacolod’s Request to Inspect All Electronic Files about Himself (PRU-47690).....	5
	B. Bacolod’s Request for a List of Inmates Who Downloaded Isis Makes a Porn (PRU-48397).....	7
	C. Bacolod’s Request for Every Single JPay Message That Was Rejected by the Department as Sexually Explicit Since 2010 (PRU-49030).....	12
	D. Proceedings in the Trial Court	14
IV.	STANDARD OF REVIEW.....	16
V.	ARGUMENT	17
	A. Consistent with Prior Appellate Decisions, the Department Did Not Deny Bacolod Records When It Permitted Him to Obtain Copies But Declined to Allow Inspection at His Prison	17
	1. As This Court Recognized in Prior Published Decisions, the Department’s Policies Governing Inmate Inspection of Public Records Are Reasonable Rules Permitted by the PRA; the Department Followed Those Rules in Its Response to Bacolod’s Request	17
	2. The Court Should Reject Bacolod’s Attempts to Distinguish <i>Sappenfield</i> and <i>Gronquist</i>	25
	3. <i>Sappenfield</i> and <i>Gronquist</i> Are Still Correct.....	28

- B. Based on the Trial Court’s Uncontested Findings, the Department Did Not Have Records Responsive to PRU-48397.....30
- C. The Department Did Not Violate the PRA in Its Response to Bacolod’s Request for Sexually Explicit JPay Messages (PRU-49030).....33
 - 1. Bacolod’s Request Did Not Seek Identifiable Public Records33
 - 2. Even if the Court Disagrees, the Court Can Affirm the Dismissal Because Bacolod’s Request Meets the Criteria of RCW 42.56.565(2)(c)(i), (ii), or (iii)37
- D. The Court Should Not Consider a Number of Factual Allegations and Arguments in Bacolod’s Brief Because They Are Not Adequately Supported and Were Not Raised Below40
- E. The Court Should Reject Bacolod’s Untimely Challenge to the Department’s Cost Bill Because the Department Was Entitled to Costs under RCW 4.84.060.....42
- F. Bacolod Is Not Entitled to Attorney’s Fees or Costs on Appeal44
- VI. CONCLUSION45

TABLE OF AUTHORITIES

Cases

<i>Adams v. Wash. State Dep't of Corr.</i> , 189 Wn. App. 925, 361 P.3d 749 (2015).....	16, 26
<i>Ang v. Martin</i> , 154 Wn.2d 477, 114 P.3d 637 (2005).....	40
<i>Belenski v. Jefferson Cnty.</i> , 187 Wn. App. 724, 350 P.3d 689 (2015), <i>reversed on other grounds by</i> 186 Wn.2d 452, 378 P.3d 176 (2016).....	34
<i>Bldg. Indus. Ass'n of Wash. v. McCarthy</i> , 152 Wn. App. 720, 218 P.3d 196 (2009).....	30
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	16, 23
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	40
<i>Crosswhite v. Wash. State Dep't of Soc. & Health Servs.</i> , 197 Wn. App. 539, 389 P.3d 731 (2017)	34
<i>Dep't of Corr. v. McKee</i> , 199 Wn. App. 635, 399 P.3d 1187 (2017).....	37, 38, 40
<i>Dragonslayer, Inc. v. Wash. State Gambling Com'n</i> , 139 Wn. App. 433, 161 P.3d 428 (2007).....	34
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles</i> , 148 Wn.2d 224, 59 P.3d 655 (2002).....	23
<i>Gipson v. Snohomish Cnty.</i> , --- Wn.2d ---, --- P.3d ---, 2019 WL 5076603 (2019).....	21

<i>Gronquist v. Department of Corrections</i> , 159 Wn. App. 576, 247 P.3d 436 (2011).....	passim
<i>Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	34
<i>Hoffman v. Kittitas Cnty.</i> , 4 Wn App. 2d 489, 422 P.3d 466 (2018), <i>affirmed by --- Wn.2d ---, 449 P.3d 277 (2019)</i>	16
<i>In re Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993).....	40
<i>Kozol v. Wash. State Dep’t of Corr.</i> , 192 Wn. App. 1, 366 P.3d 933 (2015).....	30, 34
<i>Livingstone v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008).....	20
<i>Mitchell v. Wash. State Dep’t of Corr.</i> , 164 Wn. App. 597, 277 P.3d 670 (2011).....	16, 22, 44
<i>Mitchell v. Wash. State Institute of Pub. Policy</i> , 153 Wn. App. 803, 225 P.3d 280 (2009).....	42
<i>Neighborhood All. of Spokane Cnty. v. Spokane Cnty.</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	32
<i>Nissen v. Pierce Cnty.</i> , 183 Wn.2d 863, 357 P.3d 45 (2015)	31
<i>Sappenfield v. Department of Corrections</i> , 127 Wn. App. 83, 110 P.3d 808 (2005).....	passim
<i>Simpson Logging Co. v. Chehalis Cnty.</i> , 80 Wn. 245, 141 P. 344 (1914).....	43
<i>Smith v. State</i> , 873 N.E.2d 197 (Ind. Ct. App. 2007)	24

<i>State v. Cox</i> , 109 Wn. App. 937, 38 P.3d 371 (2002)	28
<i>Westmark Dev. Corp. v. City of Burien</i> , 140 Wn. App. 540, 166 P.3d 813 (2007)	28
<i>Wood v. Lowe</i> , 102 Wn. App. 872, 10 P.3d 494 (2000)	34
<i>Zabala v. Okanogan Cnty.</i> , 5 Wn. App. 517, 428 P.3d 124 (2018)	34, 35

Statutes

RCW 4.84.010	43
RCW 4.84.010(1), (6), and (7)	42
RCW 4.84.060	3, 42, 43, 44
RCW 42.56.010(3)	31, 35
RCW 42.56.040	21
RCW 42.56.080	18
RCW 42.56.080(2)	34
RCW 42.56.090	22
RCW 42.56.100	passim
RCW 42.56.120	22
RCW 42.56.550(4)	43
RCW 42.56.565	2, 38, 39, 40
RCW 42.56.565(2)	14
RCW 42.56.565(2)(c)	37, 40

RCW 42.56.565(2)(c)(i).....	38
RCW 42.56.565(2)(c)(i), (ii), (iii).....	38
RCW 42.56.565(2)(c)(i), (ii), or (iii)	3, 37
RCW 42.56.565(c)(i), (ii), & (iii)	33
RCW 72.09.010(1).....	3

Other Authorities

<i>Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Law</i> (2d ed. 2014) 6-51	21
--	----

Rules

Civil Rule 78(e).....	16, 42
RAP 10.3(5)	40
RAP 14.2.....	44
RAP 14.4.....	44
RAP 14.5.....	44

Regulations

WAC 137-08.....	4
WAC 137-08-090.....	4, 19
WAC 137-08-090(1)(c)	18

I. INTRODUCTION

This Court should affirm the trial court's dismissal of Plaintiff-Appellant Eric Bacolod's Public Records Act (PRA) claims related to three separate public records requests that he made to the Department. First, the Department did not violate the PRA when it declined to allow Bacolod to personally inspect all electronic records regarding himself at his prison. The Department did not have a duty under the PRA to facilitate personal inspection at a prison, and the Department rules governing inspection by incarcerated individuals are reasonable procedural rules adopted under RCW 42.56.100. This Court recognized as much in two prior published decisions: *Sappenfield v. Department of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005) and *Gronquist v. Department of Corrections*, 159 Wn. App. 576, 247 P.3d 436 (2011). It should follow this well-established precedent and affirm the dismissal of Bacolod's claims related to this request.

Second, the Department did not violate the PRA in its response to Bacolod's request for a list of all inmates who downloaded songs from the album "Isis makes a porn." As the trial court's uncontested factual findings confirm, the Department did not have a copy of any responsive records and by telling Bacolod there were no responsive records after conducting a reasonable search for such records, it complied with the

PRA. Finally, the trial court correctly found that Bacolod's request for all JPay messages¹ sent or received by Washington inmates or any outside party that were rejected as sexually explicit and the corresponding rejection notice over a seven-year period was not a request for identifiable public records. The Court should affirm on this basis, or it can affirm because the evidence supports that this request meets the criteria of the inmate injunction statute in RCW 42.56.565. Therefore, this Court should reject Bacolod's arguments and affirm the dismissal of his claims.

II. COUNTERSTATEMENT OF THE ISSUES

1. Incarcerated individuals cannot travel to an agency's headquarters to inspect records. Does an agency violate the PRA when it declines to allow personal inspection by an incarcerated individual at a prison?

2. The Department did not have a copy of a list of individuals who downloaded the album or songs from an album purportedly called "Isis makes a porn." Did the Department violate the PRA when it informed Bacolod that it did not have responsive records after conducting a reasonable search?

¹ A JPay message is an electronic message that inmates in the custody of the Department can send and receive. CP 192. JPay is a private company that is headquartered in Florida. CP 191.

3. Bacolod requested a copy of every JPay message that had ever been rejected as sexually explicit by Department staff and the corresponding mail rejection notice for a seven-year period. The Department would have been required to review all JPay accounts to research the basis for every JPay rejection in order to respond to the request. Did the trial court err in concluding that Bacolod's request was not a request for identifiable public records?

4. Bacolod's request sought a very large number of records that had been rejected by Department staff because they were sexually explicit. Bacolod has not presented any persuasive reason for seeking such records. In the event that the Court disagrees with the trial court's analysis of Bacolod's request for all sexually explicit JPay messages, can this Court affirm because Bacolod's requests meet the criteria of RCW 42.56.565(2)(c)(i), (ii), or (iii)?

5. The trial court's dismissal of Bacolod's case meant that Bacolod was not entitled to costs. Does Bacolod have a basis to object for the first time on appeal to the Department's cost bill seeking costs under RCW 4.84.060?

III. STATEMENT OF THE CASE

The Department was established to ensure public safety. RCW 72.09.010(1). As part of this mission, the Department manages adult

prisons and supervises adult offenders who live in the community. The Department operates 12 prison facilities, 86 field offices, and 6 community justice centers. CP 105. The Department manages approximately 17,000 incarcerated offenders and supervises approximately 15,000 offenders in the community. CP 105.

The Department receives thousands of requests for public records each year. CP 106. These include requests for public records, inmate health records, chemical dependency records, inmate central file reviews, and inmate health record file review requests. CP 106. In 2017, the Department received a total of 11,776 requests. CP 106. Of these requests, 4,803 requests were general public records requests assigned to the Public Records Unit located in Tumwater, Washington. CP 105.

The Department's public records process is outlined in WAC 137-08. WAC 137-08-090 states that "[a]ll requests for the disclosure of a public record, other than requests by incarcerated offenders for inspection of their health record or central file must be submitted in writing directly to the Department of Corrections Public Records Officer at P.O. Box 41118, Olympia, WA 98504 or via email at publicdisclosureunit@doc1.wa.gov." This requirement is also outlined in Department Policy. CP 122, 124. The term "central file" is a term that is used by the Department to refer to a physical file of documents with

records related to an offender's incarceration. CP 106. For individuals who are currently incarcerated, their central files are maintained at the prison where they are housed. CP 106.

A. Bacolod's Request to Inspect All Electronic Files about Himself (PRU-47690)

On June 20, 2017, the Department received a request from Bacolod that sought "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 128. This request was assigned PRU-47690. CP 108, 128.

After timely acknowledging Bacolod's request, the Department made records available to Bacolod. CP 109, 132-33. Bacolod refused to pay for the records because he insisted that he should be allowed to personally inspect the records. CP 110, 135. The Department informed Bacolod that it could not facilitate personal inspection because he was incarcerated and the records were not contained in his central file or medical file. CP 137-38, 394. After receiving no further correspondence from Bacolod on this request, the Department administratively closed the request for nonpayment. CP 110.

The Department's handling of this request was consistent with the Department's policy regarding inspection of electronic records. CP 394; *see also* CP 106-07. The Department's process that allows inmates to only inspect their central and medical files is intended to allow the Department to respond to public records requests without interfering with the Department's main function of supervising incarcerated individuals and individuals on community custody. CP 107-08 (discussing increased burden on staff that would be caused by allowing incarcerated individuals to inspect other records), 175-77 (discussing logistical and security issues with inspection), CP 252-54 (similar); *see also* 394 (trial court's order finding that inspection would interfere with the Department's functions). To allow review of any electronic file or other files that inmates would want to inspect would not allow the Department to carry out its necessary functions. CP 107-08, 394. Additionally, allowing offenders direct access to electronic systems would violate the Department's information technology policy as well as the State's information technology policy. CP 175, 189. Offenders are not given access to the internet and their contact with the outside world is carefully monitored because of concerns that inmates will attempt to contact victims or engage in illicit activity. CP ___ (Rivera Declaration, at ¶ 6).² Inmates' use of portable storage devices is

² The Department has filed a supplemental designation of clerk's papers that

also carefully monitored to reduce the risks to safety and security created by offenders accessing such technology. CP ___ (Rivera Declaration, at ¶ 8). Despite the restrictions in place, the Department has dealt with multiple situations in which offenders have used portable storage devices to attempt to compromise Department computers. CP ___ (Rivera Declaration, at ¶¶ 7-8). Such circumstances include a situation in 2018 where inmates were discovered with portable storage devices that contained hacking software and computer code writing programs that gave them the ability to defeat computer security protocols and download unauthorized media to JPay media players. CP ___ (River Declaration, at ¶ 8). The Department's public records processes promotes these important security interests and the Department followed this process in responding to Bacolod's request. CP 394.

B. Bacolod's Request for a List of Inmates Who Downloaded Isis Makes a Porn (PRU-48397)

The Department contracts with a private vendor, JPay, Inc., to provide services to offenders, including emessaging, video visitation, and music downloads. CP 191-92. Under the contract, JPay owns the Recording Media and that term is defined as the data gathered as a result of JPay's services. CP 192, 205, 220. JPay owns all of the servers on

includes documents Bacolod omitted from his designation. The Department attempts to identify the document to which it is citing in parenthesis.

which the data is stored. CP 192, 205. When the Department has a problem with a JPay kiosk, the Department contacts JPay and JPay sends a technician to the facility. CP 192. Additionally, when an offender or family member has a problem with the JPay system, they are referred to JPay. CP 192.

The Department receives a commission from JPay. CP 193. This commission is set by the contract. CP 193. Any commission paid to the Department is paid into the Offender Betterment Fund. CP 193. The Offender Betterment Fund provides support for offender activities. CP 193. The Department receives a monthly report of the commissions paid by JPay, but this report does not contain the names of individual songs or albums that any inmate downloads. CP 289; *see also* CP 153-54. Because the Department's commission does not vary based on the name of the song or album, the Department does not have any use for information about the specific songs downloaded by inmates. CP 289.

On July 27, 2017, the Department received a public records request from Bacolod that sought "a list of any and all offender's [sic] who have downloaded any individual songs of or the entire album titled, 'Isis Makes a Porn,' by Stephanie Love, from the WA State JPay system, during the time periods of January 1, 2010, to the present time and date of this

request.” CP 110, 140. This request was assigned PRU-48397 and was assigned to Public Records Specialist Mara Rivera. CP 110.

The Department acknowledged Bacolod’s request within five days and sought clarification about whether Bacolod was seeking records from a specific facility. CP 110, 142. About a month later, the Department received a letter from Bacolod indicating that he would like any and all records from any Department facility. CP 111, 144. The Department acknowledged Bacolod’s clarification of his request and began searching for responsive records. CP 111, 146.

On September 18, 2017, Rivera sent a routing slip to Shawn Coleman in Business Services at Department Headquarters asking staff to search for records. CP 111. On October 23, 2017, Rivera resent the routing slip to Julyette Prothero in Business Services because Shawn Coleman had been out on leave for a period of time. CP 111. On the same day, Julyette Prothero forwarded the request to Fiscal Services Analyst Karen Southwell in Business Services. CP 111. Southwell responded that Business Services would not have responsive records and after receiving a follow-up response from Prothero, Southwell clarified that the request should be run through the Department’s investigations unit. CP 111, 148-49. Prothero forwarded Southwell’s response to Rivera on the same day. CP 148.

On October 25, 2017, Rivera sent a response to Prothero and stated that she had been notified that the Department's Trust Accounting Manager Dan Lewis would be knowledgeable of these records and that Lewis had provided records for requests similar to this in the past. CP 111, 153-54. Rivera asked that Prothero check with Lewis. CP 111, 153-54. On October 30, 2017, Rivera sent a letter to Bacolod indicating that additional time was needed to respond to his request and that further response would be provided by December 13, 2017. CP 111-12, 151.

On November 1, 2017, Lewis responded to Prothero and cc'ed Rivera. CP 112, 153-54. Lewis stated that he did not have access to the records that were being requested, if they exist in the JPay system. CP 112, 153-54. Lewis stated that he gets a monthly report of commissions paid and sent an example of what he receives. CP 112, 153-54. On November 6, 2017, Rivera sent a follow-up email asking Prothero and Lewis to confirm that there was no one else in the Department who would be able to provide the records that were being requested. CP 112, 153-54. Lewis responded on the same day and said that he did not know whether investigations staff at Department Headquarters might be able to see the

level of detail that was being requested and recommended that Rivera forward the request to Keith DeFlitch.³ CP 112, 153-54.

On the same day, November 6, 2017, Rivera sent an email to DeFlitch asking him whether he was able to provide responsive records. CP 112, 153. DeFlitch responded on the same day and indicated that he did not have access to the title of songs that offenders purchase and that he can only see the amount that they spend on songs. CP 112, 153, 194. On December 13, 2017, Rivera sent Bacolod a letter indicating that the Department had searched and had not found any responsive records. CP 112, 156.

In the trial court, Bacolod was unable to produce any admissible evidence that the JPay system ever had an album entitled “Isis makes a porn.” CP __ (1/4/19 Counsel Declaration, at 16-17). In fact, Bacolod attempted to access the album on his JPay player⁴ and was unable to do so. CP __ (1/4/19 Counsel Declaration, at 18). His belief in the existence of this album was based on rumors that were “flying around” the inmate community. CP __ (1/14/19 Counsel Declaration, at 16). The trial court found that “[t]he Department did not have a record that contained the information requested by Mr. Bacolod.” CP 395.

³ Keith DeFlitch is a Security Specialist 1 for the Department, and the Department’s primary contact with JPay. CP 191.

⁴ Inmates in Department custody are able to purchase a tablet-like device to listen to music, type emessages, and play games. CP 192.

C. Bacolod’s Request for Every Single JPay Message That Was Rejected by the Department as Sexually Explicit Since 2010 (PRU-49030)

On September 1, 2017, the Department received a public records request from Bacolod that sought 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” and 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 periods of January 1, 2010, to the present date of this request.” CP 113, 158-59. This request was assigned PRU-49030 and was assigned to PRU Specialist Cary Nagel. CP 113-114.⁵

Inmates are permitted to send and receive JPay messages through a kiosk or a tablet-like device. CP 192. JPay messages that are sent by or to an inmate in the Department’s custody are screened by Department mailroom staff pursuant to the Department’s mail policy. CP 250. Some messages are automatically flagged by the JPay system for further review by the mailroom staff. CP 250. If a Department employee determines that

⁵ By the time of the proceedings in the trial court, Nagel had left the Department. CP 113.

a message should be restricted, the Department staff member will select an option in JPay to reject the message. CP 250. The staff selects an option from a dropdown menu that identifies the reason for the rejection and submits the rejection. CP 250. Once the rejection is submitted, the JPay system automatically generates a restriction notice and it is sent to the offender. CP 250. The Department also has an appeal process for restricted JPays. CP 251.

On September 11, 2017, the Department sent a letter to Bacolod acknowledging the request and indicating that the request had been assigned PRU-49030. CP 113-14. In this letter, the Department informed Bacolod that the requested records from the JPay system were not public records, created, used, or maintained by the Department and therefore were not disclosable under the PRA. CP 163. Bacolod did not follow up with the Department on this request or otherwise seek clarification of this response. CP 116.

The trial court found that:

15. At the time of the request, the Department did not have the ability to search for JPay messages based on the reason that a message was rejected, nor does it have such a capability today. Mr. Bacolod's request essentially sought every single message that was rejected as sexually explicit as well as the corresponding rejection notice for the entire time that JPay has existed in the Department. This request would have required the Department to review every single

JPay user's account to see if JPays had been rejected and then determine the reason that the JPay was rejected;

16. Due to the sweeping and vague nature of Mr. Bacolod's request, this process would have been incredibly burdensome and almost impossible for the Department to complete in a reasonable fashion. This request would have required the Department to essentially research the reason for each rejection to determine if it was responsive.

17. Mr. Bacolod's incredibly broad, sweeping request lacked sufficient specificity to be a request for identifiable public records.

CP 396. Bacolod does not assign error to these factual findings.

D. Proceedings in the Trial Court

Approximately eleven months after he received the Department's final responses to PRU-49030 and PRU-47690, Bacolod filed this lawsuit in August 2018. CP 3-8. The Department filed a counterclaim against Bacolod under RCW 42.56.565(2). CP 28-30. The Department's counterclaim was based on the nature of Bacolod's requests, which sought a large volume of sexually explicit information sent by and to inmates as well as information about an album supposedly called "Isis makes a porn." Additionally, there was reason to believe that Bacolod was affiliated with a group of inmates at the Stafford Creek Corrections Center (SCCC)⁶ who had submitted over 1,400 public records requests for JPay records in 2015 and 2016. CP 29. After a PRA scheduling conference, the trial court

⁶ Bacolod was housed at SCCC at all times relevant to this case. CP 3.

concluded that it would wait to decide the Department's counterclaim until after it had resolved Bacolod's PRA claims. CP ____, (Scheduling Order). It entered a scheduling order to that effect. CP ____, (Scheduling Order).

In January 2019, the trial court held a hearing on the merits of Bacolod's claims. CP 393. The trial court concluded that the Department did not violate the PRA and dismissed Bacolod's claims. CP 398. The trial court concluded 1) the Department was not required to facilitate personal inspection by Bacolod in response to his request for all electronic records regarding himself; 2) the Department did not violate the PRA in response to his request for all inmates who downloaded "Isis makes a porn" because the requested records were not public records and the Department did not have a record with that information; and 3) the Department did not violate the PRA in response to his request for the sexually explicit JPay messages and rejection notices because the JPay messages themselves were not public records and Bacolod's request was not a request for identifiable public records. CP 397-398. The trial court's dismissal of Bacolod's claims effectively rendered the Department's counterclaims moot.

The trial court entered a written order that reflected its ruling on March 22, 2019. The trial court had previously denied a motion for reconsideration filed by Bacolod before the written order had been entered. CP 377. The Department filed a cost bill seeking costs related to

Bacolod's deposition, a filing fee,⁷ and statutory attorney's fees. CP 399-404. Bacolod did not file any written objections to this cost bill. However, the cost bill was never reduced to judgment by the Clerk.⁸ Bacolod appeals from the trial court's decision that the Department did not violate the PRA. CP 405.

IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion 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). However, unchallenged factual findings are treated as verities on appeal. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015).⁹

⁷ The Department's cost bill contained two references to statutory attorney's fees: one of \$200 and one of \$240. CP 399. This latter reference was a typographical error and as the supporting documents indicated, it referred to the filing fee paid by the Department on its counterclaims. CP 403.

⁸ Under Civil Rule 78(e), the Clerk is supposed to enter a judgment if a cost bill is filed and no motion to retax costs is filed within six days.

⁹ There appears to be some disagreement among Court of Appeals decisions about the proper standard of review for challenged factual findings in a PRA case. *Hoffman v. Kittitas Cnty.*, 4 Wn App. 2d 489, 500-05, 422 P.3d 466 (2018) (Lawrence-Berry, J., concurring) (recognizing the ambiguity but concluding the appropriate standard was substantial evidence), *affirmed by* --- Wn.2d ---, 449 P.3d 277 (2019). This Court does not need to address that issue because Bacolod does not assign error to any of the trial court's factual findings.

V. ARGUMENT

A. **Consistent with Prior Appellate Decisions, the Department Did Not Deny Bacolod Records When It Permitted Him to Obtain Copies But Declined to Allow Inspection at His Prison**

The trial court concluded that the Department did not violate the PRA when it offered Bacolod copies of records but declined to allow personal inspection of records at his prison. Bacolod argues that the trial court erred in reaching a contrary conclusion. However, Bacolod's argument is foreclosed by two prior published decisions from this Court that concluded the Department's rules governing inspection of records for inmates are reasonable procedural rules under RCW 42.56.100. To the extent that Bacolod argues the prior cases should be overruled or not followed, Bacolod has failed to establish a persuasive reason that those prior decisions were wrongly decided. Therefore, the Court should affirm the trial court's conclusion that the Department did not violate the PRA in its response to PRU-47690.

1. **As This Court Recognized in Prior Published Decisions, the Department's Policies Governing Inmate Inspection of Public Records Are Reasonable Rules Permitted by the PRA; the Department Followed Those Rules in Its Response to Bacolod's Request**

The PRA allows agencies to adopt and enforce reasonable rules that are consistent with the PRA's purposes of allowing access to public records, protecting public records from damage or disorganization, and

preventing excessive interference with other essential functions of the agency. RCW 42.56.100. “Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency.” RCW 42.56.080.

Consistent with the PRA’s statutory provisions and to ensure that the processing of PRA requests does not interfere with these important agency functions, the Department has enacted regulations and an internal policy that governs the handling of public records requests. WAC 137-08-090(1)(c); CP 122, 124. These rules help to avoid excessive interference with the Department’s operations and other essential functions. By the nature of their incarceration, offenders are not able to inspect records at the Department’s main office in Tumwater. Additionally, a requirement to transport offenders to Tumwater to inspect public records would interfere with the Department’s function of supervising inmates in a prison setting and could present a significant safety risk to the community. As explained in detail in the declarations that were filed with the trial court, an option that requires the Department to permit inspection at a prison of records either in paper format, on CD, or via the state government network presents significant logistical and security concerns. CP 107-08, 175-77, CP 252-54.

This Court has previously recognized in two published opinions that the Department's rules are reasonable procedural rules under RCW 42.56.100. Over a decade ago, an inmate challenged the Department's policy in *Sappenfield v. Department of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005). In that case, Sappenfield asked for documents that were not contained in his central file. Pursuant to WAC 137-08-090, the Department offered to mail the records after receiving payment for copy costs and postage in advance. Rather than pay for the records, Sappenfield sued the Department and challenged WAC 137-08-090.

On appeal, Division III of this Court concluded that "Corrections's procedures appropriately balance public disclosure act mandates with its duty to manage prison inmates." *Sappenfield*, 127 Wn. App. at 84. In reaching this conclusion, the Court rejected Sappenfield's arguments that inspection should be allowed because the documents were located in the same facility. *Id.* at 86-88. In determining that the Department did not violate the PRA, Division III made a number of important observations. First, the Court observed that a request by a prison inmate to personally inspect records is not the usual case because "[p]rison inmates do not enjoy all the privileges of the public community—they are imprisoned." *Sappenfield*, 127 Wn. App. at 88. Second, the Court found that promptly mailing the records to Sappenfield at a reasonable charge satisfied the

Department's obligation to set its own disclosure rules. 127 Wn. App. at 89. In fact, the Court went on to say that the Department is "statutorily required to adopt procedures that protect the integrity of its records and also avoid interference with Corrections's essential function to securely restrain criminal offenders." *Id.* Third, the Court found that the PRA "does not categorically preclude denying requests *for direct inspection* when necessary to preserve the records and its own essential functions." *Id.* The Washington Supreme Court later favorably cited the *Sappenfield* decision in *Livingstone v. Cedeno*, 164 Wn.2d 46, 53-54, 186 P.3d 1055 (2008).

Six years after *Sappenfield*, two inmates filed another action challenging the Department's policy regarding personal inspection of records in *Gronquist v. Department of Corrections*, 159 Wn. App. 576, 247 P.3d 436 (2011). These two inmates requested to inspect various types of records outside of their central files. Although the Department offered to mail the records to the inmates after receiving payment for copy costs and postage in advance, the inmates sued the Department and challenged the Department's policy. The inmates argued that the PRA required the Department to permit in person inspection of records and that denial of such inspection was a denial of the PRA request. *Gronquist*, 159 Wn. App. at 582.

Relying on *Sappenfield*, this Court rejected the inmates' argument. The Court concluded that DOC Policy 280.510 appropriately balanced the Department's responsibilities under the PRA with its duty to manage prison inmates. *Gronquist*, 159 Wn. App. at 584. The Court went on to conclude that the Department's policy reasonably considered the unique nature presented by requests from incarcerated individuals and the Department did not deny the inmates records by applying the Department's valid policy. *Gronquist*, 159 Wn. App. at 586.

The *Gronquist* court also observed that "there is no requirement [in the PRA] that an agency transmit the records to the requester who is unable to come to the agency's premises." *Gronquist*, 159 Wn. App. at 586 n.7. In other words, if a requester is not able to physically travel to inspect records, an agency does not violate the PRA by declining to facilitate inspection at a different location. *See id.*; *see also* Washington State Bar Association, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Law* (2d ed. 2014) 6-51.¹⁰ Indeed, the PRA itself appears to generally contemplate inspection at the agency's headquarters. *See* RCW 42.56.040 (referring to requirement that procedures be published for inspection at the central agency for a local

¹⁰ Courts have occasionally looked to the *Deskbook* as persuasive authority when its analysis is consistent with the PRA's statutory language. *See Gipson v. Snohomish Cnty.*, --- Wn.2d ---, --- P.3d ---, 2019 WL 5076603, at 4 (2019).

agency), .090 (referring to customary office hours of the agency). At a minimum, as *Gronquist* recognized, the PRA should not be interpreted to require an agency to facilitate inspection at any location designated by the requester, especially when that location is a prison.

Similar to *Sappenfield* and *Gronquist*, this Court has also decided that the Department does not have a duty to produce records electronically to an incarcerated requester. See *Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 607, 277 P.3d 670 (2011). In reaching this conclusion, the Court affirmed that the Department's offer to provide the inmate with copies or to allow a third party to inspect the records complied with the Department's PRA obligations. *Id.*¹¹

After *Sappenfield* and *Gronquist*, the Legislature has amended RCW 42.56.120 multiple times, including a number of significant amendments in 2017. However, the Legislature has never acted to overrule or otherwise undermine this Court's *Sappenfield* and *Gronquist* decisions. Such inaction lends further support to an interpretation of the PRA that does not require agencies to transport records to the requester's location or to facilitate inspection of records by an inmate at the inmate's prison facility. See *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d

¹¹ The Court did not specifically address whether Mitchell should have been allowed to inspect the records himself because he did not raise that argument in the trial court. *Mitchell*, 164 Wn. App. at 601 n.4.

1172 (2009) (noting general rule that legislature's failure to amend statute following a judicial interpretation of that statute is considered legislative acquiescence in that interpretation).

Although Bacolod seems to suggest that personal inspection is required by the PRA, Bacolod proposes no limiting principle for his theory of personal inspection. An interpretation of inspection that requires an agency to facilitate inspection at places other than the agency's headquarters would have significant impact on agencies. Because the PRA's statutory language governing inspection applies to all state and local agencies, such a theory would impose obligations on all agencies—not just the Department. For example, under Bacolod's theory, smaller municipalities would also be required to facilitate inspection for incarcerated individuals. And because there is no requirement that a requester be a Washington resident, Bacolod's theory would also mean that agencies would be obligated to create a means by which individuals, including incarcerated individuals, can personally inspect records in locations from Alaska to Wyoming and potentially in foreign countries. Such an interpretation of the PRA should be rejected because it would lead to absurd results. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (recognizing that courts will generally avoid a reading of a

statute when such a reading would result in unlikely, absurd, or strained consequences); *see also Smith v. State*, 873 N.E.2d 197, 201 (Ind. Ct. App. 2007) (concluding that an inmate had no right to personal inspection under Indiana's public records law because personal inspection was not practical). Therefore, this Court should reject Bacolod's theory of inspection that would require public agencies to make house calls to allow inspection for people who are unable to travel to the agency's headquarters.

These cases squarely govern and foreclose Bacolod's claims. In response to Bacolod's request, Bacolod had the option to have a third party inspect the records at Department Headquarters, to pay for paper copies, to have the records emailed to a third party, and to purchase records on a CD that would be mailed to a third party. Bacolod, however, was not permitted—and the Department was not required to provide—personal inspection of records in Bacolod's prison. Bacolod made it clear that he only wanted to inspect the records at his prison. Because the Department's rules regarding inspection of records by inmates are reasonable and an agency has no obligation to permit inspection at the requester's location, the Department did not deny Bacolod records when it declined to allow personal inspection but provided Bacolod a number of alternative options to receive the records. Therefore, consistent with this

Court's prior decisions, the trial court correctly rejected Bacolod's claims because the Department responded to Bacolod's request according to its reasonable procedural rules adopted under RCW 42.56.100.

2. The Court Should Reject Bacolod's Attempts to Distinguish *Sappenfield* and *Gronquist*

Bacolod attempts to distinguish *Sappenfield* and *Gronquist* because "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." Bacolod's Brief, at 17. Bacolod is incorrect. In *Gronquist*, one of the plaintiffs "sought inspection of 14 different categories of information, *including written materials regarding himself, materials concerning a job that Gronquist appears to have wanted, the complete employment files of two corrections officers, and records and/or training materials that appraise staff.*" *Gronquist*, 159 Wn. App. at 581 (emphasis added). Despite the fact that the records being requested consisted of materials about himself, the Court rejected Gronquist's claims. To the *Gronquist* Court, the important fact was that the records did not exist in Gronquist's central file.¹² Similarly, based on the unchallenged

¹² The *Sappenfield* opinion does not describe in detail the record that was being requested but simply states that the record was a "Supply Inventory Tracking Request form for Unit C-4" that was purportedly located at Sappenfield's prison. *Sappenfield*, 127 Wn. App. at 84-87. The fact that the Court's opinion does not describe in detail the nature of the records suggests that the specific record was not important to the Court's analysis;

factual findings, the records requested by Bacolod did not exist in his central file. CP 394. As such, he was not permitted to inspect them.

Bacolod also attempts to challenge the application of *Gronquist* and *Sappenfield* by arguing that the term “central file” includes electronic documents. Bacolod’s Brief, at 15. This argument ignores the uncontested factual findings and the evidence presented by the Department. Specifically, Denise Vaughan’s declaration explains that “‘central file’ is a term that is used to refer to a physical file of documents with records related to an offender’s incarceration.” CP 107. The trial court found that the requested documents were not in Bacolod’s central file. CP 394. Contrary to Bacolod’s claims that the Department created this definition for this litigation, this definition is consistent with how the term “central file” has been used in past litigation. *See, e.g., Adams v. Wash. State Dep’t of Corr.*, 189 Wn. App. 925, 930, 361 P.3d 749 (2015) (describing physical file from which documents were removed). And tellingly, it is consistent with Bacolod’s own understanding of the term during his deposition. CP ____ (1/4/19 Counsel Declaration, at 32) (“Central file is just hard copy records that are just tangible, like these papers in front of us. I’ve never been able to see anything electronic regarding my central file.”). Contrary to Bacolod’s claim, the term central file does not

rather the important fact was that the record was not physically located in the inmate’s central file.

encompass documents in electronic databases and the Court should reject Bacolod's attempt to redefine this term.

Before this Court, Bacolod also appears to imply that his request was limited to those records that were purportedly previously maintained in his central file. Bacolod's Brief, at 15-16. This argument is difficult to square with the actual language of his request and his arguments in the trial court. Specifically, Bacolod argued that he should be allowed to inspect his "electronic file" and he indicated that he was seeking the right to inspect "[a]nything stored digitally or electronically on any kind of computer database related to him." CP __ (1/4/19 Counsel Declaration, at 7). As Bacolod confirmed, he was requesting to see any electronic record about him, including emails. CP __ (1/4/19 Counsel Declaration, at 6). As such, this Court should reject Bacolod's attempts to narrowly characterize his request before this Court.

Finally, Bacolod argues that the Department violated the PRA in response to this request because it failed to cite any exemption when it denied him the right to inspect and because it distinguished among requesters. Bacolod's Brief, at 25-26. The Department was not required to cite any exemption when it denied him the right to inspect because the Department was not claiming any exemption. Instead, the Department was making the records available to Bacolod, just not in the manner that

Bacolod desired. This Court rejected a similar argument in *Gronquist*. 159 Wn. App. at 583 n.6. Similarly, the prior decisions foreclose Bacolod’s argument that the Department’s policies impermissibly distinguish among requesters. Rather, as *Gronquist* and *Sappenfield* confirm, the Department’s policies regarding inspection by inmates are reasonable and based on the unique concerns presented by inspection by inmates. Furthermore, Bacolod has not pointed to any evidence that the Department permits inspection by nonincarcerated requesters at a location of the requester’s choosing. As such, Bacolod has not presented any evidence that the Department is treating him differently than other requesters. Therefore, Bacolod has failed to show that his circumstances are distinguishable from the issues decided in *Sappenfield* and *Gronquist*.

3. *Sappenfield* and *Gronquist* Are Still Correct

Bacolod makes a brief argument that *Sappenfield* and *Gronquist* should not be followed because they are not current with the times. Bacolod’s Brief, at 16. This brief discussion is arguably not sufficient to raise the issue of whether this Court should depart from established precedent. *See, e.g., Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 556, 166 P.3d 813 (2007) (noting that passing treatment of an issue in an appellate brief is “insufficient to merit judicial consideration”); *State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (one-sentence argument

in brief was not sufficient to properly raise issue). Assuming it is adequately raised, this Court should reject Bacolod's argument for two reasons. First, the trial court's unchallenged factual findings confirmed that "[t]he Department's reasonable concerns related to these issues have not changed" since *Sappenfield* and *Gronquist*. CP 395. Based on this unchallenged finding, Bacolod has failed to demonstrate that this Court should decline to follow *Sappenfield* and *Gronquist* based on a change in circumstance.

Second, Bacolod's argument about the development of technology misses the primary rationale behind *Sappenfield* and *Gronquist*. Those cases were not based on the idea that most inmate records were stored in the central files. They were based on "DOC's need to securely restrain incarcerated offenders and to protect public records." *Gronquist*, 159 Wn. App. at 586. In *Gronquist*, this Court recognized that those concerns had not changed between 2005 (the year *Sappenfield* was decided) and 2011. *Id.* Bacolod has failed to show such concerns have changed between 2011 and today. Based on the extensive evidence presented by the Department below and the trial court's unchallenged factual findings on this issue, such concerns have not changed. Therefore, this Court should reject Bacolod's invitation to revisit *Sappenfield* and *Gronquist*.

Because the Department did not have a duty under the PRA to permit inspection at Bacolod’s prison facility, the trial court correctly denied Bacolod any relief on this request and dismissed his claims.

B. Based on the Trial Court’s Uncontested Findings, the Department Did Not Have Records Responsive to PRU-48397

An agency has no duty to produce a record that is non-existent. *See Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 734-35, 218 P.3d 196 (2009). Instead, agencies are required to produce records that have been located after a reasonable search. *See, e.g., Kozol v. Wash. State Dep’t of Corr.*, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

In this case, Bacolod requested a list of all inmates who downloaded the album or songs from the album “Isis makes a porn.” Bacolod concedes that he was not aware of whether this album was ever available on JPay and admits that he could not find the album on JPay. CP ____ (1/4/19 Counsel Declaration, at 18). The trial court found that the Department did not have responsive records, CP 395, and Bacolod does not assign error to that finding. Because the Department did not have responsive records, the Department did not violate the PRA in its response to this request.

To the extent that any records might exist in JPay’s (a private company that is not a state agency) possession—a proposition for which

there is no evidence in the record—the records would not meet the definition of a “public record” in RCW 42.56.010(3). To be a public record, a record must be 1) a writing; 2) containing information relating to the conduct of government or the performance of any governmental or proprietary function; and 3) be prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3); *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 879, 357 P.3d 45 (2015). The requested records were records of inmates’ purchases and downloads from a private company. Such records are not owned by the Department based on the contract and are retained on JPay’s servers. Additionally, there is no evidence that a list of these downloads exists, let alone that Department staff “prepared” such a list. Nor is there any evidence that the Department “used” such a list. Indeed, the evidence before the trial court indicated that the Department has no use for such a list because the commissions paid to the Department are not based on the name of the song. CP 289. Furthermore, a list of inmates who download a specific song is not related to the conduct of government because song download information does not refer to or impact the actions, processes, or functions of government. *See Nissen v. Pierce Cnty.* 183 Wn.2d 863, 880-81, 357 P.3d 45 (2015). Again, the specific individuals who allegedly downloaded this song does not impact any

decisions made by the Department. Thus, any records maintained by JPay (if such records exist) would not be public records.

Bacolod's brief does not address the above issues and contains cursory and unsupported analysis. Instead, Bacolod's focus is on the adequacy of the Department's search. Bacolod claims that the Department's search was inadequate because there were "no searches into any retrieval or tracking systems or databases, for the actual records was conducted (sic) using any key words or terms." Bacolod's Brief, at 28. The Court should reject Bacolod's claims about the Department's search. When examining whether an agency conducted an adequate search, the question is whether the search as a whole was reasonable. *Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 719-20, 261 P.3d 119 (2011). This question focuses on the specific factual circumstances of the request. *Id.* In this case, the Department's assigned public records specialist contacted staff in all the places where the records might reasonably be found and followed all obvious leads. In fact, the specialist asked follow-up questions of certain Department staff and contacted other staff who were identified as potentially having responsive records. Although Bacolod argues that a keyword search needed to be performed, such a search is not always required in order to conduct an adequate search and was not required in this circumstance because Department staff

knew that they did not have access to the types of records that were being requested. Under the specific facts of this case, the Department's search was reasonable.

Therefore, the trial court correctly concluded that the Department did not violate the PRA in its response to this request.

C. The Department Did Not Violate the PRA in Its Response to Bacolod's Request for Sexually Explicit JPay Messages (PRU-49030)

The trial court correctly concluded that the Department did not violate the PRA in its handling of Bacolod's request for all JPay messages that had been rejected as sexually explicit and their corresponding rejection notices over a seven-year period because such a request did not seek identifiable public records. Even if the Court disagrees with this conclusion, it can affirm because Bacolod's request was intended to harass the Department, would likely undermine the security of the Department's facilities, and would likely undermine the safety of the families of offenders. *See* RCW 42.56.565(2)(c)(i), (ii), & (iii).

1. Bacolod's Request Did Not Seek Identifiable Public Records

Prior to determining whether the PRA applies, a court must make a threshold determination whether the requested documents are public records. *See Dragonslayer, Inc. v. Wash. State Gambling Com'n*, 139 Wn.

App. 433, 444, 161 P.3d 428 (2007). A valid request under the PRA must be for identifiable public records. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004), *superseded in part by* RCW 42.56.080(2); *Belenski v. Jefferson Cnty.*, 187 Wn. App. 724, 740, 350 P.3d 689 (2015), *reversed on other grounds by* 186 Wn.2d 452, 378 P.3d 176 (2016). A party requesting records under the PRA “must, at a minimum, . . . identify the documents with reasonable clarity to allow the agency to locate them.” *Hangartner*, 151 Wn.2d at 447; *Kozol*, 192 Wn. App. at 7 n.5. When a request does not seek identifiable public records, the agency is not obligated to respond to the request. *See Hangartner*, 151 Wn.2d at 449, *superseded in part by* RCW 42.56.080(2); *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000).

The inability of an agency to perform a keyword search for records is one factor that courts consider in determining whether a request sought identifiable public records. *Zabala v. Okanogan Cnty.*, 5 Wn. App. 517, at ¶ 33, 428 P.3d 124 (2018) (published in part).¹³ Agencies are not obligated to fulfill sweeping requests that would require the agencies to employ

¹³ This case is published in part and the Department is citing to the unpublished portion. Consistent with GR 14, the Department informs the Court that this portion of the decision has no precedential value, is not binding on any court, and is cited only as persuasive authority as the Court deems appropriate. *Crosswhite v. Wash. State Dep’t of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017). Additionally, when citing to the unpublished portion, the Department cites to the paragraph numbers of the relevant portion.

guesswork to fulfill or to serve as a requester's research assistants. *See Zabala*, 5 Wn. App. 517, at ¶40.

Under the unique circumstances of Bacolod's request, the trial court correctly concluded that Bacolod's request did not seek identifiable records. The trial court's unchallenged factual findings concluded that the Department does not have the capability to search for JPay messages based on the reason that they were rejected. CP 396. To fulfill the request, the Department would be required to essentially research the reason for each rejection to determine if it was responsive. CP 396. Because of the inability to search for the messages, the Department would have to review every single JPay user's account to see if there were messages that had been rejected and the reason for the rejections. At the time of the proceedings below, there were 12,000 active accounts in addition to the inactive accounts. CP 195. The trial court noted that such a search would be incredibly burdensome and almost impossible for the Department to complete in a reasonable fashion. CP 396.

Additionally, as the trial court concluded, the actual JPay messages themselves are not public records that are subject to the PRA because they do not contain information relating to the conduct of government and are also not prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3) (defining a "public record"). The messages in question

are communications between inmates and their family and friends. Although the JPay messages are writings, they do not contain information related to the conduct of government because they contain messages between private individuals (e.g. an inmate and his or her friends and family). Such private communications do not relate to the conduct of government. Furthermore, these messages are not owned, used, retained, or prepared by the Department. No Department staff are involved in preparing the records; they are retained on JPay's servers; they are owned by JPay; and the messages are not used by the Department in a manner that would transform such private communications into a public record. Bacolod's Brief does not analyze the elements of a public record as applied to the messages themselves in any meaningful manner. Bacolod's Brief, at 34-35 (asserting in a conclusory fashion that the records are prepared, owned, used, and retained by the Department). Such cursory analysis does not adequately address the issue. Therefore, the trial court correctly recognized that the JPay messages themselves are not public records.

Bacolod does make two statements about the nature of these records that require clarification. First, Bacolod claims that the Department retains these records in Department databases. Bacolod does not cite to any portion of the record, and this statement is contradicted by the record. *See* CP 192. Second, Bacolod claims that the Department collects a commission for the

records. Although it is true that the Department receives a commission, such a commission is deposited into the Offender Betterment Fund for use in funding and providing support for offender activities. CP 193. Bacolod does not explain why the receipt of a commission changes the analysis. Therefore, these unsupported assertions do not demonstrate error on the part of the trial court.

Given this unique situation where a request would require an agency to sort through thousands of accounts one-by-one to research the nature of the records, the trial court correctly concluded that Bacolod's request was not for identifiable public records. Because it was not for identifiable public records, the Department did not violate the PRA in its response to Bacolod's request.

2. Even if the Court Disagrees, the Court Can Affirm the Dismissal Because Bacolod's Request Meets the Criteria of RCW 42.56.565(2)(c)(i), (ii), or (iii)

In 2009, the Legislature passed RCW 42.56.565(2)(c) to address abusive public records requests by inmates. *Dep't of Corr. v. McKee*, 199 Wn. App. 635, 643-44, 399 P.3d 1187 (2017). The Legislature addressed this issue because of extensive evidence that inmates had been abusing the PRA through their requests to agencies. *Id.* at 647 (discussing this evidence). An agency can be relieved from responding to a request by an incarcerated individual upon a showing that 1) the request was made to

harass or intimidate the agency or its employees; 2) fulfilling the request would likely threaten the security of correctional facilities; and 3) fulfilling the request would likely threaten the safety or security of family members of other inmates, or any other person. RCW 42.56.565(2)(c)(i), (ii), (iii). The term “harass” in RCW 42.56.565(2)(c)(i) means to worry and impede by repeated attacks, to tire out, to vex, trouble, or annoy continually or chronically. *McKee*, 199 Wn. App. at 646.

In this case, the Department brought counterclaims against Bacolod under RCW 42.56.565 based on the nature of his requests. First, Bacolod was intentionally seeking a massive amount of records that Department staff had already determined should not be permitted into its facilities because they were “sexually explicit.” CP 161 (specifically requesting records that were rejected due to being sexually explicit). Releasing records that are sexually explicit to an inmate under the guise of a public records request creates obvious security concerns and would likely threaten the security of correctional facilities. Because it sought sexually explicit messages that had already been rejected by the Department, it sought records that would likely jeopardize the security of the Department’s facilities. Second, because the request sought very sensitive JPay messages between other inmates and spouses, friends, and family of those inmates, providing these messages to Bacolod would

likely threaten the safety or security of family members of other inmates, as well as the other inmates themselves.

Third, based on the trial court's findings, Bacolod's request was incredibly burdensome; indeed, it appeared designed to be burdensome. As such, it was meant to harass the Department. The only explanation that Bacolod has given for wanting to see these records is a conclusory assertion that he purportedly wanted to demonstrate that the Department was arbitrarily censoring the mail under the guise of information being sexually explicit. Notably, this same explanation was given by a group of SCCC inmates who submitted 1,400 requests in 2015 and 2016 for JPay records and against whom the Department had previously been awarded a permanent injunction under RCW 42.56.565. *Compare* Bacolod's Brief, at 27, with CP ___ (2/13/19 Counsel Declaration, Exhibit 2) (statement by Steven Kozol that he wanted the JPay records because he was researching whether the Department was acting arbitrarily and capriciously). Additionally, Bacolod's explanation is undermined by his statements to a former inmate that appear to describe his JPay requests as "golden." CP ___ (2/13/19 Counsel Declaration, Exhibit 1). Such statements demonstrate that Bacolod's real purpose behind his incredibly burdensome request for sexually explicit records was the goal of profiting from the

PRA. *McKee*, 199 Wn. App. at 646 (concluding that RCW 42.56.565 applies to requests that are burdensome and made for financial gain).¹⁴

The trial court did not need to reach this issue because it dismissed Bacolod's case on the merits. Given the uncontested facts and unchallenged factual findings, this Court can affirm the dismissal of his PRA claims because his requests meet at least one of criteria in RCW 42.56.565(2)(c).

D. The Court Should Not Consider a Number of Factual Allegations and Arguments in Bacolod's Brief Because They Are Not Adequately Supported and Were Not Raised Below

An appellate brief's statement of facts must contain a reference to the record for each factual statement. RAP 10.3(5). This rule facilitates the appellate court's review and ensures that a party is making factual assertions that have some evidentiary support in the record. Arguments that are unsupported by references to the record need not be considered by an appellate court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Similarly, a court will not consider assignments of error that have not been adequately briefed. *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005). Pro se litigants are generally held to the same standards as attorneys. *See, e.g., In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

¹⁴ The Department subpoenaed these JPay messages from JPay during the trial court litigation.

Bacolod's brief contains a number of factual assertions that are not supported by any citations to the record. For example, pages 8 through 9 contain a discussion about the Department's risk assessment process that contains no citations to anything in the trial court record.¹⁵ Similarly, on page 10 of Bacolod's brief, Bacolod provides an extensive discussion (mostly in the form of argument) about the Department's practices. However, there is not a single citation to the record on page 10 to support those statements. The Court should decline to consider arguments or factual assertions that are not adequately supported by the record.

Bacolod also raises a number of assignments of error that are not adequately briefed and should not be considered. For example, Assignment of Error No. 11 (Did DOC fail to seek clarification of the easily identifiable records?) is mentioned but there is no argument in support of this assignment of error. Bacolod's Brief, at 37. Other assignments of error were not raised before the trial court. For example, in Assignment of Error No. 13, Bacolod asks that this Court remand the case for an evidentiary hearing and further discovery. Bacolod's Brief, at 40-41. However, Bacolod did not ask for such relief below as part of the show cause hearing and did not seek a continuance of the hearing on the merits.

¹⁵ Bacolod's brief also contains much discussion that appears generally irrelevant to any issues on review. Specifically, the substance of Bacolod's brief begins with an extensive discussion of his criminal conviction. That does not appear to be relevant to any issue on review.

This Court should reject Bacolod's belated and untimely request. Additionally, in Assignment of Error No. 10, Bacolod argues that his lawsuit had a "causative effect" on another request that Bacolod made to the Department. Bacolod's Brief, at 36-37. This issue was not raised below either and should not be considered. Therefore, the Court should reject any factual statement, argument, or assignment of error that is not supported by citations to the record or adequate argument.

E. The Court Should Reject Bacolod's Untimely Challenge to the Department's Cost Bill Because the Department Was Entitled to Costs under RCW 4.84.060

RCW 4.84.060 provides that a defendant is entitled to a judgment for costs "[i]n all cases where costs and disbursements are not allowed to the plaintiff." RCW 4.84.060. Such costs include filing fees, the reasonable expense of deposition transcripts, and statutory attorney's fees. RCW 4.84.010(1), (6), and (7). A party objecting to a cost bill must generally file a motion to retax costs within six days of the filing of a cost bill. Civil Rule 78(e). Although the failure to file a timely motion to retax costs does not deprive a court of jurisdiction to review costs, *see, e.g., Mitchell v. Wash. State Institute of Pub. Policy*, 153 Wn. App. 803, 823-24, 225 P.3d 280 (2009), appellate courts do not generally decide issues related to costs when the trial court has never been given the opportunity

to address the issue. *Simpson Logging Co. v. Chehalis Cnty.*, 80 Wn. 245, 250, 141 P. 344 (1914).

In this case, the Department sought costs related to the payment of a filing fee for the Department's counterclaims, the pro rata amount of the portions of Bacolod's deposition transcript that were submitted to the trial court, and statutory attorney's fees. All of these fees were permitted by RCW 4.84.010 and 4.84.060. Bacolod did not object to the costs or file a motion to retax costs. Consequently, Bacolod has arguably waived any objection to such costs. Even if he did not waive such objections, Bacolod's objections are unsupported. It is true that the PRA's attorney's fees and costs provision in RCW 42.56.550(4) does not appear to provide for an award of costs to an agency. However, this fact does not mean an agency cannot recover costs under another statutory provision. In this case, the Department was entitled to costs under RCW 4.84.060 because Bacolod was not entitled to costs. RCW 4.84.060.

Bacolod also argues that the Department did not prevail on its counterclaims and claims that the Department abandoned its counterclaims. However, Bacolod's argument ignores that the trial court clearly prevented the Department from raising its counterclaims prior to resolution of Bacolod's claims. CP ____ (Scheduling Order). Once Bacolod's claims were resolved in the Department's favor, the

Department's counterclaims arguably became moot. Bacolod's argument to the contrary distorts the proceedings before the trial court. It also ignores that the reason that the Department was entitled to costs was because it prevailed on Bacolod's claims and secured dismissal of the case without any relief to Bacolod. Therefore, the Department was entitled to its costs based on RCW 4.84.060.¹⁶

F. Bacolod Is Not Entitled to Attorney's Fees or Costs on Appeal

A party that substantially prevails on an appeal is entitled to costs. RAP 14.2. For the above stated reasons, this Court should affirm the trial court's decision. Because the trial court's decision should be affirmed, Bacolod is not entitled to costs because he did not substantially prevail on appeal. Even if the Court reverses, however, Bacolod would not be entitled to statutory attorney's fees because he is pro se. *Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011). As far as any remaining costs, the Department will respond to any claim of costs under RAP 14.5 if the Court determines Bacolod is the substantially prevailing party and if Bacolod submits a cost bill as required by RAP 14.4. Therefore, the Court should deny Bacolod any costs because he is not the substantially prevailing party.

¹⁶ Bacolod does not contest the reasonableness of the Department's costs.

VI. CONCLUSION

The Department respectfully requests that the Court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 23rd day of October, 2019.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner

TIMOTHY J. FEULNER, WSBA #45396

Assistant Attorney General

Corrections Division OID #91025

PO Box 40116

Olympia WA 98504-0116

(360) 586-1445

Tim.Feulner@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused the BRIEF OF RESPONDENT to be filed with the Clerk of the Court. I certify that I mailed by United States Postal Service the document to the following:

ERIC M BACOLOD DOC #760310
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON WA 98584

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

EXECUTED this 23rd day of October, 2019, at Olympia,
Washington.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant 4
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445
Cherrie.Melby@atg.wa.gov

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

October 23, 2019 - 12:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53368-5
Appellate Court Case Title: Eric Bacolod, Appellant v. DOC, Respondent
Superior Court Case Number: 18-2-04188-8

The following documents have been uploaded:

- 533685_Briefs_20191023123409D2516398_6131.pdf
This File Contains:
Briefs - Respondents
The Original File Name was ResponseBrief.pdf

Comments:

Sender Name: Cherrie Melby - Email: CherrieK@atg.wa.gov

Filing on Behalf of: Timothy John Feulner - Email: TimF1@atg.wa.gov (Alternate Email:)

Address:

Washington State Attorney General, Corrections Division
P.O. Box 40116
Olympia, WA, 98504-0116
Phone: (360) 586-1445

Note: The Filing Id is 20191023123409D2516398