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NO. 53627-7-II

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

JOEL ZELLMER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

Alexander Jouravlev
Assistant Attorney General
WSBA No. 44640
Office Id. No. 91018
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

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I. INTRODUCTION

The Department of Labor and Industries adequately searched for documents responsive to Joel Zellmer's three public records requests. He asked for records regarding any independent medical examinations (IME) that had been performed by four doctors on his workers' compensation claims. But though these doctors had reviewed Zellmer's medical records, none had performed an IME, a type of workers' compensation examination that involves a physical exam.

In response to Zellmer's three requests, public records staff identified Department divisions that would be the most likely to have responsive records, sought records from those divisions, and searched databases that would have contained IME records, if there had been any. The Department found that it had no responsive records since none of the doctors identified in the public records request had ever performed an IME for Zellmer. The Department's search efforts were reasonably calculated to discover what records, if any, the Department had that were responsive to Zellmer's request.

Zellmer now alleges public records violations where none exist, by retroactively expanding the scope of his earliest requests for records, and arguing that the records the Department produced in response to a fourth request were also responsive to his first three requests. But the fourth request

did not ask for records of IMEs, as the first three did. An agency must produce the records the requestor identified, as the Department did with each request, but the agency need not guess as to whether a requestor also wants additional records.

The Department adequately searched its records for the IME records Zellmer requested, but found none. This Court should affirm the superior court's ruling that the Department complied with the Public Records Act.

II. COUNTERSTATEMENT OF ISSUES

1. Does the statute of limitations in RCW 42.56.550(6) bar Zellmer from bringing a claim related to the Department's response in request ID 112075 more than one year after the Department's final action on the request?
2. Did the Department conduct an adequate search for records in response to Zellmer's request ID 112075 when he specifically requested records of "independent medical examinations" for his industrial insurance claims, the Department searched multiple locations within the agency, and no such records existed?
3. Did the Department conduct an adequate search for records in response to Zellmer's request ID 113598 when he specifically requested records of "Independent Medical Exam[s]" under his industrial insurance claims, the Department searched multiple locations within the agency, and found that no such records existed?
4. Did the Department conduct an adequate search for records in response to Zellmer's request ID 115355 when he requested "IMEs" done between November 1, 2009, and April 30, 2010, on his industrial insurance claims, the Department searched through its database, and no such records existed because no IMEs were performed during that date range?

III. STATEMENT OF THE CASE

A. In 2010, Four Doctors Reviewed Zellmer's Medical Records but Did Not Conduct Independent Medical Examinations

In 2010, four doctors—Dr. Steven Fey, Dr. H. Berryman Edwards, Dr. Alfred Blue, and Dr. Dennis Stumpp—reviewed medical records related to Joel Zellmer's workers' compensation claims, at the Department's request. CP 76-95. Dr. Fey and Dr. Stumpp performed a records review regarding claim Y154479, Dr. Edwards performed a records review regarding claim N767257, and Dr. Blue performed a records review regarding claim Y480253. CP 76. Each of these doctors submitted invoices that described their services as involving a "record review" or "review of records." CP 81, 87, 90, 94. These four doctors have provided independent medical examinations at the Department's request in the past.

However, none of the four doctors performed an independent medical examination on Zellmer. *See* CP 77. An independent medical examination involves a physical examination of the worker. *See* WAC 296-23-347. An IME is "[a]n objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition." WAC 296-23-302. IMEs "may only be conducted by department-approved examiners." WAC

296-23-302. A review of medical records is not an independent medical examination. *See* WAC 296-23-347.

B. In 2016 and 2017, Zellmer Asked for Public Records Related to “Independent Medical Examinations” by the Four Doctors Who Reviewed His Records

In 2016 and 2017, Zellmer sent a series of public records requests to the Department: (1) request ID 112075, which Zellmer made on July 3, 2016 (hereinafter “Request No. 1”), (2) request ID 113598, which he made on October 4, 2016 (hereinafer “Request No. 2”), (3) request ID 115355, which he made on February 4, 2017 (hereinafer “Request No. 3”), and (4) request ID 115317, which he made on February 7, 2017 (hereinafer “Request No. 4”). CP 41, 49, 60, 110. The substance of each, and the Department’s response to each, follows.

1. Request No. 1

In a letter dated July 3, 2016, and received by the Department on July 8, 2016, Zellmer wrote:

I seek the following public records from your agency:

1. All order(s) for the authorization of (4) Independent Medical Examinations by: Steven G. Fey, Ph.D., H. Berryman Edwards, M.D., Alfred I. Blue, M.D., Dennis Stumpp, M.D., M.S. These IMEs would of been authorized under one of these claims possible N767257, Y154479, Y480253.
2. All billing(s), [invoice] statements by each of the providers for the IMEs as [described] above in section 1 of this request.

3. All warrants of payments for each of the IMEs as [described] above in section 1 in this request. (Copy of check sent to provider for IMEs).

CP 49.

The Department assigned this request ID 112075 and responded by letter on July 15, 2016, estimating that it would produce the records by August 26. CP 46, 52. In this July 15 letter, the Department stated:

We interpret your request to seek the following records:

1. All order(s) for the authorizations of the four Independent Medical Examinations by: Steven Fey, Ph.D; H. Berryman Edwards, MD; Alfred Blue, MD; Dennis Stumpp, MD, MS.
2. All billings, invoice statements for each provider for the IME's
3. All warrants of payments for each of the IME's

If our interpretation is incorrect, please identify the specific record you wish to have copied.

CP 52.

Laurel Chastain, a staff member in the public records unit, searched for responsive records. CP 46. She sent the records request to the two Department divisions that she determined would be most likely to have responsive records—the Insurance Services Claims Administration and Training Division and the Insurance Services Medical Information and Payment System Division. CP 46-47. These were divisions within the Department that would be most likely to have responsive records. *See* CP

239 (“For billing, we always requested MIPS.”), 273. The Insurance Services Claims Administration and Training Division responded that it could not locate any IMEs completed by any of the four doctors, so “there were no IME bills, invoices, warrants, or authorizations to provide for the doctors requested because they did not perform IMEs.” CP 47. Both divisions responded that they could not locate any responsive records. CP 47.

Chastain also searched for responsive records in the Organized Information Online Integrated Document Management (ORION) database, which contains the Department’s records for industrial insurance claim files, but she could find no responsive records. CP 248-49. Chastain’s search revealed no responsive records, and further revealed that none of the four providers conducted IMEs in the three claims Zellmer identified in his request: N767257, Y154479, and Y480253. CP 47, 54.

On August 26, 2016, the Department mailed a closing letter to Zellmer stating:

We have searched the department’s files and could find no records of the providers Steven G. Fey; Berryman Edwards; Alfred Blue; or Dennis Stumpp, performing an Independent Medical Exam (IME) for the claim numbers N767257; Y154479; and Y480253. We have no records responsive based on the information provided in the request.

This completes my response and this request is now closed.

CP 54. Zellmer did not respond to this letter.

2. Request No. 2

In a letter received by the Department on October 10, 2016, Zellmer made a new request:

I would like to request the following items from each of these requests and to expand what has already been provided.

I would like a copy of each pdf file provided under ID 76369¹ of each of the four forensic investigations under claims of Joel Martin Zellmer to be supplied in paper format.

1. fey_20100804153223.pdf
2. edwards_20100804153654.pdf
3. blue_20100804153836.pdf
4. stump_20100804153259.pdf

I would like to request items beyond this to include authorization orders for each of these IMEs listed above doctors. I would also like a copy of any payments made to each of them.

The IMEs were done as part of a[n] L&I criminal investigation. Some of the claim numbers are the following N767257, Y154479, and Y480253. These payments to each of these doctors are:

1. Fey \$35,700.00
2. Edwards \$3,850.00
3. Blue \$5,400.00
4. Stumpp \$4,200.00

I would like a copy of each payment made and the order authorizing each payment/IME.

CP 60.

¹ The Department provided records to Zellmer in response to an earlier public records request with request no. 76369. The contents of that request is not in the record on appeal.

The Department assigned this request ID 113598 and responded by letter on October 17 estimating that it would produce records by December

20. CP 63-64. The Department's letter stated:

I interpret your request to be for a paper copy of the following:

Item 1 A copy of the PDF files provided in PRR76369

- a. Few_20100804153223.pdf
- b. Edwards_20100804153654.pdf
- c. Blue_20100804153836.pdf
- d. Stump_20100804153259.pdf

Item 2 A copy of the all IME (Medical Information Payment System-MIPS) payments for the following claims of Joel Zellmer: P124792, P196690, T108247, X464295, Y453494, X225608, Y154479, N767257, Y110136, Y480253

Item 3 A copy of the authorization orders for any IMES performed for claims P124792, P196690, T108247, X464295, Y453494, X225608, Y154479, N767257, Y110136, Y480253

Item 4 A copy of the payment and order authorizing the following IME payments related to Joel Zellmer:

- a. Dr. Fey \$35,700
- b. Dr Edwards \$3,850
- c. Dr. Blue \$5,400
- d. Dr. Stump \$4,200

.....

If you have any questions or if I have interpreted your request incorrectly please let me know.

CP 63-64 (emphasis omitted).

On December 23, the Department sent Zellmer another clarification letter, which also informed him that responsive records to Item 1 had been destroyed under the Department's retention schedule:

I was recently assigned your request and to recap, your request is being interpreted to be for paper copies of the following:

Item 1: A copy of the following PDF files provided in public record request (PRR) number 76369:

- a. fey_20100804153223 .pdf
- b. edwards_20100804153654.pdf
- c. blue_20100804153836.pdf
- d. stump_20100804153259.pdf

Item 2: A copy of the following records from each Independent Medical Exam (IME) provider on your claims listed below:

- a. Authorization orders
- b. A report of any payments made

List of IME providers:

- Steven G. Fey
- Berryman Edwards
- Alfred Blue
- Dennis Stump

List of your claim numbers:

- N767257 • P196690 • X225608
- Y154479 • T108247 • Y110136
- Y480253 • X464295
- P124792 • Y453494

In response to **Item 1:** PRR 76369 is past retention and has been destroyed per our retention schedule. We only keep these types of records for two years. In order to search for the records with the programs, please identify what kind of records each of these files are and what kind of file they are a part of. For example: a Notice of Assessment in a claim investigation.

Please note that depending on the record type, these records may also be past retention with the business programs and may no longer be available.

Please provide the requested clarification by **January 10, 2017**, if I have not received a response regarding this item by this date, I will assume you want to cancel your request for this item.

In response to **Item 2**: We require time to locate, assemble, and scan any identified records. We will also be checking these materials, pursuant to the Revised Code of Washington (RCW) 42.56, to determine whether any of the information requested is statutorily exempt from disclosure and therefore unavailable for public inspection under Washington Law.

We expect to mail the records to you by **January 27, 2017**.

CP 66-67.

Zellmer responded in a letter, which the Department received on January 11, 2017, stating:

I am in receipt of your letter dated December 23, 2016, which I received on January 4, 2017. You requested clarification of my request.

1. What kind of records/what kind of file. The records were a part of a medically related worker compensation claim. The four doctors listed in my request were hired by L&I as a forensic independent medical examiner in the context of a criminal fraud investigation.

Based on the above information, I expect that any confusion on your part is cured and should satisfy your question.

Just to be clear, as I expect to be responsive to my request, I am seeking records that demonstrate authorization (by

L&I) and payment of monies to the four Independent Medical Examiners listed in my request for public records dated October 4, 2106 pursuant to my worker compensation injury claims to the Washington Department of Labor and Industries.

CP 69.

Public records unit staff member Mara Osborn reviewed the request and clarifications, and routed the request to the two divisions within the Department whom she determined would be most likely to have responsive records—the Insurance Services Claims Administration and Training Division and the Insurance Services Health Services Analysis Division. CP 56-57. She chose these divisions based on her knowledge and experience in searching for records in response to requests. CP 273. When asked why she routed the request to those two divisions, she stated:

I wanted to be sure there wasn't a document that maybe didn't live in MIPS or within that MIPS program. We have – the agency has a program titled MIPS as well as a system and they live within the health services analysis group. And so I had routed to them specifically so that if – because I had seen they'd pulled bills before. So I wanted to be very thorough and those were stretching out beyond just a copy of the claim file or what was in an automated system.

CP 267.

A staff member from Insurance Services Claims Administration informed Osborn that employees in the program had checked multiple areas for records and stated that they had no responsive records. CP 57. A Heath

Services Analysis employee stated that there did not seem to be any bills for independent medical examinations (IMEs) for the doctors or claims listed in Mr. Zellmer's request. CP 57. That employee stated there were no responsive records. CP 57. Both divisions responded that they could not locate any responsive records. CP 57.

On January 26, the Department mailed Zellmer a closing letter informing him that it had conducted a search but could not find responsive records because:

The Independent Medical Exams (IMEs) on your claim files were not performed by any of the IME providers you listed. All but one of the claim investigations for your claims have been destroyed per our retention schedule. The only remaining claim investigation was about another individual and did not contain any information regarding your claim or any of your IMEs.

CP 72. Zellmer did not reply.

3. Request No. 3

In a letter received by the Department on February 9, 2017, Zellmer asked for copies of IMEs during a specific time period:

I would like to request a copy of the following records from your agency. Any IMEs done between November 1, 2009 thru April 30, 2010. Please look for any IMEs done in claims N767257, Y154479, and Y480253.

CP 41.

The Department assigned this request ID 115355 to employee Donna Desch. CP 38. Through prior searches for the same records by the Department, she was aware that there were no responsive records. CP 38. In the process of the Department's multiple searches through different divisions and programs in response to Zellmer's previous request IDs 112075 and 113598, the Department consistently determined that there were no IMEs performed in the three claims listed by Zellmer for the time period from November 1, 2009 through April 30, 2010. CP 46-47, 57. Thus, by the time of request ID 115355, the Department had already conducted multiple searches and determined that there were no records responsive to his request.

Nonetheless, Desch searched the ORION database that the Department uses to store, organize, and recall workers' compensation claim files. CP 39. She was trained in using this system; she located the workers' compensation claim files that Zellmer referenced in his request and searched whether there were any IMEs among the records for the time period November 1, 2009 through April 30, 2010. CP 39, 402-03. She found no IMEs for this period. CP 39, 403.

The Department sent Zellmer a letter dated February 10, 2017, stating that it had searched the Department's records and found no responsive records. CP 43. He did not reply.

4. Request No. 4

In a letter received by the Department on February 7, 2017, Zellmer asked for the following records, without including any IME qualifier:

I seek the following public records from your agency:

- 1) Annual Claimant History Profile. I would like it for the years of 2007 thru 2011.
- 2) Firm Statement of Awards. I would like it for the years of 2007 thru 2011.
- 3) Remittance Advices. I would like it for the years of 2007 thru 2011.

I would like these records from any claim number that is assigned to Joel M. Zellmer. These reports are maintained in your electronic system called Enterprise Output Solution (EOS). The claim numbers are N767257, Y154479, and Y480253.

CP 110.

The Department assigned this request ID 115317. CP 111-15. The Department provided Zellmer two installments of records totaling 158 pages, consisting of records from MIPS. CP 114-15.

Zellmer did not assert a claim against the Department in this action relating to request No. 4. CP 1-13.

C. The Superior Court Dismissed Zellmer's Lawsuit Alleging Public Records Violations

On January 12, 2018, Zellmer sued the Department, alleging violations of the Public Records Act. CP 1-13. The superior court granted summary judgment in the Department's favor on all of Zellmer's claims

and it denied his request for reconsideration. CP 438-39, 455. He appeals. CP 453-57.

IV. STANDARD OF REVIEW

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.” RCW 42.56.550(3); *see also Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Summary judgment is reviewed de novo. *Neighborhood Alliance of Spokane Cty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). The court examines whether disputed issues of material fact exist and whether the moving party was entitled to judgment as a matter of law. CR 56(c); *Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 733, 218 P.3d 196 (2009). In reviewing an order granting a motion for summary judgment, the appellate court considers only the evidence and issues called to the attention of the trial court. RAP 9.12. Mere allegations, argumentative assertions, conclusive statements, or speculation do not raise issues of material fact sufficient to preclude a grant of summary judgment. *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011).

V. ARGUMENT

The Department fully complied with the PRA so the superior court correctly granted summary judgment to the Department. The Department did not violate the PRA for two reasons. First, the records that Zellmer requested did not exist because he asked only for records regarding IMEs and none of the doctors he named in his request performed IMEs. An agency cannot disclose records that do not exist. Second, and independently, the Department's searches for records in response to each of the four requests were adequate. The searches were reasonably calculated to uncover the records of IMEs that Zellmer requested.

First, none of the four doctors Zellmer named had performed IMEs, so there were no responsive records to produce. Zellmer submitted public records requests asking for records of "independent medical exams" or "IMEs," and related records. An independent medical exam is a specific type of exam, commonly referred to as an IME in workers' compensation parlance, which is used in order to resolve issues on a claim, such as a question regarding the causation of a condition and a worker's level of impairment. CP 73. WAC 296-23-302 defines an IME as "[a]n objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition. These examinations may only be conducted

by department-approved examiners.” It also defines an IME provider as a “firm, partnership, corporation, or individual licensed doctor (examiner) who has been approved and given an independent medical examination (IME) provider number by the department to perform IMEs.” WAC 296-23-302. An independent medical examination involves an examination of the worker. WAC 296-23-347. No such records existed for the four doctors because, though they are approved to perform independent medical examinations in Washington, none of them performed an independent medical examination on Zellmer in any of the three claims he identified in his request.

Lori Rigney, Medical Treatment Adjudicator, confirmed that the services performed by the four doctors on Zellmer’s claims were not IMEs. CP 77. Donna Desch, Laurel Chastain, and Debra Hatzialexiou also confirmed that there was no record of IMEs performed by those doctors on the three claims at issue. CP 39, 47, 74. Zellmer specifically sought records of IMEs and records of IME-related billing. Thus, the Department’s searches for those specific types of records, and its responses, were appropriate.

Second, the Department’s search was adequate. The Department searched multiple locations for records of IMEs based upon Zellmer’s specific parameters and found no responsive records. The Department’s search was reasonably calculated to uncover all relevant records. The

Department uncovered other documents in response to his fourth request, but that request did not ask only for records of IMEs. In response to each request, the Department conducted an adequate search.

A. Zellmer’s Lawsuit Regarding Request No. 1 Was Filed Late, So This Court Should Not Consider His Challenge to that Request

As a threshold matter, the Court should not consider Zellmer’s claims under Request No. 1 because he filed his claim beyond the PRA’s one-year statute of limitations. RCW 42.56.550(6) provides that “[a]ctions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” The Department issued its final response to this request in August 2016 when it sent the closing letter to Zellmer that stated:

We have searched the Department’s files and could find no records of the providers Steven G. Fey; Berryman Edwards; Alfred Blue; or Dennis Stumpp, performing an Independent Medical Exam (IME) for the claim numbers N767257; Y154479; and Y480253. We have no records responsive based on the information provided in the request.

This completes my response and this request is now closed.

CP 54. Zellmer should have filed his complaint in August 2017, but he did not file his complaint until almost five months later, in January 2018. CP 1, 54.

Zellmer's challenge was late. The statute is a strict bar that, in the absence of an equitable exception, a PRA action "must be filed" within the one year limit. *Belenski v. Jefferson County*, 186 Wn.2d 452, 460-61, 378 P.3d 176 (2016) (also noting that "the legislature intended to impose a one year statute of limitations beginning on an agency's final, definitive response to a public records request"). "When a requesting party is dissatisfied with an agency's response to a records request, it may bring an action under the PRA but must do so 'within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.'" *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 527, 199 P.3d 393 (2009) (quoting RCW 42.56.550(6)). The Court should not consider Zellmer's arguments about this request.

And although *Belenski* allowed the trial court to determine whether the statute of limitations should be equitably tolled, there is no basis to do so here. *See* 186 Wn.2d at 462. Equitable tolling does not excuse Zellmer's late lawsuit regarding this request, contrary to his arguments. AB 17-19. The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and a plaintiff who has exercised due diligence. *See Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Zellmer cannot meet either predicate.

The Department acted reasonably, not in bad faith or with deception. It was reasonable for the Department to rely on the “IME” or “independent medical examination” language in Zellmer’s request to search for records only involving examinations of that type. Relying on the language in a public records request to guide the scope of search is not bad faith or deception. It is an attempt to provide what the requester seeks. The Department’s attempt to provide Zellmer the records he asked for does not warrant the application of equitable tolling.

Nor has Zellmer acted with diligence. He did not respond to the Department’s closing letter. He filed a lawsuit five months late. And although he submitted additional public records requests, each asked for different records, so he cannot rely on these independent requests to prove diligence. Because he failed to challenge the Department’s response within a year, this Court should not consider his late challenge.

B. The Records Zellmer Requested Do Not Exist Because None of the Doctors He Named in His Requests Performed IMEs

There is no PRA violation because the records that Zellmer requested did not exist. As such, there were no records for the Department to produce. The types of records he sought, records of IMEs, and other documents related to those IMEs, for the four medical providers on his

workers' compensation claims, did not exist. The four providers he named never conducted IMEs on his claims.

At the heart of Zellmer's requests, and the reason why the Department could not locate responsive records, is that he continually asked for independent medical examinations (IMEs) and related records from four medical providers for three of his workers' compensation claims: N767257, Y154479, and Y480253. Because the Department's database showed no records of any IMEs having been performed by those providers on those claims, there were no records responsive to Zellmer's requests.

As noted above, an IME is "[a]n objective medical-legal examination requested (by the department or self-insurer) to establish medical findings, opinions, and conclusions about a worker's physical condition." WAC 296-23-302. An IME is not an "ancillary descriptor." AB 13. Rather, it is a specific type of medical examination authorized by the Department and has many features that distinguish it from a common medical report or other evaluation. CP 73. Although the four providers listed in Zellmer's request did provide record review services on his claims, they did not perform IMEs. Accordingly, the Department's searches uncovered no IMEs.

The touchstone of a PRA request is that the request must be for "identifiable records." RCW 42.56.080(2); *see Beal v. City of Seattle*, 150

Wn. App. 865, 875, 209 P.3d 872 (2009). 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*, 150 Wn. App. at 872; *see* RCW 42.56.080(1). Absent this statutory requirement, agencies would have to go beyond the administrative function of searching for records and would need to take on the impossible task of reading their requestors’ minds to determine all the possible additional records or information the requestor might want; Washington courts have consistently cautioned against this result. *Levy v. Snohomish County*, 167 Wn. App. 94, 98, 272 P.3d 874 (2012); *Greenhalgh v. Dep’t of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011); *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

While the PRA broadly favors disclosure, “it does not provide a right to citizens to indiscriminately sift through an agency’s files in search of records or information which cannot be reasonably identified or described to the agency.” *BIAW*, 152 Wn. App. at 734 (internal quotations omitted); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998).

Although the term “public record” is broad, if the records do not exist then there is nothing to disclose and the agency has no obligation to create or produce such records. *Smith v. Okanogan Cnty.*, 100 Wn. App. 7,

19, 994 P.2d 857 (2000). It is not a denial of a public record, nor a public records violation, when an agency does not provide a requestor with a record that does not exist; as such, there is no agency action to review under the PRA. *BLAW*, 152 Wn. App. at 739; *Beal*, 150 Wn. App. at 875 (new documents or a synthesis of existing documents are not subject to the PRA); *Sperr v. City of Spokane*, 123 Wn. App. 132, 137, 96 P.3d 1012 (2004).

Zellmer's requests all sought records for four medical providers that he described as being for IMEs, even though none of those doctors performed IMEs on any of the relevant claims. The searches by Department public records unit staff and multiple Department divisions consistently showed that Zellmer did not have IMEs performed by those providers on his workers' compensation claims. CP 39, 74, 77, CP 248, 402-03.

And although Zellmer contends that the PRA is liberally construed in favor of disclosure of records, this does not mean that an agency cannot rely on a requestor's specific language to conduct a specific search for specific records. While there is no official format for a PRA request, the requestor must "identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Viewed in this context, Zellmer's identification of the subject matter

and the specific types of records—records of IMEs—does not reasonably suggest that he was seeking other types of records. Indeed, when he did omit the IME qualifier from Request No. 4, he received non-IME records. *See* CP 110-15.

The declarations of Debra Hatzialexiou and Lori Rigney establish that ORION, the Department's database commonly used for storing the types of records Zellmer requested, showed no responsive records. CP 73-74, 75-78. Lori Rigney's declaration further established that the Department uses specific billing codes for IMEs in its databases, and that the four medical providers that Zellmer listed in his requests did not show any services in conjunction with IME billing codes. CP 76-77. The manner in which the Department maintains IME and related documents in its normal course of business would have revealed them in its ORION database (if any such records existed), but multiple searches of that database did not find the records that Zellmer insists the Department should have produced. CP 39, 74, 77, CP 248, 402-03.

If Zellmer wanted something else—a record of something that was not an IME and not related to such an examination—it was incumbent upon him to ask for it. When a request is specific and clear about the records requested, the agency will not be found to have violated the PRA by producing only the exact records requested. *Faulkner v. Dep't of Corr.*,

183 Wn. App. 93, 101, 332 P.3d 1136 (2014); *Greenhalgh*, 160 Wn. App. at 715-16.

In *Faulkner v. Department of Corrections*, the agency received a request for a copy of “the CRCC Local Mail Rejection Disposition Notice Mail Rejection F—4—60,” a document that did not exist. *Faulkner*, 183 Wn. App. at 101. The court held the agency “did not have a duty to produce a document that was not in existence.” *Id.* The court also rejected Faulkner’s argument that the agency should have disclosed a different document, entitled “Options for Rejected Mail,” because Faulkner’s request “did not identify the ‘Options’ document with reasonable clarity to allow [the agency] to locate it.” *Id.* The same analysis applies here.

In *Greenhalgh v. Department of Corrections*, an inmate made a series of specific requests for “inmate store price list” records from the Department of Corrections (DOC). 160 Wn. App. 715. He filed suit against the agency alleging that it withheld records showing price lists for wristwatches. *Id.* at 710. This Court rejected that argument and the inmate’s argument that DOC should have provided more documents in response to his request. *Id.* at 715-16. The Court’s review of the record showed that DOC complied with the specific requests that Greenhalgh made, but that his requests began to expand over time and the agency demonstrated its attempts to provide Greenhalgh with additional

information. *Id.* The Court reiterated that “[t]he PRA does not ‘require public agencies to be mind readers.’” *Greenhalgh*, 160 Wn. App. at 714 (quoting *Bonamy*, 92 Wn. App. at 409). Zellmer similarly expands the scope of his requests in litigation, long after the Department provided him its final responses.

Because the records Zellmer sought here do not exist, he fails to show a PRA violation. On this basis, the Court should affirm the superior court’s grant of summary judgment.

C. Even if the Court Concludes That the Records Zellmer Requested Existed, the Department Performed Adequate Searches

The Department searched based on Zellmer’s specific parameters in his request and found no responsive records. But even assuming that responsive records existed, then the Department still complied with the PRA because it conducted an adequate search for each request.

Even if a record exists but was not provided, the inquiry under the PRA is not whether the agency failed to produce every responsive record in existence, but only whether the agency conducted an adequate search. *Neighborhood Alliance*, 172 Wn.2d at 719-20; *Block*, 189 Wn. App. at 278. “The issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.” *Neighborhood Alliance*, 172 Wn.2d at 720. Whether an

agency complied with the PRA is a fact-specific inquiry. *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 653, 334 P.3d 94 (2014); *Block v. City of Gold Bar*, 189 Wn. App. 262, 271, 355 P.3d 266 (2015).

The adequacy of a records search is “judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.” *Hobbs v. State*, 183 Wn. App. 925, 943, 335 P.3d 1004 (2014) (quoting *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012)) (internal quotation marks omitted). The issue is not whether any further documents might conceivably exist, but whether the search was adequate. *Hobbs*, 183 Wn. App. at 943.

A court judges the adequacy of the agency’s search for records by a standard of reasonableness. *Neighborhood Alliance*, 172 Wn.2d at 720. An agency need search only those places where it is *reasonably likely* that a record may be found, not every possible place a record may conceivably be stored. *Id.* A reasonable search need not be exhaustive. *Kozol v. Dep’t of Corr.*, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

An agency may show its adequate search by “rely[ing] on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.” *Neighborhood Alliance*, 172 Wn.2d at 721. The searches

undertaken by public records unit staff, described in the declarations presented to the superior court, show that the Department conducted an adequate search reasonably calculated to uncover responsive documents, but could find no records. CP 38-39, 45-47, 55-58.

1. The Department performed an adequate search in response to Request No. 1

This Court should hold that Zellmer's claims related to Request No. 1 are time barred. But even if this Court reaches the merits of his claims related to this request, it should hold that the Department conducted an adequate search.

Zellmer sought the following records:

1. All order(s) for the authorization of (4) Independent Medical Examinations by: Steven G. Fey, Ph.D., H. Berryman Edwards, M.D., Alfred I. Blue, M.D., Dennis Stumpp, M.D., M.S. These IMEs would have been authorized under one of these claims possible N767257, Y154479, Y480253.
2. All billing(s), invoices, statements by each of the providers for the IMEs as discribed above in section 1 of this request. [sic]
3. All warrants of payments for each of the IMEs as discribed above in section 1 in this request. (Copy of check sent to provider for IMEs).

CP 49.

The Department's letter stated:

We interpret your request to seek the following records:

1. All order(s) for the authorizations of the four Independent Medical Examinations by:
Steven Fey, Ph.D; H. Berryman Edwards, MD; Alfred Blue, MD; Dennis Stumpp, MD, MS

2. All billings, invoice statements for each provider for the IME's
3. All warrants of payments for each of the IME's

If our interpretation is incorrect, please identify the specific record you wish to have copied.

CP 52.

On August 26, 2016, the Department mailed a closing letter informing Mr. Zellmer that it had performed a search of records of IMEs performed by the four providers identified in his request on his three industrial insurance claims (and records related to any such IMEs), and that it had found no responsive records. CP 54. There were no responsive records because none of the four providers conducted IMEs in Mr. Zellmer's claims N767257, Y154479, and Y480253.

Public records unit staff member Chastain routed the records request to the two Department divisions she determined would be most likely to have records: the Insurance Services Claims Administration and Training Division, and the Insurance Services Medical Information and Payment System Division. CP 46-47. Both divisions responded that they could not locate any responsive records. CP 47. She also searched for records in the ORION database, which contains the Department's records for industrial insurance claim files, and could find no responsive records. CP 248 (Dep. of

Chastain Jan. 9, 2019). This demonstrates a thorough and adequate search in response to Zellmer's request.

Zellmer's requests were specific and, after his own clarifications, were distilled to records related to IMEs. When a request is specific and clear about the records requested, the agency will not be found to have violated the PRA by producing only the exact records requested. *Faulkner*, 183 Wn. App. at 101; *Greenhalgh*, 160 Wn. App. at 715-16.

Zellmer suggests that Chastain, the Department employee who responded to his request, understood his request as "being for billing records." AB 13 (citing CP 232). But in response to his questions, she stated that she understood that Zellmer was asking for "IME medical billing" and "IME billing information" for the doctors listed in the request. CP 233-34. And that is consistent the language of the request. Zellmer asked for billings, invoices, and statements "by each of the providers for the IMEs as [described] above" and "all warrants of payments for each of the IMEs as [described] above." CP 49. It was reasonable for the Department to conclude, as Chastain did, that Zellmer sought records of IMEs and records related to such examinations.

Zellmer omits critical language about IMEs from his request when he characterizes his request on AB 14 as for "billing(s), invo[i]ces, and statements by each of the providers." The request instead asks for "[a]ll

billing(s), invo[ic]es, statements by each of the providers for the IMEs as [described] above in section 1 of this request.” CP 49. Since Zellmer asked for billings, invoices, and statements for IMEs, it was reasonable for the Department to search only for such records.

Zellmer argues that the Department failed to search the Medical Information and Payment Systems database (MIPS). AB 15. But the Department did search MIPS and found no records of IMEs on his claims for his four listed doctors. CP 46-47, 146-47, 267. And it would not have been reasonably likely for the Department to find records of IMEs in EOS because that is not the database that the Department uses to store records of IMEs and related records; ORION is. CP 77.

The Department’s Health Services Analysis division manages MIPS. CP 189. Department public records unit staff member Chastain did include a request to search within the Department’s MIPS division’s records. CP 146-47. But Zellmer did not request non-IME records in the MIPS or EOS databases, and instead specifically requested records related to IMEs, thus the Department did not uncover IME-related billing in MIPS or ORION because none existed. *See* CP 146-47. If such records existed, they would have been present in the ORION database; because the Department could not uncover them in ORION or MIPS, it would not be reasonably likely that

they would be located elsewhere. Indeed, there were no records of IMEs and thus no records responsive to Zellmer's request.

Zellmer argues that Chastain makes "no attempt to describe the type of search performed, nor which places were searched." AB 15-16. But in fact she did make an assessment that both the Claims Administration and Training, and the MIPS, divisions of the Department could potentially have responsive records. CP 46. And the request's tracking sheet shows that the Department "reviewed IME's in ORION for the claim numbers given and found that none of the doctors mentioned performed any of the IME's." CP 146.

He also argues that as soon as Department staff "realized the doctors' services had not been IME's, their duty under the PRA was to follow obvious leads as they were uncovered." AB 15. But this demands a more stringent standard than articulated in *Neighborhood Alliance*. 172 Wn.2d at 720. An agency need search only those places where it is *reasonably likely* that a record may be found, not every possible place a record may conceivably be stored. *Neighborhood Alliance*, 172 Wn.2d at 720. A court judges the adequacy of the agency's search for records by a standard of reasonableness. *Id.* A reasonable search need not be exhaustive. *Kozol v. Dep't of Corr.*, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

The court in *Neighborhood Alliance* endorsed the view that “an agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” 172 Wn.2d at 722 (internal quotation omitted). But this highlights that an agency need only seek out further record sources if they are *likely* to turn up the information requested. *Id.* at 722. Here, because the ORION database revealed that there were no IMEs performed or authorized on Zellmer’s claims, there would be no billing or payments for IMEs in ORION or any other Department system. CP 77. ORION is the “Department’s database for organizing, retaining, and search for claim file records, including records of IMEs, billings, invoices, warrants, payments, and other claim-related documents.” CP 77. Thus there were no other obvious leads or likely sources for responsive records within the parameters of Zellmer’s request.

Moreover, Zellmer’s argument, that the Department should have searched beyond IMEs even though his request specified IME records, is even more extreme than the impossible task of mind reading rejected by *Greenhalgh, Levy, and Bonamy*. He expects the Department to create new search parameters and search for records that he never requested. The Court should reject his attempts to expand his request in litigation. This would also place an obligation that agencies would never be able to fulfill; if agencies were obligated to create new criteria and expand requests, they

would have no way of knowing whether they have met their obligations under the PRA.

Here, as in *Faulkner* and *Greenhalgh*, the Department conducted its search based on the specific parameters in Zellmer's requests: IMEs are a specific type of medical examination performed in the administration of industrial insurance claims, but there are no records showing that the four providers listed in his public records requests performed any IMEs on these three claims. WAC 296-23-302; CP 73-74, 77.

As discussed in Part V. A. above, an IME is a specific type of medical examination in workers' compensation claims in order to resolve issues such as causation of a condition and level of impairment. CP 73; WAC 296-23-347. Zellmer contends that the Department did not perform any search at all for the existing billing and payment records themselves. AB 18-19. But that is not correct; the Department maintains IME-related billing and payment records in the ORION database. CP 76. And the Department searched through this database but could not find any IME-related records for Zellmer, billing or otherwise, in the database. CP 39, 74, 77, CP 248, 402-03. Given his choice to narrow the type of records to the specificity of "IME" records, it was not unreasonable for the Department to focus its search on the ORION database. But the Department went further and contacted the Department's Claims Administration and Training Division

and the MIPS Division, both of which responded that they could not find responsive records. CP 46-47, 146-47. It was reasonable for the Department to look in these divisions because they handle the Department's industrial insurance services and MIPS specifically handles the medical payments.

Because the four doctors listed in Zellmer's request did not perform IMEs on his three claims, and because the declarations of Department employees establish that there were no responsive records, the Department did not violate the PRA in its response to Request No. 1. Although the Court should hold that Zellmer is time-barred from seeking relief on his Request No. 1. But even if the Court reaches the question of whether the Department's search was adequate, it should affirm the superior court and hold that the search was adequate and that the Department did not violate the PRA in its response to request Request No. 1.

2. The Department performed an adequate search in response to Request No. 2

In Request No. 2, Zellmer's request there was a series of correspondence between the Department and Zellmer described in Part III.B.1. CP 69. After multiple letters, Zellmer self-limited his requests to: "records that demonstrate authorization (by L&I) and payment of monies to the four *Independent Medical Examiners* . . . pursuant to my worker compensation injury claims." CP 69 (emphasis added) (referencing the four

independent medical providers). Zellmer's specific limitations set the parameters for the Department's search. It was not "perfunctory" to search just for the records that Zellmer asked for, as he claims. AB 19.

Public records unit staff member Osborn routed the records to the two Department divisions she determined would be most likely to have records: Insurance Services Claims Administration and Training Division, and the Insurance Services Health Services Analysis Division. CP 56-57. Zellmer, citing *Neighborhood Alliance*, says that Osborn did not provide any facts about the type of search performed, or the places searched, but this is incorrect. AB 20.

Zellmer overextends the language in *Neighborhood Alliance* to argue that the Department's declarations were inadequate because they did not contain all search terms that the Department used. AB 20. But this is not required under the PRA. *Neighborhood Alliance* reasoned that affidavits were but one avenue that the court provided by which an agency can demonstrate that its search was adequate. 172 Wn.2d at 721. In that case, the court reasoned that an "agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith" and recommended that such affidavits "should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Id.* at 720.

But *Neighborhood Alliance* neither required such affidavits in all adequate search inquiries, nor required affidavits to always include such information in order to meet the agency's burden. Where an agency's obligations under the PRA were mandatory, the court was clear about this. *See, e.g., Neighborhood Alliance*, 172 Wn.2d at 723 (if agency finds that information was moved, then "agency must determine where the information has been moved and conduct a search there"), 732 ("agency must make a good faith effort to conduct a search"), 750 ("agency shall retain possession" of records once they become subject to a public records request). But here, the court's use of the term "should" reflects that including such information in affidavits is but one way that an agency can meet its burden of showing an adequate search.

Although the Department is not obligated to include the information that Zellmer insists it must include, Osborn's declarations and statements under oath nonetheless provide sufficient details of the Department's search to show that the search was adequate.

Osborn explained in her declaration that she determined that two divisions within the Department's Insurance Services, Claims Administration and Training Division, and Health Services Analysis, would be most likely to have records. CP 55-56. She explained that the point of contact in the Claim Division forwarded an email response from employees

in the program that they had no responsive records, despite checking multiple areas, and that the point of contact in the Health Services Analysis Division could not find responsive records. CP 57. It explained that a Health Services Analysis employee stated that there were no bills for IMEs for the doctors or claims listed in Zellmer's request. CP 57. Thus, contrary to Zellmer's assertions, the Department did search for billing records if it could find no bills. AB 19-20; CP 57. Osborn also testified that she routed the search requests to those two divisions because she "wanted to be sure there wasn't a document that maybe didn't live in MIPS or within that MIPS program." CP 267.

In January 2017, the Department mailed Zellmer a closing letter informing him that it had conducted a search but could not find responsive records because:

The Independent Medical Exams (IMEs) on your claim files were not performed by any of the IME providers you listed. All but one of the claim investigations for your claims have been destroyed per our retention schedule. The only remaining claim investigation was about another individual and did not contain any information regarding your claim or any of your IMEs.

CP 72. Zellmer did not reply.

The records that Zellmer sought were specific. He narrowed his request to "Independent Medical Examiners." CP 69. The Department reasonably understood this to mean that he only wanted records of IMEs

performed by Independent Medical Examiners. There were no IMEs conducted by those four doctors on Zellmer's workers' compensation claims.

Because Zellmer qualified his requests as being for IMEs, it was appropriate for the Department to search whether IMEs were performed on his workers' compensation claims by those four doctors.

If a requestor fails to respond to an agency request for clarification, the agency is not required to respond to any unclear portions of the request. RCW 42.56.520(3)(b). The Department's January 26, 2017 letter explained to Zellmer that its search did not uncover any records of IME on his claims because none of the four IME providers he listed performed IMEs on his specified claims. CP 72. This alerted him to why the Department was not finding any responsive records and gave him the opportunity to seek other types of records or clarify his request, yet he chose not to do so. *See Faulkner*, 183 Wn. App. at 101; *Greenhalgh*, 160 Wn. App. at 715-16.

An agency need not produce or create a document that does not exist. *Sperr*, 123 Wn. App. at 133; *Smith*, 100 Wn. App. at 13-14. Similarly, if records do not exist because they were destroyed per the agency's retention schedule, there is no record to produce and thus no PRA violation. *See BLAW*, 152 Wn. App. at 729, 742. Because Zellmer self-limited his request through his January 5, 2017 letter, the Department had no obligation to

search for the four PDF files that Zellmer requested from PRR 76369. CP 60, 66-67, 69. Even still, the Department was not obligated to produce them because they no longer existed. CP 66-67. The Department's December 23, 2016 letter to Zellmer explained that it no longer had the records from PRR 76369 because that request was beyond their retention schedule and, accordingly, the records under that request had been destroyed per the schedule. CP 66.

Zellmer contends that the Department did not follow up or conduct additional searches after receiving clarifying information. AB 20. But the PRA does not require an agency to perform additional searches once the agency has already performed an adequate search in response to a request. Here, Zellmer's clarification, received January 11, 2017, indicated to the Department that he was only seeking records of IMEs performed by those four doctors. CP 69 (authorization and payment to "four Independent Medical Examiners"). The Department had already searched and determined that it did not find IMEs or IME-related records in response to his request. CP 57, 150-52 (public records request tracking sheet), 264-65, 267.

Zellmer argues that Osborn "admitted the claim number and name of a doctor was enough information needed to locate the records." AB 19

(citing CP 261-62). But Zellmer misstates Osborn's statement. Zellmer asked

If you received a request that sought records of a payment made to a medical provider in an injured worker claim and the requester provided only the name of the doctor and the claim number, would that be enough descriptive information for you . . . to search and locate responsive records?

CP 262. Osborn responded in the affirmative but this does not support Zellmer's implicit argument that it was sufficient to provide his claim number and name of a medical provider to locate the records that he now wants. *See* AB 19. Though Osborn confirmed that she could locate responsive records if a requestor sought records solely based on a claim number and doctor's name, Zellmer's argument ignores that his Request No. 2 qualified the types of records he sought as records related to IMEs, which defined the scope of responsive records. CP 69.

Zellmer specifically sought records of IMEs, and related records, by four IME providers on three specific industrial insurance claims. Because the doctors listed in Zellmer's request did not perform IMEs on his three claims, and because the declarations and testimony of Department employees establish that there were no responsive records, the Department did not violate the PRA in its response to request ID 112075. CP 39, 47, 72, 74, 77; *see also* CP 263-64 (Osborn Dep.). Accordingly, the Court should affirm the

superior court's grant of summary judgment and hold that the Department conducted an adequate search for records and complied with the PRA in responding to Request No. 2.

3. The Department performed an adequate search in response to Request No. 3

In Request No. 3, Zellmer sought "Any IMEs done between November 1, 2009 thru April 30, 2010. Please look for any IMEs done in claims N767257, Y154479, and Y480253." CP 41.

Public records unit staff member Desch logged into the ORION database that the Department uses to store, organize, and recall workers' compensation claim files. CP 39. She was trained in using this system; she located the claim files that Zellmer referenced in his request and searched whether there were any IMEs among the records for the time period November 1, 2009, through April 30, 2010. CP 39, 402-03 (Desch Dep.). She found no IMEs for this period. CP 39, 403 (Desch Dep.).

The searches undertaken by Desch and other public records unit staff, described in the declarations presented to the superior court, show that the Department conducted an adequate search reasonably calculated to uncover responsive documents, but they could find no records. CP 38-39, 45-47, 55-58. In Request No. 3, Desch searched ORION, where the Department would keep such records, but found no IMEs on Zellmer's

claims for November 1, 2009, through April 30, 2010. CP 39, 403 (Desch Jan. 9, 2019). She sent him a letter dated February 10, 2017, stating that they had searched the Department's records and found no responsive records. CP 43. He did not reply.

Because the Department's search into ORION was adequate, and because searches on Zellmer's other requests showed that he had no IMEs for his requested time period, the superior court properly granted summary judgment in the Department's favor and this Court should affirm.

Zellmer's request specifically referred to "any IMEs" performed during a 6-month period. CP 41. That is what the Department searched for. No IMEs were performed on his claim during this period, so there were no responsive records. Zellmer now argues that the Department did not search for billing and payment records, and suggests that Request No. 3 was for "the date range of the billing records" that he had requested in his previous two requests. AB 21. But this is not correct; the language in Request No. 3 does not refer to billing records at all. CP 41. Instead it asks for "IMEs done between November 1, 2009 thru April 30, 2010" on his claims N767257, Y154479, Y480253. CP 41. Because the request was only for IMEs, there was no reason for the Department to search for billing and payment records in MIPS, LINIIS, or any other database. *See* AB 21-22. Department employee Desch confirmed that she logged into ORION and searched for

Zellmer's claim files, and searched for IMEs in those claims. CP 39. She found no IMEs for Zellmer's listed claims for his specified time period. CP 39. IMEs would have been stored in the Department's ORION database, thus, if there were responsive records to Request No. 3, the Department would have located them in ORION. *See* CP 73-74. Accordingly, the Department's search was adequate.

4. The Department's response to Request No. 4 shows the Department's attention to detail in each request

In February 2017, Zellmer made an additional public records request which the Department assigned ID 115317. CP 110-15. The Department's compliance with this request is not at issue and is not one of the claims that Zellmer brings in his cause of action. CP 10-13.

Zellmer contends that the records that the Department provided in response to Request No. 4 should have been provided to him in response to his first three requests. AB 22-23. But this is incorrect; the first three requests are not comparable to this fourth request because in the fourth request he does not request IMEs or otherwise limit the scope of the request to IME-related records. In fact, he omits the qualifier "IME" from that request and, accordingly, received records that were unrelated to an IME.

His request sought the following records:

1) Annual Claimant History Profile. I would like it for the years of 2007 thru 2011.

2) Firm Statement of Awards. I would like it for the years of 2007 thru 2011.

3) Remittance Advices. I would like it for the years of 2007 thru 2011.

I would like these records from any claim number that is assigned to Joel M. Zellmer. These reports are maintained in your electronic system called Enterprise Output Solution (EOS). The claim numbers are N767257, Y154479, and Y480253.

CP 110.

The Department responded with 138 pages of records. CP 114.

Zellmer does not contend that the Department's response to this request was incomplete. Nor should the Department have produced these records in response to No. 1 (112075), No. 2 (113598), or No. 3 (115355). In those requests, Zellmer qualified each of them as being records of IMEs or related records. But Request No. 4 does not qualify his requested records in this way. It specifically seeks a different type of record.

Indeed, the Department's response to this fourth request demonstrates that the Department takes each public records request seriously and takes requestors at their word when they request specific records. Thus, when Zellmer omitted the qualifier of IME and instead chose specific other types of records, the result was that the Department found and provided different records. The results of this request support the Department's position that the inclusion or non-inclusion of the qualifier "IME" is critical

to the outcome of the search, and that the Department's searches in response to the first three requests were adequate.

D. The Trial Court Did Not Abuse Its Discretion in Denying Zellmer's Motion for Reconsideration

The trial court correctly denied Zellmer's motion for reconsideration. Zellmer asserts numerous legal errors, but the trial court did not abuse its discretion in denying the motion. AB 23-27.

There were no records responsive to Zellmer's first through third requests. Accordingly, the trial court properly granted summary judgment. Moreover, even if there were records responsive, the trial court's decision was correct because Zellmer's requests sought IMEs or related records, and the Department's searches properly focused on records within those parameters. The trial court's decision was correct.

E. Zellmer Is Not Entitled to Any Penalties

Zellmer is not entitled to any penalties because the Department complied with the PRA. But even if the Court determines that the Department violated the PRA, then it should not award Zellmer any penalties. He is currently incarcerated and was also incarcerated the time of his public records requests. RCW 42.56.565(1) applies to requests by incarcerated individuals; it states:

A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or

privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

“In the PRA context, bad faith incorporates a higher level of culpability than simple or casual negligence.” *Faulkner*, 183 Wn. App. at 103. “[T]o establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency.” *Id.* And even the “failure to conduct a reasonable search or the failure to follow policies in a search” by themselves do not necessarily constitute bad faith. *Francis v. Dep’t of Corr.*, 178 Wn. App. 42, 63 n.5, 313 P.3d 457 (2013).

The declarations and depositions of Chastain, Desch, and Osborn showed that the Department’s public records staff contacted different divisions within the Department to locate Zellmer’s requested records, and that public records staff themselves conducted searches for his requested records. The uncontroverted declarations showed that the Department did not have the records that Zellmer sought. He presented no evidence of bad faith, which is a prerequisite to obtaining any penalties. Accordingly, the Court should deny him penalties.

VI. CONCLUSION

Because Zellmer's claims related to Request No. 1 are beyond the one-year statute of limitations in RCW 42.56.550(6), the Court should hold that Zellmer is time barred from seeking any relief related to this request.

Because the Department's evidence related to all three requests at issue show that the Department timely responded to the requests, conducted an adequate search, and found no records responsive to Zellmer's requests, the Court should affirm the superior court and hold that the Department did not violate the PRA. The Court should deny him any fees, costs, or penalties.

RESPECTFULLY SUBMITTED this 23rd day of October, 2019.

ROBERT W. FERGUSON
Attorney General



ALEXANDER JOURAVLEV
WSBA No. 44640
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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

JOEL ZELLMER,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION
OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Response Brief and this Declaration of Service to all parties on the record as follows:

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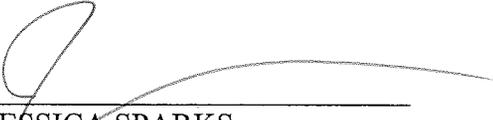
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JESSICA SPARKS
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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