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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289664

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION III

FRANKLIN R. SIMPSON

Appellants/Plaintiffs

vs.

OKANOGAN COUNTY and OKANOGAN COUNTY PROSECUTING
ATTORNEY, KARL F. SLOAN

Respondents/Defendants

REPLY BRIEF OF APPELLANT Franklin R. Simpson

Franklin R. Simpson #700640
pro se
Airway Heights Corr. Center
PO Box 2049 WA 61L
Airway Heights, WA 99001-2049

I. INTRODUCTION

In its brief, Okanogan County and Okanogan County Prosecuting Attorney Karl F. Sloan (collectively "OCPA" set forth a seemingly reasoned explanation for its delay in responding to Simpson's Public Records Act (PRA) requests. OCPA suggests it timely produced all responsive documents and withheld documents in their entirety within the PRA's statutory exemptions. However, a complete look at the record in this action, including all written correspondence and the legal authority OCPA relied upon, reveal PRA responses that are not timely, adequate or within the bounds of Washington Law. As the record shows, OCPA produced documents at 3 different times over a six month period with inexcusable delays. OCPA withheld documents in their entirety without proper use of the PRA to support claimed exemptions. Also OCPA failed to conduct an adequate search for requested records within the agency's departments.

As a result the public has been thwarted in its attempt to perform its traditional and statutorily required function of keeping this state's government agencies accountable.

II. ARGUMENT

A. The Trial Court Improperly Allowed OCPA to Disregard the Public Records Act's Requirement in Responding to Simpson's Request for Public Records

The PRA requires an agency to respond to a public records request within 5 business days. RCW 42.56.520. Within those 5 days, the agency must provide the requested record, acknowledge the request and give an estimate of the time needed to fulfill the request. Any delay must be "reasonable".

In its brief, OCPA claims that its disclosure of documents were in full compliance with the PRA, and the disclosure of documents mailed to Simpson were timely. OCPA asserts that documents mailed to Simpson on March 27, 2009 (CP at 84) were included in the first 385 documents sent to Simpson on November 28, 2008 (CP at 50). None of the 385 documents sent to Simpson were page number stamped to show which documents were produced on that date.

After Simpson inspected the 385 documents mailed to him on November 28, 2008 he sent a letter to OCPA (CP at 77) addressing very specific discrepancies/deficiencies contained in the documents he received. OCPA responded on March 16, 2009 (CP at 79) informing Simpson that the items listed as missing were not in the litigation file. OCPA later sent 192 pages of documents on March 27, 2009 (CP at 84) which were stored in a different file/format that addressed the missing items listed by Simpson.

Now, OCPA posits that the 192 pages sent to Simpson on March 27, 2009 were included in the original 385 documents sent on November 28, 2008 (see Respondents Brief at 16). This claim by OCPA is contradictory to their May 6, 2009 letter (see Declaration of Stephen Bozarth In Support of Defendants Motion for Summary Judgment (CP at 49)).

The plain language of the PRA required that OCPA initial response to Simpson "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3)(emphasis added). The trial court erred when it refused to find that OCPA's response was "devoid of any explanation". Without a brief explanation, Mr. Simpson had no understanding of how claimed exemptions applied.

OCPA asserts that it is immune from fulfilling its obligation under the PRA until a Court issues "an order requiring the agency to provide an adequate explanation."

The PRA "includes a penalty provision that is intended to 'discourage' improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the Statute." *Yousoufian v. Office of Ron Sims ("Yousoufian I")*, 152 Wn.2d 421, 429-30, 98 P.3d 463(2005)(quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246(1978)). Adopting OCPA's position will allow any state agency to openly disregard the plain language of the PRA without consequence. An agency, OCPA, could provide no claim of exemption or explanation for how the exemption applies, and force the requestor to resort to litigation to obtain this information, as in the case at issue herein.

This hardly comports with OCPA's duty to "provide for the fullest assistance to inquirers" and to promptly respond to all requests. RCW 42.56.100 *Sanders v. State*, P.3d , 2010 WL3584463.

OCPA failed to promptly produce all responsive documents, also failed to provide an exemption log pursuant to RCW 42.56.210(3) for 137 of withheld

documents.

When interpreting the PRA, the court's primary objective is to ascertain and give meaning to legislative intent. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162(2006). "We begin with the statute's plain language and ordinary meaning." *Id.* Thus, in determining what constitutes a "claim of exemption" under the PRA, this court looks to the plain language of the statute.

In general, the PRA mandates that:
agencies shall, upon request for
Identifiable public records,
make them promptly available to
any person.

RCW 42.56.080. While there are limited exemption from this requirement(see, eg. RCW42.56.240, .270), an agency cannot declare a record to be exempt without providing a specific explanation.

The PRA says:

Agency responses refusing in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

RCW 42.56.210(3). Thus, the plain language of the PRA shows the legislations intent for agencies to make a claim of exemption in a very specific was stating a specific exemption and explaining how it applies to a specific record. *Pawa*, 125 Wn.2d at 270-71. The identifying information for each record should include " the type of record, its date, and number of pages, and, unless otherwise protected the author and recipient" *Id* at 271. In other words, an agency can't play "hide the ball" by describing only general claims of exemption for 137 pages of documents.

In the case of Simpson's requests for public records, OCPA violated numerous requirements of the PRA and the trial court improperly allowed it to do so without liability.

B. RCW 70.02.020 Applies Only to the Extent the Record Identifies or Can Be Readily Associated with the Identity of a Patient

By its terms, the exemptions for patients' health care information under RCW 70.02.020 applies only to "information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." RCW 70.02.010(6). By definition, then, it does not apply to information that does not identify or cannot be readily associated with the identity of a patient. Construed narrowly—as all exemptions to disclosure of public records must be—the exemption does not apply as permitted by the trial court.

Releasing the requested records with redactions of information associated with the identity of the patient sufficiently protects the interests of the patient. The trial court holding regarding the scope of RCW 70.02.020 was in error.

C. The Trial Court Improperly Allowed OCPA to Disregard Simpson's Request for Okanogan Prosecuting Attorney's Personnel File and Bond

In its brief, OCPA claims to be a separate agency from Okanogan County thus not requiring OCPA to search for the requested records in other departments. RCW 42.56.010 defines an "agency" to include all departments and subunits of that agency". Several cases have noted or implied that an "agency" includes its various departments and subunits. See *Ames v. City of Firecrest*, 77 Wn.App 284, 291, 657 P.2d 1003(1993)(request to city for records of city police department); *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995(1993)(noting prosecuting attorney's office a department of a county);

Vance v. Offices of Thurston County Commissioners, 117 Wn.App 660, 668, 71 P.3d 680(2003), review denied, 151 Wn.2d 1013(2004)(request to one agency department can be answered by another department).

OCPA failed to provide its "fullest" assistance to Simpson by failing to adequately search for the requested records outside its department.

D. The Trial Court Improperly Denied Simpson's Motion for Continuance of Summary Judgment

OCPA untimely responses and objections to the first set of interrogatories were not received until December 24, 2009, seven days before summary judgment. This prevented Simpson from possibly seeking more discovery or properly defending the County's motion for summary judgment.

The trial court removed the burden of showing it acted in accordance with the PRA by forcing Simpson to demonstrate how discovery would show how OCPA acted improperly.

E. Simpson was the Prevailing Party and is Entitled to Attorneys Fees, Costs and a Statutory Penalty

OCPA asserts in its brief that Simpson is not entitled to fees, costs and statutory penalties set forth in RCW 42.56.550(4). Respondents brief at 25. OCPA by their own admissions and correspondence show various violation of the PRA.

OCPA also claims that Simpson appeared to be requesting different records in his letter (see Respondents Brief at 16) to justify sending additional documents responsive to original request. Simpsons letter dated March 8, 2009(OP at 77) clearly indicated that it was responding to the 305 received documents claimed responsive to his records request. This letter listed missing documents and complained of multiple copies of documents received. If OCPA's claim now that 192 pages of documents sent on March 27, 2009 were in

the first 385 pages of documents the OCPA has failed to address the issues raised in Simpson's March 8, 2009 letter.

OCPA's failure to produce a exemption log that more specifically identifies the type of record withheld and the basis for it. In response to a public records request, an agency withholding documents must provide a means for identifying records that are being withheld in their entirety.

As the Supreme Court has held,

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where the use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

Paws, 125 Wn.2d at 271. Moreover, identification of withheld documents is necessary for the request-or a court-to understand the adequacy of an agency's response.

OCPA failure to produce all responsive documents and to provide a proper withholding log for documents withheld in their entirety make Simpson the prevailing party in this matter. As prevailing party Simpson is entitled to Attorneys fees, costs and a statutory penalty.

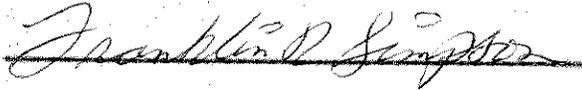
CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's finding OCPA complied with the PRA and properly withheld documents under RCW 42.56.360(2) and 70.02.020. Simpson also requests this Court to direct OCPA to release the records consistent with this Court's decision. Finally, this Court should award Simpson his costs and reasonable attorneys' fees, plus the

statutory penalty for each day and record withheld in violation of the PRA.

RESPECTFULLY SUBMITTED this 31st day of October, 2010.

By



Franklin R. Simpson #700640
pro se
Airway Heights Corr. Center
PO Box 2049 WA 61L
Airway Heights, WA 99001-2049