

FILED

SEP 15 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289664

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

FRANKLIN R. SIMPSON

Appellants/Plaintiffs

vs.

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

Respondents/Defendants

BRIEF OF RESPONDENTS

Christopher J. Kerley, WSBA #16489
Jerry P. Scharosch, WSBA #39393
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I. INTRODUCTION

Fulfilling their public duty, defendants/respondents Okanogan County and Okanogan County Prosecuting Attorney Karl F. Sloan (collectively "OCPA") complied with the Public Records Act ("PRA") in responding to the requests of Franklin Simpson ("Simpson") concerning his criminal case. OCPA timely produced documents responsive to Simpson's requests, but withheld from disclosure the medical records of Simpson's victim. Additionally, OCPA did not disclose documents requested by Simpson which did not exist.

Simpson asserts the trial court erred in denying his PRA claims by granting summary judgment in favor of OCPA. Simpson also claims the trial court erred in denying his motion to continue the summary judgment hearing under Washington Civil Rule ("CR") 56(f). Additionally, Simpson requests attorneys' fees, costs, and penalties against OCPA.

All Simpson's arguments are without merit. Therefore, OCPA respectfully requests this Court AFFIRM the trial court's rulings in all respects and DENY Simpson's request for fees, costs, and penalties on appeal.

II. ASSIGNMENT OF ERROR

Simpson assigns error to the trial court's rulings denying his motion for a continuance of the summary judgment hearing and granting

summary judgment to the County. Those rulings are discussed separately below.

III. STATEMENT OF THE CASE

Stephen Bozarth is an attorney employed by Okanogan County as an Assistant Prosecuting Attorney. (Clerk's Papers ("CP") at 42.) He was the individual at OCPA primarily responsible for responding to Simpson's PRA requests. (CP at 42.)

On September 19, 2008, OCPA received a letter from Simpson, dated September 17, 2008. (CP at 42, 53-54.) In his letter, Simpson requested records in what he styled four "groups." (CP at 53.) Group One sought documents "contained in the prosecuting attorney's litigation/discovery file "regarding Simpson's criminal prosecution."¹ (CP at 53.) Simpson's "Group Two" requested documents pertaining to a personnel file of Okanogan County Prosecuting Attorney Karl F. Sloan ("Sloan").² (CP at 53.) Simpson's "Group Three" requested a copy of

¹ Simpson's "Group One" request read: "Produce for copying the documents or portions thereof, contained in the Prosecuting Attorney Criminal litigation and or [sic] discovery files pertaining to Frank Simpson and Okanogon [sic] County Cause number -- 04-1-00281-6. (Please do not confuse this group of documents for documents contained in the County Clerk's file.) I am specifically requesting the documents contained in the Prosecuting Attorneys [sic] litigation/discovery file created to prosecute the above -- entitled cause number."

² Simpson's "Group Two" request read: "Produce all documents contained in the personnel file of Prosecuting Attorney Karl F. Sloan, including performance evaluation, employee conduct reports, complaint or any other documents relating to the performance of his official duties within the Okanogan County Prosecuting Attorney's Office."

Karl Sloan's oath of office.³ (CP at 53.) Simpson's "Group Four" requested information concerning Karl Sloan's bond and liability insurance "on record in the County Auditors [sic] Office...."⁴ (CP at 53.) Additionally, Simpson requested that OCPA "list each document by date to facilitate [his] selection of individual documents." (CP at 53.)

September 19, 2008 was a Friday. Within five business days⁵ of Simpson's request, Bozarth, on September 25, 2008, sent a responsive letter to Simpson. (CP at 43, 56-57.) Mindful that certain documents contained in the prosecuting attorney's file could be non-disclosable as work product, Bozarth asked Simpson to clarify whether Simpson was asking for the entire file, or specific documents contained in the file. (CP at 43, 56.) Bozarth also informed Simpson that his request for a list of all documents by date was not a service which OCPA provided, and that the PRA did not require such a list. (CP at 43, 56.) Bozarth informed Simpson that no documents existed that met Simpson's request for a personnel file because Sloan was not an employee of Okanogan County, but, rather, an elected official. (CP at 43, 56.) Bozarth enclosed with his

³ Simpson's "Group Three" request read: "Produce a copy of the all the [sic] documents pertaining to Mr. Karl F. Sloan's Oath of Office."

⁴ Simpson's "Group Three" request read: "Produce a copy of Karl F. Sloan's Bond and liability insurance that is on record in the County Auditors [sic] Office as required by Statute [sic]."

⁵ RCW 42.56.520.

letter a copy of the oath of office for Sloan that was on file with the County Auditor. (CP at 43, 56, 59.) Bozarth informed Simpson that no documents existed which met Simpson's request for Karl F. Sloan's "bond and liability insurance." (CP at 43, 57.)

On October 15, 2008, Mr. Bozarth received a letter from Simpson, dated October 12, 2008. (CP at 43, 61-62.) In this letter, Simpson indicated he was "writing to provide the clarification that you [Bozarth] requested pertaining to the PRA request discussed in your official response dated September 25, 2008." (CP at 44, 61.) With regard to Simpson's "Group One" request, Simpson indicated that he was specifically requesting the "criminal litigation and discovery file" created by the Prosecuting Attorney's office "in preparing for prosecuting my criminal case." (CP at 61.) Simpson explained he was seeking "all the documents contained within the entire file." (CP at 61.) Simpson also mentioned his prior request for a list of the documents by date to facilitate his selection and expressed his belief that this was required by the PRA. (CP at 61.)

In his October 12, 2008 letter, Simpson also emphatically claimed that OCPA did, in fact, have a personnel file for Sloan by virtue of Sloan's status as a "public servant" and because he "answers to the people of Okanogan County." (CP at 61-62.) With regard to Simpson's request for

bond and insurance information, Simpson simply stated his belief that there *was* a bond and liability insurance policy specific to Sloan on record in the County Auditor's office. (CP at 62.) Finally, Simpson asserted that Bozarth was in violation of the PRA "simply by your responses to my request," and Simpson asked Bozarth to provide him with "the total number of pages, the cost for copying and mailing to complete this request, and a reasonable estimate" of the time necessary to provide disclosure. (CP at 62.)

Bozarth interpreted Simpson's request for documents "contained in the prosecuting attorney's litigation/discovery file created to prosecute the above entitled cause number" as a request for the file actually created and used by OCPA during the prosecution of Simpson's criminal case. (CP 44-45.) OCPA identified 385 documents from that file, which consisted of:

1. Pleadings: all of the pleadings, subpoenas, material witness warrants and legal memoranda (with attachments) filed in the case from the initial finding of probable cause to the unpublished Division III decision denying Mr. Simpson's [criminal] appeal;
2. Investigative materials: police reports, witness statements, crime lab reports, and information regarding the firearm used in the incident;
3. Jury questionnaires: copies of the standard jury questionnaire for five jurors.
4. Prosecutor's notes: all of the Prosecutor's notes and checklists created and used in the prosecution, and a hard copy of the PowerPoint presentation used during the trial.

5. Case law: copies of case law printed and retained in the file.
6. Photographs: crime scene photographs.
7. General ministerial documents: fax coversheets, JIS printouts, discovery logs, offer sheets, emails, and the property disposal and a copy of the Just Wear case history.

(CP at 45.)

On October 20, 2008 Rhonda Watts, a legal secretary with OCPA, sent a letter to Simpson acknowledging his request for the information pertaining to Simpson's criminal case, No. 04-1-00281-6. (CP at 45-64.) Ms. Watts's letter also informed Simpson of the number of copies necessary to respond to his request, and the cost for copying and postage. (CP at 64.) Ms. Watts's letter notified Simpson that OCPA would send the documents upon receiving Simpson's money order in the amount of \$66.04. (CP at 64.)

On November 26, 2008 a relative of Simpson's paid OCPA for the records and postage with a personal check. (CP at 46, 68, 78.) The 385 pages of records pertinent to Simpson's case were mailed to Simpson that day. (CP at 46, 66.) However, the personal check was returned for insufficient funds. (CP at 46.) Simpson's relative subsequently paid the original amount (\$66.04) plus a \$30 handling fee on February 10, 2009. (CP at 46.)

On March 10, 2009, OCPA received yet another letter from Simpson addressed to Ms. Watts, dated March 8, 2009. (CP at 46, 77.) In this letter, Simpson indicated he had received the 385 standard copies and 8 nonstandard copies sent to him in response to his records requests. (CP at 77.) Simpson claimed he was writing to "inform [Ms. Watts] of the discrepancies or deficiencies contained within the groups of the records [she] mailed." (CP at 77.) Simpson alleged he was "missing" seven items from the file. (CP at 77.) Simpson also repeated his insistence that Karl F. Sloan "does have a personnel file." (CP at 77.)

Ms. Watts sent a letter to Simpson on March 16, 2009, responding to Simpson's March 8, 2009 letter. (CP at 47, 79.) In her letter, Ms. Watts indicated that the "missing" items Simpson requested in his March 8, 2009 letter were not in the litigation file. (CP at 79.) As a result, Ms. Watts stated that OCPA was considering Simpson's March 8, 2009 inquiry a new PRA request. (CP at 79.) Ms. Watts explained it would take an additional two weeks to "see about these items" and that the office would be in contact with Simpson. (CP at 79.)

On March 25, 2009 the OCPA received yet another letter from Simpson addressed to Ms. Watts, dated March 23, 2009. (CP at 47, 82.) In this letter, Simpson stated his belief that the information identified in his March 8, 2009 letter "should be in that [the litigation] file." (CP at 82.)

Simpson also stated that he did not want his March 8, 2009 letter to be considered a new request, asserting his belief that his initial request (of September 17, 2008) was "specific enough" to provide OCPA notice of the "contents sought in the prosecutor's litigation file" regarding his criminal case. (CP at 82.)

On March 27, 2009, OCPA sent Simpson 192 pages of documents reflecting what he had requested as items 1-3 and 5-7 in his March 8, 2009 letter. (CP at 47, 84.) In response to Simpson's prior allegation that OCPA had not provided him with all of the reports, OCPA staff simply sent Simpson another, un-redacted copy of the investigative reports held by OCPA. (CP 47-48.)

A letter from Bozarth accompanied OCPA's production of the 192 documents on March 27, 2009. (CP at 84.) Item four of the seven "missing" items Simpson complained of was a request for the "medical exam records of victim." (CP at 77.) In his March 27, 2009 letter, Bozarth explained to Simpson that he interpreted Simpson's item four to be a request for the medical records of the victim. (CP at 48, 84.) Bozarth notified Simpson that he had identified "143 pages of documents" that met Simpson's medical records request. (CP at 84.) Bozarth clearly stated, however, that he considered these medical records exempt from disclosure pursuant to RCW 70.02.020. (CP at 84.)

Bozarth further explained to Simpson that Bozarth found six documents that did not meet the requirements for the exemption. (CP at 84.) Accordingly, Bozarth sent those six documents to Simpson. (CP at 84.) However, Bozarth maintained that the remaining 137 documents did not meet the requirements of the exemption because the documents (1) directly pertain to the patient's healthcare, (2) contain the name of the patient, and (3) because the documents pertain to a single patient whose identity was known, there were no possible redactions which secure the confidentiality of the patient in question. (CP at 84.)

On May 1, 2009, Bozarth received yet another letter from Simpson dated April 28, 2009. (CP at 87-89.) Simpson's stated purpose for this letter was to inform Bozarth "of additional discrepancies or deficiencies contained within the groups of records [Bozarth] mailed on 3/27/09." (CP at 87.) Simpson claimed in his letter that, among other things, none of the documents provided by OCPA were "bates" stamped and that Bozarth failed to provide documents pertaining to private investigator John Dowd or any public records relating to Dowd's "investigations" of Simpson's case. (CP at 87.)

With regard to the 137 pages of medical records withheld, Simpson asserted his legal conclusion in his letter that Bozarth's "blacket [sic] approach" in denying and withholding all 137 pages" was in violation

of the PRA. (CP at 87.) After setting forth his interpretation of the law, Simpson requested Bozarth provide him with an exemption log identifying each of the 137 pages of medical records, along with the identifying information that permitted Bozarth to withhold the documents in their entirety. (CP at 88.) Finally, Simpson restated his emphatic belief that a personnel file existed for Sloan, and reiterated his request for those records. (CP at 88-89.)

On May 6, 2009, Bozarth sent a final letter to Simpson acknowledging his receipt of Simpson's April 28, 2009 letter, attempting to address Simpson's concerns. (CP at 49.) In the letter, Bozarth explained to Simpson why the 192 pages of records provided to Simpson in response to his March 8, 2009 letter were not initially supplied in response to Simpson's original request for a complete copy of the litigation file. (CP at 49.) In an effort to satisfy Simpson, Bozarth had OCPA staff review all material pertaining to Simpson's case and enclose all remaining documents held by the OCPA, in any file or in any format, with the exception of the medical records of the victim, and a copy of the appeal file. (CP at 49.) Bozarth explained that, even though Simpson had not requested a copy of the appeal file, Simpson was entitled to one if he chose. (CP at 49.) In regard to Simpson's request for records pertaining to

private investigator John Dowd, Bozarth explained that OCPA had no records regarding an investigation undertaken by Dowd. (CP at 49.)

Bozarth also explained that he withheld the 137 pages of the victim's medical records as one record pertaining to the medical treatment of the victim and because all 137 pages were in the form of medical charts dealing directly with the medical treatment of the victim and because each page was stamped with the victim's name. (CP at 49-50.) Finally, Bozarth again explained to Simpson that, with regard to his request for Sloan's "personnel file," the County did not have any records responsive to that request. (CP at 50.)

After this case was filed in superior court, Bozarth reviewed all of the documents that had been sent to Simpson in response to his requests. (CP at 50.) Bozarth discovered that the 192 pages of documents sent to Simpson on March 27, 2009 were in fact included in the 385 pages of document sent to Simpson on November 26, 2008. (CP at 50.)

In sum, in response to Simpson's multiple requests, the Okanogan County Prosecuting Attorney's office sent Simpson a complete copy of its files regarding his prosecution without redactions and without withholding, except for the victim's medical records. (CP at 50.) And the 192 pages of documents sent to Simpson on March 27, 2009 were exact,

un-redacted copies of documents sent to him on November 26, 2008. (CP at 50.)

Simpson filed his Complaint on July 20, 2009. (CP at 1.) OCPA filed its motion for summary judgment on November 19, 2009. (CP at 24.) Simpson filed a motion to continue the summary judgment hearing on December 22, 2009. (CP at 98.) After a hearing on December 31, 2009, and an in camera review of the 137 pages of medical records withheld, the trial court dismissed Simpson's complaint on summary judgment and denied Simpson's request for a CR 56(f) continuance through a letter ruling issued on January 11, 2010. (CP at 189-191.) This appeal followed. (CP at 200.)

IV. ARGUMENT

A. Summary Judgment on PRA Claim

1. Standard of Review

Pursuant to RCW 42.56.550(3), judicial review of an agency action taken or challenged under the PRA is de novo. *Prison Legal News Inc. v. Department of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005).

RCW 42.56.550 specifically authorizes judicial review of agency actions in responding to PRA requests. Although the statute references a Motion to Show Cause brought by a requesting party, summary judgment by the agency is an appropriate procedure in PRA cases, and a trial court,

in that context, may conduct a hearing based solely on affidavits or in camera review of documents. *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). See also RCW 42.56.550(3).

Appellate courts review summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860 93 P.3d 108 (2004).

A motion for summary judgment is appropriate whenever the pleadings, depositions and other records on file, together with any affidavits submitted with the motion, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). To defeat summary judgment, the non-moving party cannot rely on speculation but must come forward with specific facts, as would be admissible in evidence, which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006) (argumentative assertions, speculative statements, and conclusory

allegations do not raise material fact issues that preclude a summary judgment). Additionally, statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). Summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

If the moving party is a defendant and meets its initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). If, at that point, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Id.*

2. Propriety of Trial Court's Ruling

- a. OCPA's responses to Simpson's PRA requests were timely.

Below, Simpson claimed OCPA failed to respond to his initial request in a timely manner. (*See* CP at 9.) RCW 42.56.520 addresses the timeliness of an agency response to a PRA request, providing that within five business days of receiving a request an agency must respond by

either: (1) providing the records; (2) acknowledging the request and providing the requestor with a reasonable estimate of the time needed to respond; or (3) denying the request.

Here, Simpson's initial request came in the form of a letter dated September 17, 2008. (CP at 53-54.) Simpson's letter was received by OCPA on September 19, 2008. (CP at 42.) Bozarth, on behalf of OCPA, responded to the request on September 25, 2008. (CP at 43, 56-57.) Because September 19, 2008 was a Friday, OCPA's response was required by September 26, 2008. OCPA complied with RCW 42.56.520 when it responded to Simpson on September 25, 2008. No violation of the PRA occurred.

Simpson also challenges the timeliness of OCPA's disclosures of documents. (*See* Appellant's Opening Br. at 11.) After receiving Simpson's October 12, 2008 letter clarifying his initial request, OCPA responded with the number of pages identified and the copying charge on October 20, 2008. (CP at 43, 45.) However, Simpson's relative did not pay for the copies until November 26, 2008. (CP at 66, 68.) On November 26, 2008, OCPA mailed 385 pages of documents to Simpson responsive to his "Group One" request. (CP at 46, 66.) Any delay in mailing the documents, therefore, was due solely to Simpson.

Simpson also complains that additional documents responsive to his initial request were sent to him on March 27, 2009. (*See* Appellant's Opening Br. at 11.) Simpson requested these additional documents in a letter dated March 8, 2009. (CP at 77.) However, because Simpson appeared to be requesting records different from and in addition to the "Group One" records he previously requested, Ms. Watts on behalf of OCPA, within 5 business days, sent Simpson a letter indicating that his March 8, 2009 letter was being treated as a new request, and that the OCPA would need an additional two weeks to process the request. (CP at 79.)

This response was in full compliance with the PRA. OCPA properly considered this to be a new request, responded within five business days and, as authorized by RCW 42.56.520, asked for two weeks to process the request. (CP at 79.) Within the two week window, on March 27, 2009, OCPA sent Simpson an additional 192 pages of records. (CP at 84.) It is important to note, however, that OCPA subsequently discovered that the 192 documents sent to Simpson in March 2009 were actually included in the 385 documents sent to Simpson on November 28, 2008. (CP at 50.) Thus, no violation of the PRA occurred because OCPA timely disclosed the documents pertaining to Simpson's request. Even if this Court finds the March 27, 2009 disclosure of the 192 documents was

untimely, it was harmless error because Simpson in fact had those documents in November 2008. *See* RCW 4.36.240; *State v. White*, 31 Wn. App. 655, 667, 644 P.2d 693 (1982) (defining harmless error as an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case).

- b. OCPA properly withheld medical records of Simpson's victim under RCW 42.56.360 and RCW 70.02 *et seq.*

In his response of March 27, 2009, Bozarth informed Simpson that he was withholding 137 pages of medical records based on the healthcare information exemption. (CP at 84.) Specifically, Bozarth stated:

In reviewing the documents I have found six documents that do not meet the requirements for the exemption. Those documents are enclosed. However, the other 137 document do meet the requirements of the exemption in that they (1) directly pertain to the patient's health care, (2) contain the name of the patient, and (3) as they pertain to a single patient, whose identity is known, there are no redactions that could be made that would secure the confidentiality of the patient in question. Therefore, those documents are not subject to disclosure and are not included.

(CP at 84.) This was a proper invocation of the PRA exemption for healthcare information found in RCW 42.56.360.

The Healthcare Information Act, RCW 70.02. *et seq.*, is incorporated into the PRA through RCW 42.56.360(2). See *Prison Legal News Inc. v. Department of Corrections*, 154 Wn.2d 682, 644, 115 P.3d 316 (2005). RCW 70.02.010(7) defines healthcare information as follows:

[A]ny information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of the patient and directly relates to the patient's healthcare, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. This term includes any record of disclosures of healthcare information.

The statutory definition of "healthcare information" has two components: (1) patient identity and (2) information about the patient's healthcare. *Prison Legal News Inc.*, 154 Wn.2d at 645 (citing *Wright v. Jekyll*, 121 Wn.App. 624, 645, 90 P.3d 65 (2004)). RCW 70.02.020 prohibits disclosure of "healthcare information" without the patient's written authorization. *Id.* at 644. Here, all of the medical records withheld by Bozarth contained healthcare information about Simpson's victim, which on their face disclose the identity of the patient. Even if the records did not directly identify the victim by name, the healthcare information reflected in the records could be readily associated with a particular individual – Simpson's victim – because Simpson and others obviously know the identity of the victim. Given the broad protection afforded healthcare information under RCW 70.02, and the Washington

Courts' definition of healthcare information, Bozarth's withholding of the 137 pages of medical records was required.

RCW 42.56.550(3) specifically authorizes the court to conduct an in-camera review of records in a proceeding under PRA. Here, OCPA made the 137 pages of medical records available to the trial court, un-redacted, for an in-camera inspection. (CP at 95-96.) Simpson claims OCPA did not provide specific identifying information with regard to the medical records. (Appellant's Opening Br. at 11-12.) However, any additional identifying information would have involved providing protected information because, as emphasized above, Simpson and others knew the name of the victim/patient. Bozarth's invocation of the medical records exemption and his brief explanation in his March 27, 2009 letter complies with the requirements of RCW 42.56.210(3) (requiring only a statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld). (See CP at 84.) Moreover, after its in-camera review, the trial court concluded "as a matter of law that these records are subject to exemption pursuant to [RCW] 42.56.360 and the Healthcare Information Act, Chapter 70.02 RCW." (CP at 190.) The trial court committed no error in finding these medical records exempted from disclosure under the

PRA. OCPA met its burden of proof that the healthcare exemption to the PRA was applicable. RCW 42.56.550(1).

Simpson also faults OCPA for not providing a privilege log with regard to the 137 pages of medical records. (App. Op. Br. at 11-12.) However, a privilege log is not required by the PRA, and Bozarth's March 27, 2009 letter adequately explained why the 137 pages of medical records were being withheld. Indeed, in *Koenig v. Pierce County*, 151 Wn.App. 221, 211 P.3d 423 (July 2009), a prosecuting attorney responded to a records request with a similar letter. *Koenig*, 151 Wn.App. at 226. In holding that that the prosecuting attorney adequately described the withheld records, the court stated: "[t]he prosecutor's office did not have to provide further identifying information because to do so would have disclosed protected content." *Koenig*, 151 Wn.App. at 235.

In addition, not only would a privilege log, by its very nature, reveal protected medical information, an agency like a prosecuting attorney's office is not required to create such a document. *Smith v. Okanogan County*, 100 Wn.App. 7, 11, 994 P.2d 857 (2000); *Sperr v. City of Spokane*, 123 Wn.App. 132, 136, 96 P.3d 1012 (2004) ("an agency has no duty to create or produce a record that is nonexistent"). No PRA violation occurred when OCPA withheld Simpson's victim's medical records and did not create a separate "privilege log" for Simpson.

- c. OCPA complied with the PRA when it presented by affidavit or declaration that no records meeting Simpson's requests existed.

In Simpson's initial request of September 17, 2008, he described four groups of records. (CP at 53.) Bozarth responded to these requests in his September 25, 2008 letter. (CP at 56-57.) Simpson's "Group One" request concerned documents prepared by OCPA for his criminal prosecution. (CP at 43.) Bozarth was unclear as to exactly which records Simpson was seeking. (CP at 43.) Accordingly, in his September 25, 2008 letter, Bozarth requested a clarification. (CP at 56.) Bozarth's request was authorized by RCW 42.56.520, which provides in pertinent part:

Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging the receipt of a public records request that is unclear, an agency, the Office of Secretary of the Senate, or the Office of the Chief Clerk of the House of Representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify their request, the agency, the Office of the Secretary of the Senate, or the Office of the Chief Clerk of the House of Representatives need not respond to it.

RCW 42.56.520 (emphasis added). OCPA complied with Simpson's "Group One" request, as discussed above.

With regard to Simpson's "Group Two" request, Bozarth explained that, because Sloan was an elected official, OCPA had no personnel file for him. (CP at 56.) Bozarth's response was not a violation of the PRA. (See CP at 43.) Under the PRA, an agency may properly respond by affidavit or declaration that a requested record or group of records simply does not exist.⁶ See *Sperr v. City of Spokane*, 123 Wn.App. 132, 137, 96 P.3d 1012 (2004). If that showing is made, summary judgment is appropriate. *Id.*

In Simpson's "Group Four" request, Simpson sought documents pertaining to bond and liability insurance for Karl F. Sloan. (CP at 53.) Bozarth properly responded that OCPA had no such documents. (CP at 43, 56, 57.) Simpson alleges that RCW 26.15.050 and RCW 36.16.136 "require each public official designated as Prosecuting Attorney and/or Deputy Prosecuting Attorney to maintain the liability insurance and bond, even if the County insures [sic] payment and coverage as such." (Appellant's Opening Br. at 5.) Simpson's citations are misplaced. First, RCW 26.15 does not exist. Second, RCW 36.16.136 simply permits a

⁶ In his opening brief, Simpson expresses frustration that the Okanogan County Prosecuting Attorney's Office did not search *all* Okanogan County departments for any documents pertaining to his requests. (Appellant's Opening Br. at 14-15). However, Simpson expressly *directed* his request to the Okanogan County Prosecuting Attorney's Office. (CP at 53.) Simpson cites no authority for the proposition that an agency to whom a public records request is directed is obligated to search records of every other agency of the particular governmental entity. Such a rule would lead to absurd results and would defeat the prompt response policy articulated in RCW 42.56.520.

county's board of commissioners to purchase liability insurance protecting the county's officials and employees against liability for personal or bodily injuries and property damage caused by the officials/employees. RCW 36.16.136 does not mention prosecuting attorneys, does not mention a bond, and "requires" nothing. Simpson's misunderstanding of the law was likely the cause of his emphatic insistence that such documents existed and were in the possession of OCPA. OCPA correctly responded that such documents did not exist. (CP at 43.)

B. Denial of Motion for Continuance

1. Standard of Review

An appellate court reviews a trial court's decision on a request to continue the summary judgment hearing for abuse of discretion. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009).

2. Propriety of Trial Court's Ruling

"[A] trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003).

Simpson's motion to continue OCPA's summary judgment hearing was predicated on his alleged need to conduct discovery. (CP at 99-100.) Counsel for OCPA received Simpson's discovery requests on October 30, 2009. (See CP at 177.) OCPA's answers to Simpson's discovery requests were served on December 23, 2008. (CP at 188.) After thoroughly reviewing the record and hearing oral argument, the trial court subsequently denied Simpson's request for a continuance of the summary judgment hearing because Simpson could not state how the information he sought would help him in defending against OCPA's summary judgment motion. (CP at 189-190; *see also* CP at 170-172.) More importantly, the trial court held that any evidence Simpson may have obtained through his discovery requests would not have raised a genuine issue of material fact regarding the issues in the case. (CP at 189-190.) The trial court's ruling was not an abuse of discretion, as it was based on tenable grounds and the trial court thoughtfully evaluated the considerations governing a CR 56(f) continuance. The trial court did not err in denying Simpson's CR 56(f) motion.

C. An award of fees, costs, and penalties is not warranted.

Whether a party is "prevailing" under the PRA is a "legal question of whether the records should have been disclosed on request." *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110,

119, 231 P.3d 219 (2009) (quoting *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005)).

Simpson's request for fees, costs, and penalties is predicated entirely on his mistaken belief that OCPA violated the PRA. In support of his foregone conclusion, he advances only conclusory statements, speculative assertions, and unwarranted assumptions. As discussed above, OCPA properly disclosed to Simpson those documents which existed and which were not protected from disclosure. Attorneys' fees, costs, and penalties are improper here because OCPA fully complied with the PRA. Simpson's arguments to the contrary are without merit. Nor are fees or expenses under Washington Rule of Appellate Procedure ("RAP") 18.1(a) appropriate because Simpson has not established by authority that he has a "right to recover reasonable attorney fees or expenses on review before...the Court of Appeals...." RAP 18.1(a).

V. CONCLUSION

OCPA fully complied with the requirements of the PRA in responding to Simpson's requests. Simpson's misinterpretation of the relevant law in this area is the sole cause of his unwarranted accusations of impropriety against OCPA. The trial court correctly granted summary judgment to OCPA and properly denied Simpson's motion for a CR 56(f) continuance. OCPA respectfully requests this Court AFFIRM the trial

court's rulings in every respect and DENY Simpson's request for fees, costs, and penalties on appeal.

RESPECTFULLY SUBMITTED this 15 day of September, 2010.

EVANS, CRAVEN & LACKIE, P.S.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 15th day of September, 2010, I caused to be delivered a copy of the foregoing to the undersigned:

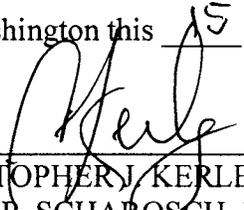
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VIA CERTIFIED MAIL []
VIA FACSIMILE []
HAND DELIVERED []

Dated at Spokane, Washington this 15 day of September, 2010.



CHRISTOPHER J. KERLEY, WSBA #16489
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