

NO. 31568-1-III

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

**FILED**

SEP 11 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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KEVIN ANDERSON, Appellant,

v.

SPOKANE POLICE DEPARTMENT, Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR  
SPOKANE COUNTY

The Honorable Maryann Moreno  
NO. 12-2-02279-2

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APPELLANT'S REPLY BRIEF

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**A. SUMMARY OF THE ARGUMENT**

Department's defense in this case is essentially this. It sent Mr. Anderson some correspondence on June 4, 2012 thereby informing him that his request was complete and ready for pickup; explaining the redactions applied to his requested records. Mr. Anderson then ignored this correspondence and filed suit. Therefore, Department has never had to produce the requested records due to Mr. Anderson's abandoning his request by failing to respond to the June 4, 2012 correspondence. Records Manager, Theresa Giannetto proffered a sworn declaration purportedly affirming this version of events.

Mr. Anderson will show that Ms. Giannetto's testimony is not only false, but knowingly false, and as such her fraudulent declaration must be ruled inadmissible. Furthermore, that without Ms. Giannetto's testimony Department has offered zero evidence which defends against Mr. Anderson's motion for partial summary judgment.

**B. ARGUMENT**

1. MS. GIANNETTO'S TESTIMONY REGARDING WHETHER DEPARTMENT MAILED MR. ANDERSON THE JUNE 4, 2012 CORRESPONDENCE IS KNOWINGLY FALSE.

Mr. Anderson has objected to Ms. Giannetto's declaration on the grounds that it offers inadmissible

evidence, and that it fails to authenticate any of the thereto attached exhibits. CP 384-389.

Department argues that this declaration simply, "corrects and clarifies facts that had been already previously disclosed." Respondent's Brief - 10.

Throughout this litigation Department has argued, "[t]he Plaintiff has waived the claim of bad faith or any rights he may have to assert a claim under the Public Records Act BY HIS ABANDONMENT OF THE TWO REQUESTS THAT WERE FULFILLED IN COMPLIANCE WITH THE PUBLIC RECORDS ACT." CP 10 [Def's Answer - 5 at ¶6.5]. Here again, "... This argument fails for three reasons: (1) NO RECORDS WERE EVER WITHHELD, AS NO DOCUMENTS WERE EVER PICKED UP OR PAID FOR BY THE PLAINTIFF WITH RESPECT TO EITHER OF HIS TWO PUBLIC RECORDS REQUESTS: HENCE, THE DEFENDANT'S ATTEMPT TO PROVIDE THEM WAS FRUSTRATED; (2) WHAT WAS ULTIMATELY GIVEN TO THE PLAINTIFF VIA DISCOVERY ONLY AFTER HE REJECTED HIS COMPLETED RECORDS..." CP 41 [Def's Response Memo. in Opp. to Summ. Judgment - 14].

When Department asked Mr. Anderson about his receiving the June 4, 2012 correspondence he flatly denied the same. CP 59, and 62 [Def's Request For Admission No. 6, and response thereto]. These RFA's

are dated November 2, 2012, and Mr. Anderson's responses are dated November 29, 2012. Department willfully chose to not follow up on this denial.

On January 3, 2013 Ms. Giannetto swore under penalty of perjury that, "ON JUNE 4, 2012 THE RECORDS DIVISION ALSO SENT THE PLAINTIFF AN EXPLANATION OF THE REDACTIONS THAT WERE MADE IN CONNECTION WITH HIS FIRST PUBLIC RECORDS REQUEST..." CP 242 [Declaration of Theresa Giannetto - 13 at ¶32]. Also, that Department did not produce records because Mr. Anderson, "never sent the fee to pay for the records. He never corresponded with the Records Division concerning this request and he made no effort to pay for them or arrange pickup and/or mailing." CP 242 [Declaration of Theresa Giannetto - 13 at ¶33]. Furthermore, Department diligently performed its duty. "We clarified his requests when necessary; communicated with him according to all statutes completely and timely. We gathered, prepared, AND NOTIFIED HIM WHEN THE RECORDS WERE READY. HE NEVER MADE ARRANGEMENTS TO PICK UP HIS RECORDS. HE DID NOT PAY FOR THEM NOR DID HE MAKE ANY EFFORT TO RECEIVE THE RECORDS HE REQUESTED..." CP 249 [Declaration of Theresa Giannetto - 20 at ¶53]. Finally, Ms. Giannetto testified that the reason no

records were produced was attributable to Mr. Anderson's ignoring the June 4, 2012 correspondence. "UNFORTUNATELY, THE PLAINTIFF MADE NO EFFORT TO PAY FOR THEM AND RECEIVE THEM ONCE THEY WERE PREPARED AND READY FOR RELEASE." CP 251 [Declaration of Theresa Giannetto - 22 at ¶56].

A review of the attached correspondence which Ms. Giannetto is so adamantly testifying was mailed and ignored shows that the very first sentence states, "ENCLOSED IS A COPY OF THE PUBLIC RECORD(S) YOU REQUESTED." CP 269 [Declaration of Theresa Giannetto - 39].

Obviously, this presents a problem. How is it that Department has consistently argued, and Ms. Giannetto has sworn under penalty of perjury, that NO records were provided because Mr. Anderson ignored the June 4, 2012 correspondence, yet the very same correspondence which Ms. Giannetto swears was mailed indicates that the records are thereto enclosed? Exactly which set of facts are "clarified and corrected" through Ms. Giannetto's testimony here?

On January 10, 2013 Department; without good cause, despite Mr. Anderson's denial of the RFA on this issue, and based solely upon Ms. Giannetto's

fraudulent declaration morphed this issue into an "undisputed fact" stating as true, "[o]n June 4, 2012, the Records Division also sent the Plaintiff an explanation of the redactions that were made in connection with his first public records request... THESE RECORDS WERE NEVER PROVIDED TO THE PLAINTIFF IN RESPONSE TO HIS PUBLIC RECORDS REQUEST BECAUSE HE NEVER SENT THE FEE TO PAY FOR THE RECORDS..." CP 336-37 [Def's Memo. of Auth. in Supp. of Dismissal - 9-10]. Department then goes on to argue, "... He [Mr. Anderson] acted preemptively in unilaterally deeming the time estimate to be unreasonable and from then on acted without any legal authority in REJECTING RECORDS that were prepared specifically for him..." CP 351 [Def's Memo. of Auth. in Supp. of Dismissal - 22]. Department then succinctly lays out its defense. "Plaintiff cannot have it both ways. HE IS WITHOUT LEGITIMATE BASIS TO ABANDON WHAT HAS BEEN COMPLETED AT HIS REQUEST while simultaneously calling it a denial of production. Moreover, he is without legal basis to arbitrarily dictate that standard of reasonableness in a manner that serves his own interests of monetary gain. HIS ABANDONMENT OF BOTH HIS RECORDS REQUESTS CAN ONLY BE VIEWED AS BAD FAITH SINCE THE TRAIL OF

DOCUMENTS AND CORRESPONDENCE UNEQUIVOCALLY SHOW THE  
REQUESTS WERE FORTHCOMING AND ULTIMATELY FULFILLED."

CP 358 [Def's Memo. of Auth. in Supp. of Dismissal  
- 31].

Clearly Department's dogged argument absolutely contradicts Ms. Giannetto's sworn testimony. In fact, Ms. Giannetto's own testimony contradicts Ms. Giannetto's testimony.

Either Ms. Giannetto's testimony that Department did mail Mr. Anderson the June 4, 2012 correspondence is false, or, if the June 4, 2012 letter was mailed, and as that letter indicates the requested records were thereto enclosed, then Ms. Giannetto's testimony (and Department's tireless argument) that NO records were provided to Mr. Anderson is false. Either way, one of Ms. Giannetto's contradictory statements is a lie.

Department is still regurgitating this same tired, knowingly false, and self defeating argument onto this court, "... This argument fails for three reasons: (1) NO RECORDS WERE EVER WITHHELD, AS NO DOCUMENTS WERE EVER PICKED UP OR PAID FOR BY THE PLAINTIFF WITH RESPECT TO EITHER OF HIS TWO PUBLIC RECORDS REQUESTS; HENCE, THE DEFENDANT'S ATTEMPT TO PROVIDE THEM WAS

FRUSTRATED; (2) WHAT WAS ULTIMATELY GIVEN TO THE PLAINTIFF VIA DISCOVERY ONLY AFTER HE REJECTED HIS COMPLETED RECORDS CONTAINED ONLY REDACTIONS THAT WERE MADE PURSUANT TO STATUTE; AND (3) PLAINTIFF WAS PROVIDED A LETTER INDICATING THE BASIS FOR THE STATUTORY REDACTIONS." Respondent's Brief - 22.

Department's argument here is so circular that Mr. Anderson need only show the court two individual pieces made at different times to prove his case.

At one time Department actually argued, "... Plaintiff makes no showing that he had to file suit to compel the production of his records. See Coalition on Government Spying v. King County Dep't of Pub. Safety, 59 Wn.App. 856, 862, 801 P.2d 1009 (1990) (holding that agency could not avoid attorney fees by disclosing documents after requestor forced to file suit). THERE IS NOTHING IN THE CORRESPONDENCE OR OTHER DOCUMENTATION THAT WOULD INDICATE THE RECORDS WERE FORTHCOMING ONLY AS THE RESULT OF THE PLAINTIFF'S ACTION IN FILING A LAWSUIT." CP 360-61 [Def's Memo. of Auth. in Supp. of Dismissal - 33-34].

Department also has argued, "... (2) WHAT WAS ULTIMATELY GIVEN TO THE PLAINTIFF VIA DISCOVERY ONLY AFTER HE REJECTED HIS COMPLETED RECORDS..." CP 41

[Def's Response Memo. in Opp. to Summ. Judgment - 14].

Department's June 4, 2012 correspondence was not mailed (despite Ms. Giannetto's declaration), and Department persistently argues that Mr. Anderson's requested records were produced as a direct result of his lawsuit. Therefore, Mr. Anderson must be granted summary judgment on the issue of Department's failure to provide him a reasonable estimate of time in response to his February 24, 2012 request.

2. MS. GIANNETTO'S TESTIMONY THAT MR. ANDERSON REFUSED TO PAY THE REQUIRED 10% DOWN PAYMENT IS KNOWINGLY FALSE, COMPLETELY CONTRADICTED BY THE RECORD, AND FURTHER EVIDENCE OF FRAUD.

Department argues here that Mr. Anderson's requested down payment was received "late". Therefore, once again it is his fault that his request was mishandled.

Ms. Giannetto testified through her declaration that, "THE PLAINTIFF DID NOT SEND A 10% DOWN PAYMENT WITHIN 30 DAYS AS REQUIRED, SO HIS REQUEST WAS CLOSED ON APRIL 25, 2012." CP 240 [Declaration of Theresa Giannetto - 11 at ¶27].

In previous discovery, Department presented the following question to Mr. Anderson. "REQUEST FOR AD-

MISSION NO. 9: ADMIT THAT, WHILE SERVING YOUR CRIMINAL SENTENCE, YOU SENT A DOWN PAYMENT FOR YOUR MARCH 13, 2012 PUBLIC RECORDS REQUEST ON APRIL 19, 2012."

CP 60 [Def's Request For Admission No. 9].

This question relates to Department's letter sent to Mr. Anderson informing him that he had until April 25, 2012 to provide the down payment. Mr. Anderson; knowing that check #85617 was sent on April 19, 2012, freely admitted this RFA.

These RFA's are dated November 2, 2012, and Mr. Anderson's responses are dated November 29, 2012. This is a clearly established fact some 35 days before Ms. Giannetto testified that Mr. Anderson's payment was not sent.

Again, which facts are "clarified and corrected" through Ms. Giannetto's testimony here?

Department is purposely misleading the court by claiming that this same payment was not received until May 2, 2012. A full two weeks after both parties agree that it was sent.

The real question which needs answered here is not whether Mr. Anderson failed to send the requested down payment, but why is it that every piece of correspondence which is in some way time sensitive takes

weeks to travel from Airway Heights to Spokane, and correspondence which is not time sensitive routinely makes the same trip in 2-3 days? This is the same issue with Mr. Anderson's challenge regarding when did Department receive his March 13, 2012 request.

The facts here are clear. On June 4, 2012 Mr. Anderson challenged Department's five day response to his March 13, 2012 request. Mr. Anderson alleged that Department's response was untimely according to RCW 42.56.520. Mr. Anderson was well within the one year statute of limitations [RCW 42.56.550(6)] when he filed his suit. Any created controversy here is irrelevant to the facts.

Ms. Giannetto's declaration must be ruled inadmissible and Mr. Anderson's motion for summary judgment on the issue of Department's untimely response to his March 13, 2012 request must therefore be granted.  
CP 14-23

3. MR. ANDERSON CONCEDES THAT DEPARTMENT'S AMENDED ANSWER MEETS THE DEFINITION OF A PLEADING. HOWEVER, MS. GIANNETTO'S DECLARATION DOES NOT, AND DEPARTMENT'S SUBMISSION OF SAID DECLARATION IN SUPPORT OF DISMISSAL SHOULD HAVE CONVERTED THE FEBRUARY 15, 2013 HEARING TO A SUMMARY JUDGMENT PROCEEDING.

Mr. Anderson's objection to Department's amended answer is based on the fact that it is untimely accord-

ing to the case schedule order. This argument and Department's response has previously been made, and is well documented before this court. CP 384-427.

The facts here are clear. Department did submit Ms. Giannetto's declaration in support of its motion for dismissal, and Department did reference this declaration as supporting its motion. CP 374-76.

The trial court not only considered this inadmissible declaration over Mr. Anderson's objection, but the record shows that the court essentially based its decision entirely upon this declaration.

"... However, Theresa Giannetto, who is the records manager here, provided a fairly lengthy explanation of what goes on in her department... My understanding from what I can glean from that document is... So I think that all in all, from what I can gather by Theresa Giannetto's statement, that 90 days is not unreasonable."

RP 3-4.

According to CR 12(b); the mere submission of Ms. Giannetto's declaration dictated that the February 15, 2013 hearing be converted to one strictly for summary judgment. See: Appellant's Brief - 8-9. Any dismissal of this case under CR 12 is an error.

4. BAD FAITH EXPRESSLY PERTAINS TO PENALTIES, AND IN THIS CASE, BAD FAITH IS EASILY REACHED.

RCW 42.56.565(1) state:

"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..."

Id.

Black's Law Dictionary defines "bad faith" as:

"Dishonesty of belief or purpose."

Black's Law Dictionary (9th ed. 2009) at 159.

The failure to act in good faith is deemed bad faith:

"When courts speak of liability for bad faith OR THE DUTY TO USE GOOD FAITH, they are usually referring to the same obligation. Generally speaking in the context of these cases, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto.

Tyler v. Grange Insurance Association, 3 Wn.App. 167, 173, 473 P.2d 193 (1970) (citations omitted) (emphasis added).

The record before this court shows bad faith to not be nearly as untenable as Department would lead this court to believe.

On February 24, 2012 Mr. Anderson submitted a public records request to Department where he sought, "a police report concerning incident number B00072895".

CP 255 [Declaration of Theresa Giannetto -25].

Department argues, "[t]he Records Division required more information from the Plaintiff in order to complete his request because his request DID NOT PROVIDE INFORMATION THAT CLEARLY IDENTIFIED A SPECIFIC PUBLIC RECORD SEARCHABLE BY THE RECORDS DIVISION.

The information Plaintiff provided to the Records Division was insufficient..." Respondent's Brief - 2.

A review of the records (CP 90-115) shows this need for clarification to be Department's first lie. The actual citation which Mr. Anderson clearly identifies in his request references the same police report number (08-27339) which Department requested Mr. Anderson to supply. Thus, the police report which Mr. Anderson sought could have easily been located using only the citation number initially provided by him.

A review of Department's March 4, 2012 correspondence (CP 257 [Declaration of Theresa Giannetto - 27]). shows this to be Department's second lie. March 4, 2012 was a Sunday. The Spokane Police Department does not author business letters on Sundays.

These facts along with Ms. Giannetto's fraudulent declaration create a material issue in regards to

the question of bad faith. This case must be remanded so that further discovery may be conducted on the issue of bad faith.

### C. CONCLUSION

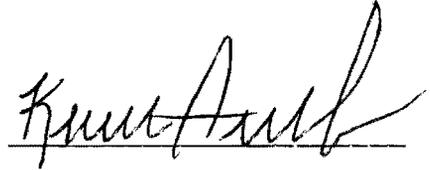
This case could have been handled totally different. If Department would have simply admitted that it did not send the June 4, 2012 correspondence attributing it to being overworked with requests then absolutely no bad faith could be found. Here however, Department has repeatedly lied to Mr. Anderson and the court in an attempt to cover up what should have been no more than an innocuous mistake.

This is no way for any government agency to conduct business, nor litigation. This case points to a much larger issue of an agency's seeming willingness to blatantly lie to its citizens, and the court.

This is not a request which is in any way meant for some improper purpose. This case is simply Mr. Anderson needed Department's assistance in obtaining a police report pertaining to him for a family court matter.

Mr. Anderson asks that this court rule Ms. Giannetto's declaration inadmissible. Grant his motion for partial summary judgment, and remand back for determination of bad faith and sanctions against both Department and Department's attorney for offering a knowingly false declaration.

DATED this 9th day of September, 2013.

A handwritten signature in cursive script, appearing to read "Kevin Anderson", written over a horizontal line.

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Connell, WA 99326

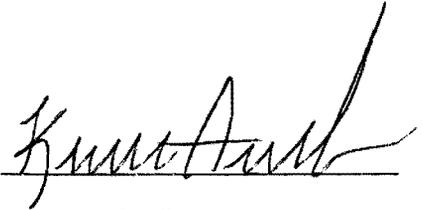
DECLARATION OF SERVICE

The undersigned hereby swears under the penalty of perjury of the laws of the State of Washington that on this day he did deposit in the internal mail of Coyote Ridge Corrections Center in accordance with GR 3.1: Appellant's Reply Brief. Causing the same to be delivered via U.S. mail and addressed to:

Court of Appeals  
Attn: Darnell Zundel  
N. 500 Cedar St.  
Spokane, WA 99201

City Attorney's Office  
Attn: Mary Muramatsu  
W. 808 Spokane Falls Blvd.  
Spokane, WA 99201

DATED this 9th day of September, 2013.

A handwritten signature in black ink, appearing to read "Kevin Anderson", written over a horizontal line.

Kevin Anderson