

FILED

JUN 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31568-1-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

KEVIN ANDERSON, Appellant,

v.

SPOKANE POLICE DEPARTMENT, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
SPOKANE COUNTY

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

BRIEF OF APPELLANT

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 2

C. SUMMARY OF THE ARGUMENT..... 5

D. STANDARD OF REVIEW..... 6

 1. Dismissal under CR 12(b)(6)..... 6

 2. Dismissal under CR 56..... 7

 3. Denial of a summary judgment motion..... 7

 4. Public Records Act..... 8

E. ARGUMENT..... 8

 1. The record shows that the rules of court dictate that the Feb 15, 2013 hearing was one for summary judgment..... 8

 2. The date which Department received Mr. Anderson's Mar 13, 2012 request, and the timing of Department's actions in relation to this date is determinative in assessing liability. This date being in question precludes summary judgment..... 10

 3. The Department's withholding records without identifying the nexus between any specific record and that record's claim of exemption is in fact a violation of the Public Records Act, thus Mr. Anderson's motion for partial summary judgment should be granted..... 14

 4. Mr. Anderson is entitled to statutory allowable fees and costs if he prevails on this appeal..... 17

F. CONCLUSION..... 18

TABLE OF AUTHORITIES

CITED CASES:

Burton v. Lehman,
153 Wn.2d 416, 103 P.3d 1230 (2005)..... 6

Capitol Hill Methodist Church of Seattle v. City of Seattle,
52 Wn.2d 359, 324 P.2d 1113 (1958)..... 7

Margoles v. Hubbert,
111 Wn.2d 195, 760 P.2d 324 (1988)..... 7

Neighborhood Alliance v. Spokane City,
153 Wn.App. 241 (Division III 2009)..... 7, 13

Prison Legal News, Inc. v. The Dept. of Corrections,
154 Wn.2d 628, 115 P.3d 316 (2005)..... 7

Progressive Animal Welfare Society v. University of Wa.,
125 Wn.2d 243, 884 P.2d 592 (1994)..... 8, 14

Reid v. Pierce County,
136 Wn.2d 195, 961 P.2d 333 (1998)..... 6

Rental Housing Assoc. of Puget Sound v. City of Des Moines,
165 Wn.2d 525, 199 P.3d 393 (2009)..... 15

Ruff v. County of King,
72 Wn.App. 289, 865 P.2d 5 (Division I 1995)
125 Wn.2d 697 887 P.2d 886 (1995)..... 8

Sanders v. State,
169 Wn.2d 827, 240 P.3d 120 (2010)..... 14, 15, 16

Smith v. Okanogan County,
100 Wn.App. 7, 994 P.2d 857 (2000)..... 10

State ex rel. Nugent v. Lewis,
93 Wn.2d 80, 605 P.2d 1265 (1980)..... 9

Tenore v. AT&T Wireless Servs.,
136 Wn.2d 322, 962 P.2d 104 (1998)..... 6

STATUTES:

RCW 42.56..... 2, 8
RCW 42.56.230..... 15
RCW 42.56.240..... 15
RCW 42.56.240(1)..... 15
RCW 42.56.520..... 3, 10, 12, 13
RCW 42.56.550(1)..... 12
RCW 46.12.635..... 16
RCW 10.97..... 17

COURT RULES:

CR 12(b)..... 9
CR 12(b)(6)..... 1, 4, 5, 6, 9
CR 56..... 1, 4, 5, 7
CR 56(c)..... 7

RULES OF EVIDENCE:

ER 613..... 5

A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting dismissal of this case under CR 12(b)(6).

a. ISSUES PERTAINING TO ERROR

1. Is dismissal under CR 12(b)(6) appropriate after the court takes into consideration evidence outside of the pleadings?
2. Does Mr. Anderson's complaint set forth any set of facts which, if proven, would entitle him to relief?

2. The trial court erred in failing to address Mr. Anderson's objection to, and motion to strike, evidence.

a. ISSUE PERTAINING TO ERROR

1. Did the trial court have a duty, pursuant to Mr. Anderson's motion to strike, to address the admissibility of evidence being proffered by the Spokane Police Department?

3. The trial court erred in granting dismissal of this case under CR 56.

a. ISSUE PERTAINING TO ERROR

1. Do the pleadings in this case demonstrate a material issue of disputed fact?

4. The trial court erred in denying Mr. Anderson's motion for partial summary judgment.

a. ISSUE PERTAINING TO ERROR

1. Does the Police Department's June 4, 2012 letter used to exempt numerous pages of requested records provide the requisite link between any individually withheld record and that record's claim of exemption?

B. STATEMENT OF THE CASE

On June 4, 2012 Mr. Anderson filed a lawsuit against the Spokane Police Department (Department). CP 1-5. In this lawsuit Mr. Anderson claimed that Department had violated the Public Records Act (PRA), ch 42.56 RCW, in Department's handling of Mr. Anderson's two public records requests dated Feb 24, 2012 and Mar 13, 2012. Mr. Anderson specifically alleged that Department failed to provide him with a reasonable estimate of time needed to fulfill his requests, also that Department failed to timely respond to his Mar 13, 2012 request. CP 4. Department answered Mr. Anderson's complaint and discovery ensued. On Dec 14, 2012 the trial court entered a case schedule order thereby setting the deadline for filing amendments as Jan 7, 2013. CP 13. On Dec 19, 2012 Mr. Anderson motioned the court

for partial summary judgment on three separate issues. CP 14-23. One issue Mr. Anderson sought judgment on was Department's initial response to his Mar 13, 2012 request. Mr. Anderson claimed that Department's response being 12-days after the date of his request was untimely under RCW 42.56.520 where Department is mandated to respond within 5-business days. Department stated in both, their answer to Mr. Anderson's complaint, as well as answers given in response to discovery, that Mr. Anderson's Mar 13, 2012 request was not received until Mar 25, 2012, therefore, the initial response also dated Mar 25, 2012 was timely. Here then, Mr. Anderson informed the court through his summary judgment motion that Department's date claimed as receiving his Mar 13, 2012 request could not possibly be true in light of the document he submitted in support of his motion. This document, authored by Department's Records Manager, Theresa Giannetto, and dated Mar 21, 2012, referenced Mr. Anderson's Mar 13, 2012 request 4-days prior to Department claiming to have received said request. CP 119. On Dec 31, 2012 Department responded to Mr. Anderson's summary judgment motion. CP 28-53. At this time Department had not filed any amended answer, and in their response to Mr. Anderson's motion Department essentially argued against their answer then on file with the court

by acknowledging: (1) Department's answer then on file with the court has been knowingly wrong for approximately 90-days (since first round of discovery produced on Oct 3, 2012) (CP 38); (2) the Department in fact did not receive Mr. Anderson's Mar 13, 2012 request on the date stated in said answer (Id); and (3) the date stamp used on Mr. Anderson's Mar 13, 2012 representing it as being received on Mar 25, 2012 was also incorrect. Id. Furthermore, Department questioned the veracity of their own correspondence sent to Mr. Anderson in response to his Mar 13, 2012 request. CP 40. Mr. Anderson had submitted this particular correspondence as evidence showing Department's acknowledgment of his Mar 13, 2012 request on Mar 16, 2012. CP 121. On Jan 10, 2013 (after the deadline for filing amendments had passed) Department filed a motion to dismiss under both CR 12(b)(6) and CR 56. CP 374-376. Included with Department's motion was an amended answer to Mr. Anderson's complaint (CP 321-327), and in this amended answer Department abandoned the date of Mar 25, 2012 as having received Mr. Anderson's Mar 13, 2012 request instead stating that Department actually received said request on Mar 21, 2012. CP 323 at ¶4.6. Department offered no explanation as to why this date was only now being changed, however, Department did offer a sworn declaration

in support of dismissal from Records Manager, Theresa Giannetto. CP 230-320. In Ms. Giannetto's declaration she contradicted her previous sworn statement regarding the date Department claimed to have received Mr. Anderson's Mar 13, 2012 request. Upon receiving Department's motion to dismiss Mr. Anderson filed a cross motion to strike Department's amended answer as untimely according to the Dec 14, 2012 case schedule order, and Theresa Giannetto's declaration as being inadmissible evidence under ER 613. CP 384-389. On Feb 15, 2013 the trial court after reviewing the entire record granted Department's motion to dismiss under both CR 12(b)(6) and CR 56. This dismissal was based on the court's finding that Department did not act in bad faith.

C. SUMMARY OF THE ARGUMENT

Mr. Anderson will show that this case simply does not meet the standard for dismissal under CR 12(b)(6). Furthermore, given the fact that Department completely changed the date which they claim to have received Mr. Anderson's Mar 13, 2012 request along with the fact that liability hinges on this date; and the timing of Department's actions in relation to this date, there is a material issue of disputed fact in this case which

precludes summary judgment. Lastly, Mr. Anderson will show that Department's letter written in response to his Feb 24, 2012 request where Department claims exemption of numerous pages of records under a blanket style claim of exemption has consistently been upheld as a violation of the PRA, thus, Mr. Anderson's motion for partial summary judgment on that particular issue should be granted.

D. STANDARDS OF REVIEW

1. Dismissal under CR 12(b)(6).

A trial court's order of dismissal based upon a CR 12(b)(6) motion is reviewed de novo. Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Dismissal under CR 12(b)(6) "is appropriate only if 'it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery.'" Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) (quoting Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). In making this determination, a trial court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. Id at 422.

2. Dismissal under CR 56.

"The standard of review on appeal of a summary judgment order is de novo. The reviewing court conducts the same inquiry as the trial court." *Margoles v. Hubbert*, 111 Wn.2d 195, 760 P.2d 324 (1988). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A court that is ruling on a motion for summary judgment construes the facts submitted and the reasonable inferences that may be drawn from the facts in the light most favorable to the nonmoving party. *Neighborhood Alliance v. Spokane City*, 153 Wn.App. 241, 255 (Div III 2009). A material fact is one which the outcome of the litigation depends. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958).

3. Denial of a summary judgment motion.

The trial court's denial of a summary judgment motion is reviewable in the context of a case in which

an appeal is taken from some other appealable order or judgment. *Ruff v. County of King*, 72 Wn.App. 289, 865 P.2d 5 (Div I 1993), decision rev'd, 125 Wn.2d 697, 887 P.2d 886 (1995)(no appeal from denial of plaintiff's motion, but on plaintiff's appeal from granting of summary judgment for defendant, court was willing to review denial of summary judgment for plaintiff).

4. Public Records Act.

"Judicial review of all agency actions taken or challenged under [RCW 42.56] shall be de novo." *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). When the record consists only of affidavits, memoranda of law, and other documentary evidence, the appellate court stands in the same position as the trial court. *Id.*

E. ARGUMENT

1. The record shows that the rules of court dictate that the Feb 15, 2013 hearing was one for summary judgment.

"If on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters

outside the pleadings are presented to and not excluded by the court, the motion **SHALL** be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(b)(emphasis added).

"As a general rule, the use of the word "shall" in a statute or court rule is mandatory and operates to create a duty. State ex rel. Nugent v. Lewis, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980).

Here, In support of Department's Jan 10, 2013 motion to dismiss Department filed an amended answer to Mr. Anderson's complaint as well as a declaration of Department's Records Manager, Theresa Giannetto. These filings by rule converted the Feb 15, 2012 hearing to one for summary judgment.

Furthermore, Mr. Anderson's complaint explicitly alleged that Department violated the PRA by failing to timely respond to his public records request. CP 4. Under the standard for CR 12(b)(6) dismissal the trial court must presume this allegation to be true, and given this allegation is accepted as true then Department would in fact be liable for violating the PRA and Mr. Anderson would be entitled to the relief which he requested.

2. The date which Department received Mr. Anderson's Mar 13, 2012 request, and the timing of Department's actions in relation to this date is determinative in assessing liability. This date being in question precludes summary judgment.

When an agency receives a request for disclosure it must respond as directed by statute [RCW 42.56.520]. When an agency fails to respond it violates the PRA. *Smith v. Okanogan County*, 100 Wn.App. 7, 13, 994 P.2d 857, 862 (2000).

In order to assess whether or not Department is liable under this provision of the PRA the court must make a two part determination. First, the court must determine when the agency received the request. Second, the court must determine when the agency responded. The record here shows that Department cannot prove the date the received Mr. Anderson's Mar 13, 2012 request as the usual means of proving this date are admittedly unreliable and Department's testimony on this subject contradicts itself.

Department has three resources at their disposal which can be used to verify the date which they receive a public records request. First is the date stamp used in marking all incoming requests. Here, however,

that date stamp shows a date of Mar 25, 2012 and Department admits that this date is false. CP 239 at ¶23 [Declaration of Theresa Giannetto-10]. Second is Department's public disclosure log where incoming requests are logged in. Here too, Department admits that Mr. Anderson's Mar 13, 2012 request was logged in on some day other than the date which Department actually received his request. CP 238 at ¶22. Finally, there is the testimony of the person who worked on the request, or has personal knowledge regarding the pertinent facts of the request. Here again, Records Manager, Theresa Giannetto swore that Mr. Anderson's Mar 13, 2012 request was received by Department on two completely different dates. Ms. Giannetto first swore that said request was received on Mar 25, 2012. CP 67, 73 [Def's Responses to Plntf's First Set of Interr and RFP of Documents-2, -8]. Later Ms. Giannetto swore that Department received Mr. Anderson's request on Mar 21, 2012. CP 237 at ¶19.

The Department will argue that since they have (conveniently) chosen a second date of receiving Mr. Anderson's Mar 13, 2012 request that is within the allowable 5-day period (according to Department's Mar 25, 2012 initial response) to respond that they

should not be found to have violated the prompt response provision [RCW 42.56.520] of the PRA. To this Mr. Anderson reminds the court that under the PRA the burden of proof falls squarely on the agency [RCW 42.56.550(1)] to justify the withholding of a public record. Department, who photocopies envelopes received, has a copy of the envelope used by Mr. Anderson in mailing his Mar 13, 2012 request. Department has not offered this envelope as evidence which would show the postmark and possibly explain how U.S. mail traveling from Airway Heights, WA to Spokane, WA took either 12-days, or 8-days (depending on which version they attempt to prove).

The record is clear and there is no controversy as to the date of Mr. Anderson's request (Mar 13, 2012), and the date of Department's initial response (Mar 25, 2012). The question of fact is: Did Department receive Mr. Anderson's request on Mar 16, 2012 (as he has asserted) where there is an entry in Department's public disclosure log and there is a piece of correspondence from Department referencing this date; or, did Department receive Mr. Anderson's request on either Mar 25, 2012 or Mar 21, 2012 where there is no evidence or admittedly erroneous evidence to

support? If Mr. Anderson's assertion is correct then Department is liable for violating the prompt response provision of the PRA [RCW 42.56.520], however, if Department's assertion is correct then there is no liability. This question demonstrates a material issue of disputed fact and precludes summary judgment.

"A question of fact may not be decided as a matter of law by summary judgment unless reasonable minds could reach only one conclusion. Neighborhood Alliance v. Spokane City, 153 Wn.App 241, 255 (Div III 2009).

Incidentally, to reach the conclusion Department wishes on this issue of when did Department receive Mr. Anderson's Mar 13, 2012 request calls into question the estimate of time provided to Mr. Anderson. Department would lead the court to believe that within one eight hour business day they: (1)received Mr. Anderson's request in the incoming mail; (2)retrieved all the responsive records from their various locations; (3)reviewed each record determining that "no redactions [are] necessary" (CP 119), and instead of simply notifying Mr. Anderson of the cost, or sending the records that Department then provided him with a reasonable estimate by informing him that his seemingly completed request would take an additional 90-business

days (18 weeks) to complete. CP 123.

3. The Police Department's withholding records without identifying the nexus between any specific record and that record's claim of exemption is in fact a violation of the Public Records Act, thus Mr. Anderson's motion for partial summary judgment should be granted.

Washington's Supreme Court has characterized failure to provide an explanation as "silent withholding," which occurs when "an agency... retain[s] a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld." PAWS, 125 Wn.2d at 270. Providing the required explanation is important not only because it informs the requestor why the documents are being withheld, but also because failure to provide the explanation "vitiates" "the reviewing court's ability to conduct the statutorily required de novo review." *Id.* The court in *Sanders* said, "Claimed exemptions cannot be vetted for validity if they are unexplained". *Sanders v. State*, 169 Wn.2d 827, 842, 240 P.3d 120 (2010).

To comply with the PRA, the agency must provide an explanation that specifically describes how the claimed exemption applies to the withheld information because "[a]llowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render [the PRA's] brief explanation clause superfluous." Sanders, 169 Wn.2d at 846.

In response to Mr. Anderson's Feb 24, 2012 request Department included along with the numerous pages of withheld records (CP 93-115) a two page letter (CP 90-91) where the Department claims that the records are being withheld from disclosure under the incantation of: Effective law enforcement [RCW 42.56.240(1)]; and, personal privacy [RCW 42.56.230 .240(Includes Social Security Number)]. In Rental Housing v. City of Des Moines the Supreme Court held that this type of letter used to exempt records without providing the requisite link between a withheld record and a claim of exemption is a violation of the PRA. Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539-40, 199 P.3d 393 (2009). And in Sanders the following question was asked. "Did AGO's response violate the PRA if it did not contain a brief explanation of how its claimed

exemption applied to the record withheld, and if so, what is the remedy for such a violation? Conclusion: Yes..." Sanders v. State, 169 Wn.2d at 842.

The record here shows exactly the sort of chaos that results when an ineffective claim of exemption (Department's June 4, 2012 letter) is used in an attempt to explain the withholding of numerous pages of public records. Department first cited to effective law enforcement and personal privacy as the reason for withholding records responsive to Mr. Anderson's Mar 13, 2012 request. Department then changed their claim of exemption when responding to summary judgment by now claiming that the records were exempt under RCW 46.12.635. CP 41-42. Here, Department completely misrepresented facts and misled the court by stating that the June 4, 2012 letter (which does not in any way reference RCW 46.12.635) somehow still adequately explains the withholding. When this issue came up again the Department now stated that "federal laws" prevented the records release. CP 421. Once again stating that the June 4, 2012 letter (which does not reference any federal laws) adequately explains the withholding. Finally, at the Feb 15, 2012 hearing Department revealed in oral argument that at least

a portion of the records being withheld contain criminal conviction data. Mr. Anderson now argues that not only does the June 4, 2012 inadequately correlate any withheld record to a claim of exemption, but that if these records do in fact contain criminal conviction data pertaining to himself then he explicitly has a right to review such data under RCW 10.97.

By failing to provide the nexus between any record being withheld and that record's claim of exemption Department's June 4, 2012 letter should be found to constitute a per se violation of the PRA and Mr. Anderson's motion for partial summary judgment on this issue should be granted. CP 14-23.

4. Mr. Anderson is entitled to statutory allowable fees and costs if he prevails on this appeal.

"A plaintiff who prevails in an appeal of an action to enforce a public disclosure request is entitled to an award of costs and reasonable attorney fees on appeal." *Prison Legal News, Inc. v. The Dept. of Corrections*, 154 Wn.2d 628, 648, 115 P.3d 316 (2005).

E. CONCLUSION

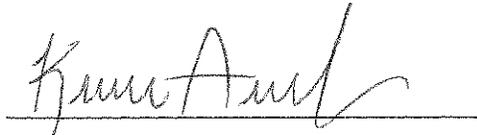
Department's actions here are wrong. Department has lied to Mr. Anderson concerning how they fulfill incoming public records requests. Lied to Mr. Anderson concerning how long was needed to fulfill his requests. Lied in response to Mr. Anderson's lawsuit. And Department continues to lie concerning why they have to date refused him an opportunity to review his requested records.

Department will argue that Mr. Anderson has somehow abandoned his requests, or that Mr. Anderson has preemptively sued Department. The record shows that this too does not make sense. Mr. Anderson has always maintained that he needed these records in a timely manner (Mr. Anderson needs these records for an ongoing family law matter). Mr. Anderson was the person who sought Department to provide this simple police report from a referenced city ticket number in a more timely manner. Mr. Anderson even provided the requested clarification to an objectively clear request (CP 76), in order to ease Department's effort needed in locating these records. Not to identify which records Mr. Anderson was seeking, but to locate them. And when Department asked for payment of the deposit Mr. Anderson again complied. Under the PRA a requestor does not have to justify his/her actions; though Mr. Anderson can in

in this case, the PRA requires an agency to bear the burden of proof.

The fact of this matter is: Department is unlawfully withholding Mr. Anderson's criminal conviction data while never providing him with any valid claim of exemption other than the "federal laws" claimed in Department's legal pleadings. And for this reason Mr. Anderson's motion for summary judgment should be granted and this case should be remanded for in camera review of the documents.

DATED this 17th day of June, 2013.

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

Kevin Anderson
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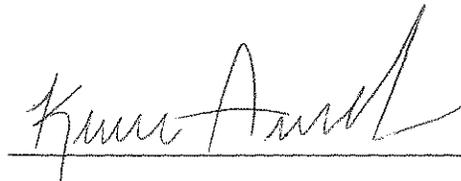
DECLARATION OF SERVICE

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: Brief of Appellant. 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 17th day of June, 2013.

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

Kevin Anderson