

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33180-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CLARENCE J. FAULKNER, Appellant-Plaintiff

v.

DEPARTMENT OF CORRECTIONS, Respondent-Defendant

APPEAL FROM THE SUPERIOR COURT FOR
SPOKANE COUNTY

The Honorable Salvatore F. Cozza

No. 14-2-03250-6

OPENING BRIEF OF APPELLANT FAULKNER

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A. ASSIGNMENTS OF ERROR

1. Assignments of Error

1. The trial court erred in entering an Order on January 23, 2015, when it ordered: Defendant was unsuccessful when it performed a reasonable search for records responsive to Plaintiff's Public Records Act request. Once Plaintiff clarified his request, Defendant was able to locate and provide Plaintiff with responsive records (Clerk's Papers (CP) at 244).

2. The trial court erred in entering an Order on January 23, 2015, when it ordered: In any event, Defendant's actions did not constitute bad faith under RCW 42.56.565 (CP at 245).

3. The trial court erred in entering an Order on January 23, 2015, when it ordered: Defendant's Motion to Show Cause is GRANTED (CP at 245).

4. The trial court erred in entering an Order on January 23, 2015, when it ordered: Plaintiff's claims are dismissed WITH PREJUDICE (CP at 245).

2. Issues Pertaining To Assignments Of Error

1. Did Defendant Department of Corrections (hereinafter Department) violate the Public Records Act (PRA) in the processing and responding to Plaintiff Faulkner's (hereinafter Faulkner) public records request for the specified FedEx invoice?

2. Did the Department act in bad faith in processing and responding to Faulkner's PRA request?

3. If Faulkner is the prevailing party on this appeal

is he entitled to reimbursement from the Department for his fees and costs in this action?

B STATEMENT OF THE CASE

On March 23, 2014, Faulkner submitted a public records request to the Department specifying (1) A copy of the FedEx invoices related to four boxes of his property shipped via FedEx from the Monroe Correctional Complex to Stafford Creek Corrections Center, (2) A copy of all records related to the four boxes of property being held at Monroe Correctional Complex pending prepayment by Faulkner, (3) A copy of the Department's policy or other directive regarding the holding and shipping of prisoner's legal records, and (4) A copy of any policy or directive requiring the filing of a PRA request to obtain a printed statement of a prisoner's trust account maintained by the Department (CP at 76). Faulkner included a copy of a previous FedEx invoice (PDU-25167) provided to him through a similar request showing the exact costs for shipping seven boxes from the Coyote Ridge Corrections Center to the Monroe Complex in May of 2013 (CP at 77).

Faulkner explained that he sought the invoice because he suspected that he was being overcharged based on being required to prepay \$45.00, and then charged \$10.37, \$9.96, \$9.45, and \$10.55 (CP at 110-111), especially considering that he sent seven boxes from Connell to Monroe for approximately \$38.00. (CP at 77).

Faulkner expressed, "The records are most likely available from the MCC Business Office (Ms. Karen Looney) where the payables are batched for payment." (CP at 76).

On April 2, 2014, Jamie Gerken of the Department's Public Disclosure Unit acknowledged Faulkner's request including the noting of the full tracking number for PKG #4. Jamie Gerken did not acknowledge Faulkner's suggestion that Ms. Karen Looney of the Monroe Complex's Business may be a likely source to locate the records (CP at 79-80). Public Disclosure Manager Gerken estimated a response would be forthcoming on or before May 29, 2014. (CP at 80).

On May 29, 2014, Alan DuVall, Public Disclosure Specialist, wrote to Faulkner indicating that 41 responsive pages were available at a total cost of \$10.44 (CP at 85-86).

On June 18, 2014, Alan DuVall, acknowledged Faulkner's payment of \$10.44 and forwarded the responsive documents stating that the 41 pages were responsive to Items #1 and #3, as requested Faulkner had cancelled Item #2, and that there were no responsive records to Item #4 (CP at 87). Alan DuVall closed the communication by stating, "This request is now closed." (CP at 88).

On June 20, 2014, Faulkner received the mailing and found that the two documents proffered as "invoices" related to the FedEx shipments were not at all invoices (CP at 163-164) and while PDU-28746 001 reflected full tracking ID information,

PDU-28746 002 (CP 164) reflected only a weight of 34 pounds and a cost of \$20.00. The remaining 39 pages of policy was a reasonable response to Item #3.

On June 20, 2014, Faulkner submitted an appeal on PDU-28746 objecting that the documents provided for Item #1 were clearly non-responsive and not the FedEx invoices requested, and further appealed the lack of any responsive document to Item #4 (CP at 197).

On July 3, 2014, Dominga Soliz of the Public Disclosure Unit's Agency Appelas Office acknowledged Faulkner's appeal and indicated that a response would be made on or before August 1, 2014 (CP at 199).

On July 28, 2014, Alan DuVall responded to Faulkner's appeal concluding that the 2 pages proffered as invoices were non-responsive, and that after a second search was conducted, the Department has determined that there are no responsive invoices. Mr. DuVall further stated that no responsive documents are available for Item #4 (CP at 201-202). Again, the request was deemed closed.

On August 2, 2014, Faulkner submitted his second appeal of the matter reiterating that the FedEx invoices surely exist, and that he had even provided a sample invoice from a previous request (CP at 204). Faulkner began drafting a civil complaint alleging a violation of Washington's Public Records Act.

On August 10, 2014, Faulkner completed his civil claim and directed it to the Clerk of the Superior Court of Spokane County.

Faulkner's indigency request was granted on August 13, 2014 (CP at 13), and his civil complaint was filed on August 18, 2014 (CP at 3).

On August 19, 2014, Dominga Soliz of the Public Disclosure Unit's appeals office acknowledged Faulkner's second appeal of the failure to provide the requested FedEx invoices. Ms. Soliz responded that a third search had been conducted and additional records responsive to Item #1 (the FedEx invoice request) had been located. She stated that the records would be reviewed and disclosed, and that Alan DuVall would contact Faulkner on or before September 10, 2014 (CP at 206).

On September 3, 2014, Faulkner was notified that 3 pages responsive to Item #1 were available upon payment of \$1.09 (CP at 208).

On September 10, 2014, Faulkner sent a remittance letter along with payment for the 3 responsive pages (CP at 211).

On September 25, 2014, Alan DuVall mailed the, "...3 pages of FedEx Invoices that show your 4 boxes." and he further stated that the request is again "closed" (CP at 213-214). Faulkner reviewed the FedEx invoices and determined that the shipments for which he was charged \$9.96, \$10.37, \$9.45, and \$10.55 respectively (CP at 110-111) were invoiced by FedEx at \$6.25, \$6.46, \$6.15, and \$6.49 respectively (CP at 90-92) resulting in a significant overcharge to Faulkner. Faulkner reviewed the Department's charging document (CP at 110-111) comparing them

to the FedEx invoices (CP at 215-217) and the inspection revealed that others were being overcharged as well.

Feeling that his records request had not been processed timely and in an adequate fashion, Faulkner continued to press his civil complaint.

After minimal discovery, Defendant Department of Corrections moved the court for a Defendant's Motion To Show Cause on November 19, 2014 (CP at 23-139). Faulkner responded to the motion on December 1, 2014 (CP at 151-175).

On December 12, 2014, the Defendant's Motion was heard before the Honorable Salvatore F. Cozza and both parties presented oral testimony (ROP at 1-15).

On December 15, 2014, Judge Cozza issued a letter opinion and requested the parties prepare an Order reflecting his ruling (CP 221-222). Upon review of the letter ruling, Faulkner did not find it clearly noted whether or not a PRA violation had occurred. Faulkner sought clarification by submitting a Motion For Clarification or Reconsideration of Letter Opinion on December 28, 2014 which was filed on January 7, 2015 (CP at 226-231).

Ms. Candie Dibble, Assistant Attorney General and counsel for the Defendant drafted an Order and provided Faulkner a copy for review. Faulkner responded that he did not feel the proposed Order accurately explicated the language of Judge Cozza's letter ruling, especially that it spoke of finding no "bad faith" yet no clarity on whether or not there was a PRA violation.

On January 12, 2015, without clarifying the matter with Faulkner, counsel Dibble scheduled a motion for Presentment to be held on January 23, 2015 (CP at 231-232).

On January 23, 2015, a short hearing was held before Judge Cozza (ROP 16-18) and counsel Dibble's Order was granted and approved for filing (CP at 235-236).

On February 20, 2015, Faulkner filed a Notice of Appeal to this Court of Appeals Division III requesting an appellate review of the matter (CP at 239-242).

On March 5, 2015, Faulkner was granted an indigency filing status by the Spokane Superior Court and the Findings transmitted to the Washington Supreme Court for review (CP at 247-256).

On March 16, 2015, after receiving a settlement of approximately \$3000.00 in another matter, Faulkner motioned the Supreme Court to withdraw his request for an Order of Indigency on Appeal of a civil matter (CP at 260-268).

On March 26, 2015, the Supreme Court granted the motion and struck the matter from further hearing (CP at 269).

Faulkner subsequently paid the appellate filing fees, Clerk's Papers, and the Verbatim Report of Proceedings.

C. SUMMARY OF ARGUMENTS

1. Faulkner first challenges the trial court's ruling that the Defendant Department of Corrections did not violate the PRA in respect to the processing of his PRA request for the FedEx invoices related to his specifically identified shipments.

2. Faulkner challenges the finding that the Defendant Department of Corrections did not act in bad faith in the processing and review of his PRA request for the FedEx invoices specified in his request.

3. Finally, Faulkner argues that he is entitled to his costs and fees in bringing this appeal.

D. ARGUMENTS

1. The Defendant Department of Corrections Violated The Public Records Act Regarding Faulkner's PRA Request For The FedEx Invoices Paid By The Department For The Shipments Of His Property.

On March 23, 2014, Faulkner made a concise request for copies of the Department's invoices from FedEx for the shipment of his four boxes from Monroe to Aberdeen, Washington. Faulkner provided the FedEx tracking numbers he had noted from the boxes delivered to him after inspection by Stafford Creek Corrections Center staff. Faulkner also provided the Department's Public Disclosure Unit with a copy of the FedEx invoice he had obtained through a similar PRA request showing the costs for shipment of seven boxes from Connell to Monroe facilities. Faulkner also stated, "The records are most likely available from the MCC Business Office (Ms. Karen Looney) where the payables are batched for payment." Faulkner included the statement as a suggested source, not to limit the search to only the Monroe facility (CP at 76 and ROP at 10).

Faulkner asserts that his request was sufficient and clear in identifying the public records he needed and that the example he provided further emphasized the specific records (CP at 76). An identifiable public record is, "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." Beal v. City of Seattle, 150 Wn. App. 865, 872, 209 P.3d 872 (2009); see also WAC 44-14-04002(2) (an "identifiable record" is one agency staff can "reasonably locate"). The "identifiable record" requirement is **satisfied** where there is a "reasonable description" of the record "enabling the government employee to locate the requested records." Bonamy v. City of Seattle, 92 Wn. App. 403, 960 P.2d 447 1998. However, a requestor is not required to identify the exact record he or she seeks. Volante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002). Here, Faulkner made a clear request and the agency sought no clarification from him. There is no support in the record for the ORDER GRANTING DEFENDANT'S MOTION FOR SHOW CAUSE finding at 1. "Once Plaintiff clarified his request, Defendant was able to locate and provide Plaintiff with responsive records." (CP at 235). Faulkner respectfully asserts that the court misapprehended any such clarification.

The Supreme Court in PAWS II emphasized that "[agencies have a duty to provide 'the fullest assistance to inquirers and the most timely possible action on requests for information.'"

Progressive Animal Welfare Society v. University of Washington (PAWS II), 125 Wn. 2d at 252 (quoting RCW 42.56.100, 42.56.520).

Further codified in the PRA, this duty exists, despite the fact that "such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

Faulkner alleges rather than giving him the fullest of assistance possible and a prompt response, the agency first responded proffering non-responsive documents (CP at 195-196) and closing the request. Faulkner filed an appeal and the Department admitted that the two pages offered as the responsive invoices were, ".... nonresponsive to Item #1." (CP at 201). More importantly, the Department then concluded that after a second search no responsive were available for Item #1, and the request was deemed closed for a second time. No request for clarification was made. (CP at 201-202).

Not giving up, Faulkner then submitted his second agency appeal over the failure to produce the invoices surely existing within one of the Department's accounting divisions or offices (CP at 204). After courteously waiting for many months, and under no obligation to beg further, Faulkner filed a civil complaint requesting the Department appear and show cause as to whether or not they were complying with the PRA and all its provisions (CP at 1-7). Faulkner asserts that the documented chronology he has presented demonstrates that the Department was not adhering to the principles of the PRA and they were

not working cooperatively with him in an effort to satisfy his request. Faulkner also asserts that the aforementioned chronology and a review of the record shows that the agency performed only a perfunctory search for responsive records, and did not diligently coordinate the claimed "clarification" of his request (CP at 235). The failure to perform an adequate search precludes an adequate response and production. The PRA "treats a failure to properly respond as a denial." Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 750, 174 P.3d 60 (2007)(citing RCW 42.56.550(2)). The adequacy of a search for records under the Public Records Act is the same as exists under the federal Freedom of Information Act. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents, Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 261 P.3d 119 (2011). When the Washington State Legislature revised the PRA to preclude the award of penalties to incarcerated individuals unless there was a showing of bad faith (see SUBSTITUTE S.B. 5025, 62nd Leg., Reg. Sess., ch 300 ((Wash. 2011))) analysis of that legislation provided, "Thus, the legislature plainly intended to afford prisoners an effective records search, while insulating agencies from penalties as long as they did not act in bad faith." Francis v. Dep't of Corr., 178 Wn. App. 60, 313 P.3d 457 (2013). This Court accepted and cited the same legislative intent in Faulkner v. Dep't of Corr., 332 P.3d 1142, 2014 WL 4086310 (2014). The Department has misapplied

the Bonamy case in alleging that Faulkner's request was akin to asking the Department to be "mind readers." (CP at 29, 32, 154-155, and ROP at 9). To the contrary, Faulkner asked for the "invoices" and specified the exact FedEx tracking numbers and shipping dates, while Bonamy sought "information."

Overlooked throughout the pleadings and hearings was the fact that Faulkner provided the Department with a FedEx invoice that had been promptly provided in PDU-25167 (CP at 77, 160). The record is devoid of any attempt made by the agency to review and ascertain the source for FedEx invoice 2-275-53708 which alerted Faulkner to the charges for his shipments from Connell to Monroe. Faulkner also suggested in his original and only request, "The records are most likely available from the MCC Business Office (Ms. Karen Looney) where the payables are batched for payment." (CP at 76). Again, the record is devoid of a showing that the MCC Business Manager Ms. Karen Looney was contacted to seek a source for the FedEx invoice. Ms. Looney was contacted to locate Item #4 - records on whether or not a prisoner must file a public records request to obtain a copy of his or her trust account statement. (CP at 106). In her DECLARATION, Ms. Denise Vaughan, Public Records Officer and Compliance Manager for the Department, states that she is a highly trained professional responsible for oversight of the Department's Public Disclosure Unit staffed with 35 or more employees. Ms. Vaughan recites the processing of Faulkner's

request and yet she too fails to make any mention of the production of the FedEx invoice provided as an aid by Faulkner (CP at 70-74). Faulkner asserts that it was prudent and reasonable to expect that the Department would check with Ms. Looney as suggested, and if not with her, then a review of the source of the example invoice. Rather than making a careful review or asking Faulkner for further clarification, the Department proffered nonresponsive documents and closed the request. Faulkner appealed and a second cursory search was made concluding with a response that no invoices exist and the request was closed a second time. Not willing to give up, Faulkner filed a second appeal and triggering a third search, which though "effective," resulted in Faulkner waiting 161 days for the much needed invoice (CP at 35). For the aforementioned arguments, Faulkner respectfully asserts that the Department violated the intent, and the provisions, of the PRA which require the fullest of assistance and prompt production of public records.

In discussing a possible penalty range the Department asserts, "Plaintiff does not claim and has not shown that his request involves issues of public importance. Indeed, this request appears to involve issues that are purely personal to Plaintiff." (CP at 36). To the contrary, Faulkner testified, "The matter is more than personally important, sir. While not a direct part of this action, the invoice alludes to an unfair system in play at Monroe Correctional Complex." (ROP at 13). Ultimately, Faulkner's inquiry resulted

in a finding that all MCC offenders who sent a FedEx package from July 2010 through November 2014 were overcharged.

Faulkner's PRA request was an important and valid use of the Washington Public Records Act, and serves as an example why prisoners should not be excluded from such requests. What would have transpired if Faulkner would have accepted and not appealed the request?

2. The Defendant Department of Corrections Acted In Bad Faith In The Processing And Review Of His PRA Request For The FedEx Invoices Specified In His Request.

According to the latest caselaw and reference available to the pro se appellant Faulkner, the Published Opinion in Faulkner v. Dep't of Corr., 332 P.3d 1137, 2014 WL 4086310 (2014) issued by this Division III Court of Appeals, remains the current reference in the analysis of bad faith as it relates to award of penalties in PRA cases by incarcerated individuals. In the interest of brevity, and due to the complexity of the matter, Faulkner presents this short and concise argument in support of his claim that the Defendants have acted in bad faith in the processing and review of his records request.

Faulkner asserts that the Department did not willfully make a timely and reasonable effort to obtain the FedEx invoices through an effective records search. The Department makes no showing that they reviewed the sample invoice previously provided in a similar request (CP at 77). Similarly, the Department failed to ask

Ms. Karen Looney, the Business Manager at the Monroe Correctional Complex, as suggested in his request (CP at 76). Further, rather than communicate with Faulkner for clarification, the Department willfully pressed Faulkner into twice appealing, proffered nonresponsive documents, claimed no invoices exist, and then after the lapsing of 161 days and three searches Faulkner finally received the specified invoices which not only proved he had been overcharged, but that all MCC offenders who shipped via FedEx from July 2010 through November 2014, were overcharged as well. Faulkner respectfully asserts that the aforementioned actions and omissions warrant a finding of bad faith and the award of minimal penalties to induce the Department to comply with the requirements of the PRA when a prisoner submits a request that is clearly non-frivolous nor abusive.

3. If Faulkner prevails on this appeal he is entitled to his fees and costs.

Under both the old and new codification of the Public Records Act, an individual who prevails against the agency is entitled to all costs, including reasonable attorney's fees. RCW 42.56.550(4); The Public Records Act's authorization of attorneys fees includes fees on appeal. Progressive Animal Soc'y v. University of Washington., 114 Wn.2d, 677, 690, 790 P.2d 604 (1990). While a pro se litigant is not entitled to attorney fees, Faulkner asks this Court to order the Department of Corrections to pay all costs if he should

prevail on his appeal.

E. CONCLUSION

For the reasons set forth above, appellant Clarence J. Faulkner respectfully asks this Court to reverse the trial court's finding that the agency did not violate the PRA in respect to his request for the FedEx invoices, reverse the finding that the agency did not act in "bad faith" regarding the processing and review of his PRA request, and remand the matter back to the superior court for a determination of penalties, or in the alternative assess a penalty this Court deems appropriate.

Finally, Faulkner asks this Court to order the Department of Corrections to pay all costs of this appeal.

Respectfully submitted this 23rd day of June, 2015.

Clarence J. Faulkner

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CERTIFICATE OF SERVICE

I certify that I served the original and a copy of the foregoing Appellant's Opening Brief, Court of Appeals Division III No. 33180-6-III, with the Clerk of the Division III Court of Appeals, and I served a copy on Respondent's counsel of record by mailing it through the "Legal Mail" process of the Airway Heights Corrections Center, U.S. Mail postage prepaid on this the 23rd day of June, 2015, addressed to:

Clerk, Court of Appeals Division III
500 N. Cedar St.
Spokane, WA 99201-1905

and to:

Candie M. Dibble, WSBA# 42279
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I certify under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of June, 2015, at Airway Heights Washington.



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APPELLANT'S OPENING BRIEF
No. 33180-6-III