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Court of Appeals
Division III
State of Washington

NO. 33180-6-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III**

CLARENCE J. FAULKNER,

Plaintiff/Appellant,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Appellee.

BRIEF OF DEFENDANT/APPELLEE

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I. INTRODUCTION

This Public Records Act (PRA) case involves prisoner Clarence Faulkner's request for FedEx invoice records related to his transfer between prison facilities. The Washington State Department of Corrections (hereinafter "the Department") properly responded to the request by providing Faulkner with the responsive record in its possession after expanding the search locations listed in his original request.

When an offender transfers between Department facilities, the offender is permitted to ship two boxes of property at the Department's expense. Any offender property over the two box limit may be shipped at the offender's expense or be donated or destroyed. The facility mailroom handling the shipment of the excess property does not receive invoices from the outside carriers who handle the offender shipment. All payments and invoices are handled through Department headquarters.

Faulkner submitted a public disclosure request for FedEx records for specific shipments indicating the records were at the prison facility. The Department timely responded to the request and initially was unable to locate the records at the prison facility. During investigation of Faulkner's appeal, the Department eventually located the records after expanding the search location noted in Faulkner's request. While his appeal was pending, Faulkner filed this action, asserting of the Department

violated the PRA by not providing him with the FedEx forms. The trial court dismissed Faulkner's claim for failure to state a claim under the PRA as the form was located after the Department was able to clarify his request. Because Faulkner does not show a violation of the PRA, the Court should affirm the dismissal of his claim.

II. STATEMENT OF THE CASE

A. Statement of Facts

DOC Policy 440.020, Transfer of Offender Property, sets forth the responsibilities of both the Department and offenders with respect to shipment of an offender's personal property when an offender is transferred between facilities. CP 45-47. Pursuant to DOC Policy 440.020(I)(B), when an offender is transferred, the Department will ship, at its expense, two 18"x12"x10" boxes of offender property; these boxes must not exceed 25 pounds per box. CP 45. These two boxes are placed on the offender transport vehicle along with the offender, and thus arrive at the new facility at the same time as the offender. CP 42. Any property in excess of this two-box limit, including legal documents/papers not needed to meet a court imposed deadline, must be shipped by common carrier at the offender's expense, or be donated or destroyed. CP 45.

When an offender has personal property that exceeds the two-box limit delineated in DOC Policy 440.020, the property is held in the facility property room. CP 42. Pursuant to DOC Policy 440.000(X) and (XI), Personal Property for Offenders, an offender is notified that his excess personal property has been restricted with property disposition form DOC 21-139. CP 55. The offender then has 90 days from the date of transfer to arrange for shipping of the extra personal property. CP 55.

When an offender wants to pay to ship out excess personal property, mailroom staff will calculate the cost to ship the property using a digital postage meter in the mailroom, which calculates shipping cost based on the size and weight of the item. CP 42. Mailroom staff then notify the offender of the cost to ship the extra property. CP 42. When the mailroom receives notice that the fees for the shipping costs have been paid, the mailroom will generate a shipping label from the digital postage meter and ship the property out. CP 42. Details about the shipment including the date, shipping destination, and offender's name will be recorded on a property disposition form, which may also include a label listing the weight and package tracking number of the shipment. CP 42-43. Property disposition forms are retained in an offender's file. CP 43. An offender

will be given a copy of the property disposition form when his property is transferred to the property room; if the offender would like a copy of the form that includes shipping information after the property is shipped out, he would need to request one. CP 43.

The mailroom does not receive invoice or billing statements from outside carriers, and specifically does not receive any invoices from FedEx. CP 43.

Department payments to FedEx are made by its headquarters office. CP 67. FedEx generates invoices and sends them directly to the Department headquarters office, where staff in the Disbursements and Purchasing Office pay the billings centrally. CP 67. The invoices include an itemized list of each package sent, including the sender and recipient addresses and total shipping charge for each package. CP 67. The Department headquarters office maintains approximately 16-18 months of payment documentation on hand, after which time the documents are sent to the state archives for retention. CP 67.

On March 26, 2014, the Public Disclosure Unit received a public records request from Faulkner for “records from DOC’s Monroe Correctional Complex.” CP 76. Faulkner requested FedEx invoice statements for four of his property boxes. CP 76. Two boxes were shipped from Monroe Correctional Complex on February 12, 2014, and two

additional boxes were shipped on March 13, 2014. CP 76. Faulkner included the package tracking numbers for each of the four boxes in his request and stated that the records were most likely located at the facility business office, because the boxes had been shipped from the mailroom. CP 76.

On April 2, 2014, the Public Disclosure Unit issued a response letter indicating his requests were assigned tracking number PDU-28746. CP 79. Faulkner was also informed that he would receive a response to his requests on or before May 29, 2014. CP 80.

Since Faulkner's request specifically sought records from the Monroe Correctional Complex, the facility was asked to search for documents responsive to his request for FedEx invoices. CP 82. Monroe Correctional Complex was provided with the shipment dates and package tracking numbers for the four boxes listed in the request. CP 82. The facility was also asked to inform the Public Disclosure Unit, as soon as possible, if the request for records should be directed to others within Department. CP 82. The facility emailed documents it believed to be responsive to Faulkner's request back to the Public Disclosure Unit on May 2, 2014. CP 82.

The responsive documents sent to the Public Disclosure Unit were two property disposition forms from the property room/mailroom. CP 73.

The first form noted that the mailroom received a money order for \$22.50 to ship two of Faulkner's boxes and sent the two boxes via FedEx to Stafford Creek Corrections Center on February 12, 2014. CP 64. The form listed two tracking numbers which nearly matched the tracking numbers Faulkner listed in his public records request. CP 64. Mailroom staff indicated on the property disposition form that two of Faulkner's extra boxes remained in the property room as of February 12, 2014. CP 64. The second form noted that on March 11, 2014, the mailroom received a second money order for \$22.50 to ship his remaining two boxes. CP 65. The boxes were shipped via FedEx on March 12, 2014. CP 65.

On May 29, 2014, Faulkner was notified there were 41 pages of documents responsive to his request, PDU-28746. CP 85-86. After receiving his payment, the Public Disclosure Unit mailed 41 responsive pages to Faulkner. CP 87-88. The responsive pages included the two property disposition forms found by the Monroe Correctional Complex. CP 73.

Faulkner appealed because he did not believe he received responsive documents. CP 104. Faulkner stated that he specifically requested FedEx billing invoices that were coded and batched for payment by the facility business office, and the property disposition forms he received were not billing invoices. CP 104.

The Department's Risk Mitigation Manager reviewed Faulkner's appeal and emailed the Public Disclosure Unit at Monroe Correctional Complex requesting a search for the FedEx invoices. CP 108. The facility responded to the request with a Department generated mailroom log. That day, the facility was emailed again asking whether the response meant there were no records generated by FedEx that were responsive to Faulkner's request and provided a copy of the example FedEx invoice that Faulkner had sent with his request. CP 108. The facility indicated that mailroom staff had been able to input the tracking numbers from Faulkner's boxes into their digital postal machine and print a document showing that the package had been shipped and received. CP 108. The facility noted it did not have any invoices, and specifically did not have any records that looked like the example Faulkner provided. CP 108. Because of the facility's response, Faulkner was notified that there were no records responsive to his request for FedEx invoices from Monroe Correctional Complex. CP 123. Further, Faulkner was notified that he would be issued a refund for his payment of the property disposition forms. CP 123.

Faulkner filed another appeal. The Risk Manager then checked with the receiving facility where Faulkner's property was shipped. CP 136. The facility informed her that the Department's headquarters'

business office was the official record keeper of accounts payable and the facility did not hold these records. CP 135. The Department's headquarters' office was then asked to conduct a search for the records. CP 68. In searching for the records, the office used the timeframe in question and the two facilities involved to pull an expenditure report from its financial system and identify particular payment batches. CP 68. Staff then pulled the actual payment batches that are maintained in the file room and looked at each bill for the tracking numbers listed in his request, PDU-28746. CP 68. Staff was able to find the FedEx invoice containing each tracking number listed in the request. CP 68. Faulkner was notified on August 19, 2014, that additional responsive records had been located and were being reviewed. CP 94. Subsequently, Faulkner was provided with the three pages of FedEx invoices upon receipt of payment. CP 90-92. CP 97-98.

B. Statement of Procedural History

On August 18, 2014, Faulkner filed a PRA Complaint alleging the Department failed to respond to his public disclosure request. CP 1-7. Three months later, the Department filed a motion to show cause arguing Faulkner failed to state a claim under the PRA. CP 23-139. Faulkner filed his response. CP 151-175. The trial court granted the Department's motion

dismissing Faulkner's claims noting the Department was able to locate the records after clarifying his request. CP 235-237.

III. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007, 236 P.3d 206 (2010). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011), *as amended on reconsideration in part*.

IV. ARGUMENT

A. The Trial Court Correctly Dismissed Faulkner's Claims for Failing to State a Violation of the PRA

Faulkner failed to state a claim under the PRA because the Department's initial search for records was reasonable in light of his request for FedEx invoices "from DOC's Monroe Correctional Complex."

The PRA requires agencies to make identifiable public records available for inspection and copying. RCW 42.56.080. 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”). In this regard, the PRA does not require agencies to be mind readers or to produce records that have not been requested. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied* 137 Wn.2d 1012, 978 P.2d 1099 (1999). To hold otherwise would put agencies in an untenable position. *Id.*

The adequacy of an agency’s search for public records is separate from the question of whether the requested records are found. *Neighborhood Alliance v. County of Spokane*, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), *affirmed in part, reversed on other grounds*, 172 Wn.2d 702, 261 P.3d 119 (2011). As the Court in *Neighborhood Alliance* explained, the standard for determining the adequacy of an agency’s search is one of reasonableness:

“The adequacy of the agency’s search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor.” *Citizen’s Comm’n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995). An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was “‘reasonably calculated to uncover all relevant documents.’” *Weisberg v. U.S. Dept. of Justice*, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (1984). Moreover, the agency must show that it “‘made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’” *Oglesby v. U.S. Dept. of Army*, U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

Id. at 257 (parenthetical citation omitted); *see also* WAC 44-14-04003(9) (“An agency must conduct an objectively reasonable search for responsive records.”). Additionally, when a request uses inexact phrasing such as “all records relating to” a topic, the agency may interpret the request to be for records that directly and fairly address the topic. WAC 44-14-04002(2). The Washington Supreme Court has held that an agency is not required to search every possible place a record may be “conceivably stored, but only those places where it is reasonably *likely* to be found.” *Neighborhood Alliance*, 172 Wn.2d at 719.

Under the PRA, public agencies are required to provide inspection or copying of public records. RCW 42.56.070. The purpose of the PRA is to provide full access to public records. RCW 42.17.010(11). If an agency denies a requestor “an opportunity to inspect or copy a public record” a requestor may proceed to court to require the agency to comply with the PRA. RCW 42.56.550(1). Under certain circumstances, the PRA shifts the burden of proof onto the agency to justify the actions taken. *See, e.g.*, RCW 42.56.550(1) (“The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”). However, the statute does not

alleviate a plaintiff's burden of proof to show that there is a controversy at issue.

In this case, Faulkner asserts the Department violated the PRA because it only performed a "perfunctory search" of the responsive records. However, the Department followed the instructions in Faulkner's request and searched for records "from DOC's Monroe Correctional Complex." Because the Department conducted a search that was reasonable in light of his initial request, it did not violate the PRA.

The Department's initial search was based on Faulkner's request for "records from DOC's Monroe Correctional Complex." CP 76. Faulkner requested the FedEx invoice statements, including tracking numbers, for four of his property boxes that were shipped from the Monroe Correctional Complex. CP 76. Faulkner stated in his request that the records were most likely located at Monroe Correctional Complex because the boxes had been shipped from the facility's mailroom and that is where they were "batched for payment." CP 76.

In response to his request and direction, the Department sought records from the Monroe Correctional Complex. The facility was asked to conduct a search for responsive records, and it responded with two property disposition forms matching the shipments described in Faulkner's request. CP 82. While they were not FedEx generated forms, the forms

listed the tracking numbers in his request. CP 64-65. Because the facility does not receive or handle outside carrier invoices, these are the only records the Monroe Correctional Complex would have had documenting Faulkner's shipments. The Public Disclosure Specialist handling Faulkner's request would have no indication the FedEx invoices would have been maintained in any other location and Faulkner's request itself indicated the documents would come from the facility. CP 76. In light of Faulkner's request for records from the Monroe Correctional Complex, the Department's initial response producing the property disposition forms was reasonable.

The Department's response to Faulkner's appeal was also reasonable. Faulkner appealed the initial response, stating that he was looking for records produced by FedEx and not the property disposition forms he had received. CP 104. His appeal again noted the documents would be at the facility because the "invoices are coded and batched for payment by the facility business office." CP 104. In reviewing Faulkner's appeal, the Risk Mitigation Manager again asked the facility to provide records, seeking specifically for records that were generated by FedEx and not by the Department. CP 108. Monroe Correctional Complex indicated again it did not have any documents fitting that request. CP 112. While the facility had a machine that created shipping labels, it did not have any

documents which looked like the example Faulkner provided. CP 112. Based on the facility's explanation, the Department again concluded there were no documents responsive to Faulkner's request. CP 123.

The Department made a reasonable search for the responsive records by searching for records from the facility that Faulkner specified in his initial request and appeal. The FedEx invoices he requested were ultimately found only when the Department broadened his request for records from Monroe Correctional Complex to include a search of the receiving facility and the Department headquarters' office. CP 101-102. Once the Department clarified exactly where the documents were stored, it was able to produce them to Faulkner. Because the Department conducted a reasonable search for the documents responsive to Faulkner's request and appeal, the dismissal of Faulkner's claim should be upheld¹.

B. Faulkner Has Failed to Show the Department's Response to His Public Records Request Amounted to Bad Faith

If the Court finds the Department violated the PRA, Faulkner must show the Department acted in bad faith prior to being entitled to penalties. Because the Department's response to Faulkner's public records request was neither wanton nor a willful act of knowingly withholding records it knew it should have produced, the Court should find the Department did not act in bad faith.

¹ Faulkner also argues if the Court finds there is a violation of the PRA, then he is entitled to recover costs. The Department agrees with Faulkner's position.

Under RCW 42.56.565(1), an offender serving a criminal sentence in a state correctional facility is not entitled to any penalties under the PRA “unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.” RCW 42.56.565(1). While the statute fails to define actions which constitute “bad faith,” the Court of Appeals addressed this issue in *Faulkner v. Dep’t of Corr.*, 332 P.3d 1136, 332 P.3d 1136 (2014) and *Francis v. Washington State Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013).

The *Francis* court held the bad faith standard does not warrant penalties to an offender “simply for making a mistake in a record search or for following a legal position that was subsequently reversed.” *Francis*, 178 Wn. App. at 63. In that case, however, the court concluded the agency deliberately failed to comply with the PRA’s requirements by conducting a cursory search that failed to look in any of the usual record locations. *See Id.* at 64; *see also Faulkner*, 332 P.3d at 1142 (clarifying that *Francis* was an example of a wanton act made in bad faith).

To find bad faith, the Court must incorporate “a higher level of culpability than simple or casual negligence.” *Faulkner*, 332 P.3d at 1141. “[A]n inmate must demonstrate a wanton or willful act or omission by the agency.” *Id.* The Court noted the legislative purpose for incorporating the bad faith requirement under RCW 42.56.565(1) was to allow penalties

“only when the conduct of the agency defeats the purpose of the PRA and deserves harsh punishment.” *Id.* at 1141. Even when an agency violates the PRA in not disclosing a record, reliance on an invalid basis for nondisclosure does not result in a finding of bad faith, so long as the basis is not ‘farfetched’ or asserted with knowledge of its invalidity. *See King County v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002).

Faulkner asserts the Department acted in bad faith when conducting its search for his responsive records because there is no evidence the Department made a “timely and reasonable” effort to locate the FedEx invoices. Faulkner alleges the Department made no effort to review the example he provided or contact the Monroe Correctional Complex business office. However, the facts show the Department conducted a reasonable search in light of his initial request and did exactly as he suggested by contacting the facility itself. Regardless of whether an example would have been provided during the first search, it is clear the FedEx invoices were not maintained at the Monroe Correctional Complex. Even if the example had been provided to the facility during the initial search, it would not have produced the FedEx invoices. Rather than assume the first response was adequate, the Department then corresponded with the facility two more times to ensure the documents were not available. CP 107-121. It was only after expanding the search beyond the

scope of Faulkner's request that the Department found responsive records at the headquarters' office.

Further, while Faulkner may not have agreed with the amount of time the Department took to respond to his request and appeal, his request was one of thousands the Department was handling. For example in 2013, the Department responded to more than 14,000 requests for public disclosure of which 4,418 were for records handled by the Public Disclosure Unit or designated statewide public disclosure coordinators. CP 71-72. The requests resulted in over 1,300,000 pages of responsive documents offered to requestors and accounted for more than 36,000 hours of Department staff time searching for and gathering the records. CP 72. At any one time, a public disclosure coordinator carries an open case load of 80 public disclosure requests. CP 72. Considering the volume of requests that are being handled, the Department's response to Faulkner's initial request received on March 26, 2014 to its production letter on May 29, 2014 was reasonable. In addition, the Risk Manager's response to Faulkner's appeals was also adequate in light of her other job responsibilities and duties. CP 100. Faulkner's first appeal was handled within a month. CP 104. CP 123-124. Faulkner's follow up appeal was handled within less than two weeks of its receipt and he was notified the documents were located. CP 139. Despite Faulkner's contentions, the facts

are devoid of any evidence to demonstrate a “wanton or willful act of omission” by the Department in response to the Faulkner’s PRA requests. In light of the wording of his request and appeal, the Department’s search for responsive records at the Monroe Correctional Complex was reasonable. In addition, its responses to his request and appeals were timely considering the volume of requests received by the Department. As such, the Court should decline to find such withholding was in bad faith.

V. CONCLUSION

For the reasons stated above, the Court should affirm the trial court’s holding in this matter and dismiss Faulkner’s claims. If the Court finds a PRA violation did occur, the Court should find the Department did not act in bad faith in responding to Faulkner’s request.

RESPECTFULLY SUBMITTED this 21st day of July, 2015.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Defendant/Appellee by US Mail Postage

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this ___ day of July, 2015, at Spokane, Washington.

PATTY WILLOUGHBY
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CERTIFICATE OF SERVICE

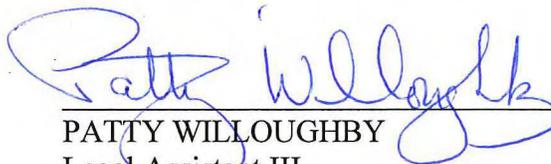
I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Defendant/Appellee by US Mail Postage

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of July, 2015, at Spokane, Washington.



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