

**NO. 34961-6-III**

In the Court of Appeals of the State of Washington  
Division 3

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JUAN ZABALA, Appellant

v.

OKANOGAN COUNTY, Respondent

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**APPELLANT'S REPLY BRIEF**

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A) ISSUES DISCUSSED IN REPLY

1. Did Mr. Zabala request identifiable public records?
2. Are public records ever exempt from disclosure?
3. Are the “records of a person confined in jail” subject to the Public Records Act?

B) ARGUMENT

**1. Mr. Zabala Requested Identifiable Public Records.**

The Public Records Act “shall be liberally construed and its exemptions narrowly construed to promote [the] public policy” of allowing “[t]he people” of Washington to “remain[] informed so that they may maintain control over” government agencies. RCW 42.56.030. “Courts shall take into account the policy of [the Public Records Act] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

“[A]dministrative inconvenience or difficulty does not excuse strict compliance with public disclosure obligations.” *Gendler v. Batiste*, 174 Wn.2d 244, 252 (2012). “Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.” RCW 42.56.080. Moreover, “[c]onsidering the PRA’s policy of broad disclosure...public records [are] not exempt under the PRA merely because

producing the records is unduly burdensome.” *Dept. of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 604 (2014).

To trigger an agency's obligation to respond to a request for public records, the requester must request “identifiable public records.” RCW 42.56.080. If an agency receives a request that does “not identify with reasonable clarity those documents that are desired,” “the agency is excused from complying with” the Public Records Act. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448-49 (2004). On the other hand, if an agency receives a request for identifiable public records—even if the request is “overbroad,” and even if producing the records would be “unduly burdensome”—the agency must respond under the Public Records Act.

For example, where an individual requested of Washington State Patrol “copies of police reports on all accidents on the Montlake Bridge involving bicycles,” that individual requested identifiable public records. *Gendler*, 174 Wn.2d at 248, 260. Washington State Patrol responded “that it could not provide accident reports by location and that it would provide records to [the requester] only if he were able to specifically identify the person involved in the collision and the precise collision date” because otherwise the search would be potentially “[in]accurate or burdensome” or “time-consuming,” possibly requiring WSP to “roll out a big long bunch of paper reports and try to find every reference to that particular street.”

*Id.* at 248-49, 254-55. The burden on WSP in responding to such a request, given the limited way WSP indexed its records, did not somehow render the request itself invalid for lack of identifiability. *Id.* at 260.

Here, Mr. Zabala made five separate, but related, requests for records. CP 127-28, 130, 132, 134-35. Each of the requests concerned records related to recorded inmate phone calls. *Id.* Each of the requests concerned records in addition to the recordings themselves. *Id.* None of the requests identified particular inmates placing the calls. *Id.* None of the requests identified particular criminal cases with which those recordings were associated. *Id.* None of these requests identified particular dates and times on which those telephone calls took place. *Id.*

Okanogan County argues Mr. Zabala should have provided additional identifying information—such as “case names” or “case numbers”—before its obligation to respond was triggered. CP 48, 59-61, 175-76; *see also* Brief of Resp. at 32-43. Apparently, Okanogan County's desire for this additional identifying information stemmed from characteristics of its electronic indexing systems. CP 60-61, 175. For example, the Prosecuting Attorney's “electronic case management system” “Justware's search capabilities are limited to case numbers, names and personal identifiers, involved agencies, statute of a crime, and date.” CP 60-61. “The ability to view the evidence content of a case (reports, audio,

video, etc.) is only available when a specific case is accessed.” CP 60. Without that additional identifying information, a search using Justware was not possible. CP 61. Without that additional identifying information, the only search available was to “examine the contents of every physical and electronic case file to determine if they contained any of the requested responsive records.” *Id.*

While it is not surprising that Okanogan County would find it easier to conduct a search using its electronic indexing systems, such as Justware, rather than manually searching its case files, Mr. Zabala was under no obligation to narrow his request by providing the additional identifying information Okanogan County sought. His requests did not somehow become for “unidentifiable” public records simply because of its breadth, or because of the burden on Okanogan County in responding. While sometimes an agency's electronic indexing system makes it easier for that agency to comply with the Public Records Act, the Public Records Act does not allow an agency to implement such a system and then avoid conducting old-fashioned manual searches where the request isn't tailored to the system's limitations. Mr. Zabala's requests, and Okanogan County's indexing systems, are functionally similar to the requests and indexing system at issue in *Gendler*. Just as that request was for identifiable public records, so were Mr. Zabala's requests.

Because Okanogan County's difficulties in responding to Mr. Zabala's requests do not render his request for unidentifiable public records, summary judgment should not have been granted.

## **2. Public Records Are Never Exempt from Disclosure.**

Okanogan County argues RCW 9.73.095(3)(b) and RCW 70.48.100 provide statutory authority for exempting public records from “disclosure.” *See* Brief of Resp. at 15-19, 28-31.

But under the Public Records Act, records are “*never* exempt from disclosure.” *Sanders v. State*, 169 Wn.2d 827, 836 (2010) (emphasis added). Rather, records may “be exempt only from production.” *Id.* “A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.” *Id.* For each record disclosed, but not produced, the agency must provide “specific means of identifying [each] individual record[] which [is] being withheld in [its] entirety.” *Rental Housing Assn. of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538 (2009). “The identifying information...should include the type of record, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.” *Id.* Failure to disclose is a violation of the Public Records Act. *Sanders*, 169 Wn.2d at 846.

When a Public Records Act case is “decided as a matter of summary judgment” and “there is a genuine issue of material fact whether [an agency] has disclosed all pertinent material,” “the appropriate course under summary judgment rules is to remand this case for resolution of that factual question.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 242, 253 (1994). This is so, in part, because “without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiating.” *Id.* at 270. “The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity.” *Id.* at 271. “In order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.” *Id.*

Here, Okanogan County did not disclose, let alone produce, any records to Mr. Zabala in response to the requests at issue in this case. *See* CP 137-39, 141-45. In other words, Okanogan County silently withheld *all* responsive records. That failure is itself a violation of the Public Records Act, and the trial court's grant of summary judgment should be reversed on that basis alone.

Furthermore, because Okanogan County failed to disclose any responsive records, neither the trial court nor this Court has a sufficient record by which it can assess Okanogan County's attempt to claim responsive records exempt under RCW 9.73.095(3)(b) and RCW 70.48.100 or any other statute. Some hypothetical responsive records—for example, a recorded telephone call between an inmate in the Okanogan County Jail and his attorney—would undoubtedly be exempt under RCW 5.60.060(2)(a) and RCW 42.56.070(1)'s “other statute” clause. Furthermore, some hypothetical records—for example, a recorded telephone call between an inmate and his wife, where no court order prohibited that telephone call, where no consent to the recording was obtained by either the inmate or his wife, and where the conversation concerned only the inmate's proposed birthday present ideas for their daughter—likely would be exempt under RCW 9.73.030(1) and RCW 42.56.070(1).

But some *actual* responsive records silently withheld in this case are clearly not exempt. For example, the Okanogan County Prosecuting Attorney was in possession of a record entitled State's Response to Defendant's Motion for New Trial or Dismissal, signed and filed on May 1, 2014 under *State v. Flores*, Okanogan County Superior Court Case No. 13-1-00176-2. CP 389-406. This record concerned, in part, a “jail phone

call made by the defendant asking another person to provide a perjured statement.” CP 389. This record is clearly responsive to the third, fourth, and fifth requests at issue in this case. *See* CP 130, 132, 134-35. This record was silently withheld in response to those requests. *See* CP 141-45. Yet the same record was produced in response to a separate public records request “without redactions.” CP 363.

On the basis of Okanogan County's failure to disclose responsive records, this Court should reverse the trial court's grant of summary judgment, and remand for trial. Furthermore, this Court should not consider, in the absence of Okanogan County's required disclosure of responsive records, whether RCW 9.73.095(3)(b) or RCW 70.48.100 or any other statute provides the basis for a claim of exemption from production for some hypothetical subset of responsive records.

**3. The “Records of a Person Confined in Jail” Are Subject To the Public Records Act.**

The Public Records Act “applies only to public records.” *Dragonslayer v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 444 (2007). “Public record' includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any...local agency regardless of physical form or characteristics.” RCW

42.56.010. “Washington courts 'liberally construe' the term 'public record' as referring to 'nearly any conceivable government record related to the conduct of government.” *Nissen v. Pierce County*, 183 Wn. App. 581, 590 (2014) (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147 (2010)).

“[T]he records of a person confined in jail shall be held in confidence and shall be made available only” under certain circumstances and to certain recipients. RCW 70.48.100(2). “The records of a person confined in the jail” is not defined by statute. However, “the records of a person confined in jail,” such as “booking photos,” are generally public records. *See Cowles Publ. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 480-81 (1999).

Okanogan County argues “[d]isclosure of jail records is governed exclusively by the City and County Jails Act” because of the statutory use of the word “only,” and therefore “disclosure of the records Mr. Zabala requested is not governed by the PRA.” Brief of Resp. at 19-28.

First, as argued in Section 2, *supra*, this Court is not in a position to assess whether some subset of records responsive to Mr. Zabala's would constitute “records of a person confined in jail” under RCW 70.48.100(2) because Okanogan County has failed to disclose what responsive records it has. Furthermore, Okanogan County *is* in possession of some records that are *not* “records of a person confined in jail.” *See* CP 310-418.

Second, although the City and County Jails Act is an “other statute” under RCW 42.56.070(1) in the sense that it provides statutory authority for claims of exemption from production, “the records of a person confined in jail” are not, by the City and County Jails Act, removed from the Public Records Act's authority.

“A statute [is] an 'other statute' when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production.” *Doe v. Wash. Assn. of Sheriffs & Police Chiefs*, 185 Wn.2d 363, 375 (2016). RCW 70.48.100(2), by indicating “the records of a person confined in jail shall be held in confidence and shall be made available only” under certain circumstances, plainly means “the records of a person confined in jail” are generally exempt from production. Indeed, the Supreme Court implicitly already made this finding. *See Cowles Publ. Co.*, 185 Wn.2d at 481.

However, the Public Records Act applies to nearly all records subject to an “other statute” exemption. Just because a record, or portion thereof, is exempt from production does not mean the agency may avoid all its responsibilities under the Public Records Act.

For example, the Privacy Act has been held to be an “other statute.” *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 526 (2014). But in finding “RCW 9.73.090(1)(c) [to be] a limited

exception to immediate disclosure under the PRA...that applies only where there is actual, pending litigation,” the Supreme Court “remand[ed] for further proceedings” under the Public Records Act. *Id.* at 528.

Additionally, “RCW 26.23.120, which governs child support records, falls within the 'other statute' exception under RCW 42.56.070(1) of the PRA.” *Anderson v. Dept. of Soc. & Health Svcs.*, 196 Wn. App. 674, 676 (2016). But in so finding, the Court additionally found the agency's “responses were proper under RCW 26.23.120 *and* [the agency] did not violate the PRA” in finding “no basis for a PRA penalty” or “attorney fees and costs on appeal.” *Id.* at 686-87 (emphasis added). Additionally, the requester's arguments that the agency violated the Public Records Act in other respects were *rejected*, but were not *mooted*. *See id.* at 684-85.

In other words, generally an “other statute” only provides authority for a claim of exemption from production. It does not provide authority to ignore the Public Records Act in its entirety. This is true even if, like the City and County Jails Act, the “other statute” uses a term like “only.” *Compare* RCW 26.23.100(1) *with* RCW 70.48.100(2).

In fact, the only statute that *does* remove public records from the Public Records Act's purview entirely is RCW 13.50.100, which concerns “juvenile justice and care records” other than records “relating to the commission of juvenile offenses.” *See Deer v. Dept. of Soc. & Health*

*Svcs.*, 122 Wn. App. 84, 92-94 (2004). Courts did recognize that removal in part based upon the use of the word “only” in the statute, finding “[t]his language...makes clear that this method is the exclusive means of obtaining juvenile justice and care records.” *Id.* at 92. However, courts also found important was that RCW 13.50 “requires DSHS to ‘implement procedures consistent with the provisions of this chapter to facilitate inquiries concerning records.’” *Id.* at 93 (quoting RCW 13.50.010(4)). And “most significantly” RCW 13.50 provides for “court oversight of the release of records.” *Id.* at 92. Indeed, under certain circumstances, “[a] party denied access to records may request judicial review of the denial and, if the party prevails, she shall be awarded attorney fees, costs, and an amount not less than five dollars and not more than one hundred dollars for each day the records were wrongfully denied.” *In re Dependency of K.B.*, 150 Wn. App. 912, 921 (2009) (citing RCW 13.50.100).

Essentially, RCW 13.50.100 provides a parallel procedure to the Public Records Act. The same cannot be said of the City and County Jails Act. Although RCW 70.48.100(2) does use the term “only,” it does not order jails to implement procedures to facilitate inquiries concerning records, it does not provide for any court oversight of the release of records, and does not provide for penalties and costs in the event of a wrongful denial. In short, RCW 70.48.100(2) is more similar to every

other “other statute” than it is to RCW 13.50.100. As such, even if some of the records requested by Mr. Zabala are exempt from production under RCW 70.48.100(2), Okanogan County is not relieved of its other obligations. For example, Okanogan County must still provide a prompt initial response. RCW 42.56.520. Okanogan County must still conduct an adequate search. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 719 (2011). Okanogan County must still disclose responsive records. *Sanders*, 169 Wn.2d at 836. Okanogan County must still provide individualized brief explanations for each record withheld. RCW 42.56.210(3). Okanogan County must still pay costs, including attorney fees, for wrongful withholding or other violations of the Public Records Act. RCW 42.56.550(4); *see also Hikel v. City of Lynnwood*, 197 Wn. App. 366, 369 (2016). And Okanogan County must still pay penalties for wrongful withholding. *Id.* On remand, Okanogan County should be barred from arguing the Public Records Act does not apply simply because some of the records Mr. Zabala requested may be “the records of a person confined in jail.”

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C) CONCLUSION

Okanogan County failed to disclose any records responsive public records in responding to any of Juan Zabala's five requests for identifiable public records. Because of that failure to disclose, this Court cannot assess whether any claims of exemption under RCW 70.48.100(2) or RCW 9.73.095(3)(b) or any other statute are meritorious. Therefore, this Court should reverse the trial court's grant of summary judgment, and remand for trial. Furthermore, this Court should clarify that although RCW 70.48.100(2) is an "other statute" under RCW 42.56.070, "the records of a person confined in jail" are nevertheless subject to the Public Records Act.

DATED this 27<sup>th</sup> day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27<sup>th</sup>, 2017, I caused a true and accurate copy of the foregoing APPELLANT'S REPLY BRIEF to be

delivered by email to Albert Lin, attorney for Respondent Okanogan  
County, at alin@co.okanogan.wa.us.

DATED this 27<sup>th</sup> day of June, 2017.

/s/ Christopher Taylor \_\_\_\_\_  
Christopher Taylor

**C.R.TAYLOR LAW PS**

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