

NO. 34961-6-III

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

JUAN ZABALA, Appellant

v.

OKANOGAN COUNTY, Respondent

APPELLANT'S BRIEF

Christopher Taylor
Attorney for Appellant
CR Taylor Law, P.S.
203 4th Ave E Ste 407
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@crtaylorlaw.com

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A) ASSIGNMENT OF ERROR

The trial court erred by granting Respondent Okanogan County's "Motion [to] Dismiss Pursuant to CR 12(b)(6), CR 12(c) and/or CR 56(c)" and dismissing *Zabala v. Okanogan County*, Douglas County Superior Court Case No. 16-2-00262-2 with prejudice.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should the Standard of Review be *De Novo*?
2. Were Mr. Zabala's Requests Made under the Public Records Act?
3. Did Okanogan County Respond to Mr. Zabala's Fourth Request?
4. Did Okanogan County Silently Withhold Responsive Public Records?
5. Did Okanogan County Conduct an Adequate Search?
6. Should Costs, Including Reasonable Attorneys Fees, be Awarded?

C) STATEMENT OF THE CASE

Juan Zabala made five separate written requests, each pursuant to the Public Records Act, asking that Okanogan County produce for copying public records. CP 127-28, 130, 132, 134-35. The first two requests were directed at the Okanogan County Jail. CP 127-28. The last three requests were directed at the Okanogan County Prosecuting Attorney's Office. CP 130, 132, 134-35. The first four requests were made by Mr. Zabala personally; the last request was made by Mr. Zabala through counsel. CP 127-28, 130, 132, 134-35. Each of the five requests concerned records

related to inmate telephone call recordings. *Id.* Three of the five requests were narrowed to recordings used in criminal prosecutions. CP 127, 130, 134-35. Each of the five requests explicitly mentioned the “Public Records Act” as the statutory authority for the request. *Id.*

Okanogan County responded to only four of these requests. CP 137-39, CP 141-45. Each of those responses constituted a denial. *Id.* Okanogan County never provided any responsive records. *Id.* Okanogan County did not disclose what responsive records it had in its responses to Mr. Zabala's requests. *Id.*

Instead, Okanogan County expressed its belief that Mr. Zabala's records requests were invalid, and that invalidity excused them from responding. *Id.* Specifically, Okanogan County indicated its belief that Mr. Zabala's requests were “so broad” that they did “not identify records that could reasonably be located.” *See* CP 137, 141, 144.

Mr. Zabala brought this action under the Public Records Act. CP 1-8. Okanogan County moved to dismiss “pursuant to CR 12(b)(6), CR 12(c) and/or CR 56(c).” CP 26.

While the motion to dismiss was pending, Mr. Zabala made a sixth Public Records Act request, asking Okanogan County produce for copying public records. CP 147-48. The sixth request mirrored the language of the fifth request almost verbatim, with the only substantive difference being

that four criminal cases were identified with particularity. *Compare* CP 147-48 *with* CP 134-35. Okanogan County responded to this request, producing over one hundred pages of responsive public records, and provided a privilege log that disclosed numerous other responsive public records. CP 300-418.

The trial court granted Okanogan County's motion, and dismissed this action with prejudice. CP 468-72. This appeal followed. CP 475-81.

D) ARGUMENT

1. Appellate Review on Grant of Summary Judgment Dismissal Is *De Novo*.

“If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading 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)(7). Similarly, “[i]f, on a motion for judgment on the pleadings, 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(c).

Here, Okanogan County brought a “Motion [to] Dismiss Pursuant to CR 12(b)(6), CR 12(c) and/or CR 56(c).” CP 26. Okanogan County presented matters outside the pleadings. *See* CP 45-103, 174-418, 444-67.

The trial court did not exclude those matters; to the contrary, the trial court explicitly considered matters outside the pleadings in ruling on the Motion. *See* CP 468-70. Therefore, although the trial court did not specifically state it was granting Okanogan County's Motion under the summary judgment standard, such treatment is the only coherent interpretation of the trial court's order.

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 judgment as a matter of law.” CR 56(c). Courts must consider “facts and reasonable inferences in the light most favorable to the nonmoving party.” *Building Indus. Assn. of Wash. v. McCarthy*, 152 Wn. App. 720, 735 (2009). “The motion should be denied if reasonable persons could reach differing conclusions.” *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 412 (1991).

“Grants of summary judgment are reviewed de novo, and [appellate courts] engage in the same inquiry as the trial court.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 715 (2011). “Findings of fact and conclusions of law are not necessary on summary judgment and, if made, are superfluous and will

not be considered on appeal.” *Concerned Coupeville Citizens*, 62 Wn. App. at 413.

2. Mr. Zabala's Requests Were Made under Public Records Act.

“Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person.” RCW 42.56.080. “[T]here is no official format for a valid [PRA] request.” *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447 (2004). A valid Public Records Act request must only “provide notice that the request is made pursuant to the [PRA] and identify the documents with reasonable clarity to allow the agency to locate them.” *Id.*

First, a valid request must provide “the agency fair notice that it ha[s] received a request for a public record.” *Germeau v. Mason Cty.*, 166 Wn. App. 789, 804 (2012). In other words, valid requests must “be recognizable as PRA requests.” *Id.* Therefore, if a request “could be reasonably interpreted as falling under” a different statute authorizing access to public records, the request may be invalid as a Public Records Act request. *See Wood v. Lowe*, 102 Wn. App. 872, 880 (2000).

Here, each of Mr. Zabala's five records requests were explicitly made “pursuant to the Public Records Act” or “under the Public Records Act.” CP 127-28, 130, 132, 134-35. No other statutory source of authority

for access to public records is mentioned in any of the five requests. *See id.* Okanogan County could not have reasonably believed any of Mr. Zabala's requests were anything other than requests under the Public Records Act. Moreover, Okanogan County actually believed each of Mr. Zabala's requests were made under the Public Records Act. CP 46, 59-60, 137-45.

Second, a valid request must request “identifiable public records.” RCW 42.56.080. A public record is “identifiable” if it is described “with reasonable clarity to allow the agency to locate them.” *Hangartner*, 151 Wn.2d at 447. In other words, if an agency can determine whether a particular record is responsive to a request based upon the face of the record or its record-keeping system, that request meets the identifiability requirement. *See Belenski v. Jefferson Cty.*, 187 Wn. App. 724, 740-41 (2015) (rev'd on other grounds by *Belenski v. Jefferson Cty.*, 186 Wn.2d 452 (2016)). On the other hand, if an agency is required to effectively create or produce records that do not currently exist in order to determine if a particular record is responsive, the request may not meet the identifiability requirement. *Id.* The *Belenski* court found a request for “electronic copies of every electronic record for which Jefferson County [Information Services] does not generate a back up” did not meet the identifiability requirement because “IS” does not “track[]” “[w]hether or

not county employees” “take it upon themselves to employ precautionary measures to save electronic records to external servers or drives maintained by the County.” *Id.* at 741. In other words, Jefferson County was incapable of looking at a particular record, or its record-keeping system, and discerning whether that record was or was not backed up.

However, a request does not fail the identifiability requirement simply because it is “overbroad.” *See* RCW 42.56.080. Moreover, a request does not fail the identifiability requirement simply “because producing the records is unduly burdensome.” *Dept. of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 604 (2014).

Mr. Zabala's second and third requests clearly do not run afoul of the identifiability requirement.

Mr. Zabala's second request—which was made to the Okanogan County Jail—sought “any and all records related to the recordings of inmate phone calls from any Adult Correctional Facility,” such as “all voicemail, email, audio, notes, reports, transcripts, arguments, motions, briefs, memos, letters and any other record related to the same.” CP 128. Mr. Zabala's third request—which was made to the Okanogan Prosecuting Attorney's Office—was phrased identically in terms of identifying responsive public records. CP 132. At the very least, Mr. Zabala identified “the recordings of inmate phone calls” as responsive records.

Moreover, “records related to” (or “pertaining to” or “about”) an event, topic, or class of records has routinely been found to meet the identifiability requirement. *See e.g. City of Lakewood v. Koenig*, 182 Wn.2d 87, 90 (2014) (requests for “records about the arrest and prosecution of a Lakewood police detective in January 2005 for patronizing a prostitute, (2) records about a November 2006 auto accident in the city of Fife, where a Fife police officer struck a pedestrian with his patrol car and the Lakewood Police Department assisted in the investigation, and (3) records about Tacoma police officer Michael Justice's 1998 arrest and subsequent prosecution on fourth degree assault charges” met the identifiability requirement); *see also Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 321 (1995) (request for “any and all records pertaining to the resignation and retirement of Fire Chief Jerry Benson, including any documents relating to the financial terms and conditions of his retirement” met the identifiability requirement); *see also Francis v. Dept. of Corr.*, 178 Wn. App. 42, 48-49 (2013) (request for “any and all documents related to any reason and/or justification for the reason why inmates at [McNeil] are not allowed to retain fans and hot pots in their cells, as well as any policy that may be in place to substantiate such restrictions on these items” met the identifiability requirement. Indeed, even *Hangartner*, which found a

request seeking “all books, records [and] documents of every kind” to be overbroad, and therefore violative of the identifiability requirement, implied a different result would have been reached had the request been limited to those records “that were pertinent to the purpose for which they were sought.” 151 Wn.2d at 448-49.¹

Furthermore, a disputed issue of material fact exists as to whether the “records related to” language actually formed the basis for Okanogan County's belief Mr. Zabala's second and third requests violated the identifiability requirement. Specifically, Celeste Pugsley, the Okanogan County Jail's public records officer, would have considered Mr. Zabala's second request to have met the identifiability requirement if it had contained “an inmate's case name, case numbers, or a particular named document.” CP 175. Similarly, Shauna Field, an Okanogan County Prosecuting Attorney's Office administrative assistant, would have considered the third request to have met the identifiability requirement if it had contained “specific case information, such as names and/or case numbers.” CP 61.

Furthermore, the record contains disputed issues of material fact as to whether Mr. Zabala's first request identified records with reasonable

¹ Furthermore, *Hangartner's* core holding that overbroad requests violate the identifiability requirement was abrogated by the legislature in 2005. *See* Final B. Rep., on Sp. Subst. H.B. 1758, at 2-3, 59th Leg., Reg. Sess. (Wash. 2005).

clarity. Mr. Zabala's first request—which, like the second request, was made to the Okanogan County Jail—sought “any and all records related to the recorded and/or monitored jail phone calls that were used in the prosecution of any crime by any of the Okanogan County Prosecutors Offices,” but was “limited to jail phone calls originating from Okanogan, Chelan, and Douglas County Adult Correctional Facilities.” CP 127.

The Okanogan County Jail's public records officer Celeste Puglsey opined the first request did “not identify records that can be reasonably located...because it lack[ed] specific information from which to locate and identify such records.” CP 48. However, Ms. Puglsey also indicated responsive records “are not records that are kept by the Okanogan County Jail.” *Id.* Ms. Puglsey would not have been able to determine the requested records are not the sort the Jail maintains if she had not understood the request with reasonable clarity. Furthermore, Ms. Puglsey indicated she read the first request to be “so broad that the request is not for an identifiable record that agency staff can reasonably locate.” CP 46. The phrasing suggests Ms. Pugsley misunderstood the identifiability standard—a request must be reasonably clear; a request need not concern records that are reasonably locatable. Therefore, the record is devoid of any evidence of identifiability under the proper standard as to the first request.

Finally, the record contains disputed issues of material fact as to whether Mr. Zabala's fourth and fifth requests identified records with reasonable clarity. Mr. Zabala's fourth request—which, like the third request, was made to the Okanogan County Prosecuting Attorney's Office—was virtually identical to the first request in phrasing. *Compare* CP 130 with CP 127. Specifically, the fourth request sought “any and all records related to the recorded and/or monitored jail phone calls that were used in the prosecution of any crime by any of the Okanogan County Prosecutors Offices,” and again was “limited to jail phone calls originating from Okanogan, Chelan, and Douglas County Adult Correctional Facilities.” CP 130. Mr. Zabala's fifth request—which was also made to the Okanogan Prosecutor—concerned a similar topic, but was more detailed in phrasing, and was similar to the fourth request in that it only sought records related to inmate telephone calls “that were actually used within the context of a criminal prosecution.” CP 134.

The Okanogan County Prosecuting Attorney's Office administrative assistant Shauna Field also apparently misunderstood the identifiability standard, opining the fourth and fifth requests “do not identify records that can be reasonably located by the Prosecutor's Office,” but failing to opine that the requests did not identify responsive records with reasonable clarity. *See* CP 61. Indeed, Ms. Field indicated her belief

the fourth request “would require our office to individually examine hundreds, if not thousands, of criminal case files in order to determine if and when we have utilized any inmate phone calls” in a criminal prosecution. CP 61. This belief is inconsistent with the idea that the responsive records were not identified with reasonable clarity.

As of each of Mr. Zabala's requests the record either contains uncontroverted evidence that Mr. Zabala's requests were for identifiable records, or at least contains disputed issues of material fact as to whether Mr. Zabala's requests were for identifiable records. Therefore, summary judgment should not have been granted on this basis.

3. Okanogan County Failed to Respond to Mr. Zabala's Fourth Request.

“Within five days of receiving a public records request, an agency...must respond.” RCW 42.56.520. “[F]ailure to acknowledge a request for records within five business days constitute[s] a violation of the PRA.” *West v. Wash. State Dept. of Natl. Res.*, 163 Wn. App. 235, 244 (2011).

Here, Okanogan County never responded to Mr. Zabala's fourth request, let alone within five business days. *See* CP 59, 67-68. Indeed, Okanogan County has continued to fail to acknowledge Mr. Zabala's fourth request, even after receiving the Complaint which specifically

alleged this failure to respond as an issue in this judicial review. *See* CP 8.

Therefore, dismissal on summary judgment was inappropriate.

4. Okanogan County Silently Withheld Responsive Public Records.

If an agency responds to a public records request by denying the request, the “[d]enial[]...must be accompanied by a written statement of the specific reasons therefor.” RCW 42.56.520. More particularly, any denial of a request “shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210(3). “[A]n agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety” to provide a framework for its written statement claiming an exemption. *Rental Housing Assn. of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538 (2009). “The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.” *Id.* (internal citation omitted).

Records are “never exempt from disclosure; [they] can only be exempt from production.” *Sanders v. State*, 169 Wn.2d 827, 836 (2010). In other words, “[t]he Public Records Act does not allow silent withholding

of entire documents or records.” *Rental Housing Assn. of Puget Sound*, 165 Wn.2d at 537. “[W]ithout 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 vitiated.” *Id.* “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.” *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271 (1994).

Here, Okanogan County not only failed to produce any records in response to Mr. Zabala's requests, Okanogan County failed to disclose any records. CP 137-39, 141-45. Furthermore, Okanogan County had responsive records. *See* CP 310-418². Okanogan County's failure to disclose responsive records violated the Public Records Act. Therefore, dismissal on summary judgment was inappropriate.

5. Okanogan County Failed to Conduct Adequate Search.

After receiving a request under the Public Records Act, an agency must conduct an adequate search. *Neighborhood Alliance of Spokane Cty.*, 172 Wn.2d at 719. “The agency bears the burden, beyond material doubt, of showing its search was adequate.” *Id.* at 721. “The adequacy of a search

² This is just a sample, based upon four criminal cause numbers, of records responsive to Mr. Zabala's fifth request only. Additional responsive public records likely have yet to be disclosed.

is judged by a standard of reasonableness; that is, the search must be reasonably calculated to uncover all relevant documents.” *Id.* at 720.

“[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.” *Id.* “The search should not be limited to one or more places if there are additional sources for information requested.” *Id.* “Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Id.* (internal citation omitted). An agency must search “those places where [responsive records are] reasonably likely to be found.” *Id.*

“The failure to perform an adequate search precludes an adequate response and production.” *Id.* at 721. “[A]n inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determination, at least insofar as the requester may be entitled to costs and reasonable attorney fees.” *Id.*

Here, in response to the first two requests, the record contains no evidence what sort of a search, if any, Okanogan County conducted. *See* CP 45-48. Moreover, the Okanogan County Jail's public records officer Ms. Pugsley implied *no* search was conducted, and provided two contradictory explanations for that failure. First, Ms. Pugsley indicated the records requested by Mr. Zabala “are not records that are kept by the

Okanogan County Jail.” CP 48. But Ms. Pugsley also explained that she might have been able to locate responsive records if she had had “specific information, such as case names and/or case numbers.” *Id.* Moreover, Ms. Pugsley had previously provided Mr. Zabala with public records, some of which would have been responsive to at least the second request in this case. *See* CP 175, 194-96, 205-07, 219-20, 274. At the very least, disputed issues of material fact exist as to whether the Okanogan County actually conducted any search, let alone an adequate search, in response to Mr. Zabala's first two requests. Therefore, dismissal on summary judgment was inappropriate.

In responding to Mr. Zabala's third and fifth requests, the record does contain evidence about Okanogan County's search. Specifically, Okanogan County Prosecuting Attorney's Office administrative assistant Shauna Field “attempted to locate responsive records utilizing the search functions available in Justware,” Okanogan County's “electronic case management software.” CP 59-60. Ms. Field, however, declined to “manually examin[e] the contents of [any] physical [or] electronic case files.” CP 60-61. The rationale for only searching for responsive records in Justware, and not searching for records in the physical or electronic case files, involved the need for “additional staff, which [was] unavailable, and overtime hours that cannot be determined.” CP 61.

The Public Records Act provides an agency the option of “acknowledging [it]...has received the request and providing a reasonable estimate of time the agency...will require to respond.” RCW 42.56.520. The statute also indicates “[a]dditional time required to respond to a request may be based upon the need to...locate and assemble the information requested.” *Id.* In other words, the statute already provides an agency a remedy when responding to a burdensome public records request. And that remedy is exclusive. *See Dept. of Transp.*, 182 Wn. App. at 604 (“public records [are] not...exempt under the PRA merely because producing the records is unduly burdensome”).

Essentially, then, Okanogan County admitted it could have located and disclosed records responsive to at least three of Mr. Zabala's requests, but chose not to do, choosing instead to only conduct a perfunctory search of one records system, and declining to search others due to undue burden. Because the PRA does not recognize “undue burden” as a basis upon which to deny a public records request, dismissal on summary judgment was inappropriate.

6. Costs, Including Reasonable Attorney Fees, Should Be Awarded.

“Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in

connection with such legal action.” RCW 42.56.550(4). A prevailing party must also be awarded costs, including reasonable attorney fees, incurred in bringing an appeal. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 690 (1990).

Here, Mr. Zabala will ultimately be determined to be the prevailing party. Thus, he is entitled to costs, including reasonable attorney fees. An affidavit of fees and expenses will be filed pursuant to RAP 18.1.

E) CONCLUSION

Okanogan County failed to conduct an adequate search for responsive public records after receiving Juan Zabala's five valid Public Records Act requests. Okanogan County failed to disclose records in its responses to those requests. Indeed, Okanogan County failed to respond at all to Mr. Zabala's fourth request. Therefore, Okanogan County violated

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the Public Records Act. Therefore, the trial court's granting of summary judgment should be reversed, and this case should be remanded for further proceedings.

DATED this 12th day of May, 2017.

/s/ Christopher Taylor
Christopher Taylor
Washington State Bar Association # 38413
CR Taylor Law, P.S.
Attorney for Appellant
203 4th Ave E Ste 407
Olympia, WA 98501
Telephone: (360) 352-8004
Fax: (360) 570-1006
E-mail: taylor@crtaylorlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 12th, 2017, I caused a true and accurate copy of the foregoing APPELLANT'S BRIEF to be delivered by email to Albert Lin, attorney for Respondent Okanogan County, at alin@co.okanogan.wa.us.

DATED this 12th day of May, 2017.

/s/ Christopher Taylor
Christopher Taylor

C.R.TAYLOR LAW PS

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