

No. 349616-III

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

JUAN ZABALA

Appellant,

v.

OKANOGAN COUNTY,

Respondent.

RESPONDENT'S BRIEF

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I. IDENTITY OF THE RESPONDING PARTY

Respondent Okanogan County is represented by the Okanogan County Prosecuting Attorney's Office, Albert Lin, Chief Civil Deputy Prosecuting Attorney.

II. ASSIGNMENT OF ERROR AND RELIEF SOUGHT

Did the Trial Court err in granting Okanogan County's Motion to Dismiss and/or Motion for Summary Judgment and Dismissal with Prejudice on December 21, 2016? (CP 468-472, 940-944) The answer is no.

Okanogan County respectfully requests that this Court deny Mr. Juan Zabala's appeal filed on January 3, 2017 (CP 475-481, 945-951) and uphold the Honorable Douglas County Superior Judge John Hotchkiss' decision granting Okanogan County's Motion to Dismiss and/or Motion for Summary Judgment and Dismissal with Prejudice on December 21, 2016. (CP 468-472, 940-944)

III. ISSUES ON APPEAL

- A. Does RCW 9.73.095(3)(b) exempt disclosure of recorded conversations from corrections facilities such as the Okanogan County Jail? Yes.**
- B. Is Mr. Zabala's Request a Public Records Request under Chapter 42.56 RCW? No.**

- C. **Are Inmates' privacy interests protected under RCW 70.48.100 and therefore inmates' jail records are exempt from disclosure? Yes.**
- D. **Do Mr. Zabala's requests provide sufficient information upon which Okanogan County can reasonably identify, locate, and produce the records requested? No.**

IV. STATEMENT OF THE CASE

Mr. Zabala alleged violations of RCW 42.56 of the Public Records Act. See Complaint generally. (CP 1-8, 482-489) However, Mr. Zabala's appeal, complaint, and opposition to the motion to dismiss and/or motion for summary judgment absurdly attempts to place Okanogan County into a hypocritical Catch 22. If this Court agrees that the Public Records Act applies and the exemption provision for privacy and/or confidentiality of jail recordings and/or the contents of such conversations are not protected, then Okanogan County will be put in the position of potential liability for the release of such inmate records that Mr. Zabala attempts to obtain. That position is entirely inconsistent with the statutes the legislature adopted in protecting the privacy and use of jail recordings and/or conversations. Simply put, 1. RCW 9.73.095(3)(b) exempts disclosure of recorded conversations from corrections facilities such as the Okanogan County Jail; 2. Mr. Zabala's Request is not a Public Records Request Under Chapter 42.56 RCW; and 3. Inmates' privacy interests are protected under RCW 70.48.100 and therefore inmates' jail records are exempt from

disclosure. Common sense and plain reading of the applicable statutes and case law cited herein demonstrates that the release of jail recordings and/or conversations in any form by Okanogan County is statutorily limited and Mr. Zabala's Public Records Act complaint is not an exception to the rule. The hypocrisy of Mr. Zabala's position theoretically would allow him to complain simultaneously that he is entitled to the jail records and/or conversations under the Public Records Act and then turn around and complain that the release of such records violated inmate privacy and confidentiality. That certainly cannot be the common sense intent of the legislature and the courts in interpreting the Public Records Act under RCW 42.56. Lastly, Mr. Zabala's requests do not provide sufficient information upon which Okanogan County can reasonably identify, locate, and produce the records requested.

V. FACTS

On March 24, 2016, Mr. Zabala made a request for public records to Celeste Pugsley, the Okanogan County Jail Public Record's Officer. On March 29, 2016, Ms. Pugsley responded. (CP 45-57, 526-538) On March 31, 2016, Mr. Zabala followed up on his request. See 10-5-16 Celeste Pugsley Declaration ¶3, Exhibit 1. (CP 45-57, 526-538) Ms. Pugsley responded to Mr. Zabala's March 31, 2016 request on April 5, 2016. *Id.* at ¶4, Exhibit 2. (CP 45-57, 526-538)

Ms. Pugsley is familiar with the public records requests made by Mr. Zabala on March 24, 2016, and March 31, 2016. *Id.* Ms. Pugsley declared that the Okanogan County Jail did not possess the records requested because she would have to try to get that information from the Okanogan County Prosecuting Attorney's Office and/or contact Chelan County Jail. These records are not kept by the Okanogan County Jail. *Id.* at ¶5. (CP 45-57, 526-538) It is Ms. Pugsley's professional opinion, based on twenty one and one-half years as the Okanogan County Jail Public Records Officer, that Mr. Zabala's March 24, 2016 and March 31, 2016 requests do not identify records that can be reasonably located because it lacks specific information from which to locate and identify such records. In order to identify records that can be reasonably located by the Okanogan County Jail, specific information, such as case names and/or case numbers would be needed. *Id.* at ¶¶6-7. (CP 45-57, 526-538)

Ms. Pugsley, therefore, was unable to search the Okanogan County Jail database to locate any identifiable records because of the lack of sufficient and/or specific information in the Appellant's requests. Ms. Pugsley so advised Mr. Zabala by email on March 29, 2016 that the "jail has provided the responsive documents that could be located in your prior requests. However, your new request for any and all records related to recorded and/or monitored jail phone calls that were used in the

prosecution of any crime by any of the Okanogan County Prosecutor's offices is so broad that the request is not for an identifiable records that agency staff can reasonably locate." *Id.*, Exhibit 1. (CP 45-57, 526-538) See 11-16-16 Declaration of Celeste Pugsley in Support of Defendant's Reply in Support of Motion to Dismiss and/or Summary Judgment ¶5. (CP 174-291, 650-767)

Mr. Zabala has made public records requests to the Respondent Okanogan County Jail with sufficient information for Okanogan County to respond with identifiable jail records in the year 2016. (CP 174-291, 650-767) Ms. Pugsley responded with jail records on January 8, January 12, January 20, February 18, and February 19 in the year 2016 to public records requests made by Mr. Zabala because there was sufficient information to search, locate, and respond. See 11-16-16 Declaration of Celeste Pugsley in Support of Defendant's Reply in Support of Motion to Dismiss and/or Summary Judgment ¶4, Exhibit A. (CP 174-291, 650-767) (requested to be filed under seal to protect inmate privacy pursuant to RCW 70.48.100(2)). (CP 169-173, 440-443)

Shauna Field is the Office Administrator for the Okanogan County Prosecuting Attorney's Office. Ms. Field has been in this current position since 2014 and has been an employee of the Okanogan County Prosecuting Attorney's Office for the past 5 years. Ms. Field provided a

Declaration in support of the Defendant's motion to dismiss and/or summary judgment. Ms. Field is familiar with the public records requests in the above entitled case, and also is familiar with the use and function of the electronic case management software utilized by the Okanogan County Prosecuting Attorney's Office, called Justware. 10-4-16 Declaration of Shauna Field, ¶1. (CP 58-71, 539-552)

On April 5, 2016 Mr. Zabala submitted a request for "any and all records related to recordings of inmate phone calls from any Adult Correctional Facility" including "all voicemail, email, audio, notes, reports, transcripts, arguments, motions, briefs, memos, letters and any other record related to the same," and a second request, submitted on the same day, of "any and all records related to recorded and/or monitored jail phone calls that were used in the prosecution of any crime by any of the Okanogan County Prosecutors Offices." The second request was limited to jail phone calls originating from Okanogan, Chelan and Douglas County Adult Correctional Facilities. *Id.* at ¶5, Exhibit 1. (CP 58-71, 539-552). The Okanogan County Prosecuting Attorney responded timely on April 6, 2016. *Id.* at ¶6, Exhibit 2. (CP 58-71, 539-552)

On June 3, 2016, Mr. Zabala submitted a third request for "all recordings of telephone calls placed by adult inmates at any jail or correctional facility in Okanogan, Chelan, or Douglas Counties in the

possession of the Okanogan Prosecuting Attorney's Office (or any other office of the County or third party contractor that is in possession of the same on behalf of the Prosecutor, such as an county-wide IT department or a Microsoft cloud service),” “any transcripts or summary made of any such recording,” and “any records prepared by any employee of the Okanogan Prosecuting Attorney's Office that were later filed with any court or provided to any defense attorney that explicitly or implicitly mention such a phone call.” Mr. Zabala narrowed this request to “records that were created within the past three years” and “records that were actually used within the context of a criminal prosecution.” *Id.* at ¶7, Exhibit 3. (CP 58-71, 539-552)

After receiving each of the above mentioned requests, Ms. Field attempted to locate responsive records utilizing the search functions available in Justware. Justware’s search capabilities are limited to case numbers, names and personal identifiers, involved agencies, statute of a crime, and date. The ability to view the evidence content of a case (reports, audio, video, etc.) is only available when a specific case is accessed. Using a date range of 3 years and the statutes of crimes suggested by Mr. Zabala in the June 3rd request, Ms. Field was able to locate 368 potential files, 14 cases involving Intimidating a Witness, 19 cases involving Tampering with a Witness, and 335 cases involving

Violation of No Contact Order and/or Protection Order but was unable to determine whether or not jail phone calls were used, listened to, or initiated criminal prosecution in these cases without manually examining the contents of all 368 physical and electronic case files. *Id.* at ¶8. (CP 58-71, 539-552)

The Okanogan County Prosecuting Attorney's Office handles up to two thousand criminal cases per year, with each individual case requiring the request, examination, and utilization of various types of investigative materials. The Prosecutor's office does not have the ability to track the specific types of these materials, nor does the Prosecutor's office store these materials in any manner other than in physical case files and electronic case management system, Justware. In Ms. Field's opinion, the requests made on April 5, 2016 would require the Prosecutor's office to individually examine hundreds, if not thousands, of criminal case files in order to determine if and when the Prosecutor's Office utilized any inmate phone calls in the ways specified by Mr. Zabala. Narrowing the scope of the June 3, 2016 request to case types suggested by the Appellant and the time frame of 3 years resulted in 368 potential files *that may or may not contain responsive records*. The Okanogan County Prosecutor's Office would be required to examine the contents of every physical and electronic case file to determine if the files contained any of the requested

responsive records. This would require additional staff, which is unavailable, and overtime hours that cannot be determined. *Id.* at ¶9. (CP 58-71, 539-552)

In order to reasonably locate records in the Prosecutor's criminal case files, specific case information, such as case names and/or case numbers are needed. It is Ms. Field's opinion, based on 5 years as an employee utilizing the Justware system, Mr. Zabala's April 5, 2016 and June 3, 2016 requests do not identify records that can be reasonably located by the Prosecutor's Office. *Id.* at ¶10. (CP 58-71, 539-552)

On June 6, 2016, the Okanogan County Prosecuting Attorney sent to Mr. Christopher Taylor its June 4, 2016 response pursuant to RCW 42.56 to his request for public records dated June 3, 2016. The Okanogan County Prosecuting Attorney on behalf of itself and Okanogan County responded that Mr. Taylor's June 3, 2016 "requests do not identify records that can be reasonably located by the Prosecutor's Office and thus we cannot respond" and further claimed public records exemptions, including the following:

3. The PRA requires agencies to make available for public inspection and copying all public records, unless the records fall within the specific exemptions of another statute which exempts disclosure of certain records. RCW 42.56.070(1). RCW 9.73.095(3)(b) exempts disclosure of recorded conversations from corrections facilities. It provides "[t]he contents of any intercepted and recorded conversation shall be

divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.”

See 10-4-16 Declaration of Albert H. Lin ¶4, Exhibit 1. (CP 72-103, 553-584)

On July 1, 2016, the Okanogan County Prosecutor’s Office received a follow up letter from Mr. Taylor dated June 29, 2016, citing disagreement with the Okanogan County Prosecuting Attorney’s June 4, 2016 response letter. See 10-4-16 Albert H. Lin Declaration, ¶5 Exhibit 2. (CP 72-103, 553-584)

The Okanogan County Prosecuting Attorney on behalf of itself and Okanogan County responded on July 5, 2016, again stating that Mr. Taylor’s “requests do not identify records that can be reasonably located by the Prosecutor's Office and thus we cannot respond” and again further claimed public records exemptions, including the following:

3. The PRA requires agencies to make available for public inspection and copying all public records, unless the records fall within the specific exemptions of another statute which exempts disclosure of certain records. RCW 42.56.070(1). RCW 9.73.095(3)(b) exempts disclosure of recorded conversations from corrections facilities. It provides “[t]he contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.” *Id.* at ¶5. (CP 72-103, 553-584)

The Okanogan County Prosecuting Attorney also stated to Mr. Christopher Taylor its response pursuant to RCW 42.56 to his June 29, 2016 letter stating in particular:

In order to identify records that can be reasonably located by the Prosecutor's Office, please provide specific information, such as case names and/or case numbers. See 10-4-16 Albert H. Lin Declaration, ¶5 Exhibit 2. (CP 72-103, 553-584)

Mr. Taylor never responded and instead filed the Complaint dated September 14, 2016 in Douglas County Superior Court (CP 1-8, 482-489) and received by the Okanogan County Prosecuting Attorney on September 29, 2016. 10-4-16 Albert H. Lin Declaration, ¶5 Exhibit 2. (CP 72-103, 553-584)

On November 8, 2016, Mr. Zabala's attorney Christopher Taylor sent by email a records request that contained specific case information, with case numbers and case names. See 12-1-16 Declaration of Albert H. Lin in Support of Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss and/or Motion for Summary Judgment, ¶4 Exhibit 1. The specifics of the request are as follows:

I am seeking copies of all recordings of telephone calls placed by adult inmates at any jail or correctional facility in Okanogan, Chelan, or Douglas Counties in the possession of the Okanogan Prosecuting Attorney's Office (or any other office of the County or third party contractor that is in possession of the same on behalf of the Prosecutor, such as a county-wide IT department or a Microsoft cloud service) that were used in the following cases: *State v. Dick*, 14-1-00324-1; *State v. Flores*, 13-1-00176-2; *State v.*

Gallegos Villegas, 14-1-00045-4; and *State v. Stotts*, 14-1-00090-0. By "used" I mean those recordings that were reviewed by any employee of the Okanogan County Prosecuting Attorney's Office and subsequently acted upon. By "acted upon" I mean offered into evidence in either a hearing or a trial; provided to a criminal defense attorney; or explicitly referenced in any document filed with any court or provided to a criminal defense attorney (e.g. a probable cause declaration, a *Brady* letter, or a negotiation email). (CP 292-418, 768-894)

On December 1, 2016, Okanogan County provided responsive records to the November 8, 2016 public records request subject to exemptions and/or redactions that are discussed in this brief. *Id.*, ¶5 Exhibit 2. (CP 292-418, 768-894)

On December 20, 2016, Okanogan County provided additional responsive records to the November 8, 2016 public records request regarding *State v. Stotts*, 14-1-00090-0, subject to exemptions and/or redactions that are discussed in this brief. 12-20-16 Second Declaration of Albert H. Lin in support of Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss and/or Motion for Summary Judgment ¶4, Exhibit 1. (CP 444-467, 916-939)

On December 21, 2016, the Honorable Douglas County Superior Judge John Hotchkiss granted Okanogan County's Motion to Dismiss and/or Motion for Summary Judgment. (CP 468-472, 940-944) Mr. Zabala on January 3, 2017 filed his Notice of Appeal. (CP 475-481, 945-951)

VI. ARGUMENT

This Court reviews de novo challenged agency responses to PRA requests. RCW 42.56.550(3). Thus, this Court stands in the same position as the trial court. *Wright v. State*, 176 Wn.App. 585, 592, 309 P.3d 662 (2013), citing *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wash.2d 895, 904, 25 P.3d 426 (2001).

Mr. Zabala's claims against Okanogan County were dismissed pursuant to CR 12(b)(6) and CR 12(c) for failure to state a claim upon which relief may be granted and for judgment on the pleadings. In reviewing the dismissal of a complaint, the court inquires whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief. CR 12(b); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009). When considering a Rule 12(c) dismissal, the court accepts the facts as pled by the nonmovant. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.2009). See also *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (“For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.”).

Mr. Zabala's claims were also dismissed pursuant to CR 12(c) judgment on the pleadings. A motion for judgment on the pleadings is appropriate to "test the legal sufficiency of the complaint," i.e., the

substance of the action, not just form of the complaint's allegations. *Springer v. Superior Court, Spokane County*, 4 Wash. 2d 53, 59, 61 (1940). A defendant's motion for judgment on the pleadings "admits, for the purposes of the motion, the truth of every fact well pleaded." *Bailey v. Town of Forks*, 108 Wash. 2d 262, 264 (1988). In deciding such a motion, a court may, though it need not, consider hypothetical facts not alleged or in the record. See *P.E. Sys., LLC v. CPI Corp.*, 176 Wash. 2d 198, 211 (2012). A motion for judgment on the pleadings does not admit "mere conclusions nor the [complaint's] interpretation of statutes involved nor [its] construction of the subject matter." *Pearson v. Vandermay*, 67 Wash. 2d 222, 230 (1965).

Likewise, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). Summary judgment is proper if the pleadings show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one that affects the outcome of the litigation. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). As will be discussed below, this Court should deny Mr. Zabala's appeal filed on January 3, 2017 and uphold

the Honorable Douglas County Superior Judge John Hotchkiss' decision granting Okanogan County's Motion to Dismiss and/or Motion for Summary Judgment and Dismissal with Prejudice on December 21, 2016. (CP 468-472, 940-944)

A. RCW 9.73.095(3)(b) exempts disclosure of recorded conversations from corrections facilities such as the Okanogan County Jail.

The Okanogan County Prosecuting Attorney has repeatedly claimed the following public records exemptions and may redact, may not be permitted, and/or is not required to provide such information.

RCW 42.56.070(1) states “[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or *other statute which exempts or prohibits disclosure of specific information or records*. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.”

RCW 9.73.095(3)(b) exempts disclosure of recorded conversations from corrections facilities. It provides “[t]he contents of any intercepted

and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or *in the prosecution or investigation of any crime.*” *Garvie v. Washington State Dept. of Corrections*, 185 Wn.App. 1046, 2015 WL 461036 at 6 (2015)(Division II unpublished). GR 14.1.¹ (CP 86-91, 567-572)

¹ RCW 9.73.095. Intercepting, recording, or divulging offender conversations-- Conditions—Notice

(3) The department of corrections shall adhere to the following procedures and restrictions when intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility as provided for by this section. The department shall also adhere to the following procedures and restrictions when intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present:

(a) Unless otherwise provided for in this section, after intercepting or recording any conversation, only the superintendent and his or her designee shall have access to that recording.

(b) The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.

(c) All conversations that are recorded under this section, unless being used in the ongoing investigation or prosecution of a crime, or as is necessary to assure the orderly operation of the correctional facility, shall be destroyed one year after the intercepting and recording.

RCW 9.73.060. Violating right of privacy--Civil action--Liability for damages

Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

Mr. Zabala's requests for jail recordings are exempted pursuant to RCW 9.73.095(3)(b) and RCW 42.56.070(1). Therefore, the Okanogan County Prosecuting Attorney in using the Offender Phone Recordings from a Correctional Facility is limited to its use "in the prosecution or investigation of any crime" and would be exempt from release in response to a public records request, which is consistent with the plain meaning of the statute. A public records request for release of such recordings is completely separate and apart from use in a prosecution or investigation of a crime. *Id.* When a statute is unambiguous, the court looks to a statute's

RCW 9.73.080. Penalties

- (1) Except as otherwise provided in this chapter, any person who violates RCW 9.73.030 is guilty of a gross misdemeanor.
- (2) Any person who knowingly alters, erases, or wrongfully discloses any recording in violation of RCW 9.73.090(1)(c) is guilty of a gross misdemeanor.

GR 14.1 CITATION TO UNPUBLISHED OPINIONS

(a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

(b) Other Jurisdictions. A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.

(c) Citation of Unpublished Opinions in Subsequent Opinions. Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.

(d) Copies of Unpublished Opinions. The party citing an unpublished opinion from a jurisdiction other than Washington shall file and serve a copy of the opinion as an appendix to the pleading in which the authority is cited.

[Adopted effective September 1, 2007; amended effective September 1, 2016.]

plain language alone to determine the legislature's intent. *Wright v. State*, 176 Wn.App. 585, 594, 309 P.3d 662 (2013). Pursuant to RCW 9.73,² the public records privacy exemptions and/or restrictions are applicable to an agency such as Okanogan County.³ And pursuant to RCW 9.73.095(3)(c), "All conversations that are recorded under this section, unless being used in the ongoing investigation or prosecution of a crime, or as is necessary to assure the orderly operation of the correctional facility, shall be destroyed one year after the intercepting and recording." Thus, this further demonstrates that recordings of conversations at the Okanogan County Jail

² Washington's privacy act, chapter 9.73 RCW, is "one of the most restrictive electronic surveillance laws ever promulgated," significantly expanding the minimum standards of its federal counterpart and offering a greater degree of protection to Washington residents. See *State v. Smith*, COA No. 47205-8-II (Oct. 4, 2016) at 5, citing *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case." *Id.* RCW 9.73.050.

³ RCW 9.73.095(2)(b); *State v. Archie*, 148 Wn.App. 198, 201-205, 199 P.3d 1005 (2009) citing *State v. Modica*, 136 Wn.App. 434, 149 P.3d 446, review granted 162 Wn.2d 1001, 175 P.3d 1093, affirmed 164 Wn.2d 83, 186 P.3d 1062 (2006), telephone calls from inmates in state correctional facilities may be intercepted, recorded, or divulged by the Department of Corrections, provided that the Department adheres to certain procedures and restrictions, and one of these restrictions is that calls be operator announcement type calls, in which the recipient is notified that the call is from a prison inmate and will be recorded and may be monitored. This restriction shall be applicable to the Okanogan County Correctional Facility regarding Okanogan County Jail inmates. (County jail did not violate Privacy Act by recording defendant's telephone calls to family members and delivering the recordings to prosecutor for use in investigation of murder charges pending against defendant; as a pretrial detainee, defendant had a reduced expectation of privacy, and defendant and call recipients were warned that calls were recorded. *State v. Haq*, 166 Wn.App. 221, 268 P.3d 997 (2012), corrected, review denied 174 Wn.2d 1004, 278 P.3d 1111, habeas corpus denied 2014 WL 1871064).

that are no longer being used in the ongoing investigation or prosecution of a crime shall not be available for release, further supporting the intent of RCW 9.73.095(3)(c) restrictions, which do not include Mr. Zabala's requests.

B. Mr. Zabala's Request is not a Public Records Request Under Chapter 42.56 RCW.

Mr. Zabala's request is not a request governed by the PRA.

Records requested under the PRA may be exempt from disclosure if the record is controlled by any "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1).

Disclosure of jail records is governed exclusively by the City and County Jails Act, Chapter 70.48 RCW. RCW 70.48.100(2)⁴ states, "Except as

⁴ RCW 70.48.100(2) states:

Except as provided in subsection (3) of this section, the records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies as defined in RCW 43.43.705; or

(a) For use in inspections made pursuant to *RCW 70.48.070;

(b) In jail certification proceedings;

(c) For use in court proceedings upon the written order of the court in which the proceedings are conducted;

(d) To the Washington association of sheriffs and police chiefs;

(e) To the Washington institute for public policy, research and data analysis division of the department of social and health services, higher education institutions of Washington state, Washington state health care authority, state auditor's office, caseload forecast council, office of financial management, or the successor entities of these organizations, for the purpose of research in the public interest. Data disclosed for research purposes must comply with relevant state and federal statutes;

(f) To federal, state, or local agencies to determine eligibility for services such as medical, mental health, chemical dependency treatment, or veterans' services, and to allow for the provision of treatment to inmates during their stay or after release. Records disclosed for eligibility determination or treatment services must be held in confidence by

provided in subsection (3) of this section the records of a person confined in jail shall be held in confidence...”. As a result of the exclusivity language contained in this statute, the disclosure of the records Mr. Zabala requested is not governed by the PRA. This has been codified in Okanogan County Code 2.88.050. Jail and Inmate Records, RCW 70.48.

The court of appeals considered a similar case in *Wright v. State*, 176 Wn.App. 585, 309 P.3d 662 (2013). In that case, the court overturned a PRA ruling awarding Plaintiff \$649,896.00 in PRA penalties, fees, and costs, when it concluded that the exclusivity language contained in Chapter 13.50 RCW precluded an award under the PRA. *Id.* at 599. In reaching that decision, the court stated that because the records requested were “available to the Plaintiff only under chapter 13.50 RCW, DSHS’s failure to produce it in response to her PRA request cannot serve as the basis for a PRA violation.” *Id.* The Court also noted that chapter 13.50 RCW was adopted in 1979, well after the PRA’s adoption in 1972, and if the legislature had intended for it to have sanctions comparable to the PRA, it would have included them in the statute. *Wright* at 597, citing *In re Dependency of KB*, 150 Wn.App. 912, 923, 210 P.3d 330 (2009).

When a statute is unambiguous, the court looks to a statute’s plain

the receiving agency, and the receiving agency must comply with all relevant state and federal statutes regarding the privacy of the disclosed records; or

(g) Upon the written permission of the person.

language alone to determine the legislature's intent. *Wright*, 176 Wn.App. at 594.

The Court of Appeals addressed the same issue in *Anderson v. Dept. of Social and Health Services*, COA No. 47660-6-II (Nov. 15, 2016), holding RCW 26.23.120, which governs child support records, falls within the "other statutes" exemption under RCW 42.56.070(1) of the Public Records Act. An attorney client e-mail string between the Division of Child Support and the King County prosecutor's office is exempt from disclosure under RCW 5.60.060(2)(a). *Id.* Because the PRA mandates broad public disclosure, we liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. *Anderson* at 7, citing *White v. Clark County*, 188 Wn.App. 622, 631, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016). There are three sources of PRA exemptions, (1) the PRA itself, (2) the "other statutes" exemption, and (3) the Washington Constitution. *White*, 188 Wn.App. at 630-31.

"The 'other statutes' exemption, [RCW 42.56.070(1)], incorporates into the [PRA] other statutes which exempt or prohibit disclosure of specific information or records." *Anderson* at 8, citing *PAWS II*, 125 Wn.2d at 261-62. The "other statutes" exemption supplements the PRA when the statute in question is not in conflict with the PRA; if there is a

conflict between the PRA and the other statute(s), the PRA governs. RCW 42.17.920; *PAWS II*, 125 Wn.2d at 261-62.

RCW 26.23.120(1) expressly provides,

Any information or records concerning individuals who owe a support obligation or for whom support enforcement services are being provided which are obtained or maintained by the Washington state support registry, the division of child support, or under chapter 74.20 RCW *shall be private and confidential and shall only be subject to public disclosure as provided in subsection (2) of this section.*

(Emphasis added.)

Under RCW 26.23.120(1), child support records, although private and confidential, are subject to public disclosure only as provided in RCW 26.23.120(2). RCW 26.23.120(2) permits the DCS secretary to adopt rules regarding disclosure and confidentiality, and requires the DCS secretary to “provide for disclosure of the information and records, under appropriate circumstances.” RCW 26.23.120(2)-(3). Other statutes, like RCW 13.50.100(2), contain similar language that protect information designated as confidential by statute while providing for public disclosure under appropriate circumstances. DCS argued that RCW 26.23.120(1) falls within the “other statutes” exemption to the PRA. The Court in *Anderson* agreed with DCS. *Anderson* at 8-9.

The PRA mandates the broad disclosure of public records. *SEIU 775 v. DSHS, et al.*, No. 48881-7-II, at 3-9 (April 27, 2017), citing *John*

Doe A v. Wash. State Patrol, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Therefore, a state agency has an affirmative obligation to disclose records requested under the PRA unless a specific exemption applies. *Id.* at 371-72. And the court must liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. RCW 42.56.030; *Wash. State Patrol*, 185 Wn.2d at 371. Although the PRA encourages openness and transparency, the legislature has made certain records exempt from disclosure. *Wash. State Patrol*, 185 Wn.2d at 371. There are three sources of PRA exemptions: (1) enumerated exemptions contained in the PRA itself, (2) any “other statute” that exempts or prohibits disclosure as provided in RCW 42.56.070(1), and (3) the Washington Constitution. *White v. Clark County*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016). The party seeking to prevent disclosure of requested records has the burden of establishing that an exemption applies. *SEIU Healthcare 775NW v. Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 391, 377 P.3d 214, *review denied*, 186 Wn.2d 1016 (2016).

The “other statute” exemption is found in RCW 42.56.070(1): “Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, *unless the record falls within the specific exemptions of . . . this chapter, or other statute which*

exempts or prohibits disclosure of specific information or records.“

(Emphasis added.) Whether a statute is an “other statute” under RCW 42.56.070(1) is a question of law that we review de novo. *Wash. State Patrol*, 185 Wn.2d at 371.

The Supreme Court in *Washington State Patrol* emphasized that an “other statute” exemption applies only if that statute explicitly identifies an exemption and that a court cannot imply such an exemption. *Id.* at 372. The court stated: “[W]e will find an ‘other statute’ exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.” *Id.* at 373. The statute “does not need to expressly address the PRA, but *it must expressly prohibit or exempt the release of records.*” *Id.* at 372 (emphasis added).

In *Washington State Patrol*, the Supreme Court concluded that “courts consistently find a statute to be an ‘other statute’ when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production.” *Id.* at 375. The court reviewed several cases applying an “other statute” exemption that support this proposition. *Id.* at 375-77.

In *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 527-28, 326 P.3d 688 (2014), the Supreme Court held that

RCW 9.73.090(1)(c) provided an “other statute” exemption for dashboard camera videos. That statute provided that “[n]o sound or video recording [made by a dashboard camera] may be duplicated and made available to the public . . . until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.” RCW 9.73.090(1)(c).

In *Ameritrust Mortgage Company v. Office of the Attorney General*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010), the Supreme Court held that the federal Gramm–Leach–Bliley Act (GLBA) certain Federal Trade Commission rules enacted pursuant to the GLBA provided an “other statute” exemption. That statute and related rules concerned privacy of bank customers’ personal information and provided that “the receiving nonaffiliated third party may not reuse or redisclose the nonpublic personal information to another nonaffiliated third party unless an exception applies or the reuse or redisclosure would be lawful if done by the financial institution.” *Ameritrust*, 170 Wn.2d at 426 (citing 15 U.S.C. § 6802(c) and 16 C.F.R. § 313.11(c)-(d)).

In *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004), the Supreme Court held that RCW 5.60.060(2)(a), the attorney-client privilege statute, provided an “other statute” exemption. That statute stated that “[a]n attorney or counselor shall not, without the consent of his

or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” RCW 5.60.060(2)(a).

In *Planned Parenthood of the Great Northwest v. Bloedow*, 187 Wn. App. 606, 623, 350 P.3d 660 (2015), Division One of this court held that RCW 43.70.050(2) provided an “other statute” exemption for records of induced abortions. That statute stated that health care data “shall not be disclosed” when the patient or health care provider could be identified. RCW 43.70.050(2).

However, the Supreme Court in *Washington State Patrol* stated that to qualify as an “other statute” under RCW 42.56.070(1), a statute must explicitly exempt or prohibit from production a “specific record.” 185 Wn.2d at 373. The court emphasized that although the statute need not reference the PRA, it “must expressly prohibit or exempt the release of records.” *Id.* at 372.

The Supreme Court in *Washington State Patrol* essentially endorsed the holdings in these cases. Conversely, the court noted that courts will not find an “other statute” exemption when a statute is not explicit. 185 Wn.2d at 377. The court referenced this court’s decision in *Belo Management Services, Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.3d 370 (2014). In *Belo*, the court addressed whether federal

regulations allowing parties who submit materials to the Federal Communications Commission to request that the information “not be made routinely available for public inspection,” 47 C.F.R. § 0.459(a)(1), precluded disclosure of retransmission consent agreements (RCAs). *Id.* at 660. The court held that these regulations did not provide an “other statute” exemption because they did not “specifically state that RCAs are confidential and protected from disclosure” and did not “preclude disclosure of any *specific* information or records.” *Id.* at 660-61.

In *Washington State Patrol* itself, the Supreme Court held that RCW 4.24.550 did not provide an “other statute” exemption for information regarding sex offenders. 185 Wn.2d at 384-85. That statute stated that public agencies are authorized to release information regarding sex offenders in certain situations and provided guidelines for local law enforcement to consider when deciding whether to disclose such information. RCW 4.24.550(1)-(3). The court noted that “[t]here is no language in the statute that prohibits an agency from producing records” and that “[t]he plain language of RCW 4.24.550 does not explicitly exempt any records from production.” *Wash. State Patrol*, 185 Wn.2d at 377.

An analogous situation is presented by this case. First, Mr. Zabala is only entitled to his jail records under RCW 70.48.100(2)(f)(g),⁵ which

⁵ *Id.*

have been provided by the Okanogan County Jail pursuant to his requests on January 8, January 12, January 20, February 18, and February 19, 2016. See 11-16-16 Declaration of Celeste Pugsley in Support of Defendant's Reply in Support of Motion to Dismiss and/or Summary Judgment ¶4, Exhibit A. (CP 174-291, 650-767) Because this statute provides him with the exclusive right to receive these records, a violation of this statute cannot provide the basis for a PRA violation. Second, chapter 70.48 RCW was adopted after the PRA and if the legislature had intended for violations of this act to carry sanctions similar to the PRA, it would have written those into the act.

As a result, Mr. Zabala is not entitled to penalties under the PRA and his PRA claims were dismissed as a matter of law.

Although Okanogan County did not cite to all possible exemptions contained in the PRA in response to the Appellant's requests, it is not prohibited from doing so in litigation. *Sanders v. State*, 169 Wn.2d 827, 848, 240 P.3d 120 (2010).

C. Inmates' privacy interests are protected under RCW 70.48.100.

It is well settled that inmates do not lose all their privacy interests because they are incarcerated. *Houchms v. KQED*, 438 U.S. 1, 5-6 (1978). Our legislature has also recognized that those individuals not convicted of

crimes have a particular privacy interest in the stigmatizing effect of releasing non-conviction data. RCW 10.97.⁶ In Washington, we also have strong privacy protection rights under WA State Const. Sec. 7. RCW 70.48.100 is consistent with these privacy rights by keeping records of persons confined in county jails confidential.⁷ Notably, RCW 70.48.100 does not reference or include the PRA as an exception to the rule that inmate records are confidential. Finally, RCW 70.48.100(2)⁸ does contemplate that jail records may be discoverable because it includes the written permission of the person or the court as an exception. In this case, that is also the process intended by the Okanogan County Prosecutor's office and defense bar. It is appropriate that the jail recordings be subject to discovery standards and available for criminal and civil litigation. It is not appropriate that it be subject to the PRA and released to the general public.

A party is not entitled to discovery of information from privileged sources. *Dana v. Piper*, 173 Wash.App. 761, 295 P.3d 305, review denied

⁶ Washington's Criminal Records Privacy Act, RCW 10.97, generally provides for the "completeness, accuracy, confidentiality, and security of criminal history record information...." RCW 10.97.010. Section 10.97.080 of the act states: "No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete." Chapter 10.97.050 specifically controls the dissemination of nonconviction information. *Beltran v. State, Department of Social and Health Services*, 98 Wash.App. 245, 258, 989 P.2d 604, review granted 140 Wash.2d 1021, 10 P.3d 405 (1999).

⁷ "Jail" is defined in RCW 70.48.020(9) as "any holding, detention, special detention or correctional facility."

⁸ See footnote 4.

178 Wash.2d 1006, 308 P.3d 642 (2013). Public policy underlying public disclosure act did not outweigh counterbalancing interest in exempting pretrial confidential attorney communications with school district from public inspection by newspaper, which sought records of district's investigation in anticipation of wrongful death suit, which had culminated in settlement, brought by surviving relatives of student who died of anaphylactic shock after he ate snack provided by district containing known allergen. *Soter v. Cowles Pub. Co.*, 131 Wash.App. 882, 130 P.3d 840, review granted 158 Wash.2d 1029, 152 P.3d 1033, affirmed 162 Wash.2d 716, 174 P.3d 60 (2007)(The civil rules of discovery, CR 26(b)(4), require disclosure of all relevant documents that are not otherwise privileged. CR 26(b)(1) "Thus, where a controversy is at issue, *privileged* communications contained in documents are exempt from disclosure by way of the Public Records Act's reliance on CR 26(b))." Statutory privilege between counselor and patient prohibited discovery of former husband's 10-year-old mental health records, in post-divorce proceedings to resolve child custody dispute, though parties had authorized release of certain information in the order appointing guardian ad litem, where authorization allowed release of parties' mental health information only to the guardian ad litem, guardians were ordered to maintain confidentiality of records, and former wife demonstrated no relevance to her perceived need to have the records. *In re Marriage of True*, 104 Wash.App. 291, 16 P.3d 646 (2004). Mother's request for employment applications of caseworkers was properly denied in

negligence action against state and one of those caseworkers arising from sexual assaults on mother's children while they were in foster home; statute exempted applications for public employment from disclosure as public records, request arguably exceeded scope of discovery because mother did not allege in complaint that caseworkers were not qualified for their positions, and mother had opportunity to question caseworkers about those matters in deposition without breaching any statutory exemptions. *Beltran v. State, Department of Social and Health Services*, 98 Wash.App. 245, 989 P.2d 604, review granted 140 Wash.2d 1021, 10 P.3d 405 (1999). Under CR 26(b)(1), the court considers whether matters to be discovered are “relevant to the subject matter involved in the pending action.” The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial. *Id.* at 255-56, citing *Barfield v. City of Seattle*, 100 Wash.2d 878, 886, 676 P.2d 438 (1984). The fact that the evidence sought would be inadmissible at trial is not an impediment to discovery, “so long as the ‘information sought appears [to be] reasonably calculated to lead to the discovery of admissible evidence.’ ” *Id.*, citing *Barfield*, 100 Wash.2d at 886, 676 P.2d 438 (citations omitted). Nonetheless, Beltran’s discovery request for employee applications was properly denied because it conflicts with RCW 42.17.310(1)(t), which provides that the following records are exempt from disclosure: “All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.” *Id.* at 256.

D. Mr. Zabala's requests do not identify records that can be reasonably located by the Prosecutor's Office.

Okanogan County Ordinance No. 2006-3 Section 2.88.030(5)(b) states: "A requestor must request identifiable records or class of records. An identifiable record is one that is in existence at the time of the request and that agency staff can *reasonably locate*." "A request under the PRA must be for an '*identifiable public record*'." *Belenski, v. Jefferson County*, 187 Wn.App. 724, 740-741, 350 P.3d 689 (2015); *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016); See *Hangartner v. City of Seattle*, 151 Wash.2d 439, 447-48, 90 P.3d 26 (2004) (Emphasis added) (quoting former RCW 42.17.270 (1987)). A mere request for information does not so qualify. *Wood v. Lowe*, 102 Wash.App. 872, 879, 10 P.3d 494 (2000); *Bonamy v. City of Seattle*, 92 Wash.App. 403, 410-12, 960 P.2d 447 (1998). RCW 42.56.080; *Smith v. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000); *West v. Wash. State Dep't of Natural Res.*, 163 Wash.App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wash.2d 1020, 272 P.3d 850 (2012). Although there is no official format for a valid PRA request, "a party seeking documents must, at a minimum, [(1)] provide notice that the request is made pursuant to the [PRA] and [(2)] identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner*, 151 Wash.2d at 447, 90 P.3d 26. The PRA does

not require agencies to research or explain public records, but only to make those records accessible to the public. *Bonamy*, 92 Wash.App. at 409, 960 P.2d 447. When a request is invalid, the agency is excused from complying with it. *Bonamy*, 92 Wash.App. at 412, 960 P.2d 447. The PRA requires agencies “to disclose any public record on request unless [the record] falls within a specific, enumerated exemption.” *Neighborhood Alliance of Spokane County v. County of Spokane*, 153 Wn.App. 241, 258, 224 P.3d 775 (2009), *aff’d in part and rev’d in part*, 172 Wn.2d 701, 714, 261 P.3d 119 (2011) (citing RCW 42.56.070(1)).

The test for adequacy of a search for records under the PRA is the same as under the federal Freedom of Information Act, 5 U.S.C.A. section 552. *Neighborhood Alliance*, 172 Wn.2d at 718–19. Accordingly, “the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate.” *Neighborhood Alliance*, 172 Wn.2d at 719. “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*, 172 Wn.2d at 719. “What will be considered reasonable will depend on the facts of each case[; thus, w]hen examining the circumstances of a case, ... the issue of whether the search was reasonably calculated [to lead to the discovery of the requested documents] and therefore adequate is separate from whether

additional responsive documents exist but are not found.” *Neighborhood Alliance*, 172 Wn.2d at 719 (citations omitted).

Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Neighborhood Alliance*, 172 Wn.2d at 719 (citing *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326, 336 U.S.App. D.C. 386 (1999)). The search should not be limited to one or more places if there are additional sources for the information requested. *Neighborhood Alliance*, 172 Wn.2d at 719.

“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.’ “ *Neighborhood Alliance*, 172 Wn.2d at 719 (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68, 287 U.S.App. D.C. 126 (1990)). “***This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.***” *Neighborhood Alliance*, 172 Wn.2d at 719.

Wright v. State, 176 Wn.App. 585, 592-594, 309 P.3d 662 (2013) is instructive. Here, the requester at least identified her name upon which a search could be done. However, the court stated the following regarding what essentially was an open ended kitchen sink request:

^{14]} ^{15]} ¶ 12 On March 26, 2007, Wright submitted her first request to DSHS, seeking “her entire DSHS file.” CP at 145. On June 1, DSHS sent her a five-volume file that contained her children’s juvenile administrative

records, which DSHS explained it was providing under the juvenile records act, *593 chapter 13.50 RCW, rather than under the PRA, chapter 42.56 RCW. More than one year later, on May 20, 2008, Wright submitted a second request to DSHS, seeking “any and all documents relating to Amber Wright.” CP at 11. DSHS responded to Wright’s second request by again providing under chapter 13.50 RCW a series of disclosures related to her children’s juvenile administrative records.

¶ 13 As our Supreme Court has explained,

The [PRA] was enacted to allow the public access to government documents once agencies are allowed the opportunity to determine if the requested documents are exempt from disclosure; *it was not enacted to facilitate [the] unbridled searches of an agency’s property. [A] proper request under the [PRA] must identify with reasonable clarity those documents that are desired.*

Hangartner, 151 Wash.2d at 448, 90 P.3d 26 (emphasis added). The PRIDE manual and investigation protocols provide general **666 DSHS guidance and procedures for numerous DSHS clients and other members of the public; they are not specific to Wright’s individual Child Protective Services (CPS) referral history and records.

¶ 14 Wright’s request for document production neither expressly mentioned nor identified with “reasonable clarity” the manual or the protocols; on the contrary, its language limited her request to a broad range of materials specifically related to the 2005 investigation of a CPS referral when she was a child. We hold, therefore, that *594 because Wright’s request for “any and all documents relating to Amber Wright” did not include the DSHS protocols and manual with “reasonable clarity,” DSHS’s “failure” to disclose these documents was not a PRA violation and cannot support the trial court’s PRA award to Wright for attorney fees, costs, and penalties.

Ms. Pugsley declared that the Okanogan County Jail did not possess the records requested because she would have to try to get that information from the Okanogan County Prosecuting Attorney’s Office and/or contact the Chelan County Jail. These are not records that are kept

by the Okanogan County Jail. It is Ms. Pugsley's professional opinion, based on twenty one and one-half years as the Okanogan County Jail Public Records Officer, that Mr. Zabala's March 24, 2016 and March 31, 2016 requests do not identify records that can be reasonably located because it lacks specific information from which to locate and identify such records. In order to identify records that can be reasonably located by the Okanogan County Jail, specific information, such as case names and/or case numbers would be needed. 10-5-16 Declaration of Celeste Pugsley ¶¶3-7. (CP 45-57, 526-538)

Ms. Pugsley advised Mr. Zabala by email on March 29, 2016 that the "jail has provided the responsive documents that could be located in your prior requests. However, your new request for any and all records related to recorded and/or monitored jail phone calls that were used in the prosecution of any crime by any of the Okanogan County Prosecutor's offices is so broad that the request is not for an identifiable records that agency staff can reasonably locate." See 10-5-16 Celeste Pugsley Declaration, Exhibit 1. (CP 45-57, 526-538)

Ms. Pugsley, therefore, was unable to use the Okanogan County Jail search database to locate any identifiable records because of the lack of sufficient and/or specific information in Mr. Zabala's requests. 11-16-

16 Declaration of Celeste Pugsley in Support of Defendant's Reply in Support of Motion to Dismiss and/or Summary Judgment ¶5. (CP 174-291, 650-767)

Further, Okanogan County asserts that Mr. Zabala has made public records requests to the Respondent Okanogan County Jail with sufficient information for Okanogan County to search, locate, and respond with records on January 8, January 12, January 20, February 18, and February 19, 2016. See 11-16-16 Declaration of Celeste Pugsley in Support of Defendant's Reply in Support of Motion to Dismiss and/or Summary Judgment ¶4, Exhibit A. (CP 174-291, 650-767)

On November 8, 2016, Mr. Zabala's attorney Christopher Taylor sent by email a records request that contained specific case information, with case numbers and case names. 12-1-16 Declaration of Albert H. Lin in Support of Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss and/or Motion for Summary Judgment, ¶4 Exhibit 1. The specifics of the request are as follows:

I am seeking copies of all recordings of telephone calls placed by adult inmates at any jail or correctional facility in Okanogan, Chelan, or Douglas Counties in the possession of the Okanogan Prosecuting Attorney's Office (or any other office of the County or third party contractor that is in possession of the same on behalf of the Prosecutor, such as a county-wide IT department or a Microsoft cloud service) that were used in the following cases: *State v. Dick*, 14-1-00324-1; *State v. Flores*, 13-1-00176-2; *State v. Gallegos Villegas*, 14-1-00045-4; and *State*

v. Stotts, 14-1-00090-0. By "used" I mean those recordings that were reviewed by any employee of the Okanogan County Prosecuting Attorney's Office and subsequently acted upon. By "acted upon" I mean offered into evidence in either a hearing or a trial; provided to a criminal defense attorney; or explicitly referenced in any document filed with any court or provided to a criminal defense attorney (e.g. a probable cause declaration, a *Brady* letter, or a negotiation email). (CP 292-418, 768-894)

On December 1, 2016, Okanogan County provided responsive records to the November 8, 2016 public records request subject to exemptions and/or redactions that are discussed in this brief. *Id.*, ¶5 Exhibit 2. (CP 292-418, 768-894)

On December 20, 2016, Okanogan County provided additional responsive records to the November 8, 2016 public records request regarding *State v. Stotts*, 14-1-00090-0, subject to exemptions and/or redactions that are discussed in this brief. Second Declaration of Albert H. Lin in support of Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss and/or Motion for Summary Judgment ¶4, Exhibit 1. (CP 444-467, 916-939)

Shauna Field is the Office Administrator for the Okanogan County Prosecuting Attorney's Office. Ms. Field has been in this current position since 2014 and has been an employee of the Okanogan County Prosecuting Attorney's Office for the past 5 years. Ms. Field has provided a Declaration in support of the Defendant's motion to dismiss and/or

summary judgment. Ms. Field is familiar with the public records requests in the above entitled case, and also is familiar with the use and function of the electronic case management software utilized by the Okanogan County Prosecuting Attorney's Office, called Justware. 10-4-16 Declaration of Shauna Field ¶¶1-2. (CP 58-71, 539-552)

After receiving each of the above mentioned requests, Ms. Field attempted to locate responsive records utilizing the search functions available in Justware. The Justware case management system cannot reasonably locate any files responsive to Appellant's April 5, 2016 and June 3, 2016 requests and would require manual, individualized inspection/examination of every file, hundreds or possibly thousands of potential criminal case files for the April 5, 2016 requests, and all 368 of these files for the June 3, 2016 request, *that may or may not contain responsive records*. Justware's search capabilities are limited to case numbers, names and personal identifiers, involved agencies, statute of a crime, and date. The ability to view the evidence content of a case (reports, audio, video, etc.) is only available when a specific case is accessed. *Id.* at ¶¶8-10. (CP 58-71, 539-552) Thus, Mr. Zabala's requests for records lack the reasonable clarity to allow the Okanogan County Prosecuting Attorney's Office to locate them. *Hangartner*, 151 Wash.2d at 447, 90 P.3d 26. In order to reasonably locate records in the Prosecutor's

criminal case files, specific case information, such as case names and/or case numbers are needed. It is Ms. Field's opinion, based on 5 years as an employee utilizing the Justware system, Mr. Zabala's April 5, 2016 and June 3, 2016 requests do not identify records that can be reasonably located by the Prosecutor's Office. 10-4-16 Declaration of Shauna Field ¶10. (CP 58-71, 539-552)

Mr. Zabala's requests are unreasonable based on the reasonable and adequate search done by the Okanogan County Jail and the Prosecutor's Office for responsive records. Furthermore, Courts have not imposed on public agencies the duty to acquire technology to redact or provide a record pursuant to the Public Records Act. See *Mechling v. City of Monroe*, 152 Wash App 830, 222 P.3d 808 (2009); *Benton County v. Zink*, 191 Wash App 269, 361 P.3d 801 (2015). For what may be "technically feasible in one situation may not be in another. Not all agencies especially smaller units of local government, have the electronic resources of larger agencies." WAC 44.14.05001. As noted by the trial court in *Mechling*, "[t]echnology has made tremendous progress in communication, information dissemination, and records storage. Limited by, generally financial considerations, government agencies try to keep up with such progress, but not all are able to provide 'current state-of-art' facilities or equipment." *Mechling v. City of Monroe*, 152 Wash. App. 830,

840, 222 P.3d 808 (2009) (City had no obligation to provide paper records in an electronic format unless it was reasonable or feasible to do so).

Mr. Zabala's public record's appeal should be denied because his requests do not request an identifiable public record that can be located.⁹ It is nothing more than the kitchen sink request for "all records" designed not truly to seek records but to be vexatious and harassing in demanding Okanogan County find the "needle in the haystack."¹⁰ Furthermore, on July 5, 2016, the Okanogan County Prosecuting Attorney sent to Mr. Christopher Taylor its response pursuant to RCW 42.56 to his June 29,

⁹ See *Gronquist v. State*, 177 Wn.App. 389, 401, 313 P.3d 416 (10/29/2013) GR 14.1 unpublished opinion text, and footnote 1. (CP 92-103, 573-584)

¶ 27 Gronquist argues that because DOC Policy 330.700 states that DOC "will identify offenders who are citizens of other nations," the superior court erred in finding that Gronquist's request for "undocumented alien workers" in DOC's Class II Industries program did not seek identifiable public records.¹⁷ Second Am. Br. of Appellant at 24, 26-27 (quoting CP at 425). There is no support for this claim in law or in the record. Michael Holthe, Clallam Bay Corrections Center's Public Disclosure Coordinator, declared that after receiving Gronquist's July 30, 2007 request, he had inquired with the Class II Industries program manager, who explained that Class II Industries did not identify offenders by citizenship and that such classification was not part of its employment process.¹⁸ Thus, the record supports the superior court's ruling that there were no identifiable records matching Gronquist's request. We hold, therefore, that the superior court did not err in ruling that Gronquist's request had been for nonexistent, or unidentifiable, records.

¹⁰ It would be incorrect to suggest that a court cannot deny a violation because a request is insufficient for the agency to understand the record sought. Case law is to the contrary. See *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (holding a request for "information" and "documentation" were insufficient). Specifically, the requester must ask for "identifiable public records." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998). An identifiable public record is one in which the requester has given "a reasonable description enabling the government employee to locate the requested record." *Id.* (internal quotations omitted). When interpreting public records requests, the PRA does not require agencies to be mind readers. *Id.* at 409.

2016 letter in an effort to obtain relevant information to locate the requested records, stating in particular:

In order to identify records that can be reasonably located by the Prosecutor's Office, please provide specific information, such as case names and/or case numbers. See 10-4-16 Declaration of Albert H. Lin, Exhibit 2. (CP 72-103, 553-584)

There had been no response from Mr. Taylor to the Okanogan County Prosecutor's letter dated July 5, 2016, which demonstrates Mr. Zabala's unclean hands. *Id.* at ¶5. (CP 72-103, 553-584) Yet, on November 8, 2016, Mr. Zabala's attorney Christopher Taylor sent by email a records request that contained specific case information, with case numbers and case names. (CP 149-168, 292-418, 419-439, 444-467, 630-649, 768-894, 895-915, 916-939) RCW 42.56.100 authorizes agencies to "adopt and enforce reasonable rules and regulations ... to provide full public access to public records, to protect public records from damage or disorganization, *and to prevent excessive interference with other essential functions of the agency.*" If a requestor fails to comply with the rules published by the agency, an agency is not liable for penalties if its response does not comply with the PRA. See *Parmelee v. Clarke*, 148 Wn.App. 748, 201 P.3d 1022 (2008), review denied, 166 Wn.2d 1017 (2009).

In response to Mr. Zabala's further request that the Prosecuting Attorney "identify cases in which they have utilized recordings of jail calls in the plea bargaining, investigative or trial process," (CP 55, 536) "***an***

agency is not required to create a public record in response to a request.” (Emphasis added). RCW 42.56.080; *Smith v. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000). *A court cannot order production of records that do not exist. Neighborhood Alliance of *741 Spokane County v. County of Spokane*, 172 Wash.2d 702, 753, 261 P.3d 119 (2011) (Emphasis added); *West v. Wash. State Dep't of Natural Res.*, 163 Wash.App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wash.2d 1020, 272 P.3d 850 (2012). Because Mr. Zabala’s request asks the Okanogan County Prosecutor to create and/or produce a list or a public record that does not exist, the Okanogan County Prosecutor was not required to respond pursuant to the authorities cited above.

E. Mr. Zabala’s appeal is frivolous, thereby entitling Okanogan County to attorneys’ fees on appeal.

Okanogan County requests attorneys’ fees under RAP 18.9 and CR 11 for defending an appeal that is frivolous. “An appeal is frivolous if, considering the whole record, the court is convinced there are no debatable issues on which reasonable minds may differ and it is totally devoid of merit.” *In re Recall of Boldt et al.*, at 17, Washington State Supreme Court No. 93522-0 (January 12, 2017) citing *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990)(citing *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d

653 (1986)).¹¹ “Cases of first impression are not frivolous if they present debatable issues of substantial public *166 importance.” *Cary v. Allstate Ins. Co.*, 78 Wash.App. 434, 440-41, 897 P.2d 409 (1995) , aff’d, 130 Wash.2d 335, 922 P.2d 1335 (1996). Under RAP 14.2-14.4 as the substantially prevailing party on review, Okanogan County would be entitled to attorneys’ fees. *See Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 817, 225 P.3d 213 (2009) (citing RAP 14.2). Also, under RAP 18.1(a), a party may recover attorney fees on appeal if authorized by applicable law.

Here, there can be no doubt that there are no debatable issues of substantial public importance as identified in Okanogan County’s briefing. Furthermore, Mr. Zabala’s appeal is completely devoid of merit and he also has failed to show that his case is one of first impression. Thus, Okanogan County is entitled to attorneys’ fees and sanctions pursuant to RAP 18.1(a), RAP 18.9, and CR 11 because Mr. Zabala’s appeal is frivolous.

¹¹ “An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ, i.e., ‘it is devoid of merit that no reasonable possibility of reversal exists.’ ” *Olson v. City of Bellevue*, 93 Wash.App. 154, 165-166, 938 P.2d 894 (1998), citing *Brin v. Stutzman*, 89 Wash.App. 809, 828, 951 P.2d 291 (1998) (citation omitted).

VII. CONCLUSION

Based on the facts and law presented, Mr. Zabala's Appeal should be denied and the Honorable Douglas County Superior Judge John Hotchkiss' decision Granting Respondent's Motion to Dismiss and/or Motion for Summary Judgment and Dismissal with Prejudice on December 21, 2016 should be upheld by this Court.

Respectfully Submitted,

DATED: June 2, 2017

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ATTORNEY**

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CERTIFICATE OF SERVICE

I do hereby certify under penalty of perjury that on the day set forth below, I caused the foregoing **RESPONDENT'S BREIF** and this **CERTIFICATE OF SERVICE** to be filed in the COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON and a true copy of the same to be served on the following in the manner indicated below:

(x) Via email per e-service agreement	Attorney for Plaintiff/Appellants: <i>Juan Zabala</i> Christopher Taylor, WSBA # 38413 C.R. TAYLOR LAW, P.S. 203 4 th Ave E Ste 407 Olympia, WA 98501 (360) 352-8004 fax (360) 570-1006 Email: taylor@crtaylorlaw.com
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Dated this 2nd day of June, 2017, at Okanogan, Washington.



Julie Daigneau, Legal Assistant to Albert H. Lin

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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