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

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JOSEPH THURURA,

Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

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**ANSWERING BRIEF OF DEFENDANT-APPELLEE**

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## **I. INTRODUCTION**

This case involves Thurura's claim of violations of the Public Records Act (PRA). Thurura made a PRA request to the Department seeking metadata that showed the date and time two incident reports were created. However, those reports were printed out, signed and scanned into the computer database. Because they retained the signed copies, there was no need to maintain the initial form. Therefore, the Department had no records of the metadata showing when the two incident reports would have been created. Because the Department could not produce documents which did not exist at the time of Thurura's request, the trial court properly dismissed his complaint.

## **II. STATEMENT OF THE CASE**

### **A. Relevant Facts**

#### **1. The Department of Corrections Public Disclosure Unit**

The Department's Public Records Unit is a centralized unit located at the Department of Corrections' Headquarters in Tumwater, Washington. CP 38. The unit is currently comprised of 22 full-time staff: four Administrative staff, 12 Public Records Specialists, one Management Analyst, four Program Specialists, and the Governance Director. CP 38.

The Department receives thousands of records requests each year. CP 38. These requests include public records requests, inmate health

records requests, chemical dependency requests, central file review requests, and inmate health record file review requests. CP 38. In 2017, the Department received a total of 11,776 public records requests. CP 38. Of these requests, 5,347 were general public records requests and 4,803 of these were assigned to the Public Records Unit. CP 38. The number of public records requests the Department receives has increased in volume and complexity over time, with the most dramatic increase being in the number of general public records requests. CP 38. Individual public records requests can greatly vary in scope and volume; some may simply ask for a policy, while some may ask for several broad categories of records located throughout the agency and require an extensive search and review process. CP 38. In 2017, the Department of Corrections staff reported 36,347 hours spent processing public records requests. CP 38.

All Public Records Specialists in the unit attend various formal trainings related to the PRA and processing public records requests. CP 38. Trainings provided by the Department have included Public Disclosure Email Vault Training, Public Records Act – Offender Records, Public Records Updates, and Public Records Officers Celebrating Open Government. CP 38-39. This does not include the informal on-the-job training and instruction that unit employees receive on a daily basis. CP 39.

When the Department receives a public records request, the delegated Public Records Unit staff member will respond, within five business days, to the requester in writing by either: 1) making the requested records available; 2) acknowledging receipt of the request and providing a reasonable estimate of the time needed to respond; 3) seeking clarification of the request; or 4) denying the request. CP 39.

Often, additional time is needed for the Department to respond fully to a request. CP 39. This is caused by factors such as: a need to clarify the request; the time it takes to locate and assemble the requested documents; the requirement to notify persons affected by the request; and the need to determine whether any of the responsive records or information contained in the responsive records, are exempt from disclosure and require redaction. CP 39. Whenever possible, the Department prefers to provide the requested records within five business days; however, the ability to do this depends on the ease of finding the records, the workload and schedule of the assigned unit Specialist, notification requirements, and the need to review records for redactions. CP 39. The assigned Specialist determines the time needed for a complete response based on the size and scope of the request, as well as his or her additional workload, and any other scheduling issues. CP 39.

## **2. Thurura's Public Records Act Request**

Incident reports are used to document inmate behavior. CP 61. Staff may access incident report forms online and fill out various information on the form. CP 61. Staff then print out the form and add their signature. CP 61. Then the signed form will likely be scanned and emailed to the Shift Lieutenant and Shift Sergeant along with any other relevant staff pertaining to the incident. CP 61.

In some cases, the incident report may be used as evidence for an inmate infraction. CP 61. In those cases, the incident report is submitted with the infraction packet for the Hearings Officer's consideration. CP 61. Infraction records are maintained in the Captain's Office until they have met their applicable retention period. CP 61. It is not the responsibility of staff to retain additional infraction documents or reports that they may have submitted as part of the infraction. CP 61.

On May 19, 2017, two Airway Heights Corrections Center employees, Geraldine Sauter and Chris Burnette, drafted incident reports in response to an event that indicated Joseph Thurura, DOC #332733, had been fighting with another inmate. CP 61, 65-66. Both staff members printed the reports, signed the reports, scanned the signed reports and emailed the scanned copies to necessary staff. CP 61. However, the incident reports were not submitted as part of the infraction packet. CP 61.

Then nine months later, on February 16, 2018, the Public Records Unit received a PRA request from Thurura. Thurura specifically sought “(1) The metadata associated with the Incident Report (IR) written by Chris Burnette (CISA), on 05/19/2017; specifically, I want to know the date and time this incident report (IR) was created (generated)” and “(2) The metadata associated with the Incident Report (IR) written by G. Sauter (CIS2), on 5/19/2017; specifically, I want to know the date and time this incident report (IR) was created (generated).” CP 45-46. The request was assigned tracking number PRU-51504. CP 44.

The Public Disclosure Unit requested Airway Heights Corrections Center review its records for the metadata associated with the Incident Reports written by Chris Burnette and Geraldine Sauter on May 19, 2017. CP 55-57. Because the reports related to an infraction, the Captain’s Office was requested to perform a search of its records. CP 61. The Captain’s Office noted it did not have any responsive records containing metadata information. CP 61. Thurura was notified that there were no records responsive to his request. CP 43.

After Thurura filed his lawsuit, a subsequent search was conducted and identified the scanned copies of the incident reports on Chris Burnett’s work computer drive in PDF format. CP 61. The PDF documents are the scanned copies of the forms that were printed out and signed by Burnette

and Sauter. CP 61. The only metadata available relates to the time and date the incident reports were scanned. CP 61-62, 69. The metadata does not include the date or time the incident reports were actually created or generated. CP 62.

In addition, only limited information is maintained on a user's computer usage for 90 days. CP 70. For that short period, only domain logs, users logon/logoff times and the equipment being used is accessible. CP 70. Information on when specific documents were created/generated would not be maintained. CP 70.

**B. Procedural History**

On April 16, 2018, Thurura filed his complaint alleging the Department violated the PRA by failing to produce records responsive to his request and performing an inadequate search for records. CP 2-5. Thurura alleged the Department should have had the metadata associated with his request for the date and time two specific incident reports were "created(generated)" because the Department tracks employees' computer use and "has the ability to identify the date/time employees create incident reports." CP 3-4. The Department filed a show cause motion noting the documents Thurura requested did not exist. CP 27-73. The trial court granted the motion, dismissing Thurura's claims with prejudice. CP 109-110.

### III. STANDARD OF REVIEW

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

The purpose of the PRA is to ensure the speedy disclosure of public records. *Spokane Research & Defense Fund v. City of Spokane (Spokane Research III)*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *rev'd on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005). The statute sets forth the procedure to achieve this. Upon the motion of any person having been denied an opportunity to inspect or copy a public record, the superior court may require the agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. RCW 42.56.550(1). “[S]how cause hearings are the usual method of resolving litigation under [the PRA].” *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003). The burden of proof is on the agency

to establish that the refusal is in accordance with a statute that exempts or prohibits disclosure. RCW 42.56.550(1).

RCW 42.56.550 expressly permits a show cause hearing to determine issues and the Court “may completely resolve PRA claims in the show cause proceeding.” *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110, 114 (2014). This includes the threshold issue of whether there is a PRA violation, and if so, whether the Defendant’s actions amounted to bad faith under RCW 42.56.565. Such determinations clearly fall under the purposes of a show cause hearing in a PRA matter. *West*, 336 P.3d at 114.

#### IV. ARGUMENT

##### A. **The Trial Court Properly Dismissed Thurura’s Complaint Because He Failed to Show A Violation of the Public Records Act**

“The [PRA] is a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA requires every government agency to disclose any public record upon request, unless an enumerated exemption applies. *Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010); RCW 42.56.070(1). The act requires agencies to provide the “fullest assistance” and the “most-timely possible action on requests for information.” RCW 42.56.100. The government agency receiving a request for public records must respond within five business days by (1) providing the records, (2) denying the

request, or (3) providing a reasonable estimate of the time within which to respond to the request. RCW 42.56.520. The PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record, or (2) when an agency has not made a reasonable estimate of the time required to respond to the request. RCW 42.56.550(1), (2).

- 1. There are no records which show the date and time the incident reports were created/generated; therefore, the Department cannot produce records it does not have.**

Thurura contends the Department violated the PRA by failing to provide him with the metadata from the incident reports written on May 19, 2017 specifically “the date and time this incident report (IR) was created (generated).” CP 45. However, the Department cannot produce a record that does not exist at the time of Thurura’s request.

An agency has “no duty to create or produce a record that is nonexistent.” *Sperr v. City of Spokane*, 123 Wn. App. 132, 136–37, 96 P.3d 1012 (2004) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13–14, 994 P.2d 857 (2000)). Therefore, a requestor has no cause of action under the PRA when the public record he seeks does not exist. *Sperr*, 23 Wn. App. at 137; *see also Building Industry Ass’n of Washington v. McCarthy*, 152 Wn. App 720, 218 P.3d 196 (2009) (holding a requestor did not have a viable action under the PRA for emails which were already destroyed at the

time of the request); *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had “made available all that it could find”); *Smith*, 100 Wn. App. at 22 (when county had nothing to disclose, its failure to do so was proper).

Following normal protocol, the incident reports were filled out, printed, signed and then scanned and emailed to the Shift Lieutenant and Shift Sergeant along with any other relevant staff pertaining to the incident. CP 61, 69. There was no reason to maintain or save the incident reports in their original form. Therefore, the only saved copies of the reports were pdf copies which had metadata of when the reports were scanned. CP 61. The metadata does not include the date or time the incident reports were actually created or generated. CP 62, 69. In addition, the metadata showing “the date and time this incident report (IR) was created (generated)” could not be obtained directly from the user’s computer. CP 70. Only limited information is maintained on a user’s computer usage for 90 days. CP 70. For that short period, only domain logs, users logon/logoff times and the equipment being used is accessible. CP 70. Information on when specific documents were created/generated would not be maintained. CP 70. Moreover, Thurura’s request for the metadata information was made nearly nine months after the record was signed which would amount to more than 250 days later. Well

beyond the time where limited information would be available on the computers where the forms were initially completed.

Despite any contentions Thurura may make, there is no evidence the metadata indicating the date and time incident reports were created or generated exist. Because the Department is not required to produce records that do not exist, Thurura failed to state a PRA violation and the trial court properly dismissed his claim.

**2. The Department conducted a search for responsive records in all reasonable locations.**

Thurura argues the Department did not search in all reasonable locations when looking for records responsive to his request. An agency is obligated to conduct an adequate search when it receives a request for identifiable public records. *See Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). When examining whether an agency conducted an adequate search, the focus is not whether additional responsive documents were found but whether the agency's search was reasonably calculated to find the responsive documents. *Neighborhood Alliance*, 172 Wn.2d at 719-20. This question focuses on the specific factual circumstances of the request. *Id.*

The incident reports were signed on May 19, 2017. CP 65-66. More than 270 days later, the Department received Thurura's request for records

on February 16, 2018. CP 45. Because Thurura sought records related to incident reports, the prison searched the Captain's Office where infraction records are usually maintained. CP 61. Staff who author the incident reports are not responsible for retaining additional infraction documents or reports they may have submitted as part of the infraction. CP 61. Therefore, when it was determined the Captain's Office did not have any responsive records containing metadata information for when the incident reports were created or generated, Thurura was informed there were no records responsive to his request. CP 43 and 61. The Department fulfilled its obligation to search all reasonable locations. Reviewing the work computer drives for Burnett and Sauter would not be a reasonable location as neither staff member was responsible for maintaining the record. CP 61. Moreover, only limited data is maintained on a Department user's computer for 90 days and does not include information on when specific documents were created or generated. As such, a review of Burnett or Sauter's computers would not have been a reasonable location as neither would have contained the metadata information Thurura sought.

**3. The Department is not required to retain draft forms.**

Finally, Thurura argues that the Department violated the PRA when it failed to retain the draft incident report forms that were initially filled out by Burnett and Sauter. However, Thurura provides no case law to support

his position and draft documents are not public records. There is no evidence to show the Department utilizes the draft forms for the performance of any Department function.

Further, documents which have already been destroyed or lost at the time of the request, even ones that have not met their retention expiration, do not present a cause of action under the PRA. *West v. Washington State Department of Natural Resources*, 163 Wn. App. 235, 244-46, 258 P.3d 78 (2011). In *West*, the requestor sought numerous emails, which were already destroyed at the time he made the request. *West*, 163 Wn. App. at 240. While the emails should have been retained under the applicable retention schedule, they were determined to be inadvertently lost and therefore no longer existed. *West*, 163 Wn. App. at 240-241. The court found that even though West alleged the emails were unlawfully destroyed, there was “simply no evidence” to support such an assertion. *West*, 163 Wn. App. at 244. The court rejected West’ argument that the records were destroyed and held that the emails had been inadvertently lost and did not exist at the time of the request. Therefore, there was no agency action to review under the PRA. *West*, 163 Wn. App. at 244-246. *See also Building Industry Ass’n of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009) (holding a requestor did not have a viable action under the PRA for emails which were already destroyed at the time of the request).

Similar rulings have been made in cases regarding Freedom of Information Act requests where the federal courts have found the agency in compliance when it performed a reasonable search which resulted in discovering some of the requested records had been accidentally lost. *See Iturralde v. Comptroller of the Currency*, 345 U.S. App. D.C. 230, 315 F.3d 311 (2003) (holding the requestor did not meet his burden of showing a violation as an agency’s failure to find one specific document in response to a search does not alone render a search inadequate); *Maynard v. C.I.A.*, 986 F.2d 547 (1st Cir. 1993) (finding that while a document may have previously existed does not mean the agency retained it nor does it mean the agency’s search was unreasonable); *Rollins v. United States Department of State*, 70 F.Supp.3d 546 (D.D.C. 2014) (holding the adequacy of a search is “not determined by the fruits of the search,” as some documents may have been lost or destroyed).

While the PRA promotes the production of public records, it is not intended to require the agency retain draft copies of final forms or provide strict liability for not saving records that could possibly be subject to a PRA request.

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**V. CONCLUSION**

For the reasons stated above, the Court should affirm the trial court's judgment dismissing Thurura's claims.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of February, 2020.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing Answering Brief of Defendant-Appellee with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participants:

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

DATED this 12<sup>th</sup> day of February, 2020, at Spokane, Washington.

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