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DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

MICHAEL B. LIVINGSTON,  
Petitioner,

v.

RUBEN CEDENO and THOMAS D. McINTYRE, Defendants, and DEPARTMENT OF  
CORRECTIONS,  
Respondent.

APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
THE HONORABLE CHRISTINE A. POMEROY

**PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT**

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## **I. IDENTITY OF PETITIONER**

Petitioner Michael B. Livingston made the public records act request that is the subject of this litigation.

## **II. CITATION TO COURT OF APPEALS DECISION**

The decision of the Court of Appeals was filed on November 14, 2006, by Division II and is attached hereto in the Appendix at A-1. The Court of Appeals has designated that the decision will be published. No motion for reconsideration was filed.

## **III. ISSUES PRESENTED FOR REVIEW**

Petitioner Livingston, a former inmate, made a request for public records from the Department of Corrections (hereafter "the Department" or "DOC") pursuant to RCW 42.56 *et. seq.* (the Public Records Act). The Department agreed the records were public and not subject to any exemption barring disclosure and mailed him the records.

However, when the records arrived at the facility at which Petitioner Livingston was incarcerated, the records were inspected pursuant to the Department's mail screening policy. After inspecting the records, the Department backtracked from its earlier determination and withheld the records from Petitioner Livingston under DOC Policy 450.100, which authorizes the Department to inspect and read all incoming mail to prevent offenders from

receiving material that threatens the security and order of the facility. Petitioner Livingston appealed the decision to withhold the records. The DOC denied the appeal on the grounds that the superintendent of a facility “has the authority to restrict any item from entering [it].” CP 6.

Petitioner Livingston filed an action in superior court seeking an order to require the DOC to show cause why it had withheld the records. The court denied the motion. The Court of Appeals held that the Public Records Act does not require agencies to “guarantee disclosure or guarantee that mailed documents will be physically received by the person making the request” and, therefore, “[t]he DOC’s obligations under the [Public Records Act] were discharged when the [public records] coordinator mailed the records to Livingston.” Judge Armstrong dissented, arguing that since the DOC itself seized the records, thus preventing their delivery, the DOC has prevented Petitioner Livingston from receiving the requested records and “should answer for its failure to deliver.”

Petitioner Livingston seeks discretionary review on the following issues:

1. May the DOC adopt rules forbidding access by inmates to public records and thereby override the Public Records Act?
2. Does the DOC violate the Public Records Act when it refuses to deliver public records which the DOC has admitted are not exempt from disclosure under the Act?
3. If an agency has control over whether a requester actually receives

public records and uses that control to deny disclosure of the records, does that agency violate the Public Records Act?

#### **IV. STATEMENT OF THE CASE**

**A. THE DOC AGREED THAT THE REQUESTED RECORDS ARE NOT EXEMPT FROM DISCLOSURE AND SHOULD BE RELEASED.**

Petitioner Michael Livingston was incarcerated at the Olympic Corrections Center ("OCC"). CP 14, ¶ 9. On February 19, 2003, while at the OCC, Livingston submitted a Public Records Act request to the OCC Public Disclosure Coordinator seeking the training records of corrections officer Marleen Amundson, who worked at the OCC. CP 14, ¶ 5; CP 56. Upon receipt of the request, OCC notified Ms. Amundson of the request and allowed her two weeks to determine whether she would seek injunctive relief to block disclosure. CP 58. After she declined to seek relief, on March 4, 2003, the DOC granted Livingston's request and stated that upon receipt of the copying cost, the records would be mailed to him. CP 60. Livingston caused the funds to be transferred on or about March 16, 2003. CP 61.

**B. THE DOC REFUSES TO DELIVER THE RECORDS TO LIVINGSTON.**

On March 17, 2003, Livingston was transferred from OCC to the Cedar Creek Corrections Center ("CCCC"). CP 14, ¶ 9. On March 26, 2003, he received a Mail Rejection form from the DOC stating that the public records from the OCC would not be released to him pursuant to DOC Policy 450.100 as "items identified by the superintendent/facility administrator" as not allowed. CP 63.

The Mail Rejection form noted that the records were DOC employee's records "which are not allowed per the superintendent." CP 63.

Livingston appealed this denial of access to public records to the Superintendent of the CCCC, who denied the appeal because he "has determined that he is not going to allow an employee's training record into the institution to be given to an inmate." CP 65-66. Livingston further appealed to the CCCC Regional Administrator. CP 68. This appeal was denied because "after [documents] leave the [Public Disclosure Coordinator's] office and arrive in an institution's mail room, mail policy comes into effect...[and the] superintendent...has the authority to restrict any item from entering [CCCC]." CP 74.

**C. THE COURT OF APPEALS HELD THAT DOC CAN WITHHOLD PUBLIC RECORDS FROM DISCLOSURE THROUGH USE OF ITS MAIL ROOM POLICY.**

Livingston filed suit in Thurston County Superior Court, moving for an order requiring the Department to show cause for its failure to disclose the records. CP 2-11. The motion was denied. CP 104-05.

The Court of Appeals held that the Public Records Act "only requires that agencies 'make available' public records – it does not require agencies to guarantee disclosure or guarantee that mailed documents will be physically received by the person making the request." A-4. The court found that the DOC's obligations were discharged once the public records coordinator mailed

the records to the DOC facility at which Livingston was located. A-5. The court further stated “[w]e decline to hold that if an agency does not ensure that records are physically delivered to an incarcerated individual, that an agency violates the [Public Records Act].” *Id.*

Judge Armstrong dissented, noting that in this case the DOC itself seized the very records which it without qualification had previously agreed to release and failed to cite any exemption to the Public Records Act authorizing such non-disclosure:

Perhaps to avoid these clear rules [requiring citation to a statutory exemption to the Act to justify non-disclosure], the Department crafts an argument that it fully complied with the PDA when it mailed the requested documents to itself on Livingston’s behalf. And, continues the Department, the PDA does not require an agency to guarantee that the requester actually receives mailed PDA records...[T]he majority accepts the Department’s reasoning.

I would too if the U.S. Postal Service had lost the records. But it did not; the Department seized the records. The Department, not the Postal Service, has prevented Livingston from getting the requested records and it should answer for its failure to deliver.

A-7.

## V. ARGUMENT

### A. THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT DECISIONS AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Supreme Court may grant discretionary review if the decision “is in conflict with a decision of the Supreme Court.” RAP 13.4(b)(1). Review may also be accepted if the case “involves an issue of substantial public interest...” RAP 13.4(b)(4). Issues are appropriate for review if the outcome has the potential to affect other proceedings. *E.g., State v. Watson*, 155 Wn.2d 574, 577 (2005).

Here, as discussed below, the Court of Appeals' holding that an agency may withhold public records from disclosure without reference to a statutory exemption to the Public Records Act conflicts with both the plain language of the Act and longstanding Supreme Court case law. Moreover, the Court of Appeals' decision involves an issue of substantial public interest, namely, whether the identity of the requesting party can be used as the basis for denying access to public records. The issues presented are likely to reoccur, and the outcome of this matter will affect all incarcerated persons within the State of Washington who make requests for public records.

**B. THE COURT OF APPEALS' HOLDING THAT A DEPARTMENT POLICY CAN OPERATE TO EXEMPT PUBLIC RECORDS FROM DISCLOSURE CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND WASHINGTON CASE LAW.**

1. The Public Disclosure Act Strongly Favors Disclosure Of Public Records And Puts The Burden On The Public Agency To Prove That A Document Is Exempt From Disclosure Under A Statutory Exemption.

The Public Records Act is to be construed liberally in favor of access, and its exemptions from mandatory disclosure are to be construed narrowly. RCW 42.56.030. The Supreme Court has characterized the Act as a "strongly worded mandate for broad disclosure of public records." *Spokane Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 33 (1989). The Act explicitly states that public agencies do not have "the right to decide what is good for the people to know and what is not good for them to know. RCW 42.56.030; *see also PAWS v. University of Washington*, 125 Wn.2d 243 (1994); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127 (1978). The Act requires a court reviewing a request for public records to "take into account the policy...that free and open examination of the public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others..." RCW 42.56.550(3).

As such, the Supreme Court has made clear that an agency may not withhold public records from a requester absent an applicable statutory

exemption. Once a document is determined to be a public record, “disclosure is required unless a specific statutory exemption is applicable.” *Dawson v. Daly*, 120 Wn.2d 782, 789 (1989) (emphasis added).

Here, the DOC has admitted that the requested documents are public records not exempt from disclosure. The DOC, and the Court of Appeals, has identified no statutory exemption under the PRA rendering the records exempt from disclosure. As such, the Court of Appeals’ ruling conflicts with the statute and case law thereunder, and review should be granted.

2. The DOC Mail Room Policy Is Not An Exemption To The Public Records Act.

The DOC mail room policy, Policy No. 450.100, provides that certain categories of mail will not be delivered to inmates, including “items identified by the Superintendent...” CP 128-31. The Policy was adopted pursuant to WAC 137-48-040, which provides that the DOC may reject mail if the mail “threatens the safety and security of the institution.”

Agency policies, and even Washington Administrative Code provisions, do not constitute exemptions to the disclosure requirements of the PRA. In *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 794 (1990), the Supreme Court held that a regulation guaranteeing the confidentiality of certain records contained in the WAC could not be an exemption to the PRA because public agencies lack the authority to determine the scope of exemptions under the

Act. *See also Hearst*, 90 Wn.2d at 129.<sup>1</sup> The Court has been clear:

“[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization”....It is the court, and not the agency, which determines whether records are exempt.

*Servais v. Port of Bellingham*, 127 Wn.2d 820, 832 (1995), *quoting Hearst*, 90 Wn.2d at 131 (footnotes omitted). The Attorney General has likewise recognized that agencies are not permitted to adopt policies to exempt public records. *See* WAC 44-14-06002 (“An agency cannot define the scope of a statutory exemption through rule making or policy.”)

The Court of Appeals’ decision that the DOC has “discretion to withhold [public] records” has the effect of allowing the DOC to create an exemption to the PRA for those records falling within the prohibited categories of its mail room policy. Not only does this contradict the plain language of the statute, the decisional law applicable thereto, and the Attorney General’s understanding of the law, it also contravenes common sense. Under the ruling, an inmate might be prohibited from receiving public records – the same public records which might be reprinted in a newspaper (not barred by the policy), or even quoted on a

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<sup>1</sup> Indeed, the Legislature has exempted from disclosure certain materials that might be labeled as security threats covered by the DOC mail room policy. RCW 42.45.420(2) exempts from disclosure records showing vulnerability assessments and escape response plans for correctional facilities. However, the Legislature has only exempted these records if the disclosure would have a “substantial likelihood” of threatening the safety of a community or an individual. *Id.* The Legislature has so far declined to adopt a blanket exemption for items identified by superintendents of correctional facilities, and has explicitly rejected legislation to limit inmate access to public records. *E.g.*, H.B. 2138, 59<sup>th</sup> Leg., Reg. Sess. (Wa. 2005), § (1)(ggg).

billboard visible from the windows of the correctional facility. Moreover, because the policy in question leaves discretion to the individual superintendent of each facility, some inmates, but not others, may have access to records depending solely on where they happen to be incarcerated.

This is not, as characterized by the Court of Appeals, a case in which the delivery system happened to merely misplace the records. This is not an instance where, through no fault of the agency, records were lost in the mail. Instead, this is a case where the very same agency that determined that the records were not exempt from disclosure later seized those same records (with full knowledge that they were public records not exempt from disclosure). Under the Court's reasoning, if one agency employee determines that records are exempt, but another causes the records to be withheld, the agency is not at fault. For example, if the records coordinator released the records and asked them to be mailed, but his or her assistant failed to do so, under this ruling, the DOC would have discharged its duty. This contravenes the letter and spirit of the Public Records Act. The DOC, and not just a single records coordinator, is responsible for the public records in its custody and control. *See* WAC 44-14-00005 ("All agency employees should receive basic training on public records compliance...").

Moreover, nowhere in the Public Records Act or any other statute has the Legislature given the DOC or any other agency the discretion to withhold records; an agency may do so only if a statutory exemption applies. *Dawson*, 120 Wn.2d

at 789. The Court of Appeals' decision has elevated the DOC over every other public agency in the State and allowed the DOC alone to determine what it may release to inmates.

In sum, the DOC controlled the requested records, and had the ability and the duty under the Public Records Act to deliver them to Livingston and failed to do so.<sup>2</sup> The mail room policy is not an exemption from disclosure under the Public Records Act. Because the Court of Appeals' decision elevates a mail room policy over the stringent standards of the Public Records Act, allows an agency to deny access to records not found to be exempt by the Legislature, and opens the door for other agencies to adopt similar policies overriding the Public Records Act, the Supreme Court should grant review and reverse.

3. The Public Records Act Does Not Allow Distinction Between Requesters.

The law is clear that the identity of the citizen has no bearing on the validity of a request for access to public documents. RCW 42.56.080 ("Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request..."); *see also Dawson*, 120 Wn.2d at 797 (when examining whether exemption applies, analysis must be made "without regard to the identity of the requesting party or the

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<sup>2</sup> Given that an inmate can only receive mail through the DOC's system, this is a unique case. Livingston does not argue that an agency generally has the responsibility to ensure that records sent by mail are actually received. Here, however, the agency knowingly seized the records and prevented their delivery.

purpose of the request”).

Here, the result of the Court of Appeals’ holding is that an inmate, contrary to any other person, may be denied access to public records because an inmate, unlike others, is subject to the DOC mail room policy. Neither the statute nor any published Washington decision has ever categorically excluded a group of persons from access to public records.

Division III of the Court of Appeals recently addressed the particular problem of inmate requests for public records in *Sappenfield v. Department of Corrections*, 127 Wn.App. 83 (2005). In *Sappenfield*, the issue was whether the DOC may refuse to allow an inmate to inspect, rather than receive copies of, public records. *Id.* at ¶ 16. The court noted that the “general rule” is that agencies may not distinguish among persons who request records. *Id.* at ¶ 17. However, the court found that the DOC met its obligations under the Public Records Act by providing copies of the requested records by mail. *Id.* at ¶ 18. The court therefore recognized that the DOC was not permitted to wholesale refuse to follow the PRA because an inmate made the public records request, though the DOC is allowed to restrict the method by which the inmate can gain access due to the unique circumstances of incarceration. *Id.* at ¶ 22. In *Sappenfield*, therefore, the court recognized that access must be allowed, but that such access could be met through mailed copies rather than in-person inspection. The court’s ruling the instant case, however, *per se* bars Livingston and all incarcerated persons

from any access should the DOC determine that it does not want records disclosed.

## VI. CONCLUSION

The Court of Appeals' ruling allows the DOC to withhold from disclosure records which are admittedly not exempt from disclosure under the Public Records Act. This ruling contravenes the statute as well as long-standing Supreme Court case law and opens a Pandora's box for public agencies to adopt policies in clear violation of the Public Records Act. As such, Petitioner Michael B. Livingston respectfully requests that the Supreme Court grant discretionary review.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of December, 2006.

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.



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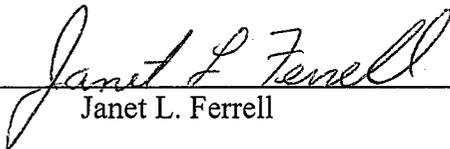
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CERTIFICATE OF SERVICE

On the 13<sup>th</sup> day of December, 2006, I caused a true and correct copy of the within document described as **PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT** to be served on all interested parties to this action as follows:

Peter W. Berney  
Assistant Attorney General  
Criminal Justice Division  
P. O. Box 40116  
Olympia, WA 98504-0116

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Janet L. Ferrell

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DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

MICHAEL B. LIVINGSTON,

Appellant,

v.

RUBEN CEDENO and THOMAS D.  
McINTYRE,

Defendants,

DEPARTMENT OF CORRECTIONS,

Respondent.

No. 32253-6-II

PUBLISHED OPINION

PENOYAR, J. — Michael B. Livingston, a former inmate, appeals the trial court's denial of his motion to show cause under the Public Disclosure Act (PDA)<sup>1</sup>, for the Department of Corrections' (DOC) alleged nondisclosure of public records. Livingston argues that the DOC violated the PDA and that the trial court erred by not requiring the DOC to show cause for violating the PDA. Livingston requested that a DOC employee's records be released to him. The DOC's public disclosure coordinator mailed the records to Livingston, but the DOC superintendent withheld them from Livingston under the DOC mail room policy. We hold that the DOC did not violate the PDA and affirm.

<sup>1</sup> Former RCW 42.17.250-.348 (2002)

## FACTS

Michael B. Livingston (Livingston) was an inmate at Olympic Corrections Center (OCC) and later at Cedar Creek Corrections Center (CCCC). While at OCC, Livingston submitted a request to the public disclosure coordinator, seeking disclosure of the training records of a corrections officer, Marleen Amundson. The public disclosure coordinator mailed a copy of the records to Livingston and the records arrived at CCCC. Like all other incoming mail, the records were inspected during CCCC's mail screening process. After inspecting them, CCCC withheld the records from Livingston under DOC Policy 450.100 that authorizes the DOC to inspect and read all incoming mail to prevent offenders from receiving material that threatens the security and order of the facility.<sup>2</sup> Livingston received a mail rejection form, explaining that the DOC superintendent did not permit DOC employee records to be released to inmates. Since Amundson was a DOC employee, the superintendent explained that Livingston could not have access to her employment records.

Livingston appealed to the CCCC superintendent/field administrator. The superintendent denied his appeal, stating that he would not "allow an employee training record into the institution to be given to an inmate." Clerk's Papers (CP) at 5. Livingston again appealed. This time, he appealed to the DOC regional administrator who also denied Livingston's appeal, explaining that "after (documents) leave the PDC's office and arrive in an institution's mail room, mail policy comes into effect . . . [and the] superintendent . . . has the authority to restrict any item from entering [CCCC]." CP at 6.

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<sup>2</sup> While the record does not disclose the rationale behind the DOC's mail room policy, the wisdom of not allowing inmates to obtain personal information about DOC employees is evident. If inmates could obtain employees' personal information, they could use the information as leverage against DOC employees.

Livingston filed an action in superior court seeking an order to require the DOC to show cause for its refusal to allow him access to public records. The superior court denied the motion to show cause and Livingston appealed.

## ANALYSIS

### THE PUBLIC DISCLOSURE ACT

Livingston asserts that the DOC violated the PDA because, although the records were mailed to him, the DOC did not ensure that the records were delivered to him and the DOC did not actually disclose the records. Livingston requests costs, attorney fees, and a fee for each day he was denied access to the records as permitted by former RCW 42.17.340(4).<sup>3</sup>

The DOC counters that it did not violate the PDA because the public disclosure process was completed when the coordinator sent the records. The DOC asserts that, for PDA purposes, it is irrelevant that the documents were withheld at CCCC's mail room.

The issue here centers on whether the DOC violated the PDA by withholding public records from an inmate under its mail room policy and should therefore be required to show cause for withholding public documents. We review a challenge to an agency action under the PDA de novo. Former RCW 42.17.340(3); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004).

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<sup>3</sup> Former RCW 42.17.340(4) provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he [or she] was denied the right to inspect or copy said public record.

Under the PDA, agencies are required to make public records available for public inspection and copying. Former RCW 42.17.260(1).<sup>4</sup> The statute only requires that agencies “make available” public records—it does not require agencies to guarantee disclosure or guarantee that mailed documents will be physically received by the person making the request. Former RCW 42.17.260(1). If an agency refuses to disclose public documents, a trial court may order that the agency show cause for its refusal. Former RCW 42.17.340(1).<sup>5</sup>

There could be numerous situations in which records mailed under a PDA request are lost or destroyed in the mail. There also could be many situations where records are delivered to a requester’s residence but not actually received by the requester. In these situations, there can be no PDA violation because the records are mailed and the PDA compliance discharged. The PDA cannot impose on agencies the burden to ensure physical delivery of all records to all persons. We hold that the trial court did not err in denying Livingston’s motion to show cause because the DOC did not violate the PDA and was therefore not required to show cause under former RCW

---

<sup>4</sup> Former RCW 42.17.260(1) provides:

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 exemption of subsection (6) of this section, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records.

(Emphasis added).

<sup>5</sup> Former RCW 42.17.340(1) provides:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained *may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record* or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

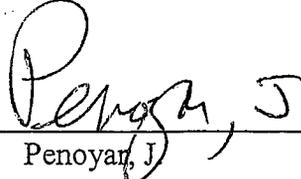
(Emphasis added).

42.17.340(1). It did not withhold documents or deny Livingston's request for documents. The public disclosure coordinator mailed the requested documents, complied with the PDA, and, in this instance, the DOC was not subject to the show cause provision of former RCW 42.17.340.

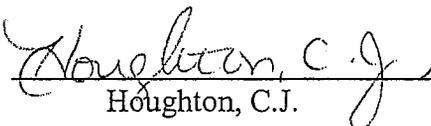
The DOC's obligations under the PDA were discharged when the coordinator mailed the records to Livingston. The CCCC's mail room policy, blocking Livingston's access to the records, is not relevant to a request to show cause for nondisclosure under the PDA. We decline to hold that if an agency does not ensure that records are physically delivered to an incarcerated individual, then an agency violates the PDA.

Livingston includes in the record documentation that another inmate received employee records and relies on the DOC's disclosure to this inmate to argue that the DOC arbitrarily denied his request. DOC Policy 450.100 gives the DOC discretion to withhold records; it does not require that all records be withheld. Therefore, it is not relevant that another inmate received records because the DOC has discretion to decide if it will withhold records. Because we hold that the DOC did not violate the PDA, we decline to award attorney fees or statutory penalties to Livingston.

Affirmed.

  
\_\_\_\_\_  
Penoyar, J

I concur:

  
\_\_\_\_\_  
Houghton, C.J.

ARMSTRONG, J. (Dissent) -- Because I disagree that the Department of Corrections can use its mail room policy to circumvent the intent and plain language of the Public Disclosure Act (PDA), I dissent.

We construe the PDA<sup>6</sup> liberally, in favor of disclosure, and construe exemptions to the Act narrowly. Former RCW 42.17.251 (2002); *see Hangartner v. City of Seattle*, 151 Wn.2d 439, 450, 90 P.3d 26 (2004) (citing *Dawson v. Daly*, 120 Wn.2d 782, 790, 845 P.2d 995 (1993) (the PDA generally requires agencies to disclose requested documents unless a “specific statutory exemption” applies)). Former RCW 42.17.340(1) states that the agency bears the burden of showing that a “refusal to permit public inspection and copying is in accordance *with a statute that exempts or prohibits disclosure* in whole or in part of specific information or records.” *See also Daly*, 120 Wn.2d at 789 (citing *Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990)).

The PDA has numerous exemptions, including one that protects some portions of an employee’s personnel records and another that protects law enforcement investigative records. Former RCW 42.17.300(1)(d), (u). But the Department did not invoke one of these exemptions and the PDA does not exempt records that may violate a mail room policy regardless of its rationale—here, threatened security and order.<sup>7</sup> Moreover, even if an agency can articulate a plausible reason for not disclosing records, it still must produce the records absent a PDA authorized exemption. *See, e.g., King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002).

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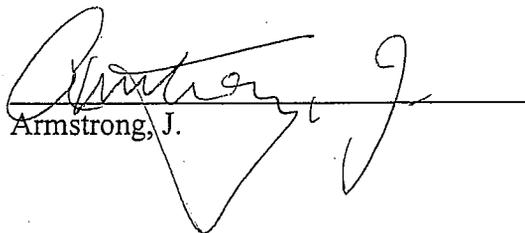
<sup>6</sup> Former RCW 42.17.250-.348 (2002).

<sup>7</sup> It is not easy to find a connection between a correction officer’s training records and a security threat.

In short, if the PDA does not authorize an exemption, the exemption does not exist. Finally, the PDA does not allow an agency to “distinguish among persons requesting records.” Former RCW 42.17.270 (2002).

Perhaps to avoid these clear rules, the Department crafts an argument that it fully complied with the PDA when it mailed the requested documents to itself on Livingston’s behalf. And, continues the Department, the PDA does not require an agency to guarantee that the requestor actually receives mailed PDA records. Thus, reasons the Department, it is not subject to the expedited legal procedures set forth in the PDA and no judge can decide whether its reasons for not producing the records are valid under the PDA. Unfortunately, the majority accepts the Department’s reasoning.

I would too if the U.S. Postal Service had lost the records. But it did not; the Department seized the records. The Department, not the Postal Service, has prevented Livingston from getting the requested records and it should answer for its failure to deliver. Because the Department claimed no PDA exemption, I would remand for the trial court to order the Department to produce the records and to impose the appropriate PDA sanctions against the Department for its willful failure to do so.

  
Armstrong, J.