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I. Assignments of Error

Assignments of Error

A. The trial court erred by ruling that the Department of Corrections (hereinafter DOC) complied with the requirements of the Public Disclosure Act (hereinafter PDA), RCW 42.17.250 et seq., when it deposited Appellant's requested records in the United States mail on March 21, 2003.

B. The trial court erred by dismissing Appellant's motion for order to show cause or compel disclosure of the public records requested February 18, 2003.

C. The trial court erred by ruling that the remedy for Appellant's being denied access to public records by the DOC was other than the show cause procedure outlined at RCW 42.17.340.

Issues Pertaining to Assignments of Error

1. Does the DOC's refusal to deliver or disclose Appellant's public records request constitute "denial of public disclosure request" for the purposes of interpreting the PDA? (Assignment of Error #1.)

2. Did the DOC fully comply with the requirements of the Act through the simple act of mailing Appellant's public records request, despite its subsequent refusal to deliver or disclose the same to Petitioner at his DOC facility mailing address? (Assignment of Error #1.)

3. Did the trial court construe the Act liberally by ruling that the DOC complied with the requirements of the Act when it deposited Appellant's requested public records in the United States mail, without considering whether actual disclosure subsequently took place? (Assignment of Error #1.)

4. Does the DOC's use of DOC Policy 450.100 to deny delivery or disclosure of Appellant's records request constitute a statutory exemption pursuant to RCW 42.17.260? (Assignment of Error #2.)

5. Did the DOC act to conceal Appellant's public records request using DOC Policy 450.100, despite its knowledge that the record in question was disclosable under RCW 42.17.260? (Assignment of Error #2.)

6. Is the DOC the "responsible agency" for denying Appellant access to the public records alleged herein, as defined at RCW 42.17.340(1)? (Assignment of Error #3.)

7. Is an incarcerated individual "any person" for the purposes of interpreting RCW 42.17.340(1)? (Assignment of Error #3.)

8. Did the DOC act in bad faith when it withheld delivery/disclosure of Appellant's public disclosure request? (Assignment of Error #1.)

II. Statement of the Case

In February 2003, Appellant requested public records, i.e., the training record of corrections officer Marleen Amundson, from the Olympic Corrections Center (hereinafter

OCC). (CP at 3.) Appellant was also incarcerated at the same facility, but following the public records request was transferred to the Cedar Creek Corrections Center (Hereinafter CCCC) in March 2003. (CP at 4.)

On March 28, 2003 Appellant was denied access to the requested public records via the use of DOC Policy 450.100, after the records had been mailed to him at the CCCC from the OCC. (CP at 4.) The guise of "prison security" was the reason given as the basis for the denial of the document in question. Appellant pursued administrative remedies by appealing the mail rejection through the required steps dictated under DOC Policy 450.100, but was ultimately denied any opportunity to inspect or copy the public record, originally requested February 18, 2003. (CP at 4-6.)

In June 2004 Appellant filed a motion for order to show cause, pursuant to RCW 42.17.340(1), alleging the DOC violated the PDA by denying him disclosure, i.e., his right to inspect or receive copies of the public records at issue.

Respondent responded to Appellant's motion for show cause in June 2004, contending it had not violated the PDA, and that it had completed the PDA's requirements when it mailed the records to Appellant on March 21, 2003. The response went further by attempting to excuse the denial of the records at the receiving facility (CCCC) by using the exaggerated "safety and security" powers detailed in DOC Policy 450.100.

On August 20, 2004 Appellant's motion for show cause was denied in the Thurston County Superior Court by the Honorable Christine A. Pomeroy. The trial court ruled that the public disclosure process was complete once the records were placed in the US Mail by the DOC. (CP at 104,105.)

III. Argument

A. Standard of Review.

When identifying the nature of appellate review under the PDA, the statute specifies that "judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.340 shall be de novo." RCW 42.17.340(3). The Supreme Court has noted that the appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence. Spokane Police Guild v. Liquor Control Board, 112 Wash.2d 30,35-36, 769 P.2d 283 (1989). This court is also asked to accord liberal construction to the pro se Appellant's pleadings, in keeping with Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652,654 (1972); Hofto v. Blumer, 74 Wn.2d 321,326, 444 P.2d 657 (1968); and Christensen v. Swedish Hosp., 59 Wn.2d 545, 368 P.2d 897 (1962).

B. The Public Disclosure Act.

The Public Records Act "is a strongly worded mandate for broad disclosure of public records." Hearst v. Hoppe, 90 Wash.2d 123,127, 580 P.2d 246 (1978). The PDA's

disclosure provisions must be liberally construed, and its exemptions narrowly construed. RCW 42.17.010(11); .251; .920. Courts are to take into account the PDA's policy "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience to public officials or others." RCW 42.17.340(3).

The agency bears the burden of proving that refusing to disclose "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.17.340(1). Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290 (emphasis added). Finally, 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" except under very limited circumstances. RCW 42.17.270; see also RCW 42.17.260(6). Progressive Animal Welfare Society v. University of Washington, 125 Wash.2d 243,251,252, 884 P.2d 592 (Wa. 11/22/94)(hereinafter PAWS).

C. Assignments of Error.

1. THE TRIAL COURT ERRED BY RULING THAT THE DOC COMPLIED WITH THE REQUIREMENTS OF THE STATE PUBLIC DISCLOSURE ACT WHEN IT DEPOSITED APPELLANT'S REQUESTED PUBLIC RECORDS IN THE UNITED STATES MAIL ON MARCH 21, 2003.

a. Does the DOC's refusal to deliver or disclose Appellant's public records request constitute "denial of public disclosure request" for the purposes of RCW 42.17.250-340?

WAC 137-08-020(5) defines "disclosure" as "inspection or copying." The act of disclosure is contingent, then, upon the requester being given access to the requested records, either through inspection or by receiving copies, as "access is the underlying theme of the Act." ACLU, 86 Wn.App. at 696. (CP at 77.)

Because the DOC refused to deliver the requested records after they had been received at the CCCC, it effectively denied Appellant the opportunity to have access to the document.

In the instant case, the DOC has not done all it could to ensure disclosure was completed. Through the use of mailroom policy, disclosure was denied. It is the DOC's direct action toward the public records in question that has resulted in the non-disclosure at issue.

Appellant submits that once the receiving DOC facility receives mail that it discerns is a public records request (from within the same agency), that mailed document must be delivered/disclosed to the requester in order for the agency to be in full compliance with the letter of the law as well as the intent. RCW 42.17.260. If the requested record is not disclosed, the public disclosure process is as a matter of law incomplete. Further, if the record is not disclosed,

the PDA requires a statutory exception be cited. RCW 42.17.310(4). (CP at 78.) The DOC's refusal to disclose/deliver Appellant's public records request constitutes "denial of public disclosure request" for the purposes of RCW 42.17.250-340.

b. Did the DOC fully comply with the requirements of the Act through the simple act of mailing Petitioner's requested public records, despite its subsequent refusal to deliver or disclose the same to Petitioner at his DOC facility mailing address?

Respondent contends, and trial court agreed, that the public disclosure process was completed by the DOC's simple act of placing the requested records in the mail. (CP at 104,105.)

As noted earlier, WAC 137-08-020(5) defines "disclosure" as "inspection or copying", thus making clear the Act's meaning with respect to its use of the term throughout the statute to promote full access to governmental processes.

The DOC has denied disclosure by not delivering the mailed public records request to the requester; thus, the PDA's process remains incomplete. As the DOC is responsible for the incomplete status of the action discussed herein, its responsibility toward the PDA is incomplete.

Under a normal set of facts, public records requests received by mail and responded to by a given agency may well promote "complete disclosure" by the agency's mailing the

requested records to the requester in a timely manner. The given agency has no further control over the delivery of the documents, normally, and to the extent of its power would have given full assistance to the requester to disclose the record.

This is not a normal set of facts under the PDA, as the DOC in this case not only mailed the record in question, but also was charged with handling the mail once it was received at the Appellant's mailing address prior to delivery. These special facts exist for all incarcerated persons confined by the DOC at a DOC facility. A ruling that the DOC is only required to mail public records request responses to incarcerated persons, without addressing the issue of delivery or non-delivery by the agency, provides free reign to the agency to decide on its own what is good and what is not good for people to know. RCW 42.17.251. Only the legislature is vested with such discretion and authority. RCW 42.17.310.

It is nonsensical that the DOC, the same agency which prepared a public record after ensuring that it contained no exempt material, would mail the record to an incarcerated person at another DOC facility, only then to deny access to the document through the use of mailroom policy DOC 450.100.

In these unique circumstances, the mailing of the public disclosure request is but one step in the overall duty under the PDA that the DOC is required to fulfill in order to fully comply with the intent and purpose of the

PDA, that of giving requesters fullest possible assistance in accessing public records. (PAWS, at 252; RCW 42.17.290.) Thus, the DOC did not fully comply with the requirements of the PDA through the simple act of mailing Appellant's requested public records, due to its subsequent refusal to deliver the same to Appellant at his DOC mailing address.

c. Did the trial court construe the PDA liberally by ruling that the DOC complied with the requirements of the PDA when it deposited Appellant's requested records in the United States mail, without considering whether actual disclosure subsequently took place?

RCW 42.17.010(11) provides:

"It is hereby declared to by the sovereign people to be the public policy of the state of Washington: That...full access to information concerning the conduct of government in every level must be assured....The provisions of this chapter should be liberally construed to promote complete disclosure of all information...." See also PAWS, 125 Wn.2d at 251; Dawson v. Daly, 120 Wn.2d 782,788, 845 P.2d 995 (1993). (emphasis added.)

The court is to construe the provisions of the PDA liberally to promote full disclosure. Appellant respectfully submits that the trial court failed to "liberally construe" the PDA to promote "complete disclosure"; i.e., ensure Appellant access to the records in question.

2. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S MOTION FOR AN ORDER TO SHOW CAUSE OR COMPEL DISCLOSURE OF THE REQUEST.

a. Does the DOC's use of Policy 450.100 to deny delivery or disclosure of Appellant's records request constitute a statutory exemption pursuant to RCW 42.17.260?

Appellant contends that any use of agency policy to deny access to disclosable public records requested is contrary to legislative intent as evidenced by the court's reasoning in PAWS, wherein the court stated: "[T]he intent of this legislation is to make clear that...agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide records." PAWS, 125 Wn.2d at 259.

The DOC mailroom's use of DOC Policy 450.100 at the CCCC is not an enactment of our state legislature. To this day, the DOC still has actual possession of the public records requested by Appellant, and therefore is mandated by the PDA to disclose the record or cite a statutory exemption. To date, no statutory exemption has been applied to the denied records in question, nor have the records been delivered or disclosed to Appellant. (CP at 7,8.)

b. Did the DOC act to conceal Petitioner's public records request using DOC Policy 450.100, despite its knowledge that the record in question was disclosable under RCW 42.17.260?

In the instant case, the Respondents knew that the record was to be released (CP at 65-74), as no statutory exemption exists by which the requested records could be declared exempt. However, while unable to deny access under a statutory exemption, the DOC acted to conceal the record under the pretense of "safety and security", using DOC Policy 450.100, in violation of RCW 42.17.260 and RCW

42.52.050(4).

Specifically commenting on RCW 42.52.050(4), the court in PAWS stated: "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." (emphasis added.) PAWS, 125 Wn.2d at 269. Appellant submits that the "weakest link" in this chain is the CCCC mailroom staff acting contrary to RCW 42.52.050(4).

Appellant submits that the Respondent in this matter is aware of this fact, as evidenced in Holmberg v. DOC, Grays Harbor County No. 02-2-00960-0, wherein Respondent agents at the Stafford Creek Corrections Center (hereinafter SCCC) also attempted to utilize DOC Policy 450.100 to deny Mr. Holmberg access to similar records (public disclosure request of officer training records), only to settle the matter out of court on November 14, 2002. (CP at 10,11.)

3. THE TRIAL COURT ERRED IN RULING THAT THE REMEDY FOR APPELLANT'S BEING DENIED ACCESS TO PUBLIC RECORDS BY THE DOC WAS OTHER THAN THE SHOW CAUSE PROCEDURE OUTLINED IN RCW 42.17.340.

a. Is an incarcerated individual "any person" for the purposes of interpreting RCW 42.17.340(1)?

b. Is the DOC the "responsible agency" for the denial of access to public records in this matter?

RCW 42.17.340(1) provides: "Upon the motion of any person having been denied the opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it has refused to allow inspection or copying of a specified record. The burden of proof shall be on the agency to establish that refusal to permit inspection or copying is in

accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." (emphasis added.)

The PDA is very specific in its language regarding what remedy is available to any person who has been denied the opportunity to inspect or copy a public record by an agency. There can be little debate that it is the DOC agency that is directly responsible for the denial of public records at issue in this matter, as the agency still maintains actual possession of the records originally requested February 18, 2003 by Appellant. The records have, to date, not been disclosed/delivered to the requester, due to the actions of the DOC mailroom and its refusal to disclose said records.

There also can be little debate that the Appellant in this matter is "any person", and has been denied the opportunity to inspect or receive copies of the requested record. Moreover, "agencies shall not distinguish among persons requesting records...." RCW 42.17.270. PAWS, 125 Wn.2d at 252.

Appellant also submits that the Respondent had not met the burden of proof in this case as required by RCW 42.17.340(1). As the DOC is the responsible agency, the superior court erred in ruling that the remedy for Appellant's being denied access to public records by the DOC was other than the show cause procedure outlined in RCW 42.17.340.

IV. BAD FAITH

Appellant submits that the DOC acted in bad faith in utilizing DOC Policy 450.100 to deny disclosure/delivery of the public record at issue, as evidenced by the arbitrary treatment of public records requests on the part of the DOC toward incarcerated individuals.

To prove "bad faith", a party must show agency neglect or refusal to fulfill some duty...not prompted by an honest mistake to his rights or duties, but by some interested or sinister move. Bentzen v. Demmons, 68 Wn.App. 339,349, Fn.8, 842 P.2d 1015 (1987) (quoting State v. Sizemore, 48 Wn.App. 835,837, 741 P.2d 572 (1987)).

To illustrate evidence of bad faith, Appellant will ask this court to consider the agency's refusal to fulfill its duty pursuant to RCW 42.17.260(1), WAC 137-08-090(3) and WAC 137-08-130(3) to rely only upon statutory exemptions to deny disclosure of the records in question, based upon so-called safety and security concerns. (CP at 9.)

RCW 42.52.050(4) provides in relevant part: "No state employee...may conceal a record if the...employee knew the record was required to be released under 42.17 RCW, was under personal obligation to release the record, and failed to do so."

The declaration of Michael A. Holmberg gives startling evidence of the DOC's arbitrary activity with respect to public records requests made by incarcerated individuals.

(CP at 10-11.) To begin with, the Supreme Court in Turner v. Safley, 482 U.S. 78,87 (1987)(quoting PELL, 417 U.S. at 827), discussing whether a regulation was reasonably related to a legitimate penological objective, or an exaggerated response to those concerns, stated:

"The 'legitimate policies and goals of the corrections systems' are deterrence of future crime, protection of society by quarantining criminal offenders, rehabilitation of those offenders and preservation of internal security."

Appellant submits that the only factor related the the facts herein is the latter, "internal security preservation".

The DOC's claims of security concerns respecting incarcerated individuals in possession of the training record of a corrections officer is belied by the fact that Mr. Holmberg has received by the public disclosure process the training record of more than one corrections officer, dating back for over four years. Mr. Holmberg continues to maintain possession of these public records, without threatening any internal security concerns. (CP at 24-28,50-54,80-89.) Therefore, the claim of Mr. Cedeno in the instant case is shown to be an arbitrary decision.

There simply is no discernible threat to internal security that is presented by an incarcerated individual possessing the training record of a corrections officer. Mr. Cedeno has instead demonstrated an exaggerated response,

offering a bad faith explanation to the court for his decision to violate the PDA. Indeed, as the court noted in King County v. Sheehan, 114 Wn.App. 325, Fn.4, 57 P.3d 307 (2002): "If a record is available to one, it is available to all."

Here, Respondent's agents knew the record was to be released, and unable to deny access under a statutory exemption, acted to conceal the record under the pretense of DOC Policy 450.100, violating RCW 42.52.050(4), and contrary to RCW 42.17.260, WAC 137-08-090(3), and 137-08-130(3).

Appellant respectfully submits that the foregoing demonstrates the Respondent's refusal to fulfill its duty under the PDA, or its own published agency rules, in the requested record at issue in this matter. The safety and security argument put forth by the DOC as a basis for denying public records requests in this case simply does not hold up to scrutiny, nor is it a statutory exemption. In fact, when held up in comparison with the same agency's actions with respect to other nearly identical public records requests made by other incarcerated individuals (Holmberg declarations, CP at 19-22,80-81.), its handling of the records at issue looks foolish, if not criminal, constituting bad faith.

V. COSTS INCURRED AND STATUTORY PENALTY

The Act provides for an award to the prevailing party

of costs, attorney fees, and a statutory penalty of \$5 to \$100 for each day the party was denied access. RCW 42.17.340(4). The statutory award is a penalty, intended to encourage broad disclosure and deter improper denial of access to public records. Hearst Corp. v. Hoppe, 90 Wash.2d 123,140, 580 P.2d 246(1978); Yacobellis v. City of Bellingham, 64 Wash.App. 295,300-01, 825 P.2d 324(1992). The award of such a penalty does not depend on a finding the agency acted in bad faith. Yacobellis, 64 Wash.App. at 301.

An award of attorney fees is mandatory, but the amount is within the court's discretion. Progressive Animal Welfare Society v. University of Washington, 114 Wash.2d 677,683-684, 790 P.2d 604(1990)(PAWS I), as is the amount of the statutory penalty. RCW 42.17.340(4).

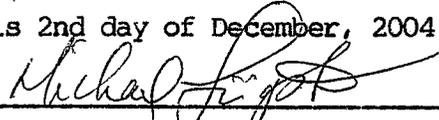
As the appellate court stands in the same position as trial court (Spokane Police Guild, 112 Wash.2d, at 35-36), Appellant requests this court order Respondent disclose/deliver requested records to him; that Appellant be awarded a \$5 to \$100 per day statutory penalty for each day he was denied access to records in question for a period beginning on March 28, 2003 through November 23, 2004, a period of 606 days, taking into account the agency's acting in bad faith; and to award him all costs incurred in pursuing this action, in the amount of \$180 for the Superior Court proceedings, costs to be called attorney fees of \$125,

a \$250 appellate filing fee, other appellate costs in the amount of \$108.25, and costs to be called appellate attorney fees in the amount of \$200. (CP at 2-3.)

VI. CONCLUSION

For the foregoing reasons, Appellant respectfully asks this court grant him the relief requested in Part V.

Respectfully submitted this 2nd day of December, 2004.



Michael Livingston, Appellant

Presented by:

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STATE OF WASHINGTON

BY
DEPUTY

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

MICHAEL LIVINGSTON,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

No. 32253-6-II

DECLARATION OF
SERVICE BY MAIL

State of Washington)
)
County of Grays Harbor)

Michael B. Livingston hereby declares under the penalty of perjury under the laws of the State of Washington that on the date below I did serve copies of the following:

1. Cover letter
2. Brief of Appellant

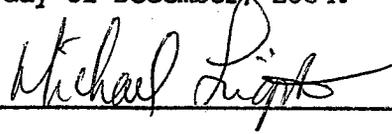
upon the following:

Washington St. Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Peter W. Berney
Asst. Atty. General/CJ Division
P.O. Box 40116
Olympia, WA 98504-0116

by processing as LEGAL MAIL, with first class postage affixed thereto at the Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520.

Subscribed to and executed this 2nd day of December, 2004.



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