

NO. 44480-1-II

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

JOHN ANDREWS,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal challenges the trial court's decision to dismiss Mr. John Andrews' claim on summary judgment. The trial court concluded that there was no genuine issue of material fact that the Washington State Patrol (State Patrol) abided by the Public Records Act (PRA), chapter 42.56 RCW, and produced responsive records to Mr. Andrews within a reasonable period of time. In his appeal, Mr. Andrews does not question that the State Patrol's ultimate production date was reasonable. Rather, Mr. Andrews claims that an agency's inability to produce records by estimated response dates, and an administrative oversight in neglecting to send out another extension letter on the agency's estimated response date, are PRA violations. Mr. Andrews also claims that a public records officer not returning a requestor's phone calls constitutes a PRA violation.

However, Mr. Andrews' contentions lack a basis in the PRA's plain language. While an agency's failure to respond to a PRA request constitutes a denial, and a violation of the PRA, the State Patrol timely responded to Mr. Andrews' request within five business days and produced responsive records within a reasonable period of time.

Despite Mr. Andrews' claim that failing to return his phone calls or send a more timely extension letter violates the PRA, the only issue here is

whether the State Patrol produced responsive records to Mr. Andrews' request within a reasonable period of time. Of particular relevance, Mr. Andrews requested recordings of attorney-client conversations. The responsive records almost certainly contained privileged conversations between a criminal suspect and an attorney. In order to preserve the confidentiality of these conversations, while providing fullest assistance to Mr. Andrews, the State Patrol developed a unique search methodology to identify responsive records without listening to the recordings. Developing and implementing a meticulous search methodology took time. In light of the State Patrol receiving scores of additional public records requests and subpoenas duces tecum between the date of the State Patrol's initial response letter to Mr. Andrews and final production, a 78-day production period was more than reasonable. Accordingly, this Court should affirm the trial court's grant of summary judgment and dismissal of Mr. Andrews' lawsuit.

II. ISSUES PRESENTED

This appeal raises the following two issues:

1. Did the trial court properly grant the State Patrol's motion for summary judgment dismissing Mr. Andrews' claim by finding that the State Patrol produced the responsive records within a reasonable period of time?
2. Did the trial court properly grant the State Patrol's motion for summary judgment dismissing Mr. Andrews' claim that

an agency's inability to produce responsive records by the estimated response dates, administrative oversight in not sending a subsequent extension letter on the estimated response date, and not returning a requestor's phone calls are per se violations of the PRA?

This Court should resolve each of these issues by affirming the trial court's decisions.

III. STATEMENT OF THE CASE

A. Mr. Andrews' Public Records Request.

On or about March 8, 2012, Mr. Andrews submitted a public records request to the State Patrol. CP 3. In his request, Mr. Andrews asked for:

All of the following requests are limited to WSP District One office from January 1, 2009 involving DUI suspect/defendant

1. Policies or procedures regarding recording attorney-client telephone conversations[;]
2. *Copy of all recorded attorney-client telephone conversations[;]*
3. Copies of any documents authorizing the WSP to record attorney-client telephone calls[; and]
4. Copies of phone records of all lines on which attorney-client telephone conversations have been recorded.

CP 6 (emphasis added).

On or about March 15, 2012, the State Patrol sent Mr. Andrews an initial response letter that acknowledged the request and estimated twenty days to produce responsive records. CP 7. On April 11, 2012, the State

Patrol's public records officer, Gretchen Dolan, sent Mr. Andrews an email that extended the estimated response period for another twenty days. CP 8. Mr. Andrews left messages with Ms. Dolan about the delay. CP 101. Ms. Dolan did not return his phone calls. *Id.*

Due to an administrative oversight, Ms. Dolan did not send another extension letter to Mr. Andrews on May 1, 2012. CP 34. This oversight was not intended to deny Mr. Andrews' public records request. *Id.* Rather, the oversight was due to the current volume of pending public records requests and subpoenas duces tecum. *Id.*

B. Search For Responsive Records.

1. Recorded attorney-client conversations.

In part, Mr. Andrews requested a copy of recorded conversations between criminal suspects and their attorneys. CP 6. When a suspect is arrested for Driving Under the Influence (DUI), a State Patrol officer may transport the suspect to the District 1 headquarters located in Tacoma, Washington. CP 67. District 1's headquarters has a room with a breathalyzer machine referred to as the BAC (Breath Alcohol Content) room. *Id.* Before a suspect provides a breath sample, an officer must read the Implied Consent Warnings. *Id.* If the suspect is under arrest, the officer must provide *Miranda* warnings to the suspect. *Id.*

When a suspect requires language interpretation assistance to

understand the Implied Consent or *Miranda* warnings, a State Patrol officer should arrange for an interpreter to read the warnings to the suspect. *Id.* District 1's BAC room has a phone line that directly connects to the Language Line. *Id.* The Language Line is a service that provides an interpreter to translate the officer's statements to the suspect. *Id.* The BAC room's direct line to the Language Line is digitally recorded to a hard drive. CP 68. The reason the State Patrol records this line is to preserve the interpreter's translation of the Implied Consent or *Miranda* warnings. *Id.*¹

When a suspect requests to speak with an attorney, State Patrol officers should honor that request. *Id.* State Patrol officers assigned to District 1 generally call the Pierce County Department of Assigned Counsel for an attorney. *Id.* The District 1 BAC room has a phone line that is not recorded. *Id.* When a suspect in the BAC room requests an attorney, the State Patrol officer uses the non-recorded phone line to contact a defense attorney. *Id.* After the officer reaches an attorney, the officer gives the phone to the suspect and then leaves the room. *Id.*

In situations where the suspect requires an interpreter, State Patrol officers have called a defense attorney on the non-recorded line in the

¹ In general, the Language Line interpreter does not reside in Washington. *Id.* Consequently, in a subsequent court proceeding, the interpreter may be unavailable to testify that he or she translated the Implied Consent or *Miranda* warnings to the suspect. *Id.*

BAC room. *Id.* The officer then places the attorney on speaker phone and the Language Line interpreter on speaker phone. *Id.* At this point, the officer leaves the BAC room to allow the suspect to speak with the attorney with the aid of the interpreter. *Id.* Since the phone line to the Language Line is recorded, this line may have recorded conversations between a suspect, Language Line interpreter, and the attorney. *Id.*

An officer may also contact the State Patrol's communications dispatch for a Language Line interpreter. *Id.* Calls between an interpreter and a suspect for Implied Consent Warnings are generally recorded by dispatch. CP 32. When connecting a suspect to an interpreter and an attorney, the dispatcher should place the call on hold. *Id.* By placing the call on hold, the suspect is able to communicate with the attorney and interpreter, but the call is not recorded by State Patrol dispatch. *Id.* If the dispatcher did not place the call on hold, it is possible that dispatch may have recorded a conversation between an attorney, suspect, and interpreter. *Id.*

State Patrol officers were not instructed by command staff to record the conversations between suspects and their attorneys. CP 68-69. The recordings resulted from State Patrol officers providing access to a defense attorney with the aid of an interpreter. CP 69. These recordings

should not have been used for any investigative or administrative purpose.

Id.

2. Search for responsive recordings between criminal suspects and defense attorneys.

After receiving Mr. Andrews' request, District 1 personnel were instructed to preserve all existing digital recordings of the direct line connecting to the Language Line. CP 30. In order to preserve the confidentiality of any attorney-client conversations, District 1 personnel were instructed not to listen to the digital recordings from the direct line connecting to the Language Line. CP 30-31.² The time frame for responsive records to Mr. Andrews' request for recordings of attorney-client conversations was October 2011 – March 15, 2012. CP 31.

In order to identify the digital recordings that potentially contained attorney-client privileged conversations, without listening to the recordings, State Patrol personnel gathered Language Line billing records, officers' reports, and digital recordings from the phone line that recorded the call. CP 31. Ms. Dolan then reviewed the reports, which corresponded to the digital recordings from the District 1 headquarters'

² District 1's communication manager listened to the first part of eight calls routed through dispatch. CP 32. While listening to one call, the District 1 communication manager heard the dispatcher telling an attorney that the attorney was conferenced to the Language Line. CP 33. When she heard the dispatcher informing the attorney of the conference to the Language Line, the communication manager stopped listening to the recording. *Id.*

direct line to the Language Line, to determine whether the officer noted that the suspect was connected with an attorney. *Id.* Ms. Dolan reviewed the Language Line billing records in late March 2012. CP 198. In late April and early May 2012, Ms. Dolan reviewed the reports that corresponded to the Language Line billing records to determine whether the reports referenced an officer connecting the suspect to an attorney. CP 199.

C. Lawsuit and Production of Responsive Records.

On May 3, 2012, Mr. Andrews filed this lawsuit and scheduled a show cause hearing for May 11, 2012. CP 3, 11. On May 9, 2012, the State Patrol filed a response to the show cause hearing. CP 13. In the State Patrol's response, the agency estimated that responsive records would be produced to Mr. Andrews by May 31, 2012. CP 23. On May 25, 2012, the State Patrol mailed the responsive records to Mr. Andrews. CP 85. The State Patrol also provided a detailed privilege log that identified the date and time of the potentially privileged recording, the officer's name, and the suspect's name. CP 85-86, 90.

D. Trial Court's Ruling Granting Summary Judgment to State Patrol.

On February 8, 2013, the trial court granted the State Patrol's motion for summary judgment and dismissed Mr. Andrews' lawsuit with

prejudice. CP 205-06. The trial court framed the issue as “whether or not the production of the documents were in a time that is reasonable and that the time estimates were reasonable” RP 5. The trial court found that the response period was reasonable. *Id.*

The trial court based this ruling on Mr. Andrews requesting, in part, records that could potentially “affect third-party privacy rights,” and the State Patrol establishing a procedure to identify the responsive records without invading those rights. *Id.* The trial court also noted that the State Patrol received scores of additional public records requests and subpoenas duces tecum during the period the agency responded to Mr. Andrews’ request. *Id.* Accordingly, the trial court found that the State Patrol’s production of responsive records by May 25, 2012 was reasonable and granted the agency’s motion for summary judgment. RP 6.

IV. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment By Finding That The Response Period Was Reasonable Given The Sensitivity Of The Responsive Records.**

1. **Standard of review.**

A summary judgment decision is subject to de novo review and the appellate court reviews “all facts in the light most favorable to the nonmoving party.” *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007) (citation omitted). Summary judgment is appropriate

when the pleadings and supporting declarations before the court “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).

“The object and function of the summary judgment procedure is to avoid a useless trial[.]” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citation omitted). The moving party bears the initial burden to show “an absence of evidence to support the nonmoving party’s case.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) (internal quotation marks omitted). The moving party can prove an absence of material fact by pointing to “those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991) (citations omitted and internal quotation marks omitted).

2. **There is no genuine issue of material fact that the State Patrol produced the responsive records to Mr. Andrews within 78-days and the trial court properly concluded that this response period was reasonable as a matter of law.**

In this case, there is no genuine issue of material fact that Mr. Andrews requested potentially privileged recordings and the State

Patrol undertook a meticulous search protocol to identify the responsive records without violating third party privacy rights. Despite this in-depth search protocol, the State Patrol still managed to produce the records within 78-days. Although the State Patrol could not release confidential attorney client communications, the State Patrol honored the PRA's mandate of transparency by providing Mr. Andrews' a detailed privilege log to identify the responsive records that were not produced due to their confidentiality.

The State Patrol fully complied with the PRA's specific requirements to provide a prompt response, adequately search for responsive records, and disclose records by producing the record or providing a redaction log identifying the record. Within five business days after receiving a public records request, the State Patrol must: (1) provide the record; (2) acknowledge the request and provide a reasonable estimate of the time to respond to the request; or (3) deny the request. RCW 42.56.520.³ When responding to a public records request, the State Patrol must disclose responsive public records by either producing non-exempt records or withholding exempt records by citing the applicable exemption. *See Sanders v. State*, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

³ An agency may also provide an "internet link address and link" to the requested records.

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 time required to respond to the request. RCW 42.56.550(1) and (2). If one of these violations occurs, the PRA provides this remedy:

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 to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4) (emphasis added). For the second type of violation, “[t]he operative word is reasonable.” *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384, 387 (2012), *review denied*, 177 Wn.2d 1002, 300 P.3d 415 (2013) (internal quotation marks omitted).

In this case, there is no dispute that the State Patrol provided an initial response letter to Mr. Andrews within five business days. Brief of Appellant, 5. There is no dispute that the State Patrol produced the responsive records by mail on May 25, 2012. *Id.* at 4. Mr. Andrews contends that the State Patrol violated the PRA by failing to produce records by its estimated response dates and failing to return his calls. *Id.*

at 3, 5-6. However, Mr. Andrews provides no argument that 78-days was an unreasonable response period. *Id.* at 5.

In determining whether an agency produced responsive records within a reasonable period, a court should consider the totality of the circumstances. These circumstances include: (1) the complexity of the request; (2) whether the agency followed-up on leads by searching additional locations for responsive records; (3) the number of pending public records requests and discovery requests; or (4) the staffing resources available to respond to the request. *See Neighborhood Alliance of Spokane Cy. v. Cy. of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) (“agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.”) (citation omitted); *Zink v. City of Mesa*, 162 Wn. App. 688, 712, 256 P.3d 384 (2011), *review denied*, 173 Wn.2d 1010, 268 P.3d 943 (2012) (substantial evidence supported the trial court’s finding that 30 days was a reasonable response period given that the agency “had to review all 21 requests manually, without cross-referencing . . .”).

While Mr. Andrews submitted a narrow request, he also requested sensitive documents. In order to comply with the PRA’s directives and spirit, the State Patrol developed a unique search methodology to identify the responsive recordings without actually listening to the recordings. At

the same time, the State Patrol had an obligation to promptly and properly respond to scores of public records requests and subpoenas duces tecum during this period. *See* CP 34. Given the totality of the circumstances, the State Patrol's estimated response date of May 31, 2012, and production date of May 25, 2012 was reasonable. Accordingly, the State Patrol did not violate the PRA. The trial court should be affirmed.

B. An Agency's Inability To Produce Responsive Records By The Agency's Estimated Response Dates, Administrative Oversight In Not Sending An Extension Letter On The Estimated Response Date, and Not Returning Phone Calls, Are Not *Per Se* PRA Violations.

Mr. Andrews claims that the State Patrol's inability to produce responsive records by the initial estimated response dates of April 4, 2012 and May 1, 2012 is the equivalent of a denial of his public records request. Brief of Appellant, 6. In addition, Mr. Andrews claims that an administrative oversight in not sending an extension letter on the date of the estimated response and not returning his phone calls violates the PRA. *Id.*, 5-6. However, the PRA does not impose strict liability on a public records officer for not getting an extension letter out on time or not returning a phone call, especially when she is simultaneously handling numerous other public records requests.

RCW 42.56.550 provides two distinct causes of action for a requestor to seek recourse under the PRA. First, a requestor may

challenge an agency's denial to inspect or copy the records. RCW 42.56.550(1). Second, a requestor may challenge the reasonableness of an agency's estimated response period. RCW 42.56.550(2). Notably absent in RCW 42.56.550 is a cause of action based on an agency's inadvertent oversight in neglecting to send out another extension letter or responding to phone calls.

Mr. Andrews argues that the State Patrol denied his public records requests by failing to produce the records by its estimated response dates. Brief of Appellant, 6. Despite Mr. Andrews' contention that an agency should be bound by its estimated response dates, Brief of Appellant, 5, the PRA's plain language lacks such an explicit requirement. To the contrary, the PRA specifically allows an agency to request additional time to respond to a public records request in order "to locate and assemble the information requested" RCW 42.56.520; *see also* WAC 44-14-04003(6) ("Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction)). Additionally, the PRA expects an agency to balance responding to public records requests with the agency's other essential responsibilities to the public. *See* RCW 42.56.100 ("Agencies shall adopt and enforce reasonable rules and regulations [in part] . . . to prevent excessive interference with other

essential functions of the agency,”).

In certain circumstances, an agency’s unreasonable response to a public records request or obstinacy in providing fullest assistance may constitute a denial. *American Civil Liberties Union (ACLU) v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997) (agency’s unreasonable refusal to mail responsive records to the requestor constituted a denial to inspect or copy records). However, those circumstances are absent in this case.

From late March 2012 through May 25, 2012, the State Patrol diligently worked to identify responsive records to Mr. Andrews’ request. In addition to locating the requested billing records and policies, the State Patrol implemented a unique search methodology to identify privileged recordings without listening to the recordings. CP 31-32. This review began in March and April of 2012. CP 198-199. This is not a case where an agency simply “sat on” a request and then scrambled to produce responsive records after being served with a lawsuit.

Despite Mr. Andrews’ impression that the State Patrol did not provide him the fullest assistance, the State Patrol followed the PRA’s spirit of transparency and accountability by locating the records and disclosing their existence in a detailed privilege log. This is a clear example of providing the fullest assistance to a requestor. Accordingly,

the State Patrol did not violate the PRA and Mr. Andrews is not entitled to relief under RCW 42.56.550(1), nor is he entitled to penalties and attorney's fees under .550(4).

V. CONCLUSION

The State Patrol respectfully requests this Court to affirm the trial court's decisions granting summary judgment.

RESPECTFULLY SUBMITTED this 3rd day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of September, 2013, I caused a true and a copy of the foregoing document to be served on the following via electronic mail:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 3rd day of September, 2013.



ALLISON CLEVELAND

WASHINGTON STATE ATTORNEY GENERAL

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