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SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BARSTAD,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

**DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION
FOR DISCRETIONARY REVIEW**

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ORIGINAL

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I. INTRODUCTION

Mr. Barstad petitions for discretionary review of the Court of Appeals' affirmance of the trial court's dismissal of his Public Records Act (PRA) complaint. Mr. Barstad requested a record that the parties agree did not exist at the time of his request. The requested record was a transitory memorandum listing the inmates subject to sanction on a particular day. Prison staff created the memorandum by copying information contained in official records, which are required to be retained by the Department of Corrections. The daily memorandum was destroyed and an updated memorandum was posted for prison staff each day. Because the memorandum was destroyed when no longer needed, it did not exist when Mr. Barstad made his public records request.

This Court and the Court of Appeals consistently have held that the Public Records Act does not require an agency to produce a record that does not exist. The courts have held that retention concerns do not provide a cause of action under the Public Records Act. There is no public interest in review of this well-settled issue. Even if a public records claim could be brought to challenge a records retention issue, this case would not raise an issue meriting review. Destruction of a transitory memorandum, created by copying information from documents that are retained by the agency, is specifically permitted by RCW 40.14.060, the

State records retention schedule, and the approved records retention schedule of the Department of Corrections. The Court previously declined to review this case and should do so again.

II. ISSUES PRESENTED FOR REVIEW

This Court should deny review because this matter does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept discretionary review, the following issues would be presented:

1. When a document has been destroyed pursuant to the State Records Retention Schedule and RCW 40, and therefore does not exist when an agency receives a public records request, is there a cause of action under the Public Records Act?

2. Under RCW 40.14.060, agency records may be destroyed if destruction is permitted by an approved records retention schedule. The State records retention schedule allows destruction of records that are secondary copies of information retained in primary documents. Did the Department of Corrections properly destroy a daily sanction memorandum created by copying information from infraction and hearing lists that are retained for years?

III. STATEMENT OF THE CASE

Mr. Barstad made a Public Records Request on April 27, 2013, requesting “copies of all Disciplinary Sanction Lists issued during October

and November of the year 2012, at the MONROE CORRECTIONAL COMPLEX.” CP 48. The Department of Corrections (“Department”) responded to the request within five business days. CP 50. The Department then sent Mr. Barstad an invoice for the request, and subsequently mailed a disk containing the disciplinary records to Mr. Barstad at the Monroe Correctional Complex. CP 52-55.

After reviewing the documents, Mr. Barstad sent a follow-up letter to the Department requesting “Sanction Lists from the [Washington State Reformatory Unit] Section of [the Monroe Correctional Complex].” CP 57. The Department sent a second disk with responsive records to Mr. Barstad at the Monroe Correctional Complex. CP 63. The prison mailroom determined that there was information on the second disk regarding other inmates that could not be provided to Mr. Barstad. CP 65. Because the disk could not be provided to Mr. Barstad, it was sent to a third party designated by Mr. Barstad. CP 68. Mr. Barstad informed the Department that he had not received the second disk, and requested that the Department provide him “the one Disciplinary Sanction List containing [Mr. Barstad’s] name.” CP 65-66.

On January 28, 2014, Mr. Barstad sent a letter to the Department advising that the second set of responsive documents it had provided did not contain the specific record he wanted. CP 68. He further clarified to

the Department that the document he had been describing in his previous correspondence was, specifically, “a memo to: ‘ALL STAFF’ from ‘SGT’S KNOX / DOPSON’ and the subject: ‘A/B UNITS Disciplinary Sanction List,” dated October 27, 2012. CP 68. Mr. Barstad was referring to the transitory memorandum that was posted each day in the cell block to remind correctional officers which inmates were being sanctioned that day for disciplinary infractions. CP 74-75.

The transitory memorandum Mr. Barstad requested was made each day by copying information from disciplinary infraction and hearing records. CP 75. A new memorandum was posted on the cell block each day. CP 75. The transitory memorandum from the prior day was destroyed when a new memorandum was posted the next day. The Department of Corrections Records Retention Schedule requires the Department to retain for two years the infraction documents and hearing records used to create the daily memorandum. Dep’t Rec. Ret. Sch. 1.1 at 27.¹ Because the daily memorandum copied information retained in the primary disciplinary infraction and hearing records, the daily memoranda were discarded each day, pursuant to the State’s General Records Retention Schedule. State Rec. Ret. Sch. at 96 (records with minimal

¹ The Department of Corrections Records Retention Schedule is available at http://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Corrections-Records-Retention-Schedule-v.1.1-Dec-2013.pdf.

retention value to be destroyed when no longer needed, including secondary copies of information retained in primary records).²

After receiving Mr. Barstad's request for the particular transitory memorandum, the Department conducted a search and found that the requested memorandum had been previously destroyed under the retention schedule. CP 72, 74-75. Because the memorandum no longer existed at the time of Mr. Barstad's request, it was not among the responsive documents the Department had provided.

Mr. Barstad filed an action alleging that the Department should have retained the daily memorandum from October 27, 2012. CP 2-8. Mr. Barstad concedes that the record did not exist at the time of his request. The Department responded that it had not violated its retention policies because the document Mr. Barstad requested was a transitory memorandum that was properly destroyed. CP 35-41. The Department pointed out that an alleged RCW 40.14 violation does not constitute a cause of action under RCW 42.56. The superior court dismissed Mr. Barstad's complaint. CP 91-92.

Mr. Barstad petitioned this Court for direct review of that decision. This Court denied review and transferred the case to the Court of Appeals. The Court of Appeals affirmed the superior court's

² The State Government General Records Retention Schedule is available at http://www.sos.wa.gov/_assets/archives/RecordsManagement/SGGRRS5.1.pdf.

order granting summary judgment in favor of the Department. Mr. Barstad now seeks this Court's discretionary review of the Court of Appeals' decision. This case does not present any issues that merit review under RAP 13.4(b). The Department requests that this Court again deny review.

IV. ARGUMENT

A. The Court of Appeals' Decision Is Not In Conflict With Any Decisions Of This Court Or The Court Of Appeals Because It Is Well Settled That The Public Records Act Does Not Require Production Of Records That Do Not Exist; This Case Does Not Present A Significant Question Of Constitutional Law

The lower courts' rulings in this case are consistent with the decisions of this Court and the Court of Appeals and do not warrant the Court's review. *See* RAP 13.4(b)(1)-(2). Additionally, this case involves only a limited question of statutory interpretation and does not raise a significant question of law under the Constitution of the State of Washington or of the United States. *See* RAP 13.4(b)(3).

Washington courts repeatedly have held that “[a]n agency has no duty to create or produce a record that is nonexistent.” *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012) (*en banc*) (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)); *accord West v. Washington State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011). Consistent with this principle,

Division Two of the Court of Appeals repeatedly has rejected the argument that alleged violations of RCW 40.14 should constitute causes of action under the Public Records Act, RCW 42.56. *West*, 163 Wn. App. at 245; *Bldg. Indus. Ass'n of Washington (BIAW) v. McCarthy*, 152 Wn. App. 720, 741, 218 P.3d 196 (2009). Simply put, “there [is] no agency action to review under the [PRA] ‘where the agency’ did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought ‘did not exist.’” *BIAW*, 152 Wn. App. at 740 (quoting *Sperr*, 123 Wn. App. at 137). Division Two’s decisions are consistent with those of the other divisions. *See Zink v. City of Mesa*, 162 Wn. App. 688, 718, 256 P.3d 384 (2011) (“the PRA does not state that an agency’s violation of independent statutory duties to prepare records is also a violation of the PRA.”). The Court of Appeals’ decision in this case acknowledges and adheres to these decisions.

Additionally, the plain language of the PRA supports the lower courts’ decisions because the PRA does not incorporate RCW 40.14 and it provides its own records retention obligations. The PRA states “[i]f a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . may not destroy or erase the record until the request is resolved.” RCW

42.56.100. Notably, this obligation attaches at the time that an agency receives a request. It is undisputed in this case that the record did not exist at the time Mr. Barstad requested it. The PRA does not incorporate RCW 40.14 and does not provide a civil remedy for destruction of a record. Where the Legislature has not provided a private civil remedy, the courts may not create one. *See Griffin v. Eller*, 130 Wn.2d 58, 69, 922 P.2d 788 (1996) (if the Legislature has not provided a statutory remedy, the remedy does not exist).

Moreover, the Legislature has demonstrated that it knows how to provide for penalties in the public records context, and it has modified the PRA penalty scheme. *See, e.g.*, RCW 42.56.565(1). The Legislature has done nothing to expand the PRA penalty scheme in response to the court decisions disallowing penalties for alleged retention violations, despite making other significant changes to the PRA penalty scheme. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009) (this Court assumes legislative acquiescence to courts' PRA interpretation where courts had interpreted the PRA and Legislature did not alter statute in response).

The limited statutory issue in this case has been settled by this Court. The Court of Appeals has applied the Court's decision and reasoning uniformly, and the lower courts' decisions here are consistent

with existing jurisprudence and the Public Records Act. Accordingly, this petition does not present an issue meriting Supreme Court review under RAP 13.4(b)(1)-(3).

B. Destruction Of The Daily Memorandum, As Permitted By The State Record Retention Laws And Schedules, Is A Narrow Factual Question That Does Not Involve An Issue Of Substantial Public Interest

This case involves a narrow factual topic only of interest to Mr. Barstad, which makes it unsuitable for this Court's review. The daily memorandum at issue is a transitory document that is discarded each day, as permitted by RCW 40.14.060, the State record retention schedule, and the Department of Corrections Record Retention Schedule. Therefore, the fact-specific question regarding the nature of the memorandum and the requirements of the Public Records Act does not involve a significant issue of substantial public interest that would allow for review by this Court. *See* RAP 13.4(b)(4).

The memorandum at issue is based on underlying documents retained by the Department. Inmates may receive notice of a prison rule infraction which issues a sanction for the violation, or have a hearing at which a sanction is ordered. A daily memorandum listing the inmates subject to sanctions was posted each day to remind the correctional

officers which inmates were subject to sanctions. At the end of the day, the memorandum was no longer needed and was discarded.

This practice complies with RCW 40.14.060, which permits destruction of a document if it is done pursuant to an approved retention schedule. The approved State Records Retention Schedule provides that when a secondary document is created by copying information from primary records, and the primary records are retained as required by an approved retention period, the secondary document should be “retain[ed] until no longer needed for agency business then destroy[ed].” State Rec. Ret. Sch. at 96. Here, the primary documents are the infraction and hearing records, which the Department’s approved retention schedule requires it to retain for two years after the end of the calendar year. Dep’t Rec. Ret. Sch. 1.1, at 27. The daily memorandum is a secondary document containing only information copied from the infraction and hearing records; therefore, it may be destroyed when it is no longer needed. State Rec. Ret. Sch. at 96.

Because RCW 40.14.060 and the State and Department retention schedules all provide that destruction of the memorandum was appropriate, there is nothing of public import requiring review. Furthermore, because the daily memorandum was properly destroyed and did not exist at the time the records request was made, the petition does

not raise a valid cause of action under the Public Records Act. The Court has no basis for review under RAP 13.4(b).

V. CONCLUSION

This case does not meet the criteria for discretionary review under RAP 13.4(b). Accordingly, The Department requests that this Court deny Mr. Barstad's motion for discretionary review.

RESPECTFULLY SUBMITTED this 30th day of December, 2015.

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Thank you,

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