COA # 476690-II

Cause No. 90616-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BARSTAD,

Appellant,

Vs.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

APPELLANT'S REPLY BRIEF

JAMES BARSTAD [#759730]

C/O MONROE CORRECTIONAL COMPLEX

P.O. BOX 777, WSRU-B123

Monroe, Washington [98272]

comm 3-19-15

I. INTRODUCTION:

Respondents are circumventing the Public Records Act (PRA). Their retention schedule specifically states that the record sought by the Appellant was to be retained for two years prior to destruction. They claim that the record sought was merely a transitory document precluded from retention. However, other transitory records created/destroyed daily are retained pursuant to the retention schedule. They further claim that the record sought was "cut and pasted" from other records that they do retain pursuant to the retention schedule. However, they failed to produce those records/information as responsive to the Public Disclosure Request. They are playing a shell game, deciding what documents/information to release to the public, contrary to the letter and substance of the PRA. Finally, they have admitted this to be a criminal act, but claim there is no cause of action.

II. STATEMENT OF THE CASE:

On April 27, 2013, Appellant requested "copies of all Disciplinary Sanction lists issued during October and November of the year 2012, at Monroe Correctional Complex. CP 48. Respondents sent First Installment CD-ROM (PDU-24877) to the Appellant. CP 52-55.

The First Installment CD-ROM did not contain the specific record sought (Disciplinary Sanction List, dated

October 27, 2012, containing the name, DOC Number, photo, and sanction of the Appellant). Appellant then requested, "Sanction Lists from the [Washington State Reformatory Unit] Section of [the Monroe Correctional Complex]." CP 57.

Respondents sent a Second Installment CD-ROM to the Apellant. Respondent "lost/misplaced" this CD-ROM when it arrived at MCC. CP 5. Appellant submitted proof of the loss to V. Shamberg at the Public Disclosure Unit, sufficient to convince her to send a (second) Second Installment CD-ROM. Respondents then sent the replacement Second Installment CD-ROM to the Appellant. CP 63.

This time, upon receipt, the MCC Mailroom rejected the CD-ROM, claiming "other offenders' information" as the reason for the rejection. CP 65. The same MCC Mailroom allowed the First Installment CD-ROM without incident, even though it also contained "other offenders' information." Appellant had the MCC Mailroom sent the CD-ROM to a third party, where the CD-ROM remains, available for in camera review upon request. CP 68. The third party has confirmed that the specific record sought is not contained on that CD-ROM. Copy of the records provided is attached to Plaintiff's Opening Brief, Appendix "A."

Finally, Appellant requested, 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. Respondents argue that this record sought is merely a "transitory memorandum" posted each day in the cell block to remind correctional officers which inmates were being sanctioned that day for disciplinary infractions. CP 74-75.

Respondents further argue that the record sought, as a transitory memorandum, is made each day by copying information from disciplinary infraction and hearing records (CP 75), and that a new memorandum is made and posted each day. CP 75. Further, they argue that since the infraction documents and hearing records are kept for two years, per the Department's records retention shcedule, they are allowed to destroy the specific records sought prior to the retention schedule, as a "secondary/transitory record not covered by a more specific record series." (Respondent's Opening Brief, page 2-3).

Respondents admit that they destroyed the specific records sought, six months after its creation. They argue that the destruction was proper under their retention schedule, as it is only a transitory memorandum. CP 45-51.

Respondents argue that a violation of RCW 40.14 (retention schedule) is not superceded/covered by the PRA, and therefore the Appellant does not have a cause of action under RCW 42.56. The Superior Court agreed, in dismissing Appellant's complaint. CP 91-92.

Appellant now appeals, argues the dismissal was in

error, and that he be entitled to damages pursuant to the PRA.

III. ARGUMENT:

A. The Specific Record Sought Was Required to be Retained for Two Years Prior to Destruction.

This Court has held that "[a]n egency has no duty to create on 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)). The lower courts have held the same. See, e.g., West v. Washington State Dep't of Natural Res., 162 Wn.App. 235, 242, 258 P.3d 78 (2011).

It is undisputed that the specific record sought did not exist at the time Appellant requested it. However, this specific record sought was not properly destroyed, as argued by Respondents. In West, supra, this type of scenario was predicted. However, at that time the issue was not yet ripe. West argued that the courts should apply RCW 40.14 (Retention Schedule Act) for the proposition that unless the courts apply this statute, agencies will circumvent the PRA and improperly destroy records. See, Building Industry Association of Washington v. McCarthy, 152 Wn.App. 720, 218 P.3d 196 (2009) (hereinafter BIAW), wherein the court stated, "despite this argument's compelling logic, no improper destruction has been shown."

West's prediction has come to fruition. Respondents are

circumventing the PRA. While they claim destroying the specific record sought was "proper," their argument fails.

Respondents cited two websites wherein the retention schedules may be seen. This is prejudicial to the Appellant who has no internet access to view/research these sites. However, they have provided a specific citation of "Dep't Rec. Ret. Sch. 1.1 (sic) at 27" (Resp. Brief at pg. 3-4). It seems that this is the only page in the DOC Retention Schedule that states, "Transitory records not covered by a more specific records series." Appellant has provided this page herein, as **Appendix "A."** Please notice that this page, cited by the Respondents, specifically states, "**Retain** for 2 years after end of calendar year... then... **Destroy.**" Obviously, Respondents must agree that the document in question was to be retained for two years prior to destruction, and not within six months of its creation.

Further, this page cited by Respondents states the destroyed tranitory record must be "covered by a more specific records series." The specific record sought is MORE specific than the records Respondents claim are retained. The specific record sought contained the name, DOC number, photo, and the specific sanction imposed on the Appellant. See Appellant's Brief, Appendix "A." The list that was provided in the Disclosure Request in question, PDU-24877, merely shows name, DOC Number, cell, infraction date, a

"serve" date, a "due" date, the WAC infraction Number, and the "Evidence" number (number of the disciplinary hearing). See Appellant's Brief, Appendix "D." There is no hint of what the sanction imposed entails.

Much more specific information is disclosed on the record sought than on the list provided as responsive. Why? Why did Respondents fail to provide this specific information as responsive? One reason is that the sanction was imposed prior to any hearing, showing due process rights violations. Second, because the specific record sought was being requested as evidence in a civil suit. Third, no other prison (improperly) destroys these records. See Appellant's Brief, Appendix "E." Fourth, because the retention schedule requires a two-year retention. Respondents have provided this citation. Appellant has also submitted other pages from the Dep't Rec. Ret. Sch. which are more relevant to the specific record sought, pages 31, 35, 36. See Appellant's Brief, Appendix "B."

Obviously, the record was to be retained for at least two years. Respondents have admitted the destruction of the record sought. Their own citation shows the destruction was improper. Respondents have admitted this to be a criminal act, but they deny any punishment is warranted.

B. Legislature Permits a Violation of RCW 40.14 to be Covered by the PRA, When There is a Circumvention of the PRA.

The predicted circumvention argued in West and referenced in BIAW has come to fruition in this case. Respondents argue substantially that under RCW 40.14.060, official public records may be destroyed pursuant to retention schedules. I have just shown that this did not occur in this case. While the Court of Appeals has consistently held that agencies are only "required to produce records that exist," and consistently rejected RCW 40.14 violations as causes of action under the PRA, this is also in error.

The mutiple cases cited by Respondents showing this legal standard all refer to instances wherein the destruction was not improper, contra to the present case. Further, those cases cited refer to instances wherein the information sought was not denied copying or inspection. In the present case, no public record was disclosed showing the "specific sanction imposed upon the Appellant." In fact, only the record sought contains this information. The "primary" records cited by Respondents as retained per schedule do not contain this information, because the "hearing" happened after the sanction was imposed. In fact, at the "hearing," Appellant was found "Not Guilty" as then was "No Evidence" that he committed the infraction/WAC violation. This is prima facie evidence that the record sought might be damning to the Respondents, and therefore a

viable reason for them not wanting to release the record.

Appellant contends a shell game is being played. Respondents further attempt to hide the truth by merely citing a website. Appellant cannot see for himself whether this is the retention schedule claimed, or merely a link to Hillary Clinton's e-mail account. Why not provide the actual page cited? Because it states, "Retain for 2 years."

Respondents state that the Legislature has acquiesced to the Courts's interpretations. Does the Court inform the Legislature every time they decide contrary to the legislative intent? No. Does the Legislature acquiesce to the circumvention of the PRA? No.

Appellant again refers to the legislative intent of the PRA, "The people, in delegating authority, do not give their public servants 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. Respondents contradict this intent.

Appellant also reiterates, "[i]n the event of a conflict between the provisions of this chapter and <u>any other act, this chapter shall govern.</u>" RCW 42.56.030 (Emphasis added). Obviously, RCW 40.14 must qualify as the "any other act" referenced by Legislature. This is an obvious statement that the Legislature does foresee RCW 40.14 to be included within RCW 42.56. This is not ambiguous or equivocal. Legislature has not, nor have they ever,

intended for monetary damages to be precluded in retention schedule violations.

Respondents agree that RCW 40.16 covers officers who intentionally destroy public records improperly. RCW 40.16.010, 40.16.020, and 40.16.030 show that violations equate to class B and class C felonies, requiring prison time and fines. Yet, Respondents deny cause of action due to the Appellant. This completely contradicts the PRA. RCW 42.56.550(4) states that in cases for non-disclosure for any reason that is not an exemption, the PRA requires monetary damages. Appellant contends that both monetary damages are forthcoming to the Appellant, and that criminal charges must be brought againt the Respondents for their knowing, willing, wanton circumvention of the PRA. Appellant has written to the Snohomish County Prosecutors Office, in vain. They did not respond in any manner.

The Respondents keep the daily Call-Out System Records for the required retention schedule time. The specific record sought by the Appellant is covered by pages 31 and 35 of the Retention Schedule. See Appellant's Brief, Appendix "B." Therefore, they needed to be retained for two years prior to destruction. The record sought was destroyed improperly. RCW 40.14, RCW 40.16, and RCW 42.56 all require punitive measures against Repsondents, to include monerary damages. Bad faith is shown in this matter. Full damages are

forthcoming. A "party prevails under this statute [PRA] if the records should have been disclosed on request." Spokane Research & Defense Fund v. City of Spokane, 255 Wn.2d 89, 103, 117 P.3d 1117 (2005), and "Penalties for late disclosure are mandatory," Id., at [*16]. The specific record sought should have been disclosed. The information is not in the primary records cited by Respondents, nor did they disclose that information or responsive.

Respondents have now reached a new level of shell game operations. They recently banned all CD-ROM's from entering the prison, except those purchased from their vested company, Access Securepak. Since that policy change, Appellant has been asking the Public Disclosure Unit of the Respondents' agency to send the Public Disclosure CD's to a third party, as in this present case.

Today, however, Appellant received two (2) Mail Rejections from the MCC Mailroom, rejecting the Public Disclosure material. The reason they gave for the rejections is that this entails a "Third Party Correspondence."

The problem with this argument is that the Respondents, themselves, are the "Third Party." This is yet another method to interfere with Appellant's legal court access, in that Appellant uses Public Dosclosure to research/investigate and obtain "informal discovery." Further, since they only pay $55 per month, when Appellant

is allowed to be employed, they are aware that this becomes a monetary hindrance. They are erecting positive barriers beyond their recent removal of typewriters from the law library. This has created a new cause of action that the Appellant will be bringing to this court at a later date.

Finally, it is another method to deny inspection and copying of the public records that Appellant has sought from the Respondents. This is yet another prime example of bad faith on the part of the Respondents.

IV. CONCLUSION

Respondents are deciding what records are good for the people to know and what records are not good for the people to know. They continually attempt and commit circumvention of the PRA. They wish for this Court to state on the record that this is what the Legislature intended. This Court cannot allow this to continue.

For the reasons and argument provided herein, this Court must find for the Appellant and impose full sanctions, to include all mandatory monetary penalties under the PRA, criminal charges under the Retention Schedule Act, and any other punitive measures that this Court might determine to warranted.

RESPECTFULLY submitted this 12th day of March, 2015 A.D.

JAMES BARSTAD

JAMES BARSTAD, Appellant
C/O [#759730]
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777, WSRU-B123
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2.3 OFFENDER CUSTODY

The activity relating to offenders currently and previously incarcerated in the state's correctional facilities

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
83-06-32474 Rev. 2	***Prison Hearings*** Records relating to any general or serious infractions committed by an offender and in response to an offender appeals. Includes, but is not limited to: • Hearing packet documents; • Tapes or other media used to record hearings, WAC 137-28-310 (1)(c); • Reduction of serious to minor infraction; • Not guilty findings and appeals.	**Retain** for 2 years after end of calendar year *then* **Destroy**.	NON-ARCHIVAL NON-ESSENTIAL OFM
01-05-60069 Rev. 2	***Work Release*** Records relating to individual offenders participating in work release programs. Includes, but is not limited to: • Point to point passes; • Job related assignments; • Pertinent contractor documents.	**Retain** for 3 years after last date of work release participation *then* **Destroy**.	NON-ARCHIVAL NON-ESSENTIAL OPR
83-06-32524 Rev. 2	***Working/Reference File – Offender*** Working/reference files maintained by correctional officers relating to their particular assigned offenders. Includes, but is not limited to: • Reference/duplicate copies of other records; • Transitory records not covered by a more specific records series.	**Retain** for 2 years after end of calendar year *then* **Destroy**.	NON-ARCHIVAL NON-ESSENTIAL OFM

CERTIFICATE OF SERVICE BY MAILING

I, JAMES BARSTAD, being of the age of majority and competent to state the matters set forth herein, Aver and Declare the following:

That on the 12th day of March, 2015, I placed into the U.S. Postal Service, at the MONROE CORRECTIONAL COMPLEX, with the proper prison forms attached, copies of the following documents:

1) APPELLANT'S REPLY BRIEF

2) CERTIFICATE OF SERVICE BY MAILING

These mailings were addressed to the following parties:

1) WASHINGTON ATTORNEY GENERAL
HALEY BEACH
P.O. BOX 40116
Olympia, WA 98504-0116

2) WASHINGTON STATE SUPREME COURT
P.O.BOX 40929
TEMPLE OF JUSTICE
Olympia, WA 98504-0929

Further, I certify these facts as true, correct, certain, and complete, under penalty of perjury, pursuant to the laws of the State of Washington and of the United States of America.

JAMES BARSTAD

C/O JAMES BARSTAD [#759730]
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