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Washington State Supreme Court

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E
Ronald R. Carpenter
Clerk

No 92496-1

IN THE WASHINGTON STATE SUPREME COURT

JAMES BARSTAD)	COA No 47669-0 II
Petitioner,)	
)	
Vs.)	PETITION FOR
)	DISCRETIONARY REVIEW
WASHINGTON STATE DEPARTMENT)	
OF CORRECTIONS)	
)	
Respondent)	

I. IDENTITY OF MOVING PARTY:

COMES NOW, James Barstad, Petitioner In Pro Per,
seeking the relief designated in Part II, herein below

II. STATEMENT OF RELIEF SOUGHT:

Petitioner Barstad seeks discretionary review of the
Division Two Court of Appeals Unpublished Opinion,
dismissing Petitioner's appeal of a Public Records Act (PRA)
suit, in COA No 47669-0-II Copy of the Opinion is attached
herein as Exhibit "A"

III. RELEVANT FACTS:

Petitioner incorporates the Facts presented in the Unpublished Opinion (See Exhibit "A"), as if fully reproduced herein

IV. GROUNDS FOR RELIEF AND ARGUMENT:

The Court of Appeals Opinion is in error, as their decision (and the State's argument) is not in line with the Legislative intent of the PRA "The PRA begins with a mandate of full disclosure of public records .." Progressive Animal Welfare Soc'y v University of Washington 125 Wn 2d 243, 358, 885 P.2d 592 (1994). Further, "We liberally construe the PRA in favor of disclosure and narrowly construe its exemptions " RCW 42 56 030.

The State also argued that since the Public Record sought did not exist at the time of the original request "[T]here was no agency action to review .. because the record he sought 'did not exist.'" Building Indus Ass'n of Wash v McCarthy (BIAW), 152 Wn App 702, 734, 218 P 3d (2009) This Division Two Court of Appeals case law is also in error

If the Preservation and Destruction of Public Records Act of 1981, c 40, 14 et seq. were enacted by the Legislature as "necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1981 [1981 c 115 § 10], it does not

follow that this **Act** was intended by the Legislature to be taken lightly. The State has informed the court that "willful violations of RCW 40 14 subject a person to criminal prosecution." It is nonsensical to assume that RCW 40 14 et seq should not be followed by the DOC.

The **Act** of RCW 40 14 was in full force and effect at the time of the original request for Public Records. The Retention Schedule that was implemented for the DOC to follow was ignored. Thus, and the State has ceded, a criminal act has occurred. Had the DOC followed the **Act** and Retention Schedules (See **Exhibit "B"**) that were in full force and effect, the record would have been present, and we would not be trying this present case.

While it is true that in Daines v Spokane County, 111 Wn App 342, 350, 44 P 3d 909 (2002), the court held that "no civil remedy is available for premature destruction of a document under RCW 40 14, this case is also in error, as it does not meet the Legislative intent of the PRA, wherein they have stated the PRA "requires every government agency to disclose any public record upon request, unless an enumerated exemption applies." RCWA 42 56 070 (1). There was no applicable exemption in the present case.

A party prevails under this statute [PRA] if the records should have been disclosed upon request. Spokane Research & Defense Fund v City of Spokane, 225 Wn 2d 89,

102, 117 P 3d 1117 (2005), and "Penalties for late disclosure are mandatory " Id. at [*16]. The record should have been disclosed. It was not due to be destroyed for another eighteen months after the request was made. The willful early destruction was a criminal act, which shows bad faith and circumvents the PRA and the Legislature's intent of its enactment.

The State's argument that RCW 40 14 is not incorporated in RCW 42 56 also cannot hold, as RCW 42 56 030 explicitly states, "In the event of conflict between the provisions of this chapter and **any other act**, the provisions of this chapter shall govern." Any other act must include the Preservation and Destruction Act of 40 14, and the Retention Schedule that follows from that. We can circularly argue the situations all we want.

Webster's II New College Dictionary (3rd ed. 2005), pg 29:

all (adj), 1 The total entirety or extent of <all the West> 2 The whole number, amount or quantity of <all the guests> 3 The utmost possible of <in all honesty>. 4 Every <all manner of trouble> 5 Any whatsoever <beyond all question> 6 Nothing but: ONLY <all hair and teeth> (pron) 1 Each and every one <all were lost> 2 The whole number: TOTALITY <all of them> (adv) 1 Wholly: entirely <all confused>. 2 each: apiece <the score was seven all> 3 exclusively <the mail is all for me>

Webster's Dictionary.

The Supreme Court reviews questions of statutory interpretation de novo. State v. Wentz, 149 Wn 2d 342, 346,

68 P 3d 282 (2003) (citing Pasco v Pub Emp't Relations Comm'n, 119 Wn 2d 504, 507, 833 P 2d 381 (1992))

Statutory interpretation is a matter of law that we review de novo. Jametsky v Olsen, 179 Wn 2d 756, 761, 317 P 3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislative intent. Jametsky, 179 Wn 2d at 762, 317 P 3d 1003 (2014). To determine legislative intent, we look to the plain language of the statute. Id. We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. Lowy v Peacehealth, 174 Wn 2d 769, 779, 280 P 3d 1078 (2012). When the statute at issue or a related statute includes an applicable statement of purpose, the statute should be read in a manner consistent with the statute. See, Protect the Peninsula's Future v Growth Mgmt Hr'gs Bd, 185 Wn App 959, 969-70, 344 P 3d 705 (2015).

If the plain meaning of the statute is unambiguous, we must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. Jametsky, 179 Wn 2d at 769, 317 P 3d 1003 (2014). We do not rewrite unambiguous statutory language under the guise of interpretation. Cerillo v Esparza, 158 Wn 2d 194, 201, 142 P 3d 155 (2006). And we do not add language to an unambiguous statute even if we believe the legislature

"intended something else but did not adequately express it "
Kilian v Atkinson, 147 Wn 2d 16, 20, 50 P 3d 638 (2002)

The PRA is unambiguous. The legislature intended the PRA to incorporate RCW 40 14, the Preservation and Destruction of Public Records Act. The express language of RCW 42 56 030 states this. To presume that a violation of RCW 40 14 will not also violate the PRA is to rewrite unambiguous statutory language under the guise of interpretation" and to "add language" where the legislature did, in fact, "adequately express" their intention.

If a statute is unambiguous (while NOT the case here), courts may "resort to statutory construction, legislative history, and relevant case law for assistance in discovering legislative intent." Christensen v Ellsworth, 162 Wn 2d 365, 373, 173 P 3d 228 (2007). A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. Berger v Sonneland, 144 Wn 2d 91, 105, 26 P 3d 257 (2001).

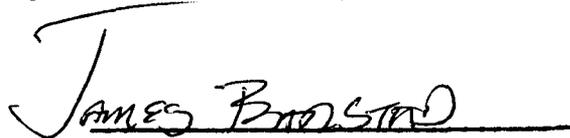
"The [PRA] is a strong, broad mandate for the disclosure of public records." Hearst Corp v Hoppe, 90 Wn 2d 123-127, 580 P 2d 546 (1978). We liberally construe the PRA in favor of disclosure and narrowly construe its exemptions." RCW 42 56 030. A Retention Schedule was in effect, but not followed, resulting in a criminal act. In

West v Washington Dept of Natural Resources, 163 Wn App 235, 258 P 3d 78 (2011) he argued that if the Court would not enforce RCW 40 14, government agencies would use this loophole to circumvent the PRA That is exactly what has occurred in the present case, and is diametrically opposed to the express intention of the Legislature regarding public records and transparency in governmental operations. All the cases cited by the Court of Appeals in support of their Opinion have originated from that same court As they are all in error, this Court needs to submit their Opinion to scrutiny and correction

V. CONCLUSION:

Based upon the facts and arguments presented herein, Petitioner Barstad requests this Court review the Opinion of the Division Two Court of Appeals

DATED this 9th day of November 2015, A D



C/O JAMES BARSTAD [#759730]
Petitioner, In Pro Per
MONROE CORRECTIONAL COMPLEX
P O BOX 777; WSRU D339
Monroe, Washington [98272]

November 3, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS,

Respondent,

v.

JAMES BARSTAD,

Appellant.

No. 47669-0-II

UNPUBLISHED OPINION

WORSWICK, J. — James Barstad filed a complaint in the Thurston County Superior Court alleging that the Washington State Department of Corrections failed to disclose a requested record in violation of the Public Records Act (PRA). Both parties moved for summary judgment. The superior court denied Barstad's motion for summary judgment and granted summary judgment in favor of the Department. Barstad appeals, asserting that the Department improperly destroyed the record at issue prior to his PRA request in violation of RCW 40.14.060, (the records retention statute) and that such violation entitled him to relief under the PRA as a matter of law. Because Barstad concedes that the record he sought had been destroyed prior to his PRA request, and because the destruction of records in violation of RCW 40.14.060 does not give rise to a cause of action under the PRA, we affirm the order granting summary judgment in favor of the Department.

EXHIBIT "A"

FACTS

Barstad is an inmate residing at the Monroe Correctional Complex. Between April 27, 2013 and January 28, 2014, Barstad filed three PRA requests with the Department. Barstad's first PRA request sought "copies of all Disciplinary Sanction Lists issued during October and November of the year 2012, at MONROE CORRECTIONAL COMPLEX." Clerk's Papers (CP) at 48. After reviewing the Department's responsive documents and not finding the specific record he was seeking, Barstad filed a second PRA request that sought "Sanction Lists from the [Washington State Reformatory Unit] section of [the Monroe Correctional Complex], from the dates previously cited [in the earlier PRA request]." CP at 57. The Department's responsive documents again did not contain the specific record that Barstad was seeking, and he filed a third PRA request. Barstad's third PRA request clarified that the specific record he was seeking was "a memo to: 'ALL STAFF' from 'SGT'S KNOX/DOPSON' and the subject: 'A/B UNITS Disciplinary Sanction List,'" and that this record was created on October 27, 2012. CP at 68. After receiving Barstad's third PRA request, the Department responded by stating that it could not locate the record he was seeking because "these types of documents are sent to unit staff and are often not kept after a sanction is completed." CP at 72.

On April 4, 2014, Barstad filed a complaint in the Thurston County Superior Court alleging that the Department violated the PRA by denying him access to his requested record. On June 26, Barstad moved for summary judgment, arguing that the Department's prior destruction of his requested record violated the records retention statute and that the Department's violation of the retention statute entitled him to relief and a finding of bad faith

under the PRA as a matter of law. The Department filed a response and cross motion for summary judgment, which asserted that the destruction of a record in violation of the records retention statute does not constitute a violation of the PRA.¹ The Department argued that it was entitled to summary judgment because there was no dispute that the record at issue no longer existed when Barstad requested it and, thus, it could not have violated the PRA for failing to produce a nonexistent record.

The superior court entered an order denying Barstad's motion for summary judgment and granting the Department's cross motion for summary judgment. Barstad appeals.

ANALYSIS

Barstad contends that the trial court erred by granting summary judgment to the Department because the Department's destruction of the record at issue was in violation of RCW 40.14.060. Because the destruction of a record in violation of RCW 40.14.060 does not give rise to a PRA claim, we disagree and affirm the superior court's summary judgment order.

We review an order granting summary judgment de novo. *Gronquist v. Dep't of Corr.*, 159 Wn. App. 576, 582-83, 247 P.3d 436 (2011). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In reviewing whether summary judgment was proper, we consider all facts and reasonable inferences in a light most favorable to party against whom summary judgment was

¹ The Department argued in the alternative that it did not violate the records retention statute by destroying the record at issue.

entered, here Barstad. *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011).

We also review challenged agency action under the PRA de novo. *Gronquist*, 159 Wn. App. at 582. The PRA generally requires state and local agencies to disclose all public records upon request, unless the record falls within a specific PRA exception or other statutory exemption. RCW 42.56.070(1); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). “The PRA is a strongly worded mandate for broad disclosure of public records.” *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011). And we liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. RCW 42.56.030. The PRA prohibits agencies from destroying a record “[i]f a public record request is made at a time when such record exists but is scheduled for destruction in the near future.” RCW 42.56.100. However, the PRA does not impose a duty on an agency to create or produce a record that is nonexistent at the time of a PRA request. *Building Indus. Ass'n of Wash. v. McCarthy* (BIAW), 152 Wn. App. 720, 734, 218 P.3d 196 (2009).

It is undisputed that the record Barstad sought had been destroyed by the Department prior to his PRA request. Therefore, the only PRA provision regarding the retention of public records, RCW 42.56.100, by its terms does not apply. Barstad argues that our legislature intended the PRA to incorporate the record retention provisions of chapter 40.14 RCW. But no

language within the PRA evinces such legislative intent.² To accept Barstad's interpretation of the PRA would require us to import language into the act that our legislature chose not to include. We lack such authority. *See Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009) (In discerning legislative intent, this court "cannot add words or clauses to a statute when the legislature has chosen not to include such language.").

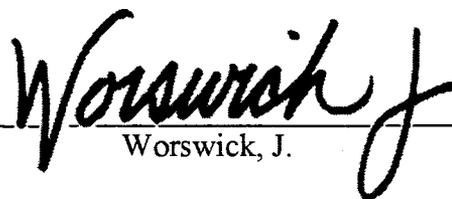
Barstad also argues that the failure to incorporate the records retention statute's records retention provisions into the PRA will allow agencies to circumvent the PRA by improperly destroying records before the records are requested. We rejected this same argument in *West v. Washington State Dept. of Nat. Res.*, 163 Wn. App. 235, 245, 258 P.3d 78 (2011), and need not revisit it here. *See also BLAW*, 152 Wn. App. at 741. Moreover, our legislature has elected to enforce the record retention provisions of chapter 40.14 RCW by imposing criminal penalties for the improper destruction of public records. RCW 40.16.010.

Because it is uncontested that the record Barstad sought did not exist when he requested it, and because the destruction of a document prior to a PRA request is not actionable under the

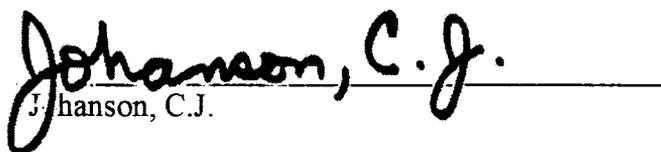
² In support of his argument that the legislature intended to incorporate the records retention statute into the PRA, Barstad cites only to RCW 42.56.030, which provides in relevant part, "In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." We cannot discern how this provision demonstrates the legislature's intent to incorporate the records retention statute into the PRA. The only apparent circumstance where provisions in the PRA and the records retention statute overlap is where a record is requested under the PRA that is scheduled to be destroyed under the timelines established in the records retention statute. In such a circumstance, which is not present here, RCW 42.56.030 merely dictates that RCW 42.56.100 applies to prevent the agency's destruction of the requested record.

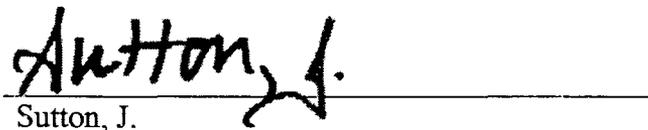
PRA, the Department was entitled to summary judgment on Barstad's PRA claim.³ Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Johanson, C.J.


Sutton, J.

³ Because we hold that the destruction of a record prior to a PRA request is not actionable under the PRA, we need not address the Department's argument that the record at issue was a "transitory document" not subject to retention under the records retention statute. Br. of Respondent at 9.

2.6 SECURITY AND CONTROL

The activity of imposing control over offender populations in an effort to provide protection and prevent security disturbances and improper conduct.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
13-09-68456 Rev. 0	<p>Law Library Access Records relating to requests from offenders for access to facility's law library. Includes, but is not limited to:</p> <ul style="list-style-type: none"> • Granted or denied requests; • Scheduling; • Call-out logs; • Copies of offender's filed court documents. 	<p>Retain for 2 years after end of calendar year <i>then</i> Destroy.</p>	<p>NON-ARCHIVAL NON-ESSENTIAL OFM</p>
83-06-32469 Rev. 2	<p>Logs – Security and Control Logs relating to the various types of tracking throughout the facility to include movements of physical items (vehicles, keys, tools), staff and offenders. Includes, but is not limited to:</p> <ul style="list-style-type: none"> • Custody, key , tool and vehicle control; • Cell block and unit tower security and control; • Drug screening and urinalysis; • Administrative segregation; • Telephone logs; • Offender mail logs; • Offenders who were in lay-in status or not released from assigned units for work or other assignments. 	<p>Retain for 2 years after end of calendar year <i>then</i> Destroy.</p>	<p>NON-ARCHIVAL NON-ESSENTIAL OFM</p> <p style="writing-mode: vertical-rl; text-orientation: mixed;">EXHIBIT 11</p>

2.5 OFFENDER MOVEMENT

The activity of tracking and monitoring movement of offenders into, within or out of the correctional facility.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
13-09-68454 Rev. 0	Extraditions Records relating to agency planning and coordination of offender extraditions to out-of-state detention facilities.	Retain for 6 years after extradition fulfilled, cancelled or expired <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OPR
83-06-32467 Rev. 2	Movement Rosters – Counts and Lists Records relating to tracking offender populations. Includes, but is not limited to: <ul style="list-style-type: none"> • Offender movement and location; • Offender population; • Various lists of offenders relating to work assignments, name and identification numbers, release dates; • Offender lists of lay-in status or not released from assigned units for work or other assignments. 	Retain for 2 years after end of calendar year <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM
95-05-54932 Rev. 2	Transportation – Offenders Records relating to the transport of offenders to and from the institutions or offenders transporting into a facility from the county of origin. Includes, but is not limited to: <ul style="list-style-type: none"> • Transportation officer receipts; • Transport records from county facility. 	Retain for 3 years after end of calendar year <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OFM

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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 9th day of NOVEMBER 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) PETITION FOR DISCRETIONARY REVIEW
- 2) CERTIFICATE OF SERVICE BY MAILING

These mailings were addressed to the following parties:

- 1) WASHINGTON STATE SUPREME COURT
TEMPLE OF JUSTICE
P O BOX 40925
OLYMPIA, WA 98504-0929
- 2) WASHINGTON ATTORNEY GENERAL
HALEY BEACH
P O BOX 40116
OLYMPIA, WA 98504-0116
- 3) COURT OF APPEALS
DIVISION TWO
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

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]
MONROE CORRECTIONAL COMPLEX
P O BOX 777; WSRU D-339
MONROE Washington [98272]