COA No. 33163-6-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In this Public Records Act (PRA) case, the Department of Corrections (DOC) silently withheld responsive pages of 31 separately requested original inmate grievances. The Department silently withheld the second pages, even though it knew each original grievance was comprised of at least two pages. The Department did not claim any exemption from producing these record pages. As a result, the Department "silently withheld" the records.

Upon receiving Mr. Kozol's 31 separate requests, the Department not only withheld the second pages, but then destroyed the original two-page grievances before Mr. Kozol was able to obtain complete judicial review.

Even though the Department confirmed that each of Mr. Kozol's 31 requests each sought the original complaint/grievance form, the Department eventually identified that it improperly modified Mr. Kozol's requests to no longer include the original complaint/grievance forms, and only considered the requests to be for any and all records of offender grievance packets.

Because the Department violated the PRA, the trial court's granting of summary judgment dismissal was error.

II. ASSIGNMENT OF ERROR

Appellant maintains all previously asserted assignments of error.

III. ISSUES PRESENTED

1. The Department's silent withholding of public records violated the Public Records Act.

2. The Department's search terms and location was inadequate.

3. The second/back pages of original complaints/grievances were responsive to the records requests.

4. PRA violation for request no. PDU-18880 is not based upon an inadequate search.

5. Department unlawfully destroyed responsive records.

6. A CR 56(f) continuance was necessary.

7. Department's e-mail evidence is irrelevant and inadmissible.

IV. ARGUMENT

A. The Trial Court Erred in Dismissing Kozol's PRA Claims

1. The Department's Silent Withholding of Public Records Violated the Public Records Act

In its response, the Department's argument that it did not silently withhold records is premised upon the categorically fallacious statement that the withheld pages "contain[ed] only boilerplate instructions for filling out the form," and thus were not responsive to Mr. Kozol's records requests. Brief of Respondent, at 8. Unfortunately, neither the Court, Mr. Kozol,

the media, nor the citizens of Washington State will ever know the true content of these 31 original grievances, as the truth evinced on these record pages have fallen prey to the Department's continued practice of unlawfully destroying records requested under the Public Records Act.

The remainder of the Department's argument is equally misplaced, asserting that the withholding of the 31 pages was not done "purposefully," because the second page of the original grievance forms are "not considered to be part of the grievance record." Brief of Respondent, at 9-10.

This argument is fatally flawed. As the record shows, Respondent verified that each of Mr. Kozol's requests sought the original complaint/grievance form. CP 72-150. Moreover, Respondent admitted that it knew each original complaint form contained at least two pages. CP 228 The record is devoid of any showing that the Department claimed a statutory exemption from producing the second page of each original grievance.

The failure to provide explanations in these 31 requests are "silent withholdings," which occurred when the Department "retain[ed] a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld." Progressive Animal Welfare Society v. Univ. of Wash., 125 Wn.2d 243, 250, 884 P.2d 592 (1994)(emphasis added).

Respondent's argument seems to advance a new theory of law under the PRA: one that categorically excuses an agency from identifying or producing non-exempt records, and excuses the agency from claiming a required exemption, so long as the agency takes it upon itself to unlawfully modify a clear request for an identifiable record, disregards a portion of the records request, and only produces the portion of the record that best serves the agency's interests. Brief of Respondent, at 9-10. Appellant has been unable to locate any statutory language or case law that supports the Department's argument.

Because the request for each original complaint/grievance was confirmed by the Department, because no clarification was sought, and because no exemptions were claimed, the Department's 31 silent withholdings of the original second pages violated the PRA.

2. Inadequate Search Terms/Location

In arguing that a different search would not have yielded the second page of the filed grievances, the Department again bases its argument upon the improvident position that "neither review of the paper copies of the grievances nor a change in the search terms would have yielded the back page of [sic] grievance form as responsive to [Kozol's] request because the Department reasonably interpreted the request not to include

the boilerplate instruction page." Brief of Respondent, at 11. Further, the Department cites to various inadmissible evidence as foundation for its various and sundry deficiencies in conforming to the strict requirements of the PRA.[1] All such argument is misplaced.

Again, the true information on these withheld pages will never be known because they were illegally destroyed after Mr. Kozol requested them. What is more, the Department had no problem searching previously for paper grievance records in its local files when responding to other PRA requests for grievance documents. CP 153. The Department's position here is that it simply did not have to abide by the PRA in this case, as the requested records apparently contained content that the DOC was willing to violate the law and destroy records to prevent the information from being disclosed.

Further, the Department knew that the back pages of original grievances contained more than just "boilerplate instructions." CP 403-56. With its admitted knowledge that the original paper

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[1] Appellant has assigned error to the trial court's failure to grant a motion to strike the Department's inadmissible evidence. Opening Brief of Appellant, at 42-48. However, even if not prevailing on this issue, the evidence being cited in Respondent's brief, as inadmissible evidence, should simply be disregarded by this Court. See Tamosaitis v. Bechtel, 182 Wn.App. 241, 253, 327 P.3d 1309 (Div.3 2014)(Rather than striking the brief, "instead, we will simply ignore the offending portions of the reply brief."); Becerra v. Expert Janitorial, LLC, 176 Wn.App. 694, 730, 309 P.3d 711 (2013)("This court is aware of what is properly before us and what is not. We have not considered material that is not properly before us in deciding this case.")

grievances contained at least two pages, its confirmation that each of the 31 requests sought the original complaint/grievance form, its knowledge that the second pages frequently contained substantive grievance content, and its having searched the local paper files in other similar requests, the Department of Corrections was required to search the local paper files, for the original grievances. Under such a search, the second pages of the original grievances were required to be identified and produced, absent a claimed exemption.

3. The Second/Back Pages Were Responsive

The Department argues that "the back page of the grievance form was not responsive regardless of whether it contained any handwriting." Brief of Respondent, at 13-14. While the Department has gone to considerable effort to obfuscate the disclosability of these public records by crafting lines of testimony in a sworn declaration to render these second/back pages of original grievances "not responsive," the ultimate determination nevertheless remains the purview of this Court.

Fortunately for the citizens of Washington State, this Court's de novo review does not give deference to any agency's interpretation, opinion, or position of whether the document pages were used, and are thus public records. See Amren v. City of Kalama, 131 Wn.2d 25, n.6, 929 P.2d 389 (1997) ("The Court, not the agency seeking to avoid disclosure, determines whether

the records [should have been disclosed]."") (citing Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995)); see Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978); Brouillet v, Cowles Publ'g Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990).

Here, not only has the Department's efforts culminated in a sworn declaration that is proven by Appellant's public records evidence to be factually false in claiming second/back pages of original grievances are never used (Opening Brief of Appellant, at 36-38), but the Department went on to illegally destroy the very document pages that it claimed only contained "boilerplate instructions." Not only is the Department's argument untenable under the terms of the Public Records Act, but it fails under the applied principles of spoliation as well.

Spoliation is the intentional destruction of evidence. BLACK'S LAW DICTIONARY (8th ed. 2004) pg. 1437. Washington courts treat spoliation as an evidentiary matter. To remedy spoliation, a court may apply a rebuttal presumption that shifts the burden of proof to the party who destroys or alters important evidence. Marshall v. Bally's Pac West, Inc., 94 Wn.App. 372, 381, 972 P.2d 475 (1999); Henderson v. Tyrell, 80 Wn.App. 592, 604, 910 P.2d 522 (1996). According to the Washington Surpeme Court:

> "[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory

> explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him."

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

In determining whether to apply the rebuttal presumption, a court considers "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." Marshall, 94 Wn.App. at 381. Whether the missing evidence is important or relevant depends on the particular facts and circumstances of the case. Henderson, 80 Wn.App. at 607. In weighing the importance of evidence, a trial court considers whether the party was afforded adequate opportunity to examine the evidence. Henderson, 80 Wn.App., at 607.

A party's actions in destroying evidence are improper, constituting spoliation, where the party has a duty to preserve the evidence in the first place. Homeworks Constr., Inc. v. Wells, 133 Wn.App. 892, 900, 138 P.3d 654 (2006). If the destroying party had a duty to preserve evidence, culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction of the evidence. Henderson, 80 Wn.App. at 609.

Here, it is well established that the Department destroyed the requested records "wrongfully". Opening Brief of Appellant, at 30-32.

4. PRA Violation for PDU-18880 is not Based Upon an Inadequate Search

The Department argues that there was no PRA violation for request no. PDU-18880 because its search was adequate. Brief of Respondent, at 15-16. But the Department has misapprehended the issue under review. Appellant argued that the failure to produce any responsive records in PDU-18880 was a violation of the PRA because the records should have been produced. Opening Brief of Appellant, at 8-9.

Appellant has not predicated this issue upon a claim that the search for records was inadequate. Merely, the records were wrongfully withheld, with no claimed exemption -- in fact, the agency stated that no records existed (CP 77) -- and the production of responsive records after suit was filed precluded dismissal as entered by the trial court. Opening Brief of Appellant, at 8-9.

5. Unlawful Destruction of Responsive Records

The Department argues in its brief, and for the first time in this litigation, that Mr. Kozol's unlawful records destruction claims are not raised in the amended pleadings. Brief of Respondent, at 16. While these claims were not enumerated in Mr. Kozol's amended complaint, the newly exposed violation claims were raised in opposition to summary judgment. CP 206-08.

Nowhere in its Reply on summary judgment did the Department object to the inclusion of these destruction claims; instead the Department was content with focusing on arguing inadmissible evidence of e-mail communications. CP 470-75. Mr. Kozol then again raised the destruction claims in his CR 59 motion for reconsideration. CP 371-75. As shown by the absence in the record, the Department elected to not object or even file any argument in opposition of these destruction claims on reconsideration. Accordingly, these claims were amended into the pleadings under CR 15(b).

CR 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Mukilteo Retirement Apartments, LLC v. Mukilteo Investors, LP, 176 Wn.App. 244, 256, 310 P.3d 814 (2013); CR 15(b). "[T]he rule is essentially self-executing," requires that issues "shall be treated as if they had been raised in the pleadings," and provides that failure to formally amend pleadings "does not affect the result of the trial on the issues." Karl B. Tegland, Vol.14 Washington Practice: Civil Procedure (6th ed. 2013) §12:38 at 895; CR 15(b).

Because the Department did not object to these destruction claims, they were tried by implied consent, and thus amended into the pleadings under CR 15(b). The trial court's Order of November 21, 2014 indicated that it considered these claims raised

in Plaintiff's Opposition to Show Cause. CP 457. Thus, the claims are amended under CR 15(b).

Next, the Department argues that the actual grievances were not destroyed. Brief of Respondent, at 17. If the Court finds this to be true, then the Department must be ordered to produce the 31 original second/back pages of the grievances without delay.

B. CR 56(f) Continuance Was Necessary

The Department argues that it was not error for the trial court to deny Mr. Kozol's motion for CR 56(f) continuance, because Mr. Kozol had two years to conduct discovery. Brief of Respondent, at 18. But it is of no moment the span of time between the records being requested and Mr. Kozol's eventual filing of this lawsuit. It was only upon the Department's first presentation of the Declaration of Lee Young, filed on May 27, 2014 (CP 151-53), that the factual assertion was made that the second/back pages of original grievances are never used, and thus would not be considered responsive to Mr. Kozol's requests for original filed grievances.

Mr. Kozol did not need to move for a continuance of summary judgment until such time that the Department actually brought such a dispositive motion. Despite Respondent's logic, it makes no sense to move for a CR 56(f) continuance prior to a dispositive

motion being filed. In fact, the Civil Rules preclude such premature application of CR 56(f). See CR 56.

C. E-mail Communication Evidence is Irrelevant and Inadmissible

The Department argues that its unlawful destruction of responsive public records, its improper modification of Mr. Kozol's 31 requests, its "silent withholding" of responsive record pages, and its inadequate record searches were somehow directly caused by the abstract fact of two individuals having conversations about various and sundry topics. Brief of Respondent, at 18-20.

It is legally untenable for an agency to attempt to evade its clear obligation under the strict requirements of the PRA by claiming its action and responsibilities were beyond its control. The Washington Courts have repeatedly held that an agency's obligations under the PRA are not vitiated by any evidence of requestor intent or reasons for records being requested. Opening Brief of Appellant, at 42-48.

There is no question that this Court's de novo review will find that the 31 original complaint/grievance forms were clearly requested (CP 72, 80-150), are identifiable records, and were known by the Department to each be comprised of at least two pages. CP 228. "An identifiable public record is one for which the requestor has given a reasonable description enabling the

government employee to locate the requested record." Beal v. City of Seattle, 150 Wn.App. 865, 872, 209 P.3d 872 (2009). Based upon the Department's confirmation of the requests and admitted knowledge that each original complaint/grievance contained two pages, the requested records were identifiable.

Because the proffered e-mail evidence is statutorily inadmissible per RCW 42.56.080, this Court's de novo review does not consider it when reviewing the order of summary judgment. See Kenco Enterprises Northwest, LLC v. Wiese, 172 Wn.App. 607, 615, 291 P.3d 261 (2013) ("[a] court cannot consider inadmissible evidence when ruling on a summary judgment motion.") The trial court should have granted Mr. Kozol's motion to strike the irrelevant e-mail evidence.

V. CONCLUSION

For the reasons stated above, and in the Opening Brief of Appellant, this Court should find that the trial court erred in denying Plaintiff's motion for continuance and motion to strike. The Court should also find the trial court erred in granting summary judgment dismissal to the Department. Summary judgment should be reversed, and the case remanded to allow Appellant to complete the necessary discovery.

RESPECTFULLY submitted this 12th day of July, 2015.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 12th day of July, 2015, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 33163-6-III:

Reply Brief of Appellant;

;

;

.

addressed to the following:

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

DATED THIS 12th day of July, 2015, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

STEVEN P. KOZOL
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