Supreme Court No. 92792-8
COA No. 33163-6-III

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

STEVEN P. KOZOL, the Appellant below, now petitions this Court to grant discretionary review of the decisions below as identified in Section II.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals published opinion dated December 1, 2015, and the Order Denying Reconsideration and Amending Opinion dated January 12, 2016. These decisions are attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. When a requestor brings an enforcement action under the Public Records Act to compel disclosure of withheld records, and during litigation the agency voluntarily produces previously withheld responsive records, does the Public Records Act require that the requestor be deemed the prevailing party, who is entitled to costs of suit, and any applicable attorneys fees?

2. When a requestor explicitly requests a certain public record that the agency knows is comprised of multiple pages, can the agency withhold some of the pages without claiming an exemption under the Public Records Act?

3. When an agency knows that requested records are located in another location, but then intentionally fails to search that location, does such agency action constitute an inadequate search violating the Public Records Act?

4. When an agency silently withholds portions of requested public records, and then destroys the records before the pending request is judicially resolved, does such agency action violate the Public Records Act?

5. When an agency considers an alleged intent of a records requestor for seeking public records in its determination of whether records should be disclosed, does such agency action violate the Public Records Act?

D. STATEMENT OF THE CASE

There is considerable misconduct within the Department of Corrections (DOC) that is currently being exposed by the media to the public. This case expands on this misconduct. Inmate Steven P. Kozol is conducting an investigation to expose illegal practices within the Department of Corrections. This misconduct includes "staff abusing the grievance process and destroying evidence submitted," staff "destroying documents submitted in the course of responding to inmate grievances," and DOC's "complete failure or a partial failure to effectively process offender's complaints on various issues." Clerk's Papers (CP) 184. This misconduct also includes racially-biased and discriminatory practices in resolving inmate grievances. CP 218.

Based upon privileged knowledge that certain DOC grievance staff frequently wrote racially derogatory remarks on the front or back pages of inmate grievance forms, Mr. Kozol began recruiting African-American inmates who had grievances processed

by these specific racially-biased staff, and he obtained hundreds of inmate grievance log i.d. numbers from these inmates.[1] Mr. Kozol also obtained additional grievance log i.d. numbers from other inmates who had "been mistreated in any grievances lately." CP 187. In total Mr. Kozol obtained "hundreds of log numbers, over a period of a year." CP 187.

The Department of Corrections does not allow inmates to receive in the U.S. Mail public disclosure documents of other inmates' grievance records, and the DOC may issue discretionary mail rejections on such documents. CP 263-267. To obtain specific inmate grievance documents through public disclosure Mr. Kozol enlisted the assistance of his attorney to receive the records produced by the Department. CP 219. Mr. Kozol submitted a first set of requests for 31 specific original inmate grievances to the Department. Each request sought "any and all records for inmate/offender grievance # []. This includes the original complaint form." CP 42-71. The DOC responded and assigned sequential tracking numbers to the requests, nos. PDU-18880 to PDU-18910, and expressly confirmed that each of Mr. Kozol's requests sought a copy of "the original complaint form." CP 72-73.

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[1] In depositions Mr. Kozol declined to divulge this specific factual basis on the grounds of attorney-client privilege and protected work product. CP 184-185. He feared retaliation from DOC staff, so he simply catagorized this issue as the "evidence base upon which I was going to be investigating and formulating the cause of action for my civil suit in federal court." CP 188.

On April 2, 2012, the Department notified Mr. Kozol that there were no responsive records to request no. PDU-18880, and closed the request. CP 77. As to the remaining 30 requests, DOC produced between April 2, 2012 to April 16, 2012 what it purported to be all responsive records in their entirety by e-mailing the records to Mr. Kozol's dedicated e-mail account in the community, and memorializing each record production in 30 separate letters sent to Mr. Kozol via U.S. Mail. Again, each of DOC's production letters expressly confirmed that Mr. Kozol had sought "the original complaint form." CP 80-150.

Mr. Kozol's incarceration prohibited him from reviewing the responsive record productions, so he had the records forwarded to his attorney. CP 219. With the assistance of counsel, Mr. Kozol identified that the DOC had not produced the second pages of the original complaint/grievance forms he had requested. CP 219. Simply trying to get these withheld second pages, Mr. Kozol submitted from May 25, 2013 to July 5, 2013 a series of seven (7) different follow-up requests specifically notifying DOC that it had silently withheld the second pages of each of the 31 original complaint forms. The DOC never produced the second pages, never indicated it would search for them, and never stated any records had been destroyed. CP 13-14. Mr. Kozol then wrote an eighth follow-up letter on November 22, 2013, again specifically requesting that the second pages of the requested original grievance forms be provided to him, but still the DOC would not produce the specific second pages. CP 222-226.

With eight follow-up requests having been ignored by the DOC, Mr. Kozol filed suit, followed by a first amended complaint on January 8, 2014. CP 11-16. On April 10, 2014, after being served with the lawsuit, the DOC produced four (4) record pages that had been silently withheld in request no. PDU-18880. CP 78. However, the DOC never produced any of the silently withheld second pages of the 31 requested original complaint/grievance forms specifically requested by Mr. Kozol. CP 232.

In discovery the DOC admitted that it knew each of the 31 requested "original" complaint/grievance forms were comprised of two pages, a front and a back of a double-sided piece of paper. CP 228. The DOC also identified in discovery that eight (8) different (two-page) original grievances responsive to requests nos. PDU-18880, 18881, 18897, and 18907-18910 were destroyed after Mr. Kozol requested the records. CP 253-256. Further, DOC admitted that the original grievance documents had been "destroyed after Plaintiff's initial February 8, 2012 records requests in this case." CP 397.

The DOC moved for summary judgment dismissal of Mr. Kozol's claims. While the DOC filed two supporting declarations in its dispositive motion, neither established how or where the searches were conducted for 30 of these requests, PDU-18881 to PDU-18910. One declaration touched on how records were located in a single request, PDU-18880, but spoke nothing to the searches in the remaining 30 requests. CP 35-37. The other declaration merely discussed general agency practices of how inmate (paper) grievance

files are scanned into a computer database, but completely failed to discuss how any searches were conducted for 30 specific requests, nos. PDU-18881 to PDU-18910. CP 152-153.

In its summary judgment motion the DOC argued its records searches were adequate, and attempted to explain its failure to produce the second pages of these 31 records by asserting that "the DOC did not deny or refuse the Plaintiff from reviewing the back page of [the original grievance forms] as it did not consider the document to be responsive to the Plaintiff's requests," as the withheld second pages are "merely instructional for the offender." CP 29. This was based, according to the Department, upon its sworn declaration evidence where DOC staff testified under penalty of perjury that the second pages of original inmate grievance forms are not used by inmates or staff in the grievance process and therefore are "not considered" part of a "grievance record." CP 29, 152-153.

To contradict this assertion, Mr. Kozol filed numerous examples of these pages that were used by inmates or staff in the agency's grievance process. CP 403-456. Mr. Kozol argued that the DOC failed to establish how it searched for the 31 requests, as the DOC's declaration evidence was deficient on summary judgment. CP 208-210. Mr. Kozol also argued that the DOC's admitted destruction of at least eight (8) of the withheld original (two-page) grievances violated the PRA. CP 204-208. Mr. Kozol also argued that DOC's summary judgment dismissal was precluded by its production of responsive records in request no. PDU-18880 after Kozol filed suit,

which required that he be found to be the prevailing party and be awarded all expenses of litigation. CP 212-215.

The trial court granted the DOC's motion for summary judgment, found that the agency's records searches were adequate, and that there was no violation of the PRA. CP 354-364. Mr. Kozol moved for reconsideration. CP 365-456. The trial court denied the motion. CP 462-469. The Court of Appeals affirmed the summary judgment dismissal, determining that (a) there was no PRA violation because no responsive records were destroyed after Mr. Kozol requested them; (b) despite the agency producing responsive records after being served with the lawsuit, Mr. Kozol was not the prevailing party and was not entitled to costs of suit; (c) the DOC's record searches were adequate; (d) the Court accepted the DOC's argument that Mr. Kozol's intent behind requesting the public records was a scheme to make money off of the PRA. Appendix A.

Mr. Kozol timely moved for reconsideration. Concomitantly the DOC moved for publication of the December 1, 2015 unpublished opinion. Appendix B. Mr. Kozol responded to the motion to publish by pointing out that the Court's ruling appeared to be in direct conflict with controlling case law and statutory authority, and as such, publication would appear to be improper. The Court denied Mr. Kozol's motion for reconsideration, but modified its opinion to recognize that responsive records were destroyed after Mr. Kozol requested them, but held no PRA violation occurred. Appendix A. Publication was granted. Appendix A. Mr. Kozol now seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. There Exists A Conflict Between the Court of Appeals' Decision and the Decisions of the Supreme Court and Statutory Authority as to Prevailing Party Status and Award of Costs of Suit Under RCW 42.56.550(4)

On appeal Mr. Kozol argued that summary judgment dismissal was improper because "Defendant's production of responsive records after litigation commenced rendered Plaintiff the prevailing party, precluding 'show cause' dismissal." Opening Brief of Appellant, at 8. As such, Mr. Kozol also sought an award of "all costs and expenses, and [prospectively] attorney fees if counsel is retained." Opening Brief of Appellant, at 49.

The Court of Appeals' published opinion stated that "[d]uring discovery, the DOC located and disclosed the grievance records responsive to request PDU-18880." Published Opinion, at 3. Then the Court stated that because Mr. Kozol was pro se "he could not have received attorney fees even if he had prevailed." Opinion at 3, n.3. Mr. Kozol was denied his costs of suit. Because the Court of Appeals determined that responsive records were produced by the agency after Mr. Kozol filed suit to compel production, but determined that Mr. Kozol was not the prevailing party and was not entitled to costs of suit, this published ruling is in direct conflict with controlling case law and statutory authority.

"The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request." Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wn.2d 243, 270, 884 P.2d 592 (1994). "Withholding a nonexempt

document is 'wrongful withholding' and violates the PRA." Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010).

Under the Public Records Act, a claimant "prevails" against an agency if the agency wrongfully withheld the documents. Germeau v. Mason County, 166 Wn.App. 789, 811, 271 P.3d 932 (2012). "'Prevailing' relates to the legal question of whether the records should have been disclosed on request." Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 726, 261 P.3d 119 (2011)(emphasis in original). Under the PRA, an award of costs against an agency who wrongfully withholds records is mandatory. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 433, 98 P.3d 463 (2004). "Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying [costs of suit and penalties]." West v. Thurston County, 144 Wn.App. 573, 581, 183 P.3d 346 (2008).

As the prevailing party compelling disclosure, Mr. Kozol is entitled to an award of all costs of litigation. RCW 42.56.550(4); Robbins, Geller, Rudman & Dowd LLP v. State, 179 Wn.App. 711, 736, 328 P.3d 905 (2014). "The prevailing party in an action against a state agency to obtain access to a public record is entitled to costs." Gendler v. Baptiste, 174 Wn.2d 244, 251-52, 274 P.3d 346 (2012). Mr. Kozol, as the prevailing party compelling disclosure, would also be entitled to all costs on appeal. Adams v. WDOC, 2015 WL 5124168 *7 (No. 32012-0, Div.3, Sept. 1, 2015).

With the publication of this opinion below, there now exists authority for agencies to avoid reimbursing requestors and paying

for attorney fees of parties having to resort to litigation to compel disclosure of withheld responsive records. This is contrary to not only the plain statutory language and legislative intent of the PRA, but is also contrary to Washington jurisprudence reaching as far back as Columbian Pub. Co. v. Vancouver, 36 Wn.App. 25, 33, 671 P.2d 280 (1983). Respectfully, because the ruling below conflicts with prior decisions and express statutory authority, and because this is an issue of substantial public interest, the Court should accept review pursuant to RAP 13.4(b).

2. **The Decision Below Conflicts With Prior Decisions and Statutory Authority, and Factually the Court of Appeals Erred When It Found Destroyed Records Were Not Responsive to the Records Requests**

After Mr. Kozol moved for reconsideration on appeal, the Court's opinion below was amended to include a footnote acknowledging that,

> "[t]here is some evidence that several of the physical complaint forms were not destroyed until after Mr. Kozol's records requests. Regardless, because the back sides of these forms contained only boilerplate instructions and were not substantively employed in the grievance process, they were not records reasonably identifiable for Mr. Kozol's requests for records on specific grievances."

Appendix A (Order Amending Opinion). Nevertheless, the published opinion finding no PRA violation occurred remains in conflict with prior decisions of this Court, and is not supported by fact.

First, by the clear facts that the DOC destroyed eight original (double-sided) grievances by shredding them after Mr. Kozol specifically requested them, these constitute eight separate violations

of the PRA. Under RCW 42.56.100, an agency is prohibited from destroying records scheduled for destruction if the agency receives a public records request "at a time when such record exists." Fisher Broadcasting - Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 541, 326 P.3d 688, 701 (2014). "Destruction of a requested record violates the PRA." Neighborhood Alliance, 172 Wn.2d at 750 (Madsen, C.J., concurring).

Each original grievance form is a double-sided piece of paper. CP 155-156. DOC identified eight original grievance forms were "shred[ded]" after Mr. Kozol's requests were made: PDU-18880, 18881, 18897, and 18907-18910. CP 253-256. When viewing the facts in the light most favorable to Mr. Kozol on summary judgment, it is impossible to only "shred" a single side of a double-sided piece of paper. It is therefore immaterial whether DOC may have thought the second pages were not responsive, because DOC admits the front pages were responsive, yet it destroyed these as well in all eight post-request destructions.

Mr. Kozol still had the right to clarify or expand his requests as necessary. In fact, he wrote eight follow-up requests specifically seeking the second pages, but DOC feigned ignorance. CP 13-14, 222-226. Mr. Kozol still had the right to have his attorney personally inspect the double-sided original paper forms he requested. See Sappenfield v. Dept. of Corrections, 127 Wn.App. 83, 88-89, 110 P.3d 808 (2005)(when a requestor cannot inspect records -- because of incarceration, for example -- the agency should allow a representative

of the requestor to inspect them.) The destruction of the original first/front page of each original grievance violated the PRA.

Second, turning to the second page, the very nature of the back/second page of an original grievance containing "boilerplate instructions" for the grievance process makes it by definition part of the grievance process. By the instructions, certain issues are not grievable. CP 156. DOC's creation of the instructions, and labeling the page "DOC 05-165 Back," makes it axiomatic that this page is used in the grievance process by some inmates or staff. Otherwise there is no purpose of the information. The Department cannot attempt to vanquish a material fact through sheer intent of a superseding declaration. Mere conclusory declaration evidence is insufficient on summary judgment. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Third, because the Department destroyed these eight original double-sided documents, there is no way to prove the pages only contained boilerplate instructions. By using other PRA requests as a discovery device, Mr. Kozol requested only "back" pages of original grievances for a six-year period. CP 259-262. This request, PDU-28154, yielded original back pages of grievance forms that contained no "boilerplate instructions" whatsoever. CP 411-419. Moreover, through these same extracurricular PRA requests Mr. Kozol clearly proved that the second/back pages of original grievance forms contained more than just "boilerplate instructions," including proof that inmates frequently used the back pages in the substantive grievance process, including continuing the grievance onto the back

page. CP 411-419. DOC even identified that staff write process/routing codes on the back pages to process grievances and direct them via campus mail. CP 259-262.

The DOC confirmed the "original complaint form" was sought in each request. CP 72-73, 80-150. The DOC admitted it knew each "original complaint form" is comprised of two pages. CP 228. As a matter of law Mr. Kozol requested the complete complaint forms, not just partial pages. "[If] the agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance, 172 Wn.2d at 727. It is not a requestor's duty to ferret out or to know beforehand what a requested record is comprised of or how many pages a certain record contains; that would be antithetical to the purpose of "public disclosure."

No requestor could ever obtain judicial in-camera review of withheld records under the PRA if an agency provides a copy of a specifically requested "original" document, yet then destroys the requested original. This is the polar opposite of the strong public policy behind transparency of government activity that the Act was intended to ensure to interested parties. No court can now determine if the DOC silently redacted, e.g., "whited out" embarrassing, inculpatory, or prejudicial information before computer scanning the front pages of these original grievances, and the contents of the front and back pages is now forever lost to the self-serving whims of the Department of Corrections. As the record shows, the DOC has used this tactic before of destroying inculpatory inmate grievances. Appendix C. Apparently, the Department answers to no one but itself.

"When a PRA request is made, a government agency must hold onto the records, including their metadata; they cannot be [destroyed]." O'Neill v. City of Shoreline, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010). The Court of Appeals' published opinion is not supported by the uncontroverted facts, and it is contrary to law. "If the undisputed facts in the record do not support the Court of Appeals' holdings as a matter of law, these holdings are subject to reversal by this court." L.K. Operating, LLC v. Collection Group, LLC, 181 Wn.2d 48, 72, 331 P.3d 1147, 1157 (2014)(citing DGHI Enters. v. Pac-Cities, Inc., 137 Wn.2d 933, 942-43, 977 P.2d 1231 (1999)). Because the published opinion below conflicts with the undisputed facts in the record, and conflicts with prior decisions, this Court should accept review pursuant to RAP 13.4(b). Further, the Court should accept review under RAP 13.4(b) because this issue of a state agency destroying silently withheld records of agency misconduct is of substantial public interest.

3. The Court of Appeals' Decision Conflicts With Prior Decisions as to What Constitutes an Inadequate Search for Records Under the Public Records Act

The DOC argued that its failing to produce the second pages of the original grievance forms was not the result of an inadequate search, because the DOC does not scan the second pages of original grievances into the computerized "grievance record," and therefore when it searched for the "grievance records" it did not consider the second pages to be responsive. CP 29-30, 152-153. However, as established above, there is no merit to the DOC's attempt to justify silent withholding by claiming the pages are never scanned into the computerized "grievance

record." Clearly, the DOC produced over 1,000 separate second/back pages of original grievance forms from its computer database "grievance record." CP 259-271.

But more importantly, because DOC knew responsive records were located in another location other than its computerized "grievance record," it had a duty to also search that location. The DOC did not do this, and therefore its search was inadequate as a matter of law. DOC established its practice is to specifically, intentionally not computer scan the second/back page of each original paper grievance when scanning documents to create the computerized "grievance record."[2] CP 152-153. After electronically scanning the first/front page of each paper grievance, the original (two-page) forms are retained at least six months in the local prison files, and are eventually destroyed. CP 247-248. Most importantly, in responding to other similar records requests for grievance documents, the DOC has previously reviewed the original (two-page) paper grievances and other documents retained in the local files that were scheduled for destruction. CP 153.

Upon these uncontroverted facts, the DOC knew that the original (two-page) grievances existed, or would have reasonably existed, in its paper file system. In fact, at least eight (8) of these original (two-page) grievances did exist, as they were not destroyed until after Mr. Kozol submitted his requests. Ante. Therefore, because DOC intentionally did not search the one location where it knew the

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2 As discussed earlier, there is no evidence in the record of how these specific 31 grievances were processed or scanned. The declaration evidence is merely general, conclusory assertions of fact.

responsive records existed, its record searches are inadequate, which violated the PRA.

This is virtually the identical situation that this Court reviewed in Neighborhood Alliance, where the agency's argument was that the location of responsive records retained in one computer did not have to be searched because the computer had been moved, and replaced with a new computer, and the agency's search was limited to the new computer that did not contain the records. Neighborhood Alliance, 172 Wn.2d at 721-23.

This Court rejected the agency's argument that its search was adequate, stating, "[i]f the agency, after establishing the primary source of requested information, finds that the information is not there, it may not assert the information has been moved so as to avoid its duty to search." Id., at 723. Rather, "the agency must determine where the information has been moved and conduct a search there, where reasonable." Id.

The published opinion below is unsupported by the facts and squarely conflicts with Neighborhood Alliance. Not only do both cases involve requestors seeking evidence of agency misconduct, but similar to Neighborhood Alliance, here the DOC intentionally did not scan the second pages into its computer database and intentionally retained it in a different paper file system, then limited its searches to the computer database when providing Mr. Kozol records. Because DOC's sworn declaration stated it previously searched the paper files when responding to other records requests, not only does its intentional

failure to search this same location in Mr. Kozol's requests violate the requirement under RCW 42.56.080 that agencies are not to differentiate between requestors, but DOC cannot now feign ignorance by purposefully limiting its search to avoid producing records of agency misconduct. This Court stated,

> "[A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested."

Neighborhood Alliance, 172 Wn.2d at 720 (internal quotation marks and citations omitted).

In actuality, the DOC knew even further that producing inmate grievance forms required searching its local paper file system. While DOC previously argued in other litigation that the PRA "does not require the grievance coordinator to hand search [] grievances filed [...] to determine if there might be another document responsive" to a PRA request, such argument was rejected by the Washington courts, which ordered DOC to "conduct a hand search of and/or for grievance records responsive to [an inmate's] public disclosure request." Appendix C.

The DOC intends for it, along with "practitioners and trial courts" to use the published opinion below as authority "in future cases about adequate public records searches." Appendix B. Because the published opinion below conflicts with uncontroverted facts in the record and with prior decisions of this Court, the Court should accept review pursuant to RAP 13.4(b). Further, the Court should accept review under RAP 13.4(b) because the issue of an adequate records search

is of substantial public importance.

4. The Court of Appeals' Decision to Permit an Agency to Consider Alleged Intent Behind Records Requests Is in Conflict With Prior Decisions of This Court.

Under RCW 42.56.080 it is legally immaterial why a requestor requests certain public records, and "agencies may not inquire into the reason for the request." Cornu-Labat v. Hospital Dist. No.2 Grant County, 177 Wn.2d 221, 240, 298 P.3d 741 (2013). The statute "specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure." DeLong v. Parmelee, 157 Wn.App. 119, 146, 236 P.3d 936 (2010)(citing RCW 42.56.080); Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 461 n.8, 229 P.3d 735 (2010); Livingston v. Cedeno, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008)("[DOC] must respond to all public disclosure requests without regard to the status or motivation of the requestor.")

In an attempt to escape PRA violations, the DOC brazenly flouted the prohibition in RCW 42.56.080 and argued to the courts below that Mr. Kozol had requested the records only to create frivolous PRA claims against the DOC, and that he only requested the grievances in order to file PRA lawsuits. Relying upon e-mail communications that were both authored by other individuals and referencing issues not a part of this case, DOC argued that Mr. Kozol "knew the request he made to the DOC was not an identifiable record." CP 472-73. Mr. Kozol moved

to strike this inadmissible evidence.[3] CP 287-96. DOC responded by elevating its argument that Mr. Kozol's intent for the requests was a "scheme to manipulate" the DOC, and that Mr. Kozol's intent was to submit requests for knowingly unidentifiable records, and based upon Mr. Kozol's intent the DOC did not produce the withheld second pages because they were not "identifiable." CP 157-59. In reply, Mr. Kozol argued that no person can "manipulate" an agency into violating the PRA by merely submitting records requests. CP 167-95.

While the Court of Appeals recognized that the trial court did not consider the DOC's e-mail evidence on summary judgment, the Court of Appeals nevertheless began its published opinion by stating, "Steven Kozol concocted a scheme in prison to make money off of the Public Records Act." Appendix A. Even though this is not a holding, see L.K. Operating, 181 Wn.2d at 72 ("if the Court of Appeals erroneously made and relied on new factual findings to support its holdings, those findings are mere surplusage to be disregarded on review"), the DOC has stated that it intends to cite the published opinion below, as "[a] published opinion that acknowledges this inmate's scheme would be helpful in resolving his remaining related cases." Appendix B. Therefore, this issue warrants review by this Court.

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[3] Mr. Kozol learned later on that the DOC had fraudulently altered many of these emails before filing them in this case. Further, the DOC only presented select emails taken out of context. Mr. Kozol submitted PRA requests to obtain all of his prison emails so he could file a RAP 9.11 motion. The DOC refused the request. Upon Mr. Kozol having several other citizens request the emails for him, the DOC denied these requests and then filed a lawsuit against seven individuals seeking a permanent injunction from giving Mr. Kozol his complete emails, claiming it would jeopardize the safety and security of the prison and would be "harmful" to DOC staff. See WDOC v. Muul, et al., Thurston County Superior Court No. 15-2-00672-7. ER 201.

Factually, there is no scheme to make money when before filing suit a requestor first submits eight (8) follow-up requests simply trying to get the records being withheld from him. Further, there is no evidence Mr. Kozol has a mole working inside the DOC who is unlawfully destroying requested records. No requestor can "manipulate" an agency into doing a legally inadequate records search. Legally, there could never be a "scheme to make money" because an inmate must prove the hightened standard of agency "bad faith". RCW 42.56.565(1). Moreoever, the trial court maintains complete discretion in awarding $0 to $100 per day. RCW 42.56.550. There are far too many safeguards in the PRA for an agency to ever argue records requestors are "tricking" it into violating the PRA in bad faith. The DOC intends for the published opinion below to be cited as authority for improperly considering an alleged intent behind records requests. This will invariably include agencies now rummaging around in requestors' social media pages, reviewing online commentary and position papers, and filing any documents where a requestor expresses a negative view of the agency. Because of the State's clear intent to foment such an environment, the Court should accept review under RAP 13.4(b) because the issue is of substantial public importance.

F. CONCLUSION

For the foregoing reasons Petitioner respectfully requests review be granted.

RESPECTFULLY submitted this 23rd day of January, 2016.

STEVEN P. KOZOL
Petitioner, Pro Per

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 24th day of January, 2016, 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:

Appellant's Petition for Discretionary Review;

;

;

.

addressed to the following:

Clerk, Court of Appeals	Candie M. Dibble, AAG
Division III	Attorney General's Office
500 N. Cedar ST	1116 W. Riverside Ave., #100
Spokane, WA 99201-1905	Spokane, WA 99201-1194

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

DATED THIS 24th day of January, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol

Signature

STEVEN P. KOZOL

Print Name

DOC 974691 UNIT H6-A86

STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

Appendix A

FILED
DEC 1, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondents.	)	No. 33163-6-III UNPUBLISHED OPINION

KORSMO, J. — Steven Kozol concocted a scheme in prison to make money off the Public Records Act (PRA) with a former inmate who was out of prison. When the trial court dismissed his action on show cause, he appealed to this court. We affirm.

FACTS

Mr. Kozol communicated with Aaron Leigh concerning a method of filing vague PRA requests for documents that they knew the Department of Corrections (DOC) did not maintain and then win awards for the failure of DOC to comply with the request. In accordance with that plan, Mr. Kozol sent 31[1] separate PRA requests to DOC, each

[1] Although only 29 of these appear in the record, there is no dispute that there were in fact 31, and all subsequent correspondence shows requests for 31 specific grievance numbers.

requesting "any and all records for inmate/offender grievance # []. This includes the original complaint form." DOC received the requests and five business days later responded with an outline of expected production dates in early April, 2012. Pursuant to that schedule DOC responded individually to each of Mr. Kozol's requests. While DOC staff were unable to locate any records on one of the requests (request number PDU-18880), they did produce, with some redactions, files on the other 30 grievances, including copies of the original grievance forms.

Between March 25 and July 12, 2013, Mr. Kozol and DOC exchanged a series of letters in which Mr. Kozol accused DOC of silently withholding responsive records, while DOC asked for proof of withholdings, and ultimately declined to provide any additional records.[2] Then again on November 22, 2013, Mr. Kozol sent a letter to DOC demanding the production of all "silently withheld responsive records" pertaining to these and other PRA requests. He then filed suit on December 11, 2013 in Spokane County, vaguely alleging a large number of non-specific PRA violations.

The primary substance of his claims was that DOC failed to adequately respond to his requests because it omitted the back side of all of the grievance forms, and that it violated the PRA by failing to disclose any responsive documents on PDU-18880. The

[2] These letters are not in the record on appeal, and so their content is not clear. They are vaguely described in Mr. Kozol's complaint, while in its answer the DOC admits their existence and asserts that their content speaks for itself.

grievance forms at issue are two sided, containing space to write the substance of the grievance on the front, with some instructional information on the back. Since the back side contains only instructions, DOC does not retain copies of the back sides when the grievance is scanned into its records system.

During discovery, the DOC located and disclosed the grievance records responsive to request PDU-18880. DOC had originally failed to locate the grievance after searching its grievance database and contacting the statewide grievance coordinator. However, the grievance had never been logged in either place, but was located at the Airway Heights Corrections Center.

DOC filed a show cause motion to dismiss, arguing that it had produced all records, had performed an adequate search for PDU-18880, and that the litigation was untimely. Mr. Kozol moved for a continuance to pursue more discovery and moved to strike his communications with Mr. Leigh from the record. The trial court denied Mr. Kozol's motions and granted the show cause motion to dismiss on the bases that DOC had provided most records and had performed an adequate search for PDU-18880. Mr. Kozol then timely appealed to this court.

ANALYSIS

Although the briefing raises several claims, we need only address two of them. The two issues we address are whether the court erred in denying the continuance and

whether the trial court correctly dismissed the action.[3] We address those two concerns in the stated order.

Continuance

CR 56(f) allows the trial court to order a continuance to allow further discovery where it appears that the responding party, for good reason, cannot present facts essential to its opposition to the motion. Review of a denial of a motion under CR 56(f) is for abuse of discretion. *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992). A court may deny such a motion where (1) the requesting party fails to offer a good reason for the delay, (2) the requesting party does not state what evidence is desired, or (3) the desired evidence will not raise a genuine issue of material fact. *Id.* Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Kozol argues that the continuance should have been granted to allow him to discover if DOC used the back of the forms in any manner. His argument is not responsive to the standards of CR 56(f) because the discovery would not have raised any issues of genuine material fact concerning DOC's compliance with the PRA. The

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[3] We do not reach the question of whether this action was timely filed. The motion to strike is moot as those materials did not play a role in the trial court's decision to grant the dismissal motion. Mr. Kozol also seeks attorney fees in this action. However, since he is proceeding pro se, he could not have received attorney fees even if he had prevailed. *West v. Thurston County*, 168 Wn. App. 162, 194-195, 275 P.3d 1200 (2012); *Mitchell v. Dep't of Corrs.*, 164 Wn. App. 597, 608, 260 P.3d 249 (2011).

questions presented by the show cause motion were whether DOC had provided what it was supposed to provide and whether it looked hard enough for the document that was belatedly provided. Whether or how the back of the grievance forms had been used when they existed was not a matter of consequence to the motion.

Mr. Kozol failed to present a valid reason for continuing the show cause motion. Thus, the court had a very tenable reason for denying the motion. There was no abuse of discretion.

Show Cause Ruling

Mr. Kozol argues that the court erred in granting the show cause motion, contending primarily[4] that DOC withheld records by not turning over the back side of the grievance forms and that the belated production of PDU-18880 proved that DOC was in violation of the PRA. His initial argument misconstrues what is a public record and the second ignores the rules concerning review of missing records.

Appellate review of a PRA case is de novo. RCW 42.56.550(3); *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009). Judicial review of PRA disputes typically is by way of a show cause hearing. RCW 42.56.550(1).

[4] Mr. Kozol also presents other arguments that are not germane to the trial court's ruling and will not be addressed.

The PRA is a broadly worded mandate for disclosure of state government records. To that end, the final paragraph of RCW 42.17A.001 declares in part that the provisions of Initiative 276 "shall be liberally construed to promote . . . full access to public records." Government agencies must make their records available for inspection and copying. RCW 42.56.070. A "public record" is broadly defined as "any writing containing information relating to the conduct of government." RCW 42.56.010(3).

However, whether or not a record should exist is a different question than whether it does exist. The PRA only requires that access be granted to existent records, not nonexistent records that one believes should exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-137, 96 P.3d 1012 (2004). While Mr. Kozol believes that the back side of the original grievance form should exist, DOC proved otherwise. As DOC produced the only part of the specified grievance forms that still existed, it complied with the dictates of the PRA. There can be no silent withholding of a document that no longer exists. The trial court correctly concluded that there was no violation of the PRA.

The remaining issue is whether DOC violated the PRA by its late disclosure of PDU-18880. DOC did not originally produce the record because it could not find it. The agency looked in the places where the grievance was supposed to be found. When an agency does not find a record that should exist, the question for review is whether or not the search was adequate. *Neighborhood All. of Spokane County v. County of Spokane*,

172 Wn.2d 702, 719-720, 261 P.3d 119 (2011). The agency must look in the place where the record "is reasonably likely to be found." *Id.* at 720.

We agree with the trial court that the search here was adequate. The grievance forms are supposed to be scanned into the grievance records system and then destroyed. The public disclosure officer for DOC checked the records system and then, when there was no record for the grievance, contacted the statewide grievance coordinator to determine if the record was located elsewhere. Neither officer knew of another location where it would likely find the missing grievance.

The fact that the record eventually was found does not establish that the agency's search was not adequate. *Id.* at 719. Instead, the question is whether the search was "reasonably calculated to uncover all relevant documents." *Id.* at 720. That was the case here. The records officer checked the records system. When that proved unavailing, the records officer checked with the statewide coordinator who likewise could not find it anywhere. Neither official knew where else it could be located. A reasonable search need neither be exhaustive or successful.

We agree with the trial court that DOC looked in all the places the record should have been. Nothing more was required of it.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	)	No. 33163-6-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered appellant's motion for reconsideration and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of December 1, 2015, is hereby denied.

IT IS FURTHER ORDERED the opinion filed December 1, 2015, is amended as follows:

The 2nd paragraph, 4th line on page 6 that reads:

> While Mr. Kozol believes that the back side of the original grievance form should exist, DOC proved otherwise.

shall be amended to include footnote 5 that reads:

> There is some evidence that several of the physical complaint forms were not destroyed until after Mr. Kozol's records requests. Regardless,

because the back sides of those forms contained only boilerplate instructions and were not substantively employed in the grievance process, they were not records reasonably identifiable from Mr. Kozol's requests for records on specific grievances. *See Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012).

PANEL: Judges Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Respondent.	)	No. 33163-6-III ORDER GRANTING MOTION TO PUBLISH OPINION

THE COURT has considered the respondent's motion to publish the court's opinion of December 1, 2015, and the record and file herein, and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, the motion to publish is granted. The opinion filed by the court on December 1, 2015, shall be modified on page 1 to designate it is a published opinion and on page 8 by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

PANEL: Judges Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

APPENDIX B

NO. 33163-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, Plaintiff/Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, Defendant/Appellee.	MOTION TO PUBLISH

I. INTRODUCTION AND IDENTIFICATION OF MOVING PARTY

The Department of Corrections respectfully requests that this Court publish its decision in this case. The opinion captures two important public records principles in a single, concise opinion, and because there have been relatively few published cases describing facts that amount to an adequate search, publication would permit trial courts to use it as a touchstone in evaluating sufficiency of an agency's search. Finally, publication of this case would allow the Department of Corrections and trial courts to expressly rely on this opinion in a series of ongoing cases involving Mr. Kozol that involve the same or similar issues.

II. STATEMENT OF RELIEF SOUGHT

The Department of Corrections respectfully moves this Court, pursuant to RAP 12.3(e), for an order to publish the opinion of the Court issued in the above-captioned matter on December 1, 2015.

III. RECORD RELEVANT TO MOTION

The record relevant to this motion is the opinion issued on December 1, 2015.

IV. GROUNDS FOR RELIEF SOUGHT

On December 1, 2015, the Court issued its opinion affirming the superior court's grant of dismissal in favor of The Department of Corrections. The Court indicated this opinion is unpublished. The Department of Corrections now respectfully requests the Court order the opinion to be published.

Publication is warranted pursuant to RAP 12.3(e)(5), which permits the publishing of an opinion if "the decision is of general public interest or importance." Inmates submit a large number of public records requests, agencies expend significant public resources to respond to these requests, and it is important to maintain a system that can quickly and efficiently respond to requests made under the Public Records Act (PRA). The Court's December 1, 2015 decision is one of both general public interest and importance because it establishes that an agency does not

violate the PRA when it does not produce a record it simply does not have. In addition, the opinion provides an example of an adequate search, even where an additional record was later located in an unexpected place.

The Department of Corrections, along with many other state and local agencies, receives thousands of public disclosure requests each year. A vast majority of the requests to The Department of Corrections are submitted by offenders. Similar to other agencies, responding to the volumes of requests with limited resources often puts a strain on the ability to promptly respond to requests. *See Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011); *see also Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012). If this opinion were published, it could serve as an example for agencies striving achieve a balance by conducting reasonable and accurate searches, with the need to be efficient so that all requesters receive responses in a timely manner.

In addition, in order to "curb abuse by inmates who use the PRA to gain automatic penalty provisions when an agency fails to produce eligible records," the legislature passed RCW 42.56.565(1) which requires an offender present evidence of an agency's bad faith before being entitled to penalties. While the bill initially barred payment of penalties to offenders, it was later amended to include a bad faith requirement in order to facilitate legitimate inmate PRA cases. *See Faulkner v. Washington*

Department of Corrections, 183 Wn. App. 93, 105, 332 P.3d 1136 (2014); *Francis v. Washington Department of Corrections*, 178 Wn. App 42, 60, 313 P.3d 457 (2014).

Adding this case to the body of published cases that evaluate an agency's search for sufficiency would assist practitioners and trial courts faced with inmate public records cases in at least two ways. First, it would provide a touchstone against which facts in future cases about adequate public records searches can be compared. Second, the opinion could indirectly assist trial courts in applying the bad faith standard in RCW 42.56.565 because the opinion provides an example of circumstances in which the agency acted appropriately, even though it later located an additional responsive record in an unexpected location.

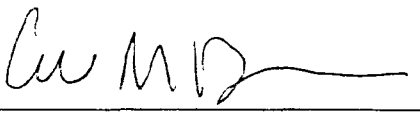
Finally, state and local agencies continue to face inmate attempts to use the PRA as a money making "scheme." Mr. Kozol has additional cases against The Department of Corrections involving the same or similar facts. A published opinion that acknowledges this inmate's scheme would be helpful in resolving his remaining related cases. This aspect of the opinion may also be of interest to policymakers moving forward.

For these reasons, the Court's opinion in this case is one of general public interest and importance. The Department of Corrections therefore

respectfully requests the Court enter an order that the opinion issued December 1, 2015, be published.

RESPECTFULLY SUBMITTED this 9th day of December, 2015.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of Motion to Publish by US Mail Postage Prepaid to the following addresses:

STEVEN P. KOZOL, DOC #974691
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of December, 2015, at Spokane, Washington.

PATTY WILLOUGHBY
Legal Assistant III

APPENDIX C

Washington DOC Pays Pro Se Prisoner $110,043 For Illegally Withholding Records

The Washington State Department of Corrections (WDOC) will pay former Airway Heights Corrections Center prisoner Derek E. Gronquist $110,043 for mishandling his requests for public records. This represents the largest payout the WDOC has ever paid to a prisoner who represented himself.

The dispute began when Gronquist submitted a request to inspect public records to the Airway Heights Corrections Center (AHCC) on October 21, 2001. The WDOC denied the request pursuant to Policy 280.510(III)(F), which prohibits incarcerated prisoners from inspecting any public record not contained within their own Central or Health Care Files. On August 29, 2003, the Spokane County Superior Court held that Policy 280.510(III)(F)'s "incarcerated offender" exclusion violated the Public Records Act's requirement of free and open inspection of public records. WDOC was ordered to disclose all requested records and to pay Gronquist $2,543 in penalties and costs.

(*PLN* readers should note that Division Three of the Washington State Court of Appeals has since ruled to the contrary. See *Sappenfield v. Department of Corrections*, 127 Wn.App. 83, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006)).

The WDOC subsequently disclosed records where the names of prisoners had been blacked out under a claim of exemption under Washington Administrative Code 137-08-150, and claimed to have made a full and complete disclosure. WDOC then subjected Gronquist's monetary award to a 35% seizure for cost of incarceration, crime victim's fund, and savings pursuant to House Bill 1571 and the newly amended RCW 72.09.480(3). A lawsuit was later filed in Thurston County Superior Court challenging the constitutionality of HB 1571.

Approximately three years later, Gronquist discovered the existence of at least one record that the WDOC neither disclosed nor claimed to be exempt: a grievance filed by AHCC prisoner Todd Wixon. On October 4, 2006, Gronquist filed a Motion for Contempt and/or to Compel Public Disclosure alleging that the WDOC had silently withheld requested inmate grievance records and had improperly subject other records to redaction. The Court ordered the WDOC to "conduct a thorough and complete search for all records responsive to Plaintiff's public disclosure request", "to produce . . . all records responsive . . . without any redaction", and to "[p]ay Plaintiff $50.00 a day [from August 29, 2003] . . . until the Defendant demonstrates to the Court's satisfaction that a thorough and complete search for all responsive documents has been made and that all responsive and un-redacted records have been disclosed to Plaintiff."

On May 11, 2007, the WDOC filed a Motion for Entry of Judgment arguing that the Public Records Act "does not require the grievance coordinator to hand search 2793 grievances filed at AHCC in 2001 to determine if there might be another document responsive to this part of Plaintiff's request." The Court denied WDOC's motion, increased the penalty to $100 a day, and ordered the WDOC to "conduct a hand search of and/or for grievance records responsive to Plaintiff's public disclosure request . . ." Reconsideration of the penalty assessment was denied. After conducting its search, the WDOC disclosed three previously withheld responsive grievances.

On July 26, 2007, the WDOC filed a second Motion for Entry of Judgment, arguing that it had fully complied with the Court's orders. Within this filing, the WDOC disclosed for the first time that it had "disposed of" almost all grievance records filed between 1993 and 1999. WDOC's motion was stayed pending discovery into the destruction of grievance records. On April 18, 2008, the WDOC agreed to settle this case for $79,000. It also agreed to pay Gronquist $1,000 to resolve litigation over the monies seized from the August 29, 2003, penalty award. See *Gronquist v. Department of Corrections*, Spokane County Superior Court No. 02-2-05518-9; and *Gronquist v. Barshaw*, Thurston County Superior Court No. 05-2-01941-4.

A second lawsuit was filed over WDOC's mishandling of a separate records request submitted to AHCC on December 28, 2005, seeking employment and misconduct records concerning AHCC Correctional Officer, Jeffrey Ward. Within five weeks of receiving this Public Records Act request, WDOC began destroying its grievance records. After all grievance records filed between 1993 and 1999 had been destroyed, WDOC asserted that it would begin searching for responsive records. The WDOC then filed a Motion for Summary Judgment claiming full compliance with the Public Records Act. After WDOC's motion was denied, it agreed to settle this case for $27,500. As part of the agreement Gronquist agreed not to pursue two other unrelated cases upon appeal. See: *Gronquist v. Department of Corrections*, Spokane County Superior Court Case No. 07-2-00562-0.

Commenting upon this litigation, WDOC Secretary Eldon Vail stated "clearly how we respond to public disclosure requests needed some attention and we've made a lot of changes since then to be better stewards of the taxpayer's money in these kinds of cases." For an agency with a history of never admitting fault, Vail's comments may sound a shift in how the WDOC responds to Public Records Act requests in the future. Gronquist is skeptical that WDOC's practices will change, believing that "these cases demonstrate the lengths that DOC and the Washington State Attorney General's Office will go to withhold records of governmental misconduct from public knowledge." In Washington State it is a Class B felony punishable up to ten years in prison and a $20,000 fine to destroy public records following a citizen's request for those records. Nevertheless, no WDOC official has ever been charged with a crime or subject to any discipline for unlawfully destroying the grievance records in these cases. Mr. Gronquist represented himself in each of these cases. The state's response was predictable: it obtained legislation to allow state agencies to seek injunctions against prisoners who file public records requests.

[Editor's Note: Gronquist has been a long time PLN subscriber. During the course of the above litigation he contacted PLN and asked for assistance locating counsel to represent him in the above cases. Despite our best efforts we were unable to find an attorney in Washington to take the cases. The moral to this story is just because a lawyer won't take a case does not mean it lacks merit. With counsel the payout in fees alone would have been much higher. PW]