

NO. 93365-1

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WASHINGTON STATE SUPREME COURT

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STEVEN P. KOZOL,

Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Defendant -Respondent.

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DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION  
FOR REVIEW

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 ORIGINAL

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## I. INTRODUCTION

Kozol submitted twenty-two individual public records requests for separate inmate grievance records from the Washington State Penitentiary. The Department of Corrections timely acknowledged each request and provided Kozol with the twenty-two separate grievance records. Kozol later filed this action, asserting the Department violated the Public Records Act (PRA) under RCW 42.56 by not providing him with the back page of the inmate grievance forms, which contained only boilerplate instructions to inmates for completing the forms. The trial court dismissed Kozol's claims finding the back page of the grievance form was not responsive to his request. Kozol appealed that decision.

In an unpublished decision, the Court of Appeals held the back page of the grievance form was not responsive to Kozol's requests. The Court of Appeals noted Kozol's request for the "original" form would not have been interpreted to include the instructional back side of the document. Therefore, the Department did not violate the PRA when it provided Kozol with only copies of the front side of the form which the Department electronically maintains as its record of the grievance.

Kozol also filed an additional request for thirty-one separate grievance records from the Airway Heights Corrections Center. After his motion to amend his complaint to add these claims to this lawsuit was

denied, Kozol filed a separate action on those records in the Spokane County Superior Court. Similarly, the trial court dismissed that case for failure to state a claim under the PRA. Kozol also appealed that finding. The Court of Appeals recognized that this litigation arose from “a scheme” that Kozol and a former inmate “concocted” “in prison to make money off the Public Records Act.” *Kozol v. Washington Dep’t of Corr.*, 192 Wn. App. 1, 366 P.3d 933 (2015). The Court of Appeals affirmed the trial court’s findings and specifically held that the Department was not required to produce the back page of the grievance form as it was not an identifiable record responsive to Kozol’s request. *Id.* at 3, fn 5. This Court denied Kozol’s petition for review of that holding.

The Court should again deny review. Kozol raises issues for the first time in this Petition, neither of which are matters of substantial public importance. Further, the Court of Appeals decision is well-reasoned, does not conflict with decisions of this Court or other courts, and is supported by prior PRA case law and principles of statutory interpretation.

## **II. COUNTERSTATEMENT OF ISSUES**

Review is not warranted in this case, but if review were granted, the issues would be:

1. **Whether the boilerplate preprinted informational back page of the grievance form was an identifiable record responsive to Kozol's request for inmate grievance records; and**
2. **Whether Kozol failed to assert his issue regarding statutory authority and spoliation both in the trial court and the Court of Appeals. Further, whether there is evidence to support Kozol's claim that the Department modified his request; and**
3. **Whether the Department wrongfully destroyed the back pages of the grievance forms when it discovered Kozol was seeking them in response to his requests.**

### **III. COUNTERSTATEMENT OF FACTS**

Under the Department's Grievance Program, inmates can file complaints related to multiple issues. CP 752. An inmate initiates a grievance using the form DOC 05-165, Offender Complaint form. CP 752. The inmate writes the grievance on the front page of the form. CP 752. The back page of the form simply provides boilerplate instructions on how to fill out the front page of the form. CP 745-746.

After the Department receives and responds to an inmate grievance, the grievance coordinator scans the original and maintains a digital copy of the front page of the grievance form in accordance with Department policy. CP 743. None of the information on the back page of the grievance form is used to process the inmate's grievance and it is not considered to be part of the grievance record. Therefore, the grievance

coordinator does not scan and maintain the back page of the form as part of the official Department grievance record. CP 743.

In 2011, Kozol and former inmate Aaron Leigh began their plan to create PRA claims by filing public disclosure requests for inmate grievance records for which they knew they would not receive the back page of the grievance forms in response to their requests. CP 888-935. They purposefully chose to limit their request to the new Department forms, which were double sided, noting: “Do not waste a moment on old NCR-type forms: charge full-speed ahead on new ones.” CP 889-890. In order to obtain as many valid Grievance Log ID numbers as possible, Kozol began “recruiting passers-by” to obtain their grievance number information. He then funneled that information so that he and his partner could begin filing duplicative PRA requests. CP 900-901. Once Kozol received the Department’s responses where they could “park” in his email account, he and his partner would then move forward with their “avalanche of suits.” CP 904-918. There would be no need to even review the records when they were received because Kozol knew the Department would not identify the back page of the grievance form as responsive to his request. CP 917-920. Kozol and Leigh would then move forward with filing PRA lawsuits in multiple counties to ensure the cases would not be



considered duplicative and consolidated, thereby maximizing potential recovery. CP 924-930.

On April 15, 2011, the Department's Public Disclosure Unit received twenty-two separate requests from Kozol for records related to twenty-two individual inmate grievances. CP 140, 630-650. Five business days later, the Department issued a response letter indicating his requests were assigned tracking numbers PDU 15229 through PDU 15250. CP 9, 175, 651-671. Kozol was also informed he would receive a response to his requests on or before June 28, 2011. CP 651-671.

Because the grievances were filed at the Washington State Penitentiary, the request for all responsive records was sent to the Washington State Penitentiary's grievance coordinator to gather documents responsive to the twenty-two separate requests. CP 748-749. The grievance coordinator responded by attaching scanned copies of the front page of all twenty-two requested grievance forms as part of the inmate grievance record. CP 748. The back instruction page, which was not considered part of the grievance or maintained by the Department, was not included in the responsive documents. CP 743.

On June 16, 2011, June 24, 2011 and June 28, 2011, the Department issued Kozol three letters indicating documents responsive to his requests were identified, available and he would be provided copies of

the records upon receipt of payment. CP 9, 672-692. More than five months later, the Department received a response letter from Kozol requesting each response be emailed separately to StevenKozolIsInnocent@gmail.com. CP 693. The Department acknowledged Kozol's email receipt request. CP 694. On January 3, 2012, the Department emailed the responsive documents to StevenKozolIsInnocent@gmail.com and informed him his requests were closed. CP 695-738. Four of those emails included exemption logs citing information which was redacted. CP 616. Several weeks later, Kozol asked for written confirmation the requests had been emailed. CP 739. The Department sent written confirmation on February 29, 2012. CP 740. There were no additional records provided to Kozol after the Department sent the records on January 3, 2012.

Kozol then sent several letters to the Department's counsel complaining of "multiple silent withholdings" but providing no detail on which documents he claimed to be withheld. CP 604-605. Kozol eventually sent a letter directly to the Department in November 2013, more than 18 months after he received the requested records, alleging the Department withheld records in response to his twenty-two requests but again failing to indicate the records he was seeking were the back page of

the form. CP 605. The Department sent an acknowledgement to his letter on December 12, 2013. CP 789.

During his ongoing correspondence with Department's counsel, on July 18, 2012, Kozol filed a PRA Complaint alleging failure to respond within the time frames of the PRA and "silent withholding" of records. CP 3-4. Kozol's Complaint was devoid of any specificity regarding which documents he claimed to be withheld or even which specific PDU tracking number request he was seeking. CP 3-4. After the Department's request for a more definite statement, Kozol filed his First Amended Complaint noting his claim was solely related to his request under the Department's tracking number PDU-15229. CP 8-9. After unsuccessful attempts to later amend his complaint over a year later to add the other twenty-one requests, Kozol filed another PRA Complaint alleging wrongful withholding of the remaining twenty-one records for his requests under PDU-15230 through PDU-15250. CP 601-607. The trial court granted the Department's dispositive motions, noting Kozol's complaint was frivolous and malicious as the request for records was a "scheme" that Kozol set up knowing he would not receive the back page of the grievance form in response to his request. CP 570-572, 596-600, 810-811, 866.

Kozol appealed, and the Court of Appeals affirmed. The Court held that RCW 42.56.070(1) does not require agencies to give their

original public records to requesters. For that reason, and because Kozol requested an electronic copy of the records, his request only encompassed a copy of the actual complaint form. The Court of Appeals further held that the Department reasonably interpreted the request to include only copies of the inmate's actual grievance complaint and not the back side instructional page of the form. The Court of Appeals also held the Department's subsequent destruction of responsive records was innocent and excused its failure to produce the back page of the grievance form.

#### **IV. REASONS WHY REVIEW SHOULD BE DENIED**

##### **A. The Court of Appeals Ruling That the Back Page of the Grievance Form Was Not Responsive to Kozol's Request Is Consistent with Existing Case Law**

The Court of Appeals held that the back page of the grievance form was not responsive to Kozol's request for grievance documents because the back page contained only boilerplate instructions that are never used in processing inmate grievances. This holding is consistent with prior case law and supported by the evidence.

Under the PRA, the "record sought must be reasonably identifiable." RCW 42.56.080; *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012). 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); *see also* WAC 44-14-04002(2) (an “identifiable record” is one agency staff can “reasonably locate”). In this regard, the PRA does not require agencies to be mind readers or to produce records that have not been requested. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied* 137 Wn.2d 1012, 978 P.2d 1099 (1999).

The Court of Appeals’ decision is based on a straightforward application of this principle. Kozol submitted requests that sought any and all records for specific inmate grievances, including the original complaint form. While the grievance form contains a back information page, that page is merely instructional for the inmate. CP 742,745-746. None of the information on the back page of the grievance form is used to process the inmate’s grievance because it is not considered to be part of the grievance record. CP 743. For the same reasons, it is not scanned and maintained as part of the official grievance record. CP 743. Therefore, when Kozol’s requests for documents related to grievances was processed, the Department did not identify or consider the back page of the grievance form to be part of the inmate grievance complaint, nor did the Department consider the back page to be responsive to his request. CP 743. The Department’s decision to provide only the portions of the grievance records that it considered part of the official packet, including the inmate

grievance itself, was based on a reasonable interpretation of Kozol's request. Again, it is well established that agencies do not violate the PRA by providing only those records that are reasonably identifiable as being responsive to the request.

Further, Kozol's subsequent PRA request seeking specifically the back page of the grievance forms does not support his contention that the Department should have reasonably interpreted his request to include the back instructional page of the form. Appendix A, Attachments 1-2<sup>1</sup>. Because inmates housed in the Intensive Management Unit do not have access to a grievance box, the grievance documents are collected directly from the inmate. Exhibit 1, Attachment C. At times, an inmate may fold his grievance in half, causing the "back page" of the grievance to become the outside/envelope of the grievance. Exhibit 1, Attachment C. The collecting staff member may write the grievance office mailbox number "W40" or the inmate's name on the outside of the grievance to ensure it is delivered to the grievance office for processing. Exhibit 1, Attachment C. This information is not deemed to be relevant to the grievance complaint itself and would not be used to investigate the inmate's complaint. Exhibit 1, Attachment C. Nor would the fact that the grievance mailbox number or

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<sup>1</sup> On May 27, 2015, the Commissioner granted Kozol's request to submit additional evidence. Kozol's additional evidence is referred to as Appendix A (*see* Kozol's opening brief COA No. 32643-8-III). The Department's additional responsive evidence is referred to as Exhibit 1 with Attachments (*see* Department's Response to Kozol's RAP 9.11 Motion for Additional Evidence on Review).

the grievance officer's name be maintained for any purpose related to the inmate's grievance complaint. Exhibit 1, Attachment C.

As noted by the Court of Appeals, the "infrequent and random use of the instruction sheet by third parties does not support a conclusion that the DOC should have regarded it as responsive to Mr. Kozol's request." In holding the Department was only required to produce records which were reasonably identifiable as responsive, the Court of Appeals applied well established statutory interpretation and case law. Therefore, the Court of Appeals decision does not conflict with other cases and this Court should deny review.

**B. Kozol Failed to Assert His Issue Regarding Statutory Authority and Spoliation Both In the Trial Court and the Court of Appeals. Further, There Is No Evidence to Support Kozol's Claim That the Department Modified His Request**

Neither in the trial court nor the Court of Appeals, did Kozol raise the issue whether there is "statutory authority for an agency to modify or disregard a record request without the requestor's consent" or that the Department's destruction of the records amounted to spoliation. In fact, his Petition is completely devoid of any argument that the Court of Appeals ruling on this issue conflicted with any other decisions by another court. Therefore, the Court should decline to decide the issue Kozol now raises for the first time through this Petition. *State v. Clark*, 124 Wn.2d 90, 104-105, 875 P.2d 613 (1994); RAP 2.5(a). While Kozol generally asserts

the Court should decide these issues, he provides no substantive argument to support his claim of public importance.

Assuming *arguendo* the Court determines the issue is one of public importance, Kozol fails to show the Department knowingly altered or modified his request. Nowhere is there evidence indicating the Department ever knew or even interpreted his request to include the back instructional page of the grievance forms as being responsive to his request. What the evidence does show is that Kozol was well aware the back page would not have been deemed responsive at the time he submitted his requests. Kozol used his request for grievance records as a pretext to set up the Department to “fail” in providing its response to his request for individual grievance records. CP 888-935. In fact, he ensured his requests would only include those grievance forms which contained the back side boilerplate instructions by asking for those only submitted on the “new” forms. CP 889-890. Therefore, in order to obtain as many “new” grievance log ID numbers as possible, Kozol began “recruiting passers-by” to obtain their grievance number information and funneled that information so that he and his partner could begin filing duplicative PRA requests. CP 900-901. Any “modification” to his request was at Kozol’s design and he continued to be purposefully evasive regarding his “need” for the back page of the grievance form even after filing his lawsuit. This is evidenced in the



Complaints themselves which make no claim regarding the back page of the grievance form and were purposefully written to provide the least amount of information as possible. CP 924-930. Accordingly, Kozol's argument that the Department somehow modified or altered his request is disingenuous and the Court should decline to accept review.

**C. The Court of Appeals Ruling That the Department's Destruction of Records Was Innocent Is Consistent with Existing Case Law. In Addition, There is No Evidence to Support Kozol's Spoliation Argument**

Kozol asserts the Court of Appeals ruling conflicts with case law because the Department was required to maintain the original grievance forms while his request was pending. Further, he argues the Department's destruction of the original grievance form amounts to spoliation. However, the evidence shows the Department maintained the substantive grievance form in electronic format and had no knowledge Kozol's request specifically sought the back instructional page of the form until well after the records were scheduled for destruction. Therefore, the Court of Appeals ruling is consistent with existing case law.

In support of his position, Kozol cites to cases in which the agency was aware that the records sought by the requestor were those specifically scheduled for destruction. *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014); *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119

(2011); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 420 P.3d 1149 (2010).

Unlike the cases cited above, the Department was not aware Kozol was seeking the back page of the grievance form until well after the records were destroyed. Moreover, the Department cannot be blamed for destroying the original paper copies containing the boilerplate back pages of the various grievances Kozol was requesting. Kozol purposefully failed to provide specific information in his Complaint in order to avoid any consolidation of his cases. CP 1-4, 924. While he identified the exact PDU numbers in his amended Complaint, he still purposefully failed to place the Department on notice of exactly which document he was alleging was silently withheld. CP 8-9. It was only after the Department took his deposition on November 22, 2013, that Kozol admitted at the time he filed his lawsuit and during the time of his deposition, his only claim of withholding was not being provided the back page of the grievance form. CP 156-157. This was well after the hard copy documents had been scheduled for destruction in December, 2012 and February, 2013. CP 783-784. As noted from Kozol's Complaint, he did not send letters of his disagreement with the responses to the Attorney General's Office until March 27, 2013. CP 603. Destruction of the back page of the grievance

forms occurred well before Kozol bothered to inform the Department that he was seeking those records.

Further, the actual grievance records were not destroyed. They were scanned and maintained by the Department. Because the Department does not utilize the back page of the form in processing the grievance, it would have no reason to continue to maintain the form as part of the grievance record. Accordingly, the Court of Appeals holding that any destruction of the back page of the grievance form was innocent is consistent with existing case law. The Court should therefore deny review.

#### V. CONCLUSION

The Court of Appeals decision in this case is carefully reasoned, it is consistent with case law, and it correctly interprets and applies statutory authority. None of the criteria for accepting review under RAP 13.4(b) are satisfied. Therefore, the Department asks this Court to deny review.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2016.

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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 the Department of Corrections' Answer to Petition for Review by US Mail Postage Prepaid to the following addresses:

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

DATED this 26<sup>th</sup> day of July, 2016, at Spokane, Washington.



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