NO. 33783-9-III

In the Court of Appeals of the State of Washington
Division 3

KEVIN ANDERSON, Appellant

v.

WALLA WALLA POLICE DEPARTMENT, Respondent

APPELLANT'S REPLY BRIEF

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A) ARGUMENT

1. Walla Walla's Response Constituted Denial.

"Under RCW 42.56.550(1), the superior court may hear a motion to show cause when a person has been 'denied an opportunity to inspect or copy a public record by an agency.'" *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 936 (2014). "Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id.* "Although the statute does not specifically define 'denial' of a public record, considering the PRA as a whole...a denial of a public record occurs when it reasonably appears that an agency will not or will no longer provide responsive records." *Id.* "[B]efore a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.* When an agency "continu[es] to provide [the requester] with responsive records," no "denial" has occurred. *Id.* at 936-37. However, when an agency indicates indicates "no records satisf[y a] request," the agency's response constitutes a "deni[al]." *Daines v. Spokane County*, 111 Wn. App. 342, 345 (2002) (*overruled in part on other grounds by Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702 (2011)).

Here, Walla Walla provided no records responsive to Mr. Anderson's request with its initial response. CP 25. To the contrary, Walla Walla's response indicated it "ha[d] no...records" to provide, other than, perhaps, "a current order of protection" which Walla Walla indicated could "be obtained by/through Walla Walla District Court." *Id.* In other words, either Walla Walla was indicating its belief that it had no responsive records, or that Walla Walla was indicating it *had* one responsive record, and that it was unwilling to provide that record. In either event, the plain language of Walla Walla's response unambiguously constitutes a "denial" of Mr. Anderson's public records request.

2. "Jacket Activity" Is a Responsive Public Record.

"A request under the PRA must be for an 'identifiable public record.'" *Belinski v. Jefferson* County, 187 Wn. App. 724, 740 (2015) (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48 (2004). A requester can run afoul of the "identifiability" requirement in a few ways. First, he could request information, not records. *See e.g. Wood v. Lowe*, 102 Wn. App. 872, 879 (2000), *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410-12 (1998). Second, he could request records without providing fair notice the request is being made pursuant to the Public Records Act. *See e.g. Germeau v. Mason County*, 166 Wn. App. 789, 804-10 (2012), *Wood*, 102 Wn. App. at 878. Third, he could provide description of the

records insufficiently detailed to "enabl[e] the government employee to locate the requested records." *Bonamy*, 92 Wn. App. at 410.

Here, Mr. Anderson's request identified itself as a "Public Records Request." CP 25. Moreover, Mr. Anderson requested "[a]ny records related to" himself. *Id.* This is clearly a request for records, not information. Finally, Mr. Anderson's request was sufficiently detailed to enable Walla Walla to locate the requested records; indeed, Walla Walla *did* locate the "jacket activity" record. CP 23.

"The PRA broadly defines the term 'public record' to include 'any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." *Wright v. State*, 176 Wn. App. 585, 595 (2013) (citing RCW 42.56.010(3)).

Walla Walla does not seem to dispute "jacket activity" record is a "public record" as the term is defined in the Public Records Act. *See* Brief of Resp at 16 ("[h]ad Mr. Anderson asked for an 'index' or 'list of records' relating to himself, the records clerk...would have provided it to him."). However, Walla Walla does characterize the "jacket activity" record as an "index," and misleadingly cites to RCW 42.56.070(3), which uses the term "index," to suggest a distinction between a record and a record that

constitutes an index. This is a false dichotomy, unsupported by the statute. That section of the Public Records Act creates an additional affirmative obligation on local agencies to "maintain and make available for public inspection and copying a current index providing identifying information as to" certain, enumerated classes of records. RCW 42.56.070(3). Those classes of records consist of "opinions...made in adjudication of cases;" "statements of policy...adopted by the agency;" "staff manuals;" "[p]lanning policies[,] goals...and...decisions;" "[f]actual staff reports and studies;" and "[c]orrespondence...by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities." First, the Public Records Act in no way indicates this index is *not* a public record, or is a public record of a different sort not subject to the judicial review process. Second, the "jacket activity" record at issue is not the sort of "index" contemplated by RCW 42.56.070(3). Rather, in this instance, it is an index of a single order of protection that concerned Mr. Anderson. CP 26. And, more broadly, it is an index of "reports generated by police officers" and "court orders." CP 19-20 at ¶ 3. Those sorts of records are not on the list contained within RCW 42.56.070(3).

Any reasonable public records officer would have used the statutory definition of "public records" to define terms contained within a public records request. Mr. Anderson requested "[a]ny records." Because

an index *is* a record, an index would necessarily be included within the phrase "[a]ny records."

Furthermore, "if [an] agency was unclear about what was requested, it was required to seek clarification." *Neighborhood Alliance of Spokane County*, 172 Wn.2d at 727. To the extent Walla Walla was confused about what Mr. Anderson was meant by "[a]ny records," Walla Walla was required to, but failed to, seek clarification.

3. Walla Walla Did Not Cross-Appeal, and Necessities of Case Do Not Demand Issues of Bad Faith and Penalties Be Considered.

"The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by timely filing a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case." RAP 2.4(a). "'Affirmative relief' normally means a change in the final result." *State v. Sims*, 171 Wn.2d 436, 442 (2011) (internal citation omitted). "[A]ny relief sought by the respondent beyond affirmation of the lower court" constitutes "affirmative relief." *Id.*

"Ordinarily a party must file a timely notice of appeal to be entitled to [affirmative] relief." *Genie Industries, Inc. v. Market Transport, Ltd.*, 138 Wn. App. 694, 707 (2007). "In exceptional circumstances, an appellate court may grant affirmative relief to a party who did not file a

notice of appeal because relief is demanded by the necessities of the case." *Id.* Where a respondent "neither file[s] the required notice of appeal nor independently demonstrate[s] a basis for relieving it of the requirements of RAP 2.4, it may not obtain affirmative relief." *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 90 fn. 2 (2007).

Here, Walla Walla requests that if the trial court's order is reversed, and the case remanded for further action, this Court "instruct[]" the trial court "that the WWPD did not act in bad faith and hold that Mr. Anderson is not entitled to any daily penalties because he was serving a criminal sentence at the time of the records request." Brief of Resp. at 9. This request constitutes "affirmative relief" in that the issue of bad faith and penalties is not addressed in the trial court's Order of Dismissal. CP 162-165. Walla Walla has not filed a notice of appeal. And Walla Walla has not even attempted to demonstrate how the necessities of the case demand this Court consider its request absent a notice of appeal. *See* Brief of Respondent. Therefore, the Court should decline to consider Walla Walla's request to instruct the trial court concerning the presence or absence of bad faith and the assessment of penalties.

B) CONCLUSION

The trial court erred by granting Walla Walla's motion to dismiss because Walla Walla's response to Mr. Anderson's March 26, 2014 public

records request constituted a denial of an opportunity to inspect or copy public records. Mr. Anderson therefore requests this Court reverse the trial court's order of dismissal and remand for further proceedings.

Furthermore, because Walla Walla did not appeal the trial court's ruling, and because no necessities are present, the Court should decline to consider Walla Walla's request for this Court to instruct the trial court on bad faith and penalties on remand.

DATED this 22nd day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on 22nd day of January, 2016 I mailed, postage prepaid, a true copy of the foregoing APPELLANT'S REPLY BRIEF to

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