NO. 33920-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

JOSEPH JONES,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF APPELLEE

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I. INTRODUCTION

This Public Records Act (PRA) case involves the Department of Corrections' response to prisoner Joseph Jones's request for a copy of his signed classification hearing notice form. At the time Jones signed the form, he was instructed to file a request with the Department's Public Disclosure Unit if he wanted a copy. His counselor then followed the Department process and provided the form for her supervisor's review. By the time the Department received Jones's request and began its search for the record, it discovered the form had been lost.

The trial court properly dismissed Jones's lawsuit for failure to state a claim under the PRA. The judge determined Jones was required to submit his request to the Public Disclosure Unit and while there was no dispute the record no longer existed, there was inadequate evidence to establish the document was lost after the PRA request was properly submitted. Accordingly, the Court should affirm the dismissal of Jones's claims for failure to show a PRA violation.

II. STATEMENT OF THE CASE

A. Statement of Facts

An offender's custody facility plan is periodically reviewed during their incarceration to ensure the offender is placed in the proper security classification level. Pursuant to DOC Policy 300.380(IV), Custody

Facility Plans are routinely initiated by a counselor through the Facility Risk Management Team. CP 44. The counselor will provide the offender with notice of the classification hearing at least 48 hours before the review by using DOC 05-794 Classification Hearing Notice/Appearance Waiver. CP 44. The form provides the offender with the option to attend the classification review meeting and also provides the offender with a notice of his rights related to the hearing. CP 61. Once the form is signed, the counselor provides the paperwork to the Classification Counselor 3 for review. CP 64. From there the form goes to the Custody Unit Supervisor and then to the Correctional Program Manager's Office for scanning into the OnBase data system. CP 64. The counselor does not retain the form. CP 64. In 2014, counselors informed offenders seeking a copy of the form that they had to file a public disclosure request directly with the Department's Public Disclosure Unit. CP 29.

Joseph Jones is housed at the Coyote Ridge Corrections Center and is assigned to Counselor Jennifer Lynch. CP 64. Jones was provided with a DOC 05-794 Classification Hearing Notice/Appearance Waiver form informing him of his upcoming classification review. CP 64. On November 3, 2014, Counselor Lynch met with Jones for his classification review and to go over his Custody Facility Plan. CP 64. During the meeting, Counselor Lynch read Jones the Custody Facility Plan and he

indicated he understood the recommendations. CP 64. Based on Jones's history, it was recommended that he be maintained at MI3 custody level, complete all recommended programs, program in a positive manner, and maintain infraction free behavior. CP 64. Counselor Lynch documented the meeting in the comments section of his Custody Facility Plan. CP 37. CP 64. The Facility Risk Management Team later met and agreed with the plan to maintain Jones at MI3 custody level. CP 38. This was the lowest classification level Jones could receive due to his conviction. CP 65.

After his meeting with Counselor Lynch, Jones filed a public disclosure request seeking a copy of his signed hearing notice form. CP 2. On November 7, 2014, the Department's Public Disclosure Unit in Tumwater, Washington, directly assigned the public disclosure request to Lori Wonders at the Coyote Ridge Corrections Center. CP 24. In addition to her duties as the facility's Public Disclosure Coordinator, Wonders is also assigned as the facility's Legal Liaison Officer, Tort Claim Manager, Policy Manager. Form Coordinator, Public Information Officer and Limited English Proficiency Coordinator. CP 20.

A few days later, Wonders sent Jones a letter acknowledging his request for the "Classification Hearing Notice/Appearance Waiver, dated November 3, 2014." CP 27. Then on December 8, 2014, Wonders began the search for records and emailed Counselor Lynch to see whether she

had the hearing notice form Jones was requesting. CP 28. Counselor Lynch indicated she did not have the form as it had been forwarded to the Correctional Program Manager's office for scanning. CP 28. The same day, Wonders emailed the Correctional Program Manager to see whether she was able to locate the November 3, 2014 form. CP 31. The following day, she was notified the Correctional Program Manager's office had not received the form and it could not be located. CP 30-31. Therefore, on December 12, 2014, Jones was notified there were no records responsive to his request. CP 32.

B. Procedural History

Jones filed a PRA complaint alleging the Department failed to respond to his public disclosure request when it did not produce his signed November 3, 2014 hearing notice form. CP 1-7. In response, the Department filed a motion to show cause, arguing Jones failed to make a claim under the PRA, as the Department could not produce a record it did not have in its possession. CP 8-173. CP 315-334. The trial court granted the Department's motion and dismissed the complaint. CP 335-342. The judge specifically noted there was inadequate evidence to establish that the document was lost after the PRA request was properly submitted. CP 246-250. Jones's motion for reconsideration was also denied. CP 348-350. Jones then filed this appeal. CP 351-360.

III. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011).

IV. ARGUMENT

A. Jones's Classification Notice No Longer Existed at the Time of His Request

Jones contends the Department violated the PRA by failing to provide him with his signed classification hearing notice form. However, the Department cannot produce a record it no longer has in its possession. An agency has "no duty to create or produce a record that is nonexistent." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136–37, 96 P.3d 1012 (2004) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13–14, 994 P.2d 857 [2000]). Therefore, a requestor has no cause of action under the PRA when the public record he seeks does not exist. *Sperr*, 23 Wn. App. at 137. *Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had "made

available all that it could find"); *Smith*, 100 Wn. App at 22 (when county had nothing to disclose, its failure to do so was proper).

Further, documents which have already been destroyed or lost at the time of the request, even ones that have not met their retention expiration, do not present a cause of action under the PRA. *West v. Washington State Department of Natural Resources*, 163 Wn. App. 235, 244-46, 258 P.3d 78 (2011). In *West*, the requestor sought numerous emails, which were already destroyed at the time he made the request. *West*, 163 Wn. App. at 240. While the emails should have been retained under the applicable retention schedule, they were determined to be inadvertently lost and therefore no longer existed. *West*, 163 Wn. App. at 240-241. The court found that even though West alleged the emails were unlawfully destroyed, there was "simply no evidence" to support such an assertion. *West*, 163 Wn. App. at 244. The court held that the emails had been inadvertently lost and did not exist at the time of the request. Therefore, there was no agency action to review under the PRA. *West*, 163 Wn. App. at 244-246. *See also Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App 720, 218 P.3d 196 (2009) (holding a requestor did not have a viable action under the PRA for emails which were already destroyed at the time of the request). Similarly, Jones's classification hearing notice form was inadvertently lost. CP 28. CP 31. An agency is

not required to produce records that no longer exist; therefore, Jones failed to state a PRA violation and his claim should be dismissed.

B. Neither the Public Records Act Itself nor Public Records Act Case Law Support a Rebuttable Presumption or the Application of Res Ipsa When a Document Has Been Inadvertently Lost

Jones argues because the Department cannot point to a specific date when the document was lost, he should receive a presumption the form was lost or destroyed after the Department received his request. Jones asks the Court to provide a requestor with a rebuttable presumption by holding an agency is required to present a "prima facie showing that a document was destroyed at an appropriate time using evidence available to the agency." Brief at 9. It is only after this showing, would the burden switch to the requestor "to show the record was actually destroyed after the request was received by the agency." Brief at 9. In the alternative, Jones requests the Court apply the doctrine of res ipsa loquitor because the Department has "total control over documents in its possession." Brief at 10-12. Jones asserts the control of the evidence imposes a special obligation onto the agency which supports the shift in the agency's burden. Brief at 12-14.

However, all of these arguments are contrary to law as neither the PRA itself nor PRA case law provides for such a presumption. When

making a claim of unlawful destruction of records, a requestor still has an obligation to do more than simply allege misconduct. There must be evidence in the record to support the claim. *West*, 163 Wn. App. at 244-246. *Building Industry Ass'n of Washington*, 152 Wn. App. at 736-737.

Further, Jones's request that the Court require the agency to show the documents were destroyed prior to the "appropriate time" goes beyond the *West* decision. The documents at issue in *West* were destroyed prior to the "appropriate time," as they should have been maintained according to the records retention policy. *West*, 163 Wn. App. at 244-245. The *West* Court did not require any showing the records were "destroyed at an appropriate time." Instead, the Court focused on whether the documents had been unlawfully destroyed, as Jones claims here, or whether the agency inadvertently lost the records before they could be produced. *West*, 163 Wn. App. at 244-246. In support of his argument of wrongful destruction, West asserted the agency delayed its search to recover the records. *West*, 163 Wn. App. at 245. The Court again noted West failed to supply any legal argument to support his argument and the facts supported a reasonable delay. *West*, 163 Wn. App. at 245-246.

Similarly, Jones fails to argue or provide any evidence to support an unreasonable delay in the Department's search for his records after his request was received which would have resulted in the wrongful

destruction of the form. Jones has never argued the Department should have begun its search for the form sooner. Moreover, in light of Wonder's numerous responsibilities and the Thanksgiving holiday, the delay in the search for the form was reasonable. Because a requestor must do more than make a claim, the Court should decline to hold Jones is entitled to a rebuttable presumption the form was wrongfully destroyed after his request was received.

C. The Evidence Supports the Form Was Inadvertently Lost Before the Department Processed Jones's Request

Assuming the Court provides Jones with a rebuttable presumption, his allegations of wrongful destruction are not supported by the record. The counselor followed protocol by forwarding the form to her supervisor for review after her meeting with Jones. CP 334. She would not have retained the form or have had any reason to retain or copy the form. CP 334. Thereafter, there is no record of the form's location or existence, even at the time the Department received Jones's request. At the time Department began to conduct its search for the form, it was notified the form had been lost and could no longer be located. CP 37-38; CP 334. Even after litigation began, the Department's subsequent search for the form was unsuccessful. CP 29.

Despite Jones's contentions, there is no evidence the form was purposefully or wrongfully destroyed to avoid production in response to his request. The form itself contains no information which the Department would want to withhold from Jones. CP 61. This is evidenced by the Department's change in no longer requiring an offender to submit a public disclosure request for the form but now providing the offender with a copy of the hearing notice form at the time it is presented and signed. CP 60. In addition, there is nothing on the form itself which appears to have changed or would have negatively affected the decision of Jones's Custody Facility Plan. CP 61. Jones's custody level remained the lowest custody level he is eligible to obtain due to his current conviction. CP 65. The Department would gain no benefit from purposefully destroying the record rather than producing it in response to Jones's public disclosure request.

The evidence does not support Jones's claim of purposeful or wrongful destruction of the classification hearing notice form after the receipt of his public disclosure request. While the Department has procedures to ensure the form is scanned and maintained in its database, with over 18,000 offenders in its custody,[1] it is understandable that a form will occasionally be lost. Without evidence of misconduct, the Court should follow the *West* Court's reasoning and accept the Department's

[1] http://www.doc.wa.gov/aboutdoc/docs/msFactCard.pdf

explanation that the loss was inadvertent. Jones has failed to do more than allege misconduct and the evidence in the record does not support a finding the form was destroyed after the receipt of his request. *West*, 163 Wn. App. at 244-246; *Building Industry Ass'n of Washington*, 152 Wn. App. at 736-737. As such, the Court should dismiss Jones's claims.

V. CONCLUSION

For the reasons stated above, the Court should affirm the trial court's judgment dismissing Jones's claims.

RESPECTFULLY SUBMITTED this 1st day of March, 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 Brief of Appellee by US Mail Postage Prepaid to the following addresses:

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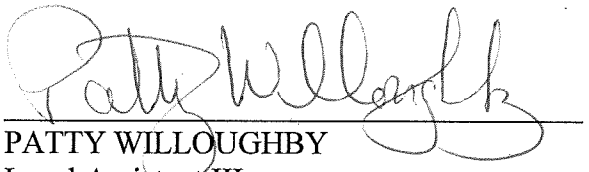
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of March, 2016, at Spokane, Washington.



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