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No. 93827-0

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOSEPH JONES

Appellant;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

REPLY ON THE PETITION FOR REVIEW

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A. INTRODUCTION

The Department of Corrections (Department) answered Jones' petition arguing that there is clear case law under the Public Records Act (PRA) which supports their position. They also argued they shifted the burden to Jones with its show cause motion. They finally argued there can be no rebuttable presumption when a document has been inadvertently lost. Jones will show why each argument leaves open questions that this Court needs to answer to the benefit of all requesters of records.

B. ARGUMENT

1. NOT ONE WASHINGTON CASE IS ON POINT WITH THE FACTS OF THIS CASE AND IT WOULD BENEFIT BOTH REQUESTERS AND AGENCIES TO HAVE THE LAW SETTLED IN THIS AREA.

Throughout the Department's brief and accepted as controlling by Division III were cases that were not on point with the facts of this case. *See e.g. Sperr v. City of Spokane*, 123 Wn. App. 132, 96 P.3d 1012 (2004); *West v. Dept. of Natural Resources*, 163 Wn. App. 234, 258 P.3d 78 (2011); *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 218 Wn. App. 720 (2009).¹ Not one of these cases addressed the factual scenario where PRA liability could not be determined because it was unknown whether a record is lost or destroyed prior to or after the request is made. Not one of

¹ Of course, this list does not include the Freedom of Information Act cases cited by Division III or the Department which are not on point with the facts of this case due to the loss or destruction occurring prior to the request.

these cases addressed how the accidental lost of a record after a request was made should be treated. Not one of these cases addressed whether our courts should impose liability on an agency for losing a record when it cannot say when that record was lost or destroyed.²

It is incumbent upon this Court to clarify this area of law for several reasons. First, the factual scenario where the search for a document occurs some time after the request is made is a common situation which results in agencies not knowing when the records were lost or destroyed. Second, by taking this case, this Court can provide guidance on how lower courts treat situations where the actual date of the loss or destruction of a document is unknown – and whether or not there should be a presumption the document existed when the request was made. Finally, this Court should address the issue of how courts are to deal with lost versus destroyed documents because it provides guidance to lower courts on how to assess liability and penalties.

2. THIS COURT SHOULD ADDRESS WHETHER OR NOT A REASONABLE SEARCH FOR A DOCUMENT LOST OR DESTROYED AFTER THE REQUEST WAS MADE IS SUFFICIENT FOR AN AGENCY TO AVOID LIABILITY UNDER THE PRA.

The Department argued and Division III held that a reasonable search for a lost document was sufficient to prevent liability. This finding was made

² Petitioner acknowledges that he treats both the loss and destruction as equivalent to the requester. Under either scenario, the requester does not receive the requested document.

even though the many cases cited by Division III did not address the timing of the loss. *Jones v. Dept. of Corrections*, p. 12. It was the reasonableness of the search for the lost document which the lower court found sufficient for the Department to avoid liability and the timing was considered irrelevant. But as this Court has acknowledged, timing matters.

When examining penalties, this Court was quite clear that the timing of the request could be a critical component of the penalty calculation. *See Yousofian v. King County*, 168 Wn.2d 444, 229 P.3d 735 (2010). Among the aggravating factors which a court when awarding penalties includes the timing of the search include a delayed agency response “especially in circumstances making time of the essence” and where there has been foreseeable personal economic loss wherein the failure to conduct a timely search caused that loss. *Id.* at 748. Timing can be a critical element in evaluating a PRA case and it certainly was critical here.³ Again, this Court should take this case for review to clarify whether or not liability can be imposed for the loss or destruction of a document when the time of its loss cannot be known.

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³ The clearest example is the five-day rule. RCW 42.56.520.

3. PUBLIC POLICY SUPPORTS THIS COURT TO ADDRESS THE BENEFITS OF A PRESUMPTION WHEN THE AGENCY DOES NOT KNOW THE DATE A RECORD WAS LOST OR DESTROYED.

There are many public benefits to a presumption in favor of the requester when a document has been lost or destroyed but the date of that loss or destruction is not known. The Department would have this Court deny this petition based on a reasonable search for the document. Quite simply, a reasonable search for a lost or destroyed document that the agency should have maintained does not protect the public interest. It does not protect the public interest because it removes the one mechanism the public has to check the power of an agency – litigation. “The people of this state do not yield their sovereignty to the agencies that serve them.” RCW 42.56.030. This is the underlying principle of the PRA and relying on the search for a document which was lost or destroyed after the request removes that oversight.


This issue is also a matter of public interest because it forces an agency like the Department to ensure better record management. Putting the presumption on a requester to show when the document was lost or destroyed when it is the agency that had possession of the record and all possible knowledge of its loss or destruction would impose an insurmountable barrier to enforcing rights under the Act. The presumption that the requester has the burden of proof is unreasonable.

C. CONCLUSION

Issues involving the timing of lost or destroyed documents and how courts treat them are now and will remain relevant to Public Records Act litigation. Clarifying the law will assist both the requester and agency in determining their rights and obligations under the Public Records Act. This Court should accept review to provide the necessary guidance to agencies and requesters on how lost and destroyed records must be treated under the Public Records Act. For the reasons stated previously and above, Mr. Jones asks this Court to accept review.

Respectfully submitted this 13th day of December, 2016.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on the date below, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

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