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Division I
State of Washington

76012-2

No. 76012-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER COOK, KEVIN EVANS, JOSEPH JONES AND CHRISTOPHER ROBINSON,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENTS EVANS, JONES AND ROBINSON

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I. INTRODUCTION

Respondents Kevin Evans, Joseph Jones and Christopher Robinson ("the Requesters") address the Public Records Act ("PRA") issues raised in *Hikel v. City of Lynnwood*, 2016 WL 7468220 (December 27, 2016). They argue that because no reasonable search was conducted, the violation was substantive and penalties are appropriate and supported by public policy.

II. ARGUMENT

A. BACKGROUND

Hikel submitted a PRA request to the City of Lynnwood. *Hikel*, at *1. The deputy city clerk acknowledged the request, asked for clarification and stated that once a reply was received, he would be notified of the anticipated date of completion. *Id*. This Court subsequently found only one violation – the failure of Lynnwood to provide Hikel a reasonable estimate of the time required to respond to his request in its five-day letter. *Id*. at *2-4.

This Court then denied Hikel penalties based on the statutory language that "[t]he PRA does not provide for penalties unless some 'final agency action' denies inspection or copying of a public record." *Id*. at *4 (citing *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 715, 354 P.3d 249 (2015)). It rejected a "freestanding penalty for procedural violations" and instead identified them as penalty aggravating factor. *Id*. (citing *Sanders v. State*, 169 Wn.2d 827, 835, 849, 859, 240 P.3d 120 (2010)).

B. FAILURE TO SEARCH FOR RESPONSIVE DOCUMENTS EVEN IF NO RESPONSIVE DOCUMENTS EXIST MANDATE THAT THE TRIAL COURT MAY AWARD PENALTIES.

1. Failure to Conduct Any Reasonable Search Requires Trial Courts Be Permitted to Award Penalties.

Failure to conduct any reasonable search requires courts have the authority to award penalties to the requesters whether or not responsive records exist. This is because such a violation is substantive – the existence or otherwise of responsive records is irrelevant to the violation. Courts must have the authority to penalize agencies for bad behavior under the PRA.

At the time the Department filed its show cause motions, it did not conduct a search for responsive public records. Instead, it argued that the requesters were not entitled to penalties because it reasonably relied on the Newsbrief it had prepared. The trial courts acknowledged this argument but rejected this argument. Evans, CP 249; Jones, CP 524; and Robinson, CP 317. Because the Department failed to investigate whether or not the exception listed on the Newsbrief applied to the records requested, the trial court awarded penalties because the actions were unreasonable. *Id*. Because the violation occurred when the Department failed to conduct a reasonable search for responsive records that it knew might exist, it cannot subsequently mitigate the violation by searching for the records after a lawsuit has been filed and then claim that since the records don't exist – no harm, no foul.

Agencies have a duty to provide 'the fullest assistance to inquirers and the most timely possible action on requests for information.'" *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (*quoting* RCW 42.56.100)). By failing to provide even some assistance, the Department failed to determine if responsive public records exist. This is not a technical procedural error but a major substantive error because it is irrelevant whether or not responsive documents existed when so search was conducted to see if they had been "used." RCW 42.56.010(3). Because the violation is substantive and not procedural, the holding in *Hikel* does not apply to the facts of this case.

2. Public Policy Requires Trial Courts Have the Authority to Award penalties for the Failure to Conduct a Search.

It is well established that failing to conduct an adequate search is both a violation and a possible aggravating factor. *Neighborhood Alliance of Spokane v. Spokane County*, 172 Wn.2d 702, 724-25, 261 P.3d 119 (2011); *Yousoufian v. King County*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). Prohibiting penalties for agencies that fail to conduct searches can incentivize agencies to not search for responsive records which might "cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). Because if no penalties are permitted for the failure to search, there is minimal or no deference – only attorney fees and costs, and if the litigant is pro se, actually none. The Supreme Court emphasized that a

penalty "must be an adequate incentive to induce further compliance." *Yousoufian*, 168 Wn.2d at 463. This language contains the mandatory word "must." To further make its point, the *Yousoufian* Court established a ninth discretionary aggravating penalty factor permits "a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." *Id*. at 468. Because any deterrence to an agency acting badly is contained in the penalty award, a trial court must have the authority to penalize agencies who unreasonably fail to search for records. *Hikel*'s holding should be limited to the type of technical violations like was found by this Court, not for violations for the failure to search.

C. THE DEPARTMENT'S FAILURE TO PRODUCE EVIDENCE SHOWING THAT NO RESPONSIVE PUBLIC RECORDS EXIST TO THE RESPONDENTS' REQUESTS MANDATE THE TRIAL COURT CONSIDER AWARDING PENALTIES TO THE REQUESTERS.

Even if the failure to search is considered a possible procedural violation a la *Hikel*, agencies must still provide sufficient evidence that no records exist to establish a non-substantive violation. Because the Department failed to provide evidence to support its show cause motion, the violation is substantive.

In the Requesters's response, they showed that the evidence could not be considered by the trial court because the Department did not act with diligence. CR 59(a)(4). Since all requests were for documents generated well before the show cause motions by more than a year, the Department failed to

exercise its diligence and could not apply for reconsideration using this rule.

CR 59(a)(7) permits reconsideration when the decision is not supported by the evidence presented at trial or it is contrary to law. *Holaday v. Merceri*, 49 Wn. App. 321, 742 P.2d 127 (1987). A "court must base its decision on the evidence it already heard at trial." *Id*. at 330 (citing *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn. App. 32, 42, 721 P.2d 18 (1986)). When the trial court granted penalties no evidence had been presented showing no responsive records existed. This is because the Department failed to "perform any search of its own records or take any steps to determine whether the records . . . came within the exception set forth in its own policy." Evans, CP 248; Jones, CP 524; and Robinson, CP 317.

Nor can the Department rely on the substantial justice alternative contained in CR 59(a)(9). Very few cases rely on this equitable remedy and then, only if there is an anomaly in the proceedings. *See e.g. Marvik v. Winkelman*, 126 Wn. App. 655, 663, 109 P.3d 47 (2005) (an error in the verdict form which would have exposed the defendant to twice the damages the jury intended); *Berry v. Coleman Systems Co*. 23 Wn. App. 622, 623-25, 596 P.2d 1365 (1979) (the defense lied in responding to interrogatories). In both cases, the special circumstances merited utilizing the equitable remedy for a new trial. There is nothing special about the circumstances here – the Department is not entitled to have the trial court consider the evidence provided with the motion for reconsideration.

The Requesters also showed that the evidence itself was flawed. In her declarations, Katie Neva failed to provide affidavits from Global Tel Link showing that the Department had not requested the subject records. The declarations lack sufficient specificity to be relied upon to make the generalized statement that the logs were not used by the Department.

The Department failed to timely present evidence in support of its show cause motion, rending its violation substantive. Because the lack of evidence makes the violation substantive, the holding of *Hikel* does not apply.

III. CONCLUSION

Because an agency's unfounded failure to search for responsive records is a substantive violation of the PRA, trial courts must be permitted to penalize agencies to ensure compliance with the PRA. Nor must agencies be permitted to cure their substantive failure by conducting an untimely search after a lawsuit has been filed. Finally, even if the lack of responsive documents can be cited to avoid penalties, the agency must still timely present sufficient evidence. For the reasons presented, Department's appeal of the penalties awards must be denied.

DATED this 20th day of January, 2017, in Seattle, Washington.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on January 20, 2017 in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. SUPPLEMENTAL BRIEF OF RESPONDENTS EVANS, JONES AND ROBINSON

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