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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
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No. 38767-1-II

Washington court of Appeals
At Division II

KEVIN MICHAEL MITCHELL,
Appellant,

AND

WASHINGTON DEPARTMENT OF CORRECTIONS,
Respondent.

BRIEF OF APPELLANT

ORIGINAL

KEVIN MICHAEL MITCHELL (1-207/308)
Appellant Pro Per, WITHOUT PREJUDICE
[SCCC 880933 ARR/TDC
c/o 191 Constantine Way
Aberdeen, Washington (98520)]
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I. INTRODUCTION

This appeal is presented by a requestor who seeks public records held by the Washington Department of Corrections ("WDOC"). Essentially, this case concerns WDOC withholding records and failing to respond to a clarification letter nor any further response from WDOC. In May of 2007, a request was sent by Mr. Mitchell seeking specific records relating to the mail logs and associated records with WDOC retains. After WDOC sought clarification of the time frame, which Mitchell provided on June 14, 2007, WDOC has since, to date, refused to further respond and refused to release any records under this request, identified by tracking ID# SCCC-947.

After filing suit, WDOC claims that since records were provided to the requestor under a separate request, identified by tracking ID# PDU-655, no response nor further records are necessary.

The requestor seeks to reverse a Thurston county Superior court order that found WDOC had fully responded to the request identified by tracking ID# SCCC-947 and the actions of WDOC warrant only the statutory minimum penalty of five dollars per day.

In this appeal, this court is granted the opportunity to clarify the duties imposed upon agencies when responding to requests for public records and their obligations to promptly disclose responsive records. This court can also affirm the

procedures mandated by the Public Records Act ("PRA") must be liberally construed and adhered to by agencies. Finally, this court is requested to set forth guidance for trial courts and agencies to follow when interpreting a request for records and the procedures agencies must follow when responding.

II. ASSIGNMENTS OF ERROR

1) Error is assigned to the trial court's finding that request #SCCC-947 has been fully responded to, when the record shows no response has been made by WDOC nor any records released to the requestor has been completed to date. (Finding No. 3, CP 65-66).

2) Error is assigned to the trial court's finding that SCCC-947 was responded to in an untimely manner, when the record shows no response has been made by WDOC to date. (Finding No. 1, Id.)

3) Error is assigned to the trial court's finding that WDOC acted in good faith and their actions were only simple negligence. (Finding No. 2, Id.)

4) Error is assigned to the trial court's failure to resolve the issue presented regarding WDOC intentionally backdating the May 08, 2007 response letter.

5) Error is assigned to the trial court imposing only the minimum statutory penalty of five dollars (\$5.00) per day, when the records shows their conduct was willful and in bad faith.

6) Error is assigned to the trial court's calculation of penalty days as being only 42 days, when the record evidences WDOC continues to accrue penalty days even to the date hereof.

III. ISSUES RELATED TO ASSIGNED ERRORS

1) Whether WDOC has responded to or released records under SCCC-947? (Error 1).

2) Whether the Public Records Act ("PRA") allows an agency to deny a request based on their claim that the records have been disclosed under a prior request? (Error 1).

3) Whether an agency's response letter that fails to mention nor reference a prior records request can be construed as responding to a subsequent request? (Error 1).

4) Whether the PRA requires records requests and any amendments thereto to be liberally construed and harmonized by both agencies and courts? (Error 1).

5) Whether an agency's claimed response is considered untimely, even though no response is ever sent? (Error 2).

6) Whether an agency acts in good faith and only simple negligence when the record shows their initial response was backdated, they refuse to respond to a clarification letter and they withhold responsive records? (Error 3).

7) Whether the trial court's failure to resolve the issue of WDOC intentionally backdating their initial response letter constitutes a factual finding against WDOC? (Error 4).

8) Whether the imposition of the statutory minimum penalty of five dollars per day is sufficient to deter WDOC and punish their deliberate conduct? (Error 5).

9) Whether the trial court improperly calculated the amount of penalty days? (Error 6).

IV. STATEMENT OF THE CASE

A. BACKGROUND FACTS

Mr. Mitchell ("Requestor") submitted a request under the Public Records Act ("PRA") on May 02, 2007 to the Washington Department of Corrections ("WDOC") seeking "the written continuous chronological mail record" related to the requestor. CP 10, 40. This request was assigned the tracking ID# SCCC-947 by the WDOC agent, Ms. Sheri Izatt, who responded to the initial request by a letter dated May 08, 2007. CP 13, 42. This response was mailed in an envelope postmarked on May 16, 2007 (CP 16) and received by Mitchell on May 18, 2007. CP 7, 13, 19.

Ms. Izatt asked the requestor to clarify the method for obtaining the records, to which Mitchell replied that the records should be sent to a specified e-mail account. CP 19, 46. After receiving this letter, Ms. Izatt sought further clarification of the time frame of requested records. CP 22, 48. Mitchell provided the requested time frame by letter on June 14, 2007. CP 25, 50. The original request was amended to include "incoming, outgoing and legal mail

from January 9, 2007 to [June 14, 2007]." CP 25, 50. WDOC has to date, refused to respond to this June 14, 2007 letter and has not released a single record under this request.

B. PROCEDURAL HISTORY

Mitchell filed a Motion for Order to Show Cause on September 30, 2008, CP 2-6, which presented three issues: 1) Whether WDOC failed to promptly respond; 2) Whether WDOC improperly denied electronic transfer of responsive records; and, 3) Whether WDOC silently withheld responsive records.

WDOC responded to Mitchell's motion on December 02, 2008 by claiming all responsive records were provided under SCCC-947 when they responded to a different request, identified as "PDU-655." CP 27-32. WDOC claimed they simply "failed to reference SCCC-947" in their five separate letters under PDU-655. CP 36-37 ¶ 7, 8. WDOC also claimed that they retain no additional documents responsive to SCCC-947. CP 37 ¶ 11.

The trial judge, Honorable Chris Wickham, orally ruled that WDOC had fully responded to SCCC-947 and the actions of WDOC were in good faith and the result of simply negligence by their delay of 42 days in disclosing records under PDU-655. This oral ruling was reduced to a signed order entered on December 12, 2008. CP 65-66.

Mr. Mitchell moved the trial court to reconsider the ruling by showing that an agency cannot cease responding nor can they claim records previously released are also being provided

under a different request. The agency must disclose records upon request. Mitchell also challenged the sufficiency of the penalty imposed and the calculation of penalty days. CP 67-70.

Judge Wickham denied reconsideration on December 29, 2008. CP 75. This appeal timely follows.

V. DISCUSSION

A. STANDARD OF REVIEW - DE NOVO

Judicial review of all agency actions taken or challenged under the Public Records Act ("PRA") "shall be de novo." RCW 42.56.550(3). "The appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). This court review de novo each of the issues presented unless otherwise stated.

B. PUBLIC RECORDS ACT POLICIES AND PROCEDURES

"The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy."

RCW 42.56.030.

The PRA is "a strongly worded mandate for broad disclosure of public records." *PAWS II*, 125 Wn.2d at 251. The purpose

of the PRA is "to provide full access to non-exempt public records. Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU I), 86 Wn.App 688, 695, 937 P.2d 1176 (1997). The PRA "requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions." PAWS II, 125 Wn.2d at 250.

When an agency receives a records request, the agency must respond within five business days by either: 1) Providing the records; 2) Requesting a reasonable estimate of time to gather documents or make redactions; or 3) deny the request. RCW 42.56.520. If any agency is unclear, they can ask the requestor to clarify the request. Id.

In any event, the agency must act promptly throughout the disclosure process. The PRA refers to this promptness requirement three times. See RCW 42.56.080; .100; .520. The agency "shall provide for the fullest assistance" to the requestor as well. RCW 42.56.100.

Finally, the PRA explicitly provides: "Courts shall take into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials." RCW 42.56.550(3).

C. WDOC REFUSED TO RESPOND NOR PRODUCE RECORDS UNDER
SCCC-947

The PRA requires agencies to disclose all records promptly to requesters. A request cannot be "denied based only on the fact that they are available through other public agencies." *Limstrom v. Ladenburg*, 85 Wn.App 524, 532, 993 P.2d 1055 (1997) and similarly, "The fact that the material may be available in other records is not a reason stated in the [PRA] for failure to disclose." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978). See generally, *Tacoma Public Library v. Woessner*, 90 Wn.App 205, 214-15, 951 P.2d 357 (1998) (Records retained by agency must be disclosed, regardless of availability from other sources or records).

Here, WDOC claims that since records were released under PDU-655, those same records were also responsive to SCCC-947 and therefore they complied with the PRA.

Contrary to such, the above common law implies that an agency may not deny a request based on the claim that they already disclosed those records in a prior request made by the requester.

Further, WDOC never referenced SCCC-947 nor discussed the requested records under SCCC-947 when responding under PDU-655. This issue was raised in *Vance v. Thurston County Comm'rs*, 117 Wn.App 660, 71 P.2d 680, rev. den., 151 Wn.2d 1013 (2003), where the requestor alleged the agency failed to respond to her request self-identified as "PD-TCC-001."

This court affirmed the trial court's ruling that since the agency had referred to the request in the salutation line ("RE: Records request PD-TCC-001") the County had in-fact responded to the request.

Here, WDOC never once referenced SCCC-947 nor even mentioned the records being sought under SCCC-947 when responding under the series of four (4) letters under PDU-655. CP 54, 56, 59, 60, 62. WDOC attempts to cover this omission by claiming they merely 'forgot' to mention SCCC-947. CP 30, 36-37 ¶ 7-9. Yet we cannot imply something that is not expressed.

The trial court's findings that WDOC fully responded to SCCC-947 was in error, as WDOC has still refused to respond to Mitchell's June 14, 2007 clarification letter under SCCC-947 still to this date, nearly two years later. CP 8 ¶ 9.

D. WDOC IS REFUSING TO DISCLOSE RECORDS UNDER SCCC-947

"The [PRA] clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request....Silent withholding would allow an agency to retain a record...without providing the required link to a specific exemption....The [PRA] does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed."

PAWS v. UW, 125 Wn.2d 243, 270, 884 P.2d 592 (1994). Here, WDOC claims the records provided under PDU-655 are also responsive to SCCC-947. CP 30, 37 ¶ 10.

Contrary to WDOC's claims, PDU-655 was a separate request seeking "The log of incoming and/or outgoing mail that is/was intercepted and routed to the [Intelligence & Investigations Unit ("I&I")] that lists the sender, addressee, date sent to I&I, and date returned to I&I" "from the time periods of January 10, 2007 through July 1, 2007" "as it relates to [Mitchell]" CP 52. Under this request, WDOC stated on July 16, 2007 they were compiling records under PDU-655. CP 54. And on that same date, WDOC compiled those records under PDU-655, as evidenced by the date bearing on the records, and the date faxed. CP 63-64.

The records sought under SCCC-947 were mail logs related to Mitchell (different than those used by I&I) that are used by WDOC to track and log mail, both incoming and outgoing. Mitchell also sought "ALL mail log entries to include incoming, outgoing and legal mail from January 9, 2007 to [June 14, 2007]." CP 25, 50. This request was for a separate time frame of specific records, unrelated to those requested under PDU-655.

Under the PRA's liberal construction requirement, this would logically require agencies to liberally construe and harmonize records requests and any clarifications or amendments thereto. No Washington case addresses this issue, yet "Washington courts often look to federal court interpretations of similar provisions of the Freedom of Information Act (FOIA) 5 USC § 552 for guidance in interpreting [PRA]." Tacoma Pub. Library,

90 Wn.App at 220. See Knight v. Food & Drug Admin, 938 F.Supp 710, 716 (D. Kan. 1996) (Agency has a duty to liberally construe the scope of records request); Horsehead Indus. Inc. v. US Evtl. Prot. Agency, 999 F.Supp 59, 66 (D.D.C 1998) ("Agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files").

In this case, WDOC intentionally construed Mitchell's last letter under SCCC-947 as limiting the scope of the request, in an attempt to cover their omission and hope they could claim since they responded under PDU-655 they would be in compliance with the PRA. Yet, even a plain reading of Mitchell's first request under SCCC-947 shows the request sought numerous records all related to Mitchell's mail logs ("and all documents, files, notes, memorandums, and e-mails that pertain to my mail records.") CP 10; 40. This original request was amended and sought "ALL mail log entries to include incoming, outgoing and legal mail". CP 25, 50. WDOC refused to liberally construe nor harmonize the records request, as amended under SCCC-947.

Mitchell affirms there are potentially hundreds of pages of records responsive to SCCC-947 that are being withheld. CP 8 ¶ 10. WDOC has failed to satisfy their burden that all records were disclosed under SCCC-947, and the trial court erred in finding WDOC fully responded to SCCC-947.

E. WDOC BACKDATED INITIAL RESPONSE LETTER

The first issue raised by Mitchell in the trial court was that WDOC had failed to promptly respond to his request within five (5) business days and they had intentionally backdated the May 08, 2007 response letter. CP 4-5; 13, 42. Mitchell had introduced a certified copy of the original envelope containing the May 08, 2007 dated letter. CP 16. WDOC never rebutted this allegation below, and the trial court failed to rule on this issue presented by Mitchell.

"In the absence of a finding of fact on a disputed matter, the appellate court will imply a finding against a party having the burden of proof on that issue." *Rhodes v. Gould*, 19 Wn.App 437, 441, 576 P.2d 914 (1978), rev. den., 90 Wn.2d 1026 (1978).

In the present case, WDOC has the burden of proving they complied with the PRA; Yet they never even attempted to contest the intentional backdating allegation made by Mitchell. The trial court erred when failing to rule on this issue, and the absence of a finding nor any rebuttal by WDOC, establishes this issue as fact by such omissions.

F. CALCULATION OF PENALTY DAYS WAS INCORRECT

The trial court ruled that WDOC simply was untimely for a period of 42 days by their delay in releasing records to Mitchell. Yet contrary to such, this calculation is in error as shown above because no records nor any response has been given to Mitchell to date. The penalty days continue to accrue. The trial court erred in miscounting the amount of penalty days.

G. AMOUNT OF PENALTIES INSUFFICIENT

The determination of an appropriate daily penalty is reviewed by this court under the abuse of discretion standard. See *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 431, 98 P.3d 463 (2005) (*Yousoufian II*).

Under the PRA, the trial court is granted with discretion to impose a penalty "not less than five dollars and not to exceed one hundred dollars for each day [the requester] was denied the right to [access the requested records]." RCW 42.56.550(4).

The trial court imposed the minimum penalty of five dollars (\$5.00) based on the "simple negligence" and "good faith" of WDOC. CP 65-66. This reasoning is presumably based on the ruling in *Yousoufian v. Office of Ron Sims*, 137 Wn.App 69, 151 P.3d 243 (2007), which established four levels of increasing severity based on an agency's culpability to assist trial courts in determining an appropriate per diem penalty. Under this system, WDOC's conduct described above would fall within the most severe level of culpability: Willful misconduct.

The purpose for the PRA's penalty provision is to "discourage improper denial of access to public records and adherence to the goals and procedures dictated by the [PRA]." *Yacobellis v. City of Bellingham*, 64 Wn.App 295, 300, 825 P.2d 324 (1992). Further, the penalty "insure[s] performance of statutory duties and can be imposed whenever a violation of duty has occurred."

Id. at 301.

The trial court abused its discretion in imposing the minimum penalty as the conduct described above that was exhibited by WDOC was deliberate and willful. Under *Yousoufian*, 137 Wn.App at 79-80, the court stated: "[I]nstances where the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose[.] Such examples fly in the face of the PDA and thus deserve the harshest penalties."

As a test for the bad faith of WDOC, what would be the result if Mitchell had not submitted the second request under PDU-655? I.e., what fanciful excuse for their deliberate omissions would be conjured up?

On January 15, 2009 a slip opinion was issued by the Washington Supreme court under *Yousoufian v. Office of Ron Sims*, No. 80081-2 (*Yousoufian IV*), that further clarifies the purpose and even more detailed guidelines for trial courts to employ when imposing penalties under RCW 42.56.550(4). At Slip Op. 47, it provides: "[T]he trial court must consider the entire penalty range established by the legislature." At Slip Op. 17-19, the court established a non-exhaustive 16 point criteria that serve to mitigate and aggravate the penalty.

Applying a few of the aggravating factors to this case satisfies six of the nine stated aggravating factors. Id. 18-19.

In accord with *Marine Power & Equip. Co. v. Wash. St. Human Rights Comm'n*, 39 Wn.App 609, 620, 694 P.2d 697 (1985) (when controlling law changes between the entering of judgment below and consideration of matter on appeal, appellate court generally should apply new or altered law) this court is asked to apply *Yousoufian IV*, supra, to the present action, as this decision modified the *Yousoufian III* opinion heavily relied upon by the trial court.

Based upon the foregoing, the minimum penalty fails to have a deterring nor punitive effect upon WDOC's flagrant and willful misconduct described herein, and as such the trial court abused it's discretion in imposing this miniscule amount.

VI. REQUEST FOR COSTS/ATTORNEY FEES

Mitchell moves this court to grant Mitchell all costs incurred as a result of this appeal, in accordance with RAP 14.3(a) and 18.1. Further, Mitchell seeks a statutory attorney fee pursuant to RCW 4.84.080(2).

VII. CONCLUSION

Based upon the above, Mitchell respectfully moves this court to vacate the trial court's December 12, 2008 order (CP 65-66) and to award Mitchell costs and statutory attorney fees on appeal.

Dated this 09th day of April, 2009.

ORIGINAL

- UNDER PROTEST -
KVA 1-207/308 APP/PRO
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Appellant Pro Per, WITHOUT PREJUDICE

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WASHINGTON DEPARTMENT OF CORRECTIONS,
Respondent.

)
) No. 38767-1-II
)

) DECLARATION OF SERVICE BY MAIL
) GR 3.1(c)
)

The undersigned affirms that on this 09th day of April, 2009, the following documents:

1) Brief of Appellant;

along with a copy of this declaration, were logged as institutional legal mail, with first class postage prepaid, addressed to each of the following:

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The undersigned affirms under penalty of perjury that the foregoing is true and correct, to the best of available knowledge and belief, without prejudice.

Dated this 09th day of April, 2009.

ORIGINAL

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KA 1-207/308 APR/TDC
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