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No. 39874- 5- II

Washington Court of Appeals
At Division Two

KEVIN MICHAEL MITCHELL,

Appellant,

AND

WA. DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY BRIEF OF APPELLANT

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Table of Contents

I. REPLY 1

 A. PERSONAL INSPECTION OF THE REQUESTED RECORDS IS NOT AT ISSUE 1

 B. WDOC CONTINUES TO REFUSE TO PROVIDE THE STATUTORILY REQUIRED EXEMPTIONS..... 1

 C. EXEMPTIONS ARE TO BE PROVIDED TO THE REQUESTOR ALONG WITH THE AGENCY RESPONSE ... 2

 D. ELECTRONIC TRANSFER IS A FEASIBLE OPTION..... 6

II. CONCLUSION 7

Table of Authorities

Washington Cases

Dep't of Ecology v. Cambell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4 (2002) 3

Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009) 6

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994)..... 4

Statutes

RCW 42.56.210(3) 2, 3, 4, 5

RCW 42.56.520..... 2, 3, 4, 5

Rules

RAP 10.3(b)..... 1

Other Authorities

WAC 137-08-130(3) 4

WAC 44-14-04004(b)(ii) 5

WAC 44-14-05001..... 6

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I. REPLY

A. PERSONAL INSPECTION OF THE REQUESTED RECORDS IS NOT AT ISSUE

WDOC inaccurately states that “Mitchell argues the PRA obligates the Department to make all public records available for inspection by inmate requestors[.]” Resp. Brief at 6. However, Mitchell never raised this issue in his opening brief under this appeal, nor was this issue properly raised by WDOC under RAP 10.3(b).

In any event, the record speaks for itself. Mitchell clarified the original PRA request (CP 31) to remove the request to inspect the requested records, and instead sought all responsive records to be transmitted electronically to a designated e-mail address. CP 36. WDOC omits this fact in its statement of the case. See Resp. Brief at 3.

Because this issue is immaterial to the actual issues at bar, this court need not expend its valuable time addressing such. See Resp. Brief at pages 5 to 9.

B. WDOC CONTINUES TO REFUSE TO PROVIDE THE STATUTORILY REQUIRED EXEMPTIONS

To begin, WDOC’s facts are misplaced on this issue as well. WDOC asserts that both letters to Mitchell from WDOC agents

(CP 33-34 & 38) did not communicate “any intent to deny access to records.” Resp. Brief at 9. However, Ms. Schave’s letter dated July 16, 2007 clearly indicated that redactions would be made when stating: “OBTS screens and OMNI will have redactions that are mandatory exempt from disclosure[.]” CP 38. This misstatement is significant because the statutorily required exemption and explanation twice mandated under the PRA (RCW 42.56.210(3) & RCW 42.56.520) is required to be provided to Mitchell along with the response letter denying disclosure. See Section C, below.

C. EXEMPTIONS ARE TO BE PROVIDED TO THE REQUESTOR ALONG WITH THE AGENCY RESPONSE

WDOC’s second argument in support of the claim that the PRA does not require an exemption log to be given to the requestor in the response letter denying access to the records is completely off target. See Resp. Brief at 10.

Contrary to WDOC’s interpretation, both RCW 42.56.210(3) and RCW 42.56.520 require that the agency’s response letter “*shall* include a statement of the specific exemption” if such letter denies access to the requested records. RCW 42.56.210(3) (emphasis added). *Cf.* RCW 42.56.520 (“Denials of requests must be accompanied by a written statement of the specific reasons therefor”).

Whether or not records are submitted to the requestor is not the determining factor of when an agency is required to provide an exemption log. The dispositive factor is the agency's responding letter which communicates the intent to deny the requestor access to the requested records. See RCW 42.56.210(3) and RCW 42.56.520.

"The meaning of a statute is a question of law reviewed de novo." *Dep't of Ecology v. Cambell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "The fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. As it applies here, the plain meaning of the statute must be given effect. This would simply entail following the twice repeated mandate to provide the requestor with an exemption log *along with* the agency response letter denying access to the records.

Applying the law to the facts of this case, the duty to provide an exemption log was triggered by Ms. Schave's July 16, 2007 letter to Mitchell, which provided: "OBTS screens and OMNI will have redactions that are mandatory exempt from disclosure[...]." CP 38. The intent to deny access to some of the responsive records was made clear by this responding letter, and following both

RCW 42.56.210(3) and RCW 42.56.520, the duty to provide Mitchell with the required exemption log was thereby activated.

The WDOC administrative rule governing PRA requests and responses provides:

If the file does contain materials exempt from disclosure, the public disclosure coordinator shall deny disclosure of those exempt portions of the file, and *shall, at the time of the denial, in writing, clearly specify the reasons for the denial of disclosure, including a statement of the specific exemptions or reasons authorizing the withholding of the record and a brief explanation of how the exemption or reason applies.* The remaining, nonexempt materials shall be fully disclosed.

WAC 137-08-130(3) (emphasis added). Both this administrative rule and the twice repeated mandate to provide an exemption log were disregarded here.

Along this same line, the Washington Supreme Court held in *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994) that "[t]he plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an *agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.* Not only does this requirement ensure

compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act. (footnote omitted, emphasis added).

Please take notice that each of the preceding authorities contain reference to the agency's responding letter which denies access to the requested records as the trigger for the requirement to provide a withholding index to the requestor.

Regardless of whether Mitchell responded further to the July 16, 2007 letter from Ms. Schave (CP 38), the duty to provide an exemption log was still triggered, which makes any response by Mitchell irrelevant. The duty to provide the exemption log is derived from the PRA itself, not any action or inaction by the requestor. This feigned excuse for non-compliance cooked up by WDOC can plainly be seen through under this light.

The Attorney General's published model rules and commentary under the PRA hints at the underlying purpose of providing the requestor with an exemption log: "The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper." WAC 44-14-04004(b)(ii).

Based upon the above, and the lack of any credible argument by WDOC to the contrary, both RCW 42.56.210(3) and RCW 42.56.520 require the agency's response letter that manifests intent

to deny access to records to include a withholding index. As a result of WDOC refusing to provide such to-date, this clear mandate has been violated. The trial court ruling should be reversed on this issue.

D. ELECTRONIC TRANSFER IS A FEASIBLE OPTION

Still once more, WDOC misrepresents facts to this court. Specifically, WDOC omits the sentence which precedes the holding in *Mechling v. City of Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009) which rejects Mechling's argument that the agency has a duty to scan documents and provide them in an electronic format to the requestor. See Resp. Brief at 12.

The portion of *Mechling* which was omitted held: "Although the City has no express obligation to provide the requested e-mail records in an electronic format, consistent with the statutory duty to provide the fullest assistance and the model rules [WAC 44-14-05001], on remand the trial court shall determine whether it is reasonable and feasible for the City to do so." (citations omitted).

As it applies here, there was never a determination made as to the viability of providing the records to Mitchell in an electronic format. Since this issue was remanded in *Mechling* for a determination by the trial court as to the feasibility of electronic transfer of the records, the same should be done here.

II. CONCLUSION

Based upon the above reasons, this court is respectfully requested to grant review and reverse the trial court's decision.

Respectfully submitted this 30th day of August, 2010.



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