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STATE OF WASHINGTON

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**No. 39874-5-II**

Washington Court of Appeals  
At Division Two

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**KEVIN MICHAEL MITCHELL,**

Appellant,

AND

**WA. DEPARTMENT OF CORRECTIONS,**

Respondent.

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION.**

This appeal is presented by Appellant / Plaintiff KEVIN MICHAEL MITCHELL. This case originated after Mitchell filed an amendment to a request for records under the Public Records Act<sup>1</sup> ("PRA") to obtain electronic transfer of records maintained by WDOC concerning Mitchell. To date, WDOC has not provided Mitchell with any statutory exemptions which authorize withholding the requested records. WDOC also denied Mitchell's request to transfer the records electronically. The trial court found that WDOC did not violate the PRA as alleged by Mitchell, of which review is sought.

## **II. ASSIGNMENTS OF ERROR.**

1. Error is assigned to the trial court denying Mitchell's motion to show cause.
2. Error is assigned to the trial court's finding no violation of the Public Records Act.
3. Error is assigned to the trial court's order denying reconsideration.

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<sup>1</sup> Codified in Chapter 42.56 RCW. Referred to as "PRA" throughout.

### **III. ISSUES RELATED TO ASSIGNED ERRORS.**

1. Whether WDOC has continuously refused to provide statutory exemption(s) and explain such (Error 2).
2. Whether an agency is required to provide statutory exemption and withholding index along with the response letter denying access to the requested records (Error 2).
3. Whether WDOC's response or the PRA requires Mitchell to respond prior to exemptions being claimed by WDOC (Error 2).
4. Whether electronic transfer of the records which are retained in electronic format is a feasible option (Error 2).

### **IV. STATEMENT OF THE CASE**

#### **A. BACKGROUND FACTS.**

On June 7, 2007, Mitchell submitted an amendment to a previous PRA request desiring to inspect "any and all OBTS and/or OMNI screens or information pertaining to [Mitchell's] LSI-R and [his] RMI Identification." CP 10 ¶ 3. OBTS was a computer program that tracked all of an offender's information. It was replaced by a new program, OMNI. CP 27-28. The LSI-R and RMI were risk assessments once used to gauge a prisoner's risk to reoffend. WDOC ceased using both of these tools by July 2009.

Sheri Izatt responded on June 18, 2007 by denying Mitchell's request to personally inspect the requested records. CP 12.

Mitchell clarified the request and requested all responsive records to be sent to a specified electronic mail address. CP 15. Gaylene Schave answered on July 16, 2007 stating that "OBTS screens and OMNI will have redactions that are mandatory exempt from disclosure[.]" CP 17. No further correspondence was made between the parties under this request. To date, no exemption log has been provided to Mitchell.

## **B. PROCEDURAL FACTS.**

Mitchell filed a motion with the trial court seeking an order directing WDOC to show cause how the PRA was not violated. Mitchell asserted that WDOC failed to provide statutory exemption(s) and an explanation of how such exemption(s) justify the withholding of the requested records. Mitchell also asserted that denying electronic transfer was improper. CP 3-17.

The Hon. Chris Wickham entered an order directing WDOC to appear and show cause how the PRA was not violated as alleged in Mitchell's motion. CP 18.

WDOC responded to Mitchell's motion and alleged that since Mitchell failed to communicate with WDOC further, no violation of the PRA occurred. CP 19-24.

Mitchell replied by asserting WDOC was required to provide a statutory exemption which justifies withholding the records under

RCW 42.56.210(3) and RCW 42.56.520. CP 39-44. The Hon. Anne Hirsch entered an order on July 31, 2009 denying Mitchell's motion to show cause and finding that there was "no violation of the Public Records Act." CP 46-56. Mitchell moved to reconsider the order. CP 48-52. WDOC responded to Mitchell's motion for reconsideration. CP 53-55. Mitchell replied to WDOC's response. CP 57-58. The Hon. Judge Hirsch denied reconsideration on September 8, 2009 and entered a letter opinion along with the order denying reconsideration. CP 59-62. This appeal timely follows.

## **V. DISCUSSION.**

### **A. STANDARD OF REVIEW – *De Novo*.**

Under the terms of the PRA, agency actions are reviewed "de novo." RCW 42.56.550(1). Appellate court review under the PRA is de novo as well. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007). Since each of the following issues are presented under the PRA, each are reviewed by utilizing this *de novo* standard of review.

### **B. FAILURE TO PROVIDE STATUTORY EXEMPTION AND EXPLANATION WITH DENIAL LETTER VIOLATES PRA.**

The PRA clearly provides that:

"Agency responses refusing, in whole or in part, inspection of any public record shall include a

statement of the specific exemption authorizing the withholding of the record (or part) **and** a brief explanation of how the exemption applies to the record withheld.”

RCW 42.56.210(3) (emphasis added).

“Denials of requests must be accompanied by a written statement of the specific reasons therefor.”

RCW 42.56.520 (emphasis added).

Both RCW 42.56.210(3) and RCW 42.56.520 mandate agencies to provide a reference to a statutory exemption and an explanation of how such exemption applies to the records sought to be withheld. This mandatory citation and explanation is required to be included along with the agency response denying access to the requested records. *Id.*

WDOC refuses to adhere to the above unambiguous language of the PRA. After receiving the original request, Mitchell demanded a statutory exemption to be provided. CP 15. Specifically, Mitchell pointed out that DOC policy is not a proper *statutory* exemption, and asked Ms. Izatt to correct this error and provide a proper exemption, in accord with the PRA’s exact terms. *Id.* Ms. Schave’s response only hinted that redactions would be made, without reference to any statute which authorizes such redaction. CP 17.

Even after commencing the present action, and in response to Mitchell’s motion to show cause, WDOC again refused to provide the requisite statutory exemption and explanation. CP 23. In a

declaration, Ms. Schave again implied a few of the exemptions which were planned to be made, yet again refused to provide any specific citation to any statute which authorizes these redactions, nor the required explanation. CP 28 ¶ 6.

WDOC maintains the position that it is not required to provide an exemption log along with a response letter, but instead claims it is proper to send an exemption log when relaying the records to the requestor. VRP 7-8. Contrary to such, the PRA plainly provides at both RCW 42.56.210(3) and RCW 42.56.520 that the exemptions and a brief explanation must be provided to the requestor along with the response letter denying disclosure.

Amazingly, this is not the first instance where WDOC has engaged in this exact form of PRA violation. This division of the Court of Appeals determined *Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 72 P.3d 206, *review denied*, 150 Wn.2d 1037 (2004), which held that WDOC “did not include a statement of the specific exemption authorizing the withholding” “and provided no explanation to Citizens in response to their request. Accordingly, the Department clearly violated this section of the [PRA, RCW 42.56.210(3).]” *Citizens*, 117 Wn. App. at 431. Counsel for WDOC attempts to distinguish *Citizens* on the basis that records were disclosed to the requestor in *Citizens* unlike here. VRP 7-8. However, this is incorrect, as the plain language of the

PRA explicitly provides that an exemption and explanation must be provided to the requestor prior to records even being disclosed.

See RCW 42.56.210(3) and RCW 42.56.520.

The Washington Supreme Court has held that:

“The 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.”

*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994) (footnote omitted).

In further support of Mitchell's position, this courts attention is guided towards the Attorney General's published model rules and commentary interpreting the provisions and application of the PRA. See generally chapter 44-14 WAC. The comments regarding procedures for agencies to follow when claiming exemptions state:

“When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as 'proprietary' or 'privacy' are insufficient.”

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

The above published commentary was cited as authority by our Supreme Court in *Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 539, 199 P.3d 393 (2009).

The trial court's finding (CP 45) that WDOC did not violate the PRA is in error because WDOC continues to withhold the requested records without providing the necessary nexus to a statutory exemption to authorize such withholding. This is contrary to both RCW 42.56.210(3) and RCW 42.56.520, as well as the above authorities interpreting both provisions. As a result of this clear violation of the PRA, reversal of the trial court's decision is required.

Under the language of the PRA, its provisions must be "liberally construed" to ensure that the public's interest is protected. RCW 42.56.030; *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008). The appellate court's purpose when interpreting a statute is to "determine and enforce the intent of the legislature." *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, effect to the language must be given. *Id.* When construing the PRA, this court is guided to "look at the act in its entirety in order to enforce the law's overall purpose." *Rental Housing Ass'n*, 165 Wn.2d at 536.

Based upon the above, WDOC violated the PRA by failing to provide citation to a statute which justified withholding the records as well as failing to explain how such exemption applies to the records, contrary to RCW 42.56.210(3) and RCW 42.56.520. The trial court's finding to the contrary (CP 45) is thus improper.

**C. MITCHELL WAS NEVER UNDER DUTY TO RESPOND.**

Under RCW 42.56.520, an agency "may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency...need not respond to it."

WDOC claims that it was waiting to hear from Mitchell in what format he wanted the records produced, then an exemption log would be provided. CP 23. Mitchell explained that under RCW 42.56.520, he was under no duty to respond further as WDOC never requested Mitchell to further clarify his request. CP 41. The Hon. Judge Anne Hirsch ruled that WDOC was under no obligation to further address Mitchell's request because he allegedly "never responded to the Department's query regarding copying or requesting documents." CP 61. See also VRP at 12.

Clearly this provision does not apply here because WDOC never requested Mitchell to clarify which records he was seeking. Ms. Schave never requested Mitchell to specify how he desired to access the records, she only provided two options. CP 17. The July

16, 2007 letter (CP 38) does not even remotely resemble a request for Mitchell to clarify the request, therefore the fact that Mitchell never communicated further with WDOC regarding this request, does not exclude WDOC from adhering to its duties proscribed under the PRA, most notably, providing the required “exemption log” which counsel claims would be sent. CP 23.

Even assuming *arguendo*, WDOC’s feigned ‘explanation’ falls short of the PRA’s mandate for “fullest assistance” and “most timely possible action” on requests. See RCW 42.56.100; *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007) (Administrative inconvenience or difficulty does not excuse strict compliance with the PRA).

In short, the fact that Mitchell never responded further is irrelevant to the issues presented, namely that WDOC continues to violate the PRA’s requirement of providing an exemption log to Mitchell. WDOC raises this issue solely as a form of misdirection, which this court is asked to look past this feigned defense and focus its precious time and attention to the actual issues at hand.

In light of the foregoing, the trial court’s basis for dismissing Mitchell’s action was contrary to the terms of the PRA, and therefore justifies reversal by this court.

**D. TRANSFER OF THE RECORDS VIA ELECTRONIC MAIL IS A FEASIBLE OPTION.**

“Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW 43.105.250 provides: ‘It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.’ In general, an agency should provide electronic records in an electronic format if requested in that format. Technical feasibility is the touchstone for providing electronic records.”

WAC 44-14-05001.

“Providing copies of electronic records usually costs the agency and requestor less than making paper copies. Agencies are strongly encouraged to provide copies of electronic records in an electronic format. See RCW 43.105.250 (encouraging state and local agencies to make ‘public records widely available electronically to the public.’).”

WAC 44-14-07003.

Mitchell raised this issue in his motion to show cause. CP 6. WDOC does not rebut the claims established by Mitchell concerning this issue. CP 19-24; 53-55. The Honorable Anne Hirsch held that “I do not think there is any requirement...that the agency be required to permit an electronic transfer of the documents.” VRP at 12.

As an initial matter, WDOC failed to meet its burden of proving compliance with the PRA, as no mention of this issue was

presented by WDOC below. See RCW 42.56.550(1) (burden of proof shall be on the agency). This error, in and of itself, warrants reversal, since the burden of proof on this issue was not even attempted to be satisfied by WDOC.

Still, the legislature has made clear that courts are to “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...to public officials.” RCW 42.56.550(3). This PRA edict coupled with the legislative directive to agencies to provide electronic records in their same format when requested (see RCW 43.105.250) evidences the trial court’s error in holding that WDOC was not required to provide the records electronically. The Honorable Judge Anne Hirsch stated “I do not think there is any requirement, although I know it has been addressed in the model rules<sup>2</sup> that the agency be required to permit an electronic transfer of the documents, and in the particulars of a case where there is an incarcerated person requesting information from the DOC, the Court has upheld reasonable regulations imposing some restrictions on how information is going to be disseminated.” VRP at 12.

It would appear Judge Hirsch is referring to *Sappenfield v. DOC*, 127 Wn. App. 83, 110 P.3d 808 (Div. 3, 2005), *rev. den.*,

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<sup>2</sup> Attorney General’s Model Rules under the Public Records Act, ch. 44-14 WAC.

156 Wn.2d 1013, 132 P.3d 146 (2006) which upheld DOC's policy that prohibits a prisoner from personally inspecting records except for his or her own central and/or medical file(s). This prohibition follows WDOC's duty to enforce reasonable regulations which prevent damage or disorganization to public records. RCW 42.56.100.

However, the PRA explicitly forbids this type of discrimination against Mitchell on the basis of his incarceration: "Agencies shall not distinguish among persons requesting records[.]" RCW 42.56.080. Yet the oral ruling from the Hon. Judge Hirsch ignored this rule prohibiting differentiation between requestors on account of Mitchell's incarcerated status. This status has no relevance nor bearing upon the availability of public records to a citizen of this State, nor to the accessibility of agents acting on Mitchell's behalf to receive records on his behalf in electronic format.

As a result of the trial court's failure to dispose of this issue, this court is respectfully requested to do so. In line with the foregoing, the trial court's decision is contrary to law, and therefore justifies reversal by this court.

#### **VI. REQUEST FOR COSTS / ATTORNEY FEES.**

Mitchell moves this court to grant him all costs incurred as a result of this appeal, in accordance with RAP 14.3(a) and

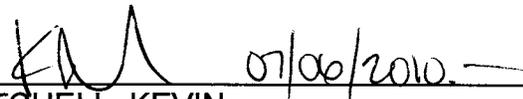
RAP 18.1. This falls within the PRA's allowance of "all costs" to be awarded to the prevailing party. RCW 42.56.550(4).

Further, Mitchell seeks a statutory attorney fee pursuant to RCW 4.84.080(2).

**VII. CONCLUSION.**

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

Respectfully submitted this 06<sup>th</sup> day of July, 2010.

  
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