

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DOC, Respondent

v.

GEORGE BARTZ, Appellant

COURT OF APPEALS
DIVISION II
11 NOV 21 AM 9:59
STATE OF WASHINGTON
BY  DEPUTY

MOTION FOR DISCRETIONARY REVIEW

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Appellant filed two Summons and Complaints. CP at 4 for 11-2-00712-7 & CP at 13 for 10-2-02314-1. The complaints were filed based upon the fact that the Public Disclosure Unit (PDU) of the Department of Corrections (DOC) failed to provide all the documents held, concerning the subject matters of the records requests.

2. The state presented no evidence that those public disclosure requests had been completed rather they contended that one Complaint CP at 9 for 11-2-00712-7 was time barred and the other had been fully answered CP at 20 for 10-2-02314-1.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the court erred in dismissing the complaints, stating in the Finding and Order of dismissal:

Cause #11-2-00712-7; CP at 22

1. The action was not necessary to obtain the records;
2. The matter was frivolous,
3. The matter was time barred.

Cause # 10-2-02314-1; CP at 26

1. That Appellant's request was for **6 GROUPS** of records "relating to different issues."
2. The Court erred in stating that there was 'no other correspondence between the Public Disclosure Unit and Mr. Bartz.'

3. Did the Court err in stating; "It is perfectly reasonable to this Court to believe that his responses were fully complied with..."
4. Did the Court err in believing that prolonged piecemeal disclosure of TORT claims falls within the intent of the PRA?

B. STATEMENT OF CASE

Cause # 11-2-00712-7: CP at 22

Appellant filed a Summons & Complaint. CP at 4, after repeated requests to the Public Disclosure Unit (PDU) had failed to fully produce records requested. In a request dated October 4, 2009, designated **PDU-8623**, CP at 22 EX A, by the PDU, the initial records received totaled 66 pages and had exactly four (4) references to "Glucosamine/Chondroitin" (Glu/Chon) and one to "Oils." The PDU was informed by letter, CP at 22 EX A, dated January 8, 2010, that the request was not complete due to the appellant having emails that were not included in the disclosed records. No further documents were received under this designation.

To try to gain full disclosure of records requested the appellant filed a second Public Records Act (PRA) request that was designated **PDU-14117**, CP at 22 EX C, directing the PDU staff to a specific person; Rhonda Kerr, Rph. The first response had more pages on Glu//Chon but not the emails; again the PDU was informed of the missing emails and on the next disclosure they were produced, along with additional information

of Glu/Chon. The disclosure demonstrated a serious lack of effort on the part of the PDU to search all files.

Cause #10-2-02314-1; CP at 26

The appellant filed a PRA request on June 12, 2009, seeking **6 GROUPS** of records which was designated **PDU-7362**, CP at 26 EX A, by the PDU. The PDU disclosed 481 pages of documents of which about 75% were not connected with the subjects requested and had pages that were repeated up to 36 times. The appellant perused these documents and found that not one of the original **'6 GROUPS'** of records had been fully answered and in most cases not answered or referred to at all.

To eliminate an oversight on the appellants part and to clarify the subject matters original request a second PRA request, designated **PDU-8827** by the PDU unit, was submitted. The second request was piecemealed in a time frame that would have taken at least 2 to 3 years to complete. The second installment proved that the original statement by a DOC employee concerning payment of frivolous TORT claims was not accurate so no additional installments were purchased.

The combination of the lack of disclosure; reluctance on the part of the PDU to admit errors and the shear volume of the 'bloat' in both requests received forced the appellant to seek redress in the courts under **RCW 42.56.550(1)(2)**.

C. ARGUMENT

The PRA under **RCW 42.56.030**, explicitly mandates that the public has a right to records held by State agency's (unless specifically withheld) and under **RCW 42.56.070(1)**;"...shall make available for public inspection and copying all public records..."

Cause #11-2-00712-7;

When the appellant filed the initial public records request it was expected, and rightly so, that the agency would do a thorough search and disclose all records requested.

Neighborhood Alliance of Spokane County v. County of Spokane, 84108-0, states at §19; "Amicus insists that the failure to adequately search for a record is especially egregious because the requester may not know responsive documents exist, and therefore would have no basis to challenge an otherwise seemingly adequate response."

At §20; "An adequate search is a prerequisite to an adequate response, so an inadequate search is a violation of the PRA because it precludes an adequate response." **Soter**, 162 Wn.2d at 756; **RCW 42.56.550(4)**;

Upon inspection of the documents received it was found that the records were not on the subject matter in over 98% of the disclosure and did not include two emails the appellant had in his possession, something

that the PDU was unaware of, which indicated that a complete search had not been accomplished. The request was not submitted to get copies of those emails but rather to get all the information on the subjects 'Glucosamine/Chondrotin' and 'Oils.'

Information was sought about the Glu/Chon because the appellant has been diagnosed with osteoarthritis and the combination of the two products has been proven to give relief. The second subject of Oils was simply being researched because the Inmate Store was supposed to sell this product, in various scents for inmate use which they had not done.

Concerning the two emails in the possession of the appellants; they were given to him by the Health Care Manager at Airway Heights Corrections Center, and indicated that the Inmate Store was supposed to start selling Glu/Chon. Only after months of no action did the appellant file the records request to ascertain the status of the product. Upon discovering that the emails were not in the disclosure the PDU was informed that the request was not complete. The PDU requested a copy of those emails, which the appellant refused to surrender. The refusal was based upon the assumption that the emails should have been included, if a thorough search had been done and as it later proved out that other documents were being withheld.

Judge Pomeroy stated: CP at 22

1. “The action was not necessary to obtain the records.” The appellants first request, was designated PDU-8623 by the PDU. The disclosure when received only referred to Glu/Chon four (4) times in 66 pages and the subject of Oils was referred to twice (the second time an exact duplicate on the very next page). The majority of the records received concerned OTC (Over the Counter) medications; not a subject matter sought for disclosure. Upon notification that there were additional records not disclosed the appellant was informed that there was an appeal process.

It is the responsibility of the Public Disclosure Unit to do a thorough and exhaustive search for requested records and not to whimsically refer the requester to the appeals unit if they are dissatisfied, which is not in the spirit of the PDA.

Neighborhood Alliance of Spokane County v. County of Spokane, 84108-0, at §14; “The PRA is silent about what constitutes an adequate search, and the court has not had reason to address it. The Court of Appeals relied on judicial interpretations of FOIA to answer this question. NASC, 153 Wn. App. @ 256 (citing Hearst Corp. v Hoppe, 90 Wn.2d 123, 128, 580 P. 2d 246 (1978) (“The state act closely parallels the federal Freedom of Information Act...and thus judicial interpretations of that act are particularly helpful in construing our own.”) Both acts

promote open government and FOIA is construed broadly with its exceptions narrowly tailored, similar to the PRA. Hearst Corp., 90 Wn.2d at 129. Both make virtually every document generated by an agency available to the public unless an exemption applies.” (Cite omitted.) “We agree with the Court of Appeals approach and hold that the adequacy of a search for records under the PRA is the same as exists under FOIA.”

§15 ”The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. Weisberg, 705 F.2d at 1351.

§16-17 The Court goes on to further state: “Moreover, records are never exempt from disclosure, only production, so an adequate search is required in order to properly disclose responsive documents. See Sanders, 169 Wn.2d at 836. “The failure to perform an adequate search precludes an adequate response and production. The PRA “treats a failure to properly respond as a denial.” Soter v. Cowles Publ’g. Co., 162 Wn.2d 716, 750, 174 P.3d 60(2007) (citing RCW 42.56.550(2)(4), (formerly RCW 42.17.340)). Thus an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations, at least insofar as the requestor may be entitled to costs and reasonable attorney fees under RCW 42.56.550(4).”

The trial court erred in the interpretation of the original complaint when Judge Pomeroy stated in CP at 22, Page 4, lines 8-9: “he already had these two emails of which this public records complaint is solely about in the lawsuit.” Neighborhood Alliance of Spokane County v. County of Spokane, 84108-0, at §24 “As will generally be true in many cases, a party does not know with certainty that a document in its possession is the public record it seeks until the agency responds. As we have previously recognized, the PRA requires a response to a request and disclosure of all responsive public records held by the agency. §16. “The fact that the requesting party possesses the document does not relieve the agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill their duty.”

A second request, designated PDU-14117, by the PDU, was subsequently filed directing the PDU to a specific person, Rhonda Kerr, Rph. The PDU still failed to produce the emails. They did produce more documents that were not disclosed in the original disclosure and were on the subject matter of Glu/Chon. Again the appellant informed the PDU that the matter was not complete so the PDU again searched and found additional documents concerning Glu/Chon, and the emails. Both of these disclosures produced documents on Glucosamine/Chondrotin that were

found in the files of a health care provider; a place it would seem should have been thoroughly searched.

The appellant had to conclude that a thorough search had not been done, as required, and there still could be information not disclosed.

2. “The matter was frivolous.” CP at 22. If no additional documents had been found then the matter could be considered trivial but based upon the fact that additional pages were found, twice, the complaint is valid. Repeated correspondence with the PDU produced more documents on two occasions. These documents were not forthcoming in the initial production of records.

3. “This matter is time barred.” CP at 22. It is stated in the PRA that; “The one year period for filing an action under RCW 42.56.550(6), to challenge a public agency’s claim of exemption or withholding of documents does not begin to run until a public agency provides a detailed privilege log under RCW 42.56.210(3), and Progressive Animal Welfare Society v. Univ of Wash., 125 Wn.2d 243, 884 P2d 592 (1994); Rental Housing Ass’n of Puget Sound v. City of Des Moines. No. 80532-6 (Jan 22, 2009). (WAPA’s Case Update, 2009). The appellant has never received such a document.

Cause #10-2-02314-1: CP at 20

A Public Records request was submitted to ascertain the validity of statements made by Eldon Vail, then Secretary of the Department of Corrections concerning potential savings that would be realized by taxpayers after taking personal clothing from inmates and then issuing some of these items, at the taxpayer's expense. Since it seemed unreasonable on its face the appellant, a taxpayer, sought clarification.

The request, designated PDU 7362 by the PDU, asked for **6 GROUPS** of records. CP at 4, EX A. To date none of the 6 Groups have been fully answered, and in fact five groups were not addressed nor referred to.

“GROUP ONE: Produce all documents that are used by Eldon Vail, Secretary of DOC in his reference to saving the Department ‘six-figures’ by taking away personal clothing from inmates.” CP at 4, EX A. The appellant carefully studied the documents received, looking for the savings to be realized but the information is not evident. While researching the data received the appellant was informed that women at the women's prison were to be allowed to keep their washers and dryers. A records request, designated PDU-14025, by the PDU was submitted and it was verified that indeed the women were being allowed to keep their washers and dryers. It seems that the savings referred to were to be carried on the backs of the male inmates and the PDU failed to mention

that fact in their disclosure, or Mr. Vale's statements, by producing any relevant documents.

GROUPS TWO-SIX; CP at 4 EX A, The appellant found piecemeal facts that allowed him to conclude that no savings were to be realized but was never able to do an in-depth analysis, based upon the scanty information received. Based upon the supposition that there is still information that has not been produced it is apparent that even DOC does not know the total overall cost of the new policy.

In particular, the cost of giving sweats to inmates, both male and female, is a number that should have been readily available but there is only a vague reference to how much it would cost one institution., but not a State wide cost.

In the perusal of the disclosed records the appellant discovered that the PDU has duplicated to such an extent that the first 250 pages had approximately 100 pages of distinct information. CP at 4 EX C. The second installment follows the same pattern with pages and pages of pictures of laundry carts and the DOC clothing matrix repeated time after time.

The PDU did adjust the cost of the second installment but the appellant has to ask "why did they not redact the installments to insure

compliance or give any indication that there were outstanding documents yet to be produced.”

In the Declaration of Virginia Shamberg, Public Records Specialist, CP 19 **Attachment A**, a letter to Ms. Shamberg dated August 28, 2009, reads in part; “I have received the incomplete Public Disclosure...” “This disclosure does not complete my request...” It was the intent and the language of that letter to inform the PDU that the information was not complete but as can be noted the PDU, represented by Ms. Shamberg, failed to make any further attempts to produce documents or clarify the problem as required under RCW 42.56.520.

2. This section is not disputed rather I will restate: “The second installment proved that the original statement by a DOC employee was in error concerning payment of frivolous TORT claims.”

The appellant has concluded after a diligent search of the disclosed documents provided under the above referenced cause numbers that the PDU of DOC has been negligent and has acted in ‘bad-faith’ in not only addressing sought records requested but in failing to do a thorough search and fully disclose all records.

D. CONCLUSION

The appellant asks this court to review the information submitted and rule on:

1. If the Complaint was frivolous and constitutes a strike under SHB 1037, #11-2-00712-7.
2. If the appellant is time barred in Cause #11-2-00712-7.
3. If the PDU of DOC provided all the documents asked for in the Public Records Request for all 6 Groups of records requested, # 10-2-02314-1.
4. Did the court properly assign a strike under SHB 1037, and /or is it even proper to assign a strike only to prison inmates.
5. Did the agency, based upon these PRA requests, act in 'bad-faith' and is the appellant entitled to compensation for that act?

DATED this 17 day of November, 2011

SUBMITTED BY:

George Bartz
George Bartz, Appellant, pro se

COURT OF APPEALS
DIVISION II

11 NOV 21 AM 9:59

STATE OF WASHINGTON

BY _____
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CERTIFICATE OF SERVICE

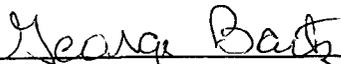
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EXECUTED this 17 day of November 2011.



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