

NO. 45329-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

EUGENE GARVIE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

ANSWERING BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a Public Records Act (PRA) case involving four records requests inmate Eugene Garvie submitted to the Department of Corrections (DOC) for audio recordings of telephone calls he made through DOC's inmate telephone system. DOC withheld the records because, by statute, recordings of inmate telephone conversations are exempt from disclosure absent a court order or for specified criminal law enforcement or prison security purposes. *See* RCW 9.73.095. In January 2013, Mr. Garvie filed a lawsuit, alleging DOC's responses to his records requests were deficient. CP__, Sub No. 5. The superior court dismissed Mr. Garvie's complaint on summary judgment, finding the claims concerning two requests were time barred under the PRA's one-year statute of limitations, and that DOC complied with the PRA when it responded to the other two requests. CP 19-20. Mr. Garvie appeals. DOC respectfully requests that the Court, in reviewing the superior court's order de novo, affirm the ruling as a matter of law.

II. STATEMENT OF THE CASE

A. February 2011 Request (PDU-14345)

On February 14, 2011, DOC received a public records request from Mr. Garvie for "the public disclosure recordings by inmate telephone whom I called at the following number: (360)-630-5612 ... from March

10th, 2010 to present and throughout this time only eight calls were made.” CP ___, Sub No. 62, Ex. 1, Attach. A. By letter dated February 23, 2011, DOC Public Disclosure Coordinator Paula Terrell acknowledged receiving Mr. Garvie’s request, assigning it tracking number PDU-14345, and informed Mr. Garvie he could expect a response on or before April 8, 2011. CP ___, Sub No. 62, Ex. 1, Attach. B. On March 2, 2011, DOC responded to Mr. Garvie’s request informing him that although staff had prepared a CD containing recorded telephone conversations responsive to his request, the recordings were exempt from disclosure under RCW 9.73.095(3)(b) and RCW 42.56.070(1). CP ___, Sub No. 62, Ex. 1, Attach. C. Mr. Garvie appealed this denial through DOC’s appeal process, and on April 12, 2011, a DOC official confirmed the recordings were exempt and denied Mr. Garvie’s appeal. CP ___, Sub No. 62, Ex. 1, Attach. D.

B. February 2012 Request (PDU-19078)

On February 17, 2012, DOC received a public records request from Peggy Steffener, a legal assistant to an attorney, Neal Friedman. Mr. Friedman represented Mr. Garvie on criminal charges arising out of the telephone calls. CP ___, Sub No. 62, Ex. 2, Attach. A. The request sought “[r]ecordings of calls between Brian Eugene Garvey [sic], DOC #307014 and telephone number 360-630-5612 between March of 2009 and September of 2010.” On February 24, 2012, DOC acknowledged receipt

of the request, advising Ms. Steffener the request was assigned tracking number PDU-19078, and that she could expect a response on or before April 6, 2012. CP ___, Sub No. 62, Ex. 2 at 2.

On April 3, 2012, DOC Public Disclosure Specialist Patti Lee sent Ms. Steffener a letter informing her, as it had Mr. Garvie a year earlier, that RCW 9.73.095(3)(b) prevented the Department from releasing the recorded calls gathered in response to her request. CP ___, Sub No. 62, Ex. 2, Attach. B. Ms. Lee further provided an exemption log, citing RCW 9.73.095(3)(b) and RCW 42.56.070(1), and also provided Ms. Steffener, at no cost, a three page call report that identified calls Mr. Garvie made during the relevant time period. CP ___, Sub No. 62, Ex. 2, Attach. B.

On April 23, 2012, Ms. Steffener provided DOC a copy of a Snohomish County Superior Court order, issued in *State of Washington v. Eugene Garvie*, No. 11-1-01780-4, requiring DOC to “produce a recording of the following phone calls in its possession involving Mr. Garvie, inmate ID 30714 calling phone number 360-630-5612: January 10, 2010 (2 calls of 20 minutes each), March 10 (2 calls of 20 minutes each), March 12 (one call 20 minutes), March 19 (one call 20 minutes) March 28 (one call 20 minutes), April 11 (12 Minutes), July 30 (one minute).” CP ___, Sub No. 62, Ex. 2, Attach. C.

On April 30, 2012, Ms. Lee wrote Ms. Steffener, informing her that inmate telephone recordings are retained on the telephone system for one year and thereafter automatically drop off unless saved outside the system. The letter further advised that none of the calls listed in the order was preserved outside the system on a CD or otherwise and, therefore, DOC was closing Ms. Steffener's request. CP ___, Sub No. 62, Ex. 2, Attach. D. It is unclear from the record whether, when Ms. Lee searched for the telephone recordings listed in the Snohomish County order, she was aware of or reviewed the CD prepared a year earlier in response to Mr. Garvie's February 2011 request (PDU-14345).

Ms. Steffener did not appeal the Department's response to PDU-19078. CP ___, Sub No. 62, Ex. 2 at 3. On May 17, 2012, the Snohomish County Superior Court dismissed the criminal charges pending against Mr. Garvie related to the telephone calls. CP ___, Sub No. 62, Ex. 3.

C. June 12, 2012, Request (PDU-20589)

On June 12, 2012, DOC received another public records request from Mr. Garvie. CP ___, Sub No. 62, Ex. 1, Attach. E. In this request, Mr. Garvie sought "public disclosure record 'PDU-14345,' which was filed in 2010, and all its contents of this PDU that was responsive to that request." On June 19, 2012, DOC acknowledged receiving the request and sought confirmation from Mr. Garvie that he sought "[t]he

original request submitted by you that was assigned tracking number PDU-14345 and all the correspondence addressed to you and/or me that were generated from that request.” CP __, Sub No. 62, Ex. 1, Attach. F. Public Disclosure Specialist Paula Terrell further requested of Mr. Garvie that he notify her if he disagreed with her interpretation of the request. In this same letter, Ms. Terrell advised Mr. Garvie that nine pages of responsive documents had been gathered in response to the request, and the cost to receive the documents, including postage, was \$2.25.

Mr. Garvie did not challenge DOC’s interpretation of his request, and on June 29, 2012, DOC received payment for the records. CP __, Sub No. 62, Ex. 1, Attach. G. DOC mailed the responsive records to Mr. Garvie’s father on July 11, 2012. CP __, Sub No. 62, Ex. 1, Attach. H. Mr. Garvie did not appeal DOC’s response to PDU-20589 through the agency’s public disclosure appeal process. CP __, Sub No. 62, Ex. 1 at 4.

D. June 29, 2012, Request (PDU-20850)

On June 29, 2012, before DOC mailed the records responsive to PDU-20859, Mr. Garvie submitted yet another PRA request, this time seeking “PDU-19078 which was filed on February 17, 2012, for telephone recordings of Brian Eugene Garvie to 360-630-5612,

between March 2009 and September 2010.” CP __, Sub No. 62, Ex. 1, Attach. I. PDU-19078 was the request submitted by legal assistant Peggy Steffener.

DOC acknowledged receipt of Mr. Garvie’s request on July 9, 2012, and requested a copy of the order Garvie said compelled DOC to release the telephone recordings. CP __, Sub No. 62, Ex. 1, Attach. J. Mr. Garvie provided a copy of the requested order on July 16, 2012. CP __, Sub No. 62, Ex. 1, Attach. K. The order was the same discovery order Ms. Steffener provided to DOC in April 2012, and required DOC to produce certain calls involving Mr. Garvie made during January, March, April, and July of 2010. The order was signed and dated April 23, 2012. However, the criminal matter in which it was issued was dismissed on May 17, 2012, two months before Mr. Garvie sent it to DOC. CP __, Sub No. 62, Ex. 3.

On July 26, 2012, DOC notified Mr. Garvie that staff had received and were reviewing the order. CP __, Sub No. 62, Ex. 1, Attach. L. Later, on August 27, 2012, DOC staff wrote Mr. Garvie informing him he should contact his attorney with concerns he has over the court order, and that the Department had closed its response to PDU-20850. CP __, Sub No. 62, Ex. 1, Attach. M. When Mr. Garvie requested reconsideration, DOC responded by notifying him that “for

purposes of public disclosure, these records are withheld in their entirety,” and provided Mr. Garvie an exemption log explaining that the Department withheld the recordings under RCW 42.56.070(1) and RCW 9.73.095(3)(b). CP __, Sub No. 62, Ex. 1, Attach. N.

E. Trial Court Proceedings

On January 14, 2013, Mr. Garvie filed his Public Records Complaint with the Thurston County Superior Court. CP __, Sub No. 5. Shortly after filing, he arranged for service of the Complaint on the Secretary of the Department of Corrections. CP __, Sub No. 13. DOC entered a notice of appearance on January 28, 2013, and on February 27, 2013, answered the Complaint, affirmatively alleging insufficient service of process and lack of personal jurisdiction. CP __, Sub Nos. 14, 22. Mr. Garvie sought an order striking DOC’s Answer on grounds that it was late. The superior court denied the motion to strike, advising Mr. Garvie that “[t]he Court will not go forward with this case until proper service is perfected and the proof of service is filed with the Court.” CP 2.

On May 9, 2013, Mr. Garvie properly served his Complaint on the Attorney General’s Office, as required by RCW 4.92.020. CP __, Sub No. 50. On September 13, 2013, the Court dismissed the Complaint, ruling that the PRA’s one year statute of limitations barred Mr. Garvie’s claims concerning the February 2011 and February 2012 requests, and that DOC

complied with the PRA when it responded to the June 2012 requests. CP 19-20. Mr. Garvie thereafter filed his Notice of Appeal.

III. STATEMENT OF ISSUES

1. Whether the PRA's one-year statute of limitations, RCW 42.56.550(6), bars Mr. Garvie's claims concerning the February 2011 and February 2012 requests.

2. Whether DOC complied with the PRA when it responded to Mr. Garvie's June 12, 2012, and June 29, 2012 records requests.

IV. ARGUMENT

Review of a trial court order dismissing PRA claims on summary judgment is de novo. *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 88, 110 P.3d 808 (2005), *review denied*, 156 Wn.2d 1013, 132 P.3d 146 (2006). This Court should affirm the superior court's dismissal of Mr. Garvie's claims; there are no material issues of fact and DOC is entitled to judgment as a matter of law. Mr. Garvie did not commence this action within the PRA's one-year statute of limitation as to the February 2011 and February 2012 requests, and thus any claims concerning those requests are time barred. Moreover, DOC complied with the PRA when it responded to Mr. Garvie's June 2012 requests. He cannot, therefore, prevail on any claims with regard to those requests.

A. Mr. Garvie's Claims Concerning His February 2011 (PDU-14345) And February 2012 (PDU-19078) Requests Are Time Barred

RCW 42.56.550 requires that PRA actions "be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). An agency claims an exemption when it provides the requestor information sufficient for him to know what records the agency has withheld, which exemption(s) the agency claims for each record, and whether there is a valid basis for the exemption to apply to the withheld records. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009).

The one-year statute of limitations for Mr. Garvie's February 2011 request began to run on March 2, 2011. On that date, DOC notified Mr. Garvie it had gathered the telephone recordings responsive to his request, but was withholding the recordings in their entirety on the basis of a specific exemption. CP __, Sub No. 62, Ex. 1, Attach. C. DOC provided Mr. Garvie the specific statutory basis for the exemption, excerpting the applicable language from RCW 9.73.095 to make clear the limited circumstances in which disclosure of recorded inmate telephone calls was permissible.

Similarly, the one-year statute of limitations for Mr. Garvie's February 2012 request (made on his behalf by Ms. Steffener) began to run on April 3, 2012. In its April 3, 2012, response letter, DOC notified Ms. Steffener it had gathered recordings responsive to her request, but explained that the recordings were exempt from disclosure under RCW 9.73.095(3)(b). CP ___, Sub No. 62, Ex. 2, Attach. B. The letter included an explanation of when disclosure was permitted under the statute, along with an exemption log that set forth the applicable statutory language that provided the basis for the claimed exemption.

Accordingly, Mr. Garvie had until March 2, 2012, and April 3, 2013, respectively, to bring his claims for the February 2011 and February 2012 requests. He certainly did not meet the March 2012 deadline for the first request, as he filed his Complaint nearly a year later, in January 2013. Nor did he meet the April 2013 deadline to pursue claims concerning the second request. Although Mr. Garvie filed his action before the statute of limitations ran, he failed to properly serve DOC within 90 days, rendering the initial filing ineffective to toll the statute of limitations.

A civil action is commenced by either: (1) filing a complaint; or (2) serving a defendant with the summons and copy of the complaint in compliance with CR 4. CR 3(a). When a party commences an action by filing a complaint, the filing tolls the statute of limitation for ninety days

to allow time for sufficient service of process. RCW 4.16.170; *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991). However, if the party does not complete service within 90 days of filing, “the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.” RCW 4.16.170. In a civil action against the state, service is accomplished by serving the Attorney General or by leaving the summons and complaint in the Office of the Attorney General with an assistant attorney general. *Landreville v. Shoreline Community College District No. 7*, 53 Wn. App. 330, 766 P.2d 1107 (1988). Because this statute is “plainly written,” service upon any other staff member is insufficient, and no other method of service will suffice. *Id.* at 330-31.

Mr. Garvie filed his Complaint on January 14, 2013. CP ___, Sub No. 5. He did not, however, serve the Attorney General’s Office until May 9, 2013, more than 90 days after filing and after the statute of limitations on the February 2012 request expired. CP ___, Sub No. 50. Consequently, the initial filing was ineffective to toll the statute of limitations under RCW 4.16.170 and any claims Mr. Garvie may have had concerning the February 2012 request are time barred. This necessarily would include any claim that Department staff did not search thoroughly enough when looking for the recordings listed in the April 23, 2012, Snohomish County order.

The Court should also reject Mr. Garvie's bare assertion that equitable tolling applies to revive his claims. Courts use equitable tolling sparingly, and only when the plaintiff's failure to meet the statute of limitations resulted from bad faith, deceptive, or fraudulent behavior by the defendant. *Trotzer v. Vig*, 149 Wn. App. 594, 606-07, 203 P.3d 1056 (2009). The party asserting equitable tolling bears the burden of proof. *Id.* at 607. Yet, Mr. Garvie offers no evidence to establish that DOC misled or deceived him such that he was unable, with the exercise of due diligence, to assert his claims within the applicable PRA limitation period. Equitable tolling, therefore, cannot apply. *See id.*

Finally, the Court should reject Mr. Garvie's effort to characterize his requests as one continuing request, ending with a "last production of a record on a partial or installment basis" under RCW 42.56.550(6), when DOC produced the telephone recording CD in April 2013 in response to a subpoena duces tecum. There are several flaws in this argument. First, it is inaccurate factually. A review of Mr. Garvie's requests and DOC's responses to them shows that both the agency and requestor treated the multiple requests as separate requests. CP ___, Sub No. 62, Ex. 1, Attach. A, E, I; Sub No. 62, Ex. 2, Attach. A. Second, production of records in a response to a subpoena duces tecum, a method of obtaining records separate and distinct from the PRA, has no bearing on when a claim

accrues under the PRA. Last, even ignoring that the subpoena and PRA requests were separate matters, production of the records in response to the subpoena after the PRA limitation period expired on March 2, 2012 (for the February 2011 request), and April 3, 2013 (for the February 2012 request), would not revive the previously extinguished claims.

Accordingly, any claims Mr. Garvie may have had concerning the February 2011 and February 2012 requests are time barred. The Court should affirm the superior court's ruling to that effect.

B. DOC Complied With The PRA When It Responded To Mr. Garvie's June 2012 Public Records Requests

The PRA requires agencies to make identifiable public records available for inspection and copying. RCW 42.56.080. An identifiable public record is "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009). Within five business days of receiving a record request, an agency must provide the record, acknowledge receipt of the request and provide a reasonable estimate of the time needed to respond to the request, or deny the request. RCW 42.56.520. If a request is unclear, an agency may seek clarification. *Id.* If the requestor fails to clarify the request, the agency need not respond to it. *Id.* Denials of requests must include a written

statement of the reasons for the denial. *Id.* Denials on the basis that a record is exempt from disclosure, in whole or in part, must include the statutory basis for the exemption, along with a brief explanation of how the exemption applies to the record withheld. RCW 42.56.210(3).

1. DOC Complied With The PRA When It Responded To Mr. Garvie's June 12, 2012, Request

Mr. Garvie's third public records request, which DOC received on June 12, 2012, sought "public disclosure record 'PDU-14345,' which was filed in 2010, and all its contents of this PDU that was responsive to that request." CP __, Sub No. 62, Ex. 1, Attach. E. DOC responded to the request within five business days, on June 19, 2012, as required by RCW 42.56.520. CP __, Sub No. 62, Ex. 1, Attach. F. Because DOC had previously notified Mr. Garvie he could not receive the telephone recordings responsive to PDU-14345, Ms. Terrell interpreted the new request to seek a copy of her file materials related to the earlier request, but not the actual recordings that were previously withheld as exempt. To ensure this was what Mr. Garvie's wanted, Ms. Terrell explained her interpretation in her June 19 response letter and asked that he notify her if her interpretation was incorrect. Mr. Garvie did not challenge the interpretation, but rather arranged for his father to pay the postage and copying charges for the records Ms. Terrell identified as

responsive to the request as she interpreted it. CP ___, Sub No. 62, Ex. 1, Attach. G. Upon receipt of payment, Ms. Terrell mailed the records to Mr. Garvie's father and closed the request. CP ___, Sub No. 62, Ex. 1, Attach. H.

Mr. Garvie fails to articulate any basis for finding that DOC violated the PRA with regard to his June 12, 2012, request. If his claim is that DOC unreasonably interpreted the request to exclude the recordings DOC previously withheld as exempt, his actions at the time defeat the claim. He accepted Ms. Terrell's interpretation of the request, promptly arranged payment for responsive records, and did not pursue an administrative appeal. Moreover, consistent with Ms. Terrell's interpretation of the June 12 request to exclude the recordings, Mr. Garvie submitted another request (the June 29, 2012, request) specifically seeking the recordings, before he even received the records responsive to that request. In sum, Mr. Garvie's actions demonstrate that DOC's interpretation of the June 12, 2012, request was reasonable and consistent with his intent in submitting the request.

2. DOC Complied With The PRA When It Responded To Mr. Garvie's June 29, 2012, Request

Mr. Garvie's claims that DOC violated the PRA in its response to his June 29, 2012, request are similarly unsupported. In that request, he

sought the telephone recordings requested in February 2012 by his attorney's legal assistant, and stated that he had a court order requiring DOC to produce the recordings. CP __, Sub No. 62, Ex. 1, Attach. I. Ms. Terrell acknowledged the request on July 9, 2012, the fifth business day after DOC received it (two weekends and the July 4th holiday intervened), and requested a copy of the order. CP __, Sub No. 62, Ex. 1, Attach. J. After receiving and reviewing the order, which had been issued in a criminal case that had since been dismissed, Ms. Terrell advised Mr. Garvie to discuss the order with his attorney, and that DOC was, again, withholding the telephone recordings as exempt under RCW 9.73.095(3)(b). CP __, Sub No. 62, Ex. 1, Attach. L, M, N.

Records that are not exempt under an enumerated PRA exemption may still be exempt from disclosure if another statute prohibits disclosure. RCW 42.56.070. Under RCW 9.73.095(3), “[t]he department of corrections shall adhere to the following procedures and restrictions when intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility as provided for by this section.” Specifically, “[t]he contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response

to a court order, or in the prosecution or investigation of any crime.”
RCW 9.73.095(3)(b).

The requested telephone recordings are exempt under RCW 42.56.070(1) and RCW 9.73.095(3)(b) because their disclosure is unnecessary to safeguard the orderly operation of the correctional facility, is not in response to a valid court order, and is not for the prosecution or investigation of any crime. Though Mr. Garvie produced an order, the order was a discovery order requiring production of certain recordings for use in a criminal proceeding that had since been dismissed with prejudice. CP ___, Sub No. 62, Ex. 3. This dismissal rendered the order moot and no longer valid. Accordingly, because the discovery order no longer was valid, Mr. Garvie failed to establish a basis for release under RCW 9.73.095(3)(b), and the recordings remain exempt from production under RCW 42.56.070 and RCW 9.73.095(3).

Finally, there is no merit to Mr. Garvie’s contention that DOC failed to adequately explain the basis for withholding the requested telephone recordings. When withholding records as exempt, agencies are required to identify the exemption claimed and briefly explain how the exemption applies to the records. *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). Here, the records at issue (those requested and withheld) were of one type – telephone recordings made through DOC’s

inmate telephone system. As it did in response to Mr. Garvie's previous requests, DOC explained in the Agency Denial Form / Exemption Log that the recorded telephone conversations he requested were exempt pursuant to specific statutes, and provided him with the exact statutory language the Department relied on in claiming the exemption. CP __, Sub No. 62, Ex. 1, Attach. N.

This was not a situation where the requestor was left to guess at how the statute applied to the record at issue. *E.g., Sanders*, 169 Wn.2d at 846 (mere claim of "work product" was insufficient to explain controversy to which the records were relevant and thus enable requestor to evaluate privilege claim). Mr. Garvie had all the information he needed to evaluate the claimed exemption for validity. Moreover, even if the Department had not briefly explained the basis for withholding the telephone recordings, as required under RCW 42.56.210(3), the PRA does not provide a separate cause of action for penalties for a violation of the brief explanation requirement. *Id.* at 860-61. Failure to provide a brief explanation can act as an aggravating factor when assessing penalties for wrongful withholding of nonexempt records (*see id.*), but here DOC did not wrongfully withhold nonexempt records.

V. CONCLUSION

The superior court correctly ruled that Mr. Garvie's claims concerning the February 2011 and February 2012 requests are time barred, and that DOC met its obligations under the PRA when it responded to Mr. Garvie's June 2012 requests. DOC therefore respectfully requests that the Court affirm the underlying dismissal.

RESPECTFULLY SUBMITTED this 5th day of March, 2014.

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CERTIFICATE OF SERVICE

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s/ Katrina Toal
KATRINA TOAL
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WASHINGTON STATE ATTORNEY GENERAL

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