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SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BARSTAD,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

BREIF OF RESPONDENT

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 ORIGINAL

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I. INTRODUCTION

The superior court properly dismissed Mr. Barstad's Public Records Act complaint against the Department of Corrections. Mr. Barstad requested from the Department a transitory memorandum listing the inmates at one prison who were subject to sanction on a particular day. Pursuant to the Department's records retention schedule, prison staff destroyed the daily memorandum and created an updated memorandum each day. Because the particular memorandum requested by Mr. Barstad had been destroyed prior to the request, it did not exist when Mr. Barstad made his public records request. As a result, it was not provided in response to Mr. Barstad's request.

This Court and the Court of Appeals consistently have held that the Public Records Act does not require an agency to produce a record that does not exist, and that alleged retention issues do not provide a cause of action under the Public Records Act. Thus, as a matter of law, Mr. Barstad had no cause of action under the Public Records Act for the destruction of the transitory memorandum. Even if the Public Records Act allowed challenges based upon records retention, Mr. Barstad had no viable claim in this case. Destruction of the transitory memorandum, which was created by copying information from documents that *are* retained by the agency, is specifically permitted by RCW 40.14.060, the State records retention

schedule, and the approved records retention schedule of the Department of Corrections.

II. STATEMENT OF THE CASE

Mr. Barstad made a Public Records Request on April 27, 2013, requesting “copies of all Disciplinary Sanction Lists issued during October and November of the year 2012, at Monroe Correctional Complex.” CP 48. The Department responded to the request within five business days. CP 50. The Department then sent Mr. Barstad an invoice for the request, and subsequently mailed a disk containing the disciplinary records to Mr. Barstad at the Monroe Correctional Complex. CP 52-55.

After reviewing the documents, Mr. Barstad sent a follow-up letter to the Department requesting “Sanction Lists from the [Washington State Reformatory Unit] Section of [the Monroe Correctional Complex].” CP 57. The Department sent a second disk with responsive records to Mr. Barstad at the Monroe Correctional Complex. CP 63. The prison mailroom determined that there was information on the second disk regarding other inmates that could not be provided to Mr. Barstad. CP 65. Because the disk could not be provided to Mr. Barstad, it was sent to a third party designated by Mr. Barstad. CP 68. Mr. Barstad informed the Department that he had not received the second disk, and requested that the

Department provide him “the one Disciplinary Sanction List containing [Mr. Barstad’s] name.” CP 65-66.

On January 28, 2014, Mr. Barstad sent a letter to the Department advising that the second set of responsive documents it had provided did not contain the specific record he wanted. CP 68. He further clarified to the Department that the document he had been describing in his previous correspondence was, specifically, “a memo to: ‘ALL STAFF’ from ‘SGT’S KNOX / DOPSON’ and the subject: ‘A/B UNITS Disciplinary Sanction List,’” dated October 27, 2012. CP 68. Mr. Barstad was referring to the transitory memorandum that was posted each day in the cell block to remind correctional officers which inmates were being sanctioned that day for disciplinary infractions. CP 74-75.

The transitory memorandum Mr. Barstad requested was made each day by copying information from disciplinary infraction and hearing records. CP 75. A new memorandum was posted on the cell block each day to remind the corrections officers which inmates were subject to sanctions that day. CP 75. The transitory memorandum from the prior day was destroyed when a new memorandum was posted the next day. The Department of Corrections’ records retention schedule requires the Department to retain for two years the infraction documents and hearing records used to create the daily memorandum. Dep’t Rec. Ret. Sch. 1.1 at

27.¹ Because the daily memorandum copied information retained in the primary disciplinary infraction and hearing records, the daily memoranda were discarded each day, pursuant to the State's General Records Retention Schedule. State Rec. Ret. Sch. at 96 (records with minimal retention value to be destroyed when no longer needed, including secondary copies of information retained in primary records).² After receiving Mr. Barstad's request for the particular transitory memorandum, the Department conducted a search and found that the requested memorandum had been previously destroyed under the retention schedule. CP 72, 74-75. Because the memorandum no longer existed at the time of Mr. Barstad's request, it was not among the responsive documents the Department had provided.

Mr. Barstad filed an action alleging that the Department should have retained the daily memorandum from October 27, 2012. CP 2-8. The Department responded that it had not violated its retention policies because the document Mr. Barstad requested was a transitory memorandum that was properly destroyed. CP 35-41. The Department pointed out that an alleged RCW 40.14 violation does not constitute a

¹ The Department of Corrections Records Retention Schedule is available at http://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Corrections-Records-Retention-Schedule-v.1.1-Dec-2013.pdf.

² The State Government General Records Retention Schedule is available at http://www.sos.wa.gov/_assets/archives/RecordsManagement/SGGRRS5.1.pdf.

cause of action under RCW 42.56. The superior court, citing two Court of Appeals cases directly supporting the Department's position, dismissed Mr. Barstad's complaint. CP 91-92. Mr. Barstad now appeals. The Department of Corrections requests that this Court affirm that dismissal.

III. ARGUMENT

A. **The Department Of Corrections Did Not Violate The Public Records Act Because The Requested Record Did Not Exist At The Time Of Mr. Barstad's Request**

This Court has held that “[a]n agency has no duty to create or produce a record that is nonexistent.” *Gendler v. Batiste*, 174 Wn.2d 244, 252, 274 P.3d 346 (2012) (*en banc*) (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)). The lower courts have held the same. *See, e.g., West v. Washington State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011).

It is undisputed that the document Mr. Barstad sought did not exist at the time he requested it. The transitory document had been properly destroyed pursuant to the applicable records retention schedule. The Department had no duty under the Public Records Act to provide a nonexistent document. *See Gendler*, 174 Wn.2d at 252, 274 P.3d 346; *West*, 163 Wn. App. at 242, 258 P.3d 78; *Sperr*, 123 Wn. App. at 136-37,

96 P.3d 1012. Therefore, there was no Public Records Act violation and the lower court properly dismissed Mr. Barstad's claim.

B. An Alleged Violation Of The Retention Provisions Of RCW 40.14 Is Not A Cause Of Action Under The Public Records Act

Under RCW 40.14.060, official public records may be destroyed pursuant to approved retention schedules. Consistent with the principle that agencies are only required to produce records that exist, the Court of Appeals has repeatedly rejected the argument that alleged violations of RCW 40.14 should constitute causes of action under the Public Records Act, RCW 42.56. *West*, 163 Wn. App. at 245; *Bldg. Indus. Ass'n of Washington (BIAW) v. McCarthy*, 152 Wn. App. 720, 741, 218 P.3d 196 (2009); *see also Zink v. City of Mesa*, 162 Wn. App. 688, 718, 256 P.3d 384 (2011) ("the [Public Records Act] does not state that an agency's violation of independent statutory duties to prepare records is also a violation of the [Public Records Act]."). Simply put, "there is 'no agency action to review under the [Public Records] Act' where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought 'did not exist.'" *BIAW*, 152 Wn. App. at 740 (quoting *Sperr*, 123 Wn. App. at 137).

The plain language of the Public Records Act supports such a conclusion because it does not incorporate RCW 40.14 and it provides

its own records retention obligations. The Public Records Act states “[i]f a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency . . . may not destroy or erase the record until the request is resolved.” RCW 42.56.100. Notably, this obligation attaches at the time that an agency receives a request. It is undisputed in this case that the record Mr. Barstad requested did not exist at the time he requested it.

Moreover, the Legislature has not amended the Public Records Act to expand its penalties to apply to records retention violations, acquiescing to the courts’ consistent rejection of such claims. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009) (this Court assumes legislative acquiescence to courts’ Public Records Act interpretation where courts had interpreted the Public Records Act and Legislature did not alter statute in response). This is true, even though the Legislature has made other significant changes to the Public Records Act penalty scheme. *See, e.g.*, RCW 42.56.565(1).

Finally, penalties for violation of the retention provisions of RCW 40.14 can be found elsewhere in the Revised Code of Washington. The Legislature has provided penalties for the willful destruction of certain public records in RCW 40.16. Therefore, the Legislature contemplated the issue of retention violations and chose to

locate the penalties in a separate, criminal provision. RCW 40.16, *et seq.* The Public Records Act, on the other hand, does not incorporate RCW 40.14 and does not provide a penalty or remedy for destruction of a record other than in RCW 42.56.100. Where the Legislature has not provided a private civil remedy, the courts may not create one. *See Griffin v. Eller*, 130 Wn.2d 58, 69, 922 P.2d 788 (1996) (if the Legislature has not provided a statutory remedy, the remedy does not exist).

The issue raised in this case has been settled by this Court in *Gendler v. Batiste*. The Court of Appeals has uniformly applied this Court's decision, and the lower court order was consistent with the Public Records Act. Moreover, the Legislature has acquiesced to the courts' interpretation. Therefore, there is no basis to deviate from precedent on this issue and the Court should affirm the lower court's dismissal of Mr. Barstad's complaint.

C. The Department Of Corrections Properly Destroyed The Daily Memorandum Mr. Barstad Sought, As Permitted By The State Records Retention Laws And Schedules; Therefore, The Department Did Not Violate RCW 40.14.060

The lower court did not reach the issue of whether the document Mr. Barstad sought was properly destroyed. Even if this Court gets beyond the legal barriers discussed above and reaches this issue, the

record in this case shows that the document's destruction was proper. The daily memorandum at issue was a transitory document that was discarded each day, as permitted by RCW 40.14.060, the State records retention schedule, and the Department of Corrections' retention schedule.

The memorandum at issue was based on underlying documents retained by the Department of Corrections. Inmates may receive notice of a prison rule infraction imposing a sanction for the violation, or have a hearing at which a sanction is ordered. A daily memorandum listing the inmates subject to sanctions was posted each day to remind the correctional officers which inmates were subject to sanctions. CP 75. At the end of the day, the memorandum was no longer needed and was discarded. CP 75.

This practice complies with RCW 40.14.060, which permits destruction of a document if it is done pursuant to an approved retention schedule. The approved State Records Retention Schedule provides that when a secondary document is created by copying information from primary records, and the primary records are retained as required by an approved retention period, the secondary document should be "retain[ed] until no longer needed for agency business then destroy[ed]." State Rec. Ret. Sch. at 96. Here, the primary documents were the disciplinary infraction and hearing records, which the Department's approved retention

schedule requires it to retain for two years after the end of the calendar year. Dep't Rec. Ret. Sch. 1.1 at 27. The daily memorandum was a secondary document containing only information copied from other disciplinary infraction and hearing records; therefore, it may be destroyed when no longer needed. State Rec. Ret. Sch. at 96.

Under RCW 40.14.060 and the State and Department retention schedules, the destruction of the memorandum was appropriate. Because the daily memorandum was properly destroyed and did not exist at the time the records request was made, Mr. Barstad's complaint did not raise a valid claim under the Public Records Act and the superior court correctly dismissed it.

IV. CONCLUSION

The Department did not violate the Public Records Act because the document Mr. Barstad requested no longer existed at the time of the request. The Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 5th day of March, 2015.

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CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the foregoing document on all parties or their counsel of record as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 5th day of March, 2015 at Olympia, Washington.

s/ Katrina Toal _____
KATRINA TOAL
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Thank you.

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