

NO. 48925-2-II

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

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SHAPPA BAKER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The electronic records at issue in this case were created on propriety third-party software, they exist entirely on the servers of a large private company, and there is no evidence that they were ever used by the Department of Corrections for a governmental purpose. The Department keeps track of prisoner funds primarily through an internal Trust Accounting System, not with the digital images created by the Bank of America.

Baker's reliance on *Concerned Rate Payers*<sup>1</sup> is misplaced because that case involved records that had clearly been used by the agency, a utility district, in deciding whether or not to approve a proposed power plant, which was within the scope of its governmental function. Accordingly, *Concerned Rate Payers* is easily distinguishable. Instead, this case is like *Nissen* and *West*,<sup>2</sup> where the Washington appellate courts have held that cell phone records possessed by a cell phone carrier, and billing records maintained by law firm, neither of which was used for a government purpose, were not public records.

The PRA requires the Department to provide responsive records that it possessed on the date of the request. Where the Department no

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<sup>1</sup> *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1 of Clark Cty., Wash.*, 138 Wn.2d 950, 983 P.2d 635 (1999).

<sup>2</sup> *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015); *West v. Thurston Cty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012).

longer possessed the documents on the date of the request, the PRA does not require the Department to purchase a copy of the documents from a private bank in order to provide the documents to the requester. Because the Department conducted a reasonable search for records, and provided all of the responsive documents that the Department still possessed on the date of the request, the Department complied with the PRA. Therefore, the Department respectfully requests that this Court affirm the order granting summary judgment to the Department.

## **II. STATEMENT OF THE CASE**

### **A. The Department Provided Baker with the Responsive Documents that It Possessed on the Date of the Request**

On April 30, 2015, the Department received a public records request from Mr. Baker dated April 26, 2015. CP 286. The request asked for the front and back of a list of what Baker called “negotiable instruments,” some of which had been deposited into a comingled inmate trust account during a specified date range. CP 286, 293.

Within five days, Gaylene Schave, Public Disclosure Specialist, sent a letter to Mr. Baker acknowledging receipt of his request, reiterating his request, and assigning a tracking number to the request. CP 286, 295-96. Over the next three months, Department staff conducted multiple extensive searches at Headquarters, and at each prison where Baker had been incarcerated during the time periods of the records he

requested, including the Washington State Penitentiary, the Airway Heights Corrections Center, and the Coyote Ridge Corrections Center (CRCC). CP 286-91. Each facility provided all responsive records still possessed by the Department.<sup>3</sup> CP 286-291.

**B. The Department Does Not Permanently Retain Prisoner's Negotiable Instruments, but Digitally Transmits the Documents to the Bank for Deposit**

The Department assists prisoners by depositing funds into the inmate banking account system. In the old days, before the advancement of technology, the Department would deposit a negotiable instrument by sending the original document to the bank. Now, the Department deposits the negotiable instrument digitally by scanning the front and back of the document using a remote deposit terminal. CP 356. The terminal uses the Bank of America's proprietary CashPro software to create and send a digital image of the document to the bank. CP 356. The digital image is stored exclusively on the bank's servers; it is not stored at the Department. CP 356. Most Department locations do not indefinitely retain the original former negotiable instruments after they have been scanned. CP 356. For instance, original former negotiable instruments scanned at Department

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<sup>3</sup> The statement of the case in Baker's opening brief suggests the Department did not provide complete copies of documents. *See* Opening Br. at 5 (contending the documents provided were incomplete). But Baker never argues that the allegedly incomplete documents violate the PRA. *See* Opening Br. at 9-24. This is because the documents provided by the Department were accurate copies of the documents as they existed at the time.

Headquarters are retained in a secure filing cabinet for only 90 days and then destroyed. CP 149.

The digital images stored on the Bank of America's servers are not the Department's records, no more than an original check mailed to the bank for deposit would have been the Department's record once the bank received it. CP 356. The digital images are created by the bank's software, are stored on the bank's servers, and belong to the bank. CP 356. The Bank of America is a private corporation, not an agency of the State of Washington. CP 356.

Because the scanned images are owned and possessed by the Bank of America, the bank charges a fee every time the Department searches for and downloads an image from the bank's servers. CP 356. The Department keeps track of prisoner funds primarily through an internal Trust Accounting System, not with the digital images located on Bank of America's servers. CP 136, 147, and 156. The funds deposited at the Bank of America are kept in comingled accounts together with the deposits for other inmates. CP 155. In most cases, inmates can request and receive a Trust Account Statement that allows them to monitor their own trust account activity. CP 143. And while, Department employees do sometimes interface with Bank of America servers and purchase *specific* scanned images to correct accounting errors or reconcile accounts, there is

no evidence that the Department ever reviewed, evaluated, or referred to the *specific* images requested by Baker. CP 150. This makes sense because while the Department may deposit thousands of instruments daily, it has to use the bank's records for reconciliation research, rather than its own internal tracking system, only rarely, typically less than once a month. CP 152. There is no evidence that the Department ever accessed or used the bank records at issue in this case.

**C. The Department Did Not Possess on the Date of the Request, and Did Not Receive Until Weeks Later, the Two Money Orders Baker Contends Should Have Been Provided**

Baker also contends the Department did not disclose two money orders. But the Department did not possess those money orders on the date of Baker's request. The Department did not receive copies of those money orders until the Bank of America faxed the documents to the Department twenty days after receipt of Baker's request. CP 353.

On May 6, 2015, Administrative Assistant Cherrie Borgen e-mailed Baker's public records request to Patricia Barrera, Local Business Advisor at CRCC. CP 353. Ms. Barrera forwarded the request to Fiscal Analyst Ben Estock because he worked with inmate banking at CRCC. CP 352-353. Mr. Estock searched the Department's inmate accounts database to determine which documents listed in the public records request may have been at CRCC. CP 353. Mr. Estock found that only two of the money orders listed in

the request were deposited into Baker's account while he was incarcerated at CRCC. CP 353. CRCC had not retained the original two money orders. CP 353. Mr. Estock telephoned the bank about the money orders on May 20, 2015. The bank was able to locate them in its records and then faxed Mr. Estock the copies of the two money orders on that same day. CP 353.

As stated by Mr. Estock, CRCC did not have front and back copies of the two money orders until it received them from the bank on May 20, 2015. CP 353. So those two money orders, like the digital images located on Bank of America's servers, were not in the Department's possession on the date Baker made his PRA request.

### **III. RE-STATEMENT OF ISSUES**

1. Whether the Department was obligated under the PRA to pay a fee and use a web-based interface to access Bank of America servers in order to provide scanned digital images of separate paper documents that it no longer possessed on the date of the request?

2. Whether the Department was obligated under the PRA to disclose two money orders that it did not prepare, own, use, or retain and that it did not obtain until some 20 days after receipt of the request?

### **IV. STANDARD OF REVIEW**

The Court reviews challenges to agency actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172

(2009); *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009). The Court stands in the same position as the trial court when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011).

## V. ARGUMENT

### A. The PRA Does Not Obligate the Department to Search for Private Records Owned and Possessed by the Bank

Rather than challenging the reasonableness of the Department's search of its own records, Baker contends the Department should have also searched the Bank of America's servers for the digital images of negotiable instruments deposited into Baker's account.

A "[p]ublic record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010. Baker contends the records at issue were "prepared" or "used" by the Department. But the case law does not support this conclusion. Opening Br. at 17.

The Court's holding in *West v. Thurston Cty.*, 168 Wn. App. at 183 shows the digital images here are not public records. In *West*, the requestor sought disclosure of invoices submitted by private attorneys appointed by

an insurance company to represent the county in a civil case. The requester claimed that because the private attorneys were agents of the county, their billings were public records even though the public agency never physically received the invoices. *Id.* at 167. The Court held the attorneys' invoices were not public records because the county did not prepare, own, use, or retain the invoices. *Id.* at 183-86.

Similar to the invoices at issue in *West*, the digital images here are not public records. To deposit a negotiable instrument into an inmate's account, the Department scans the original negotiable instrument in a remote deposit terminal that connects to the bank's servers using a proprietary web application owned by the bank. CP 356. The terminal creates a new digital image at the bank. CP 356. The Department does not receive or maintain the digital image. CP 356. The Department retains the original negotiable instrument until it is destroyed pursuant to the records retention schedule. CP 356. The newly created separate digital image remains at the bank as a private record owned by the bank. CP 356. In sum, the digital images at issue here were created by the Bank of America's software, were possessed by and stored exclusively at the bank, are owned by the bank, and were not used by the Department.

The holding in *Nissen*, 183 Wn.2d at 882, also confirms that the digital images in question here are not public records. There, text

messages on a county employee's phone were public records, but call logs and text message logs maintained by a third party, Verizon, were not public records. *Id.* at 879, 882. In analyzing why the call logs and text message logs were not public records, the *Nissen* Court explained, “[t]he call and text message logs were prepared and retained by Verizon, and Nissen does not contend that the County evaluated, reviewed, or took any other action with the logs necessary to ‘use’ them.” *Id.* at 882. As was the case in *Nissen*, because the specific images requested by Baker here were created by a third-party private corporation and retained on its servers, and because there is no evidence that the Department ever “evaluated, reviewed, or took any other action” with the images necessary to use them, the images Baker seeks are not public records within the meaning of the PRA.

Baker relies primarily on the Supreme Court's decision in *Concerned Ratepayers*, 138 Wn.2d at 960-61. But *Concerned Ratepayers* does not require the Department to search for and purchase digital images owned by the Bank of America because there is no evidence the Department ever “used” the digital images at issue in this case. In *Concerned Ratepayers*, the Court held that a document possessed by a private company may be a public record if it is “used” by the agency such that there is a nexus between information in the document and the

agency's decision-making process. *Concerned Ratepayers*, 138 Wn.2d at 960-62. The agency in that case was a public utility district in the business of evaluating proposed power plants, and the records at issue were technical specifications relating to a proposed power plant designed and possessed by a private company. *Id.* at 952-53. The information in those documents bore a nexus with the agency's decision-making process because the agency considered the information in deciding whether to go forward with the proposed power plant. *Id.* at 960-61. Accordingly, the records were public records because they had been "used" by the utility district in the decision-making process of its governmental function. The Court, however, clarified that "mere reference to a document that has no relevance to an agency's conduct or performance may not constitute 'use,' but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act." *Id.* at 961.

Unlike *Concerned Ratepayers*, the Department here did not use the digital images owned by the bank in any of its agency decision-making processes. Indeed, as stated above, there is no evidence that the Department used the digital images of Baker's negotiable instruments at all. While a Department employee scanned the original negotiable instruments using a remote deposit terminal that interfaces with bank's

servers, the digital images were created and existed solely on the bank's servers. CP 355-356. While the Department might use a particular digital image in a specific case to correct accounting errors or reconcile accounts, *see* CP 150, there is no evidence that the Department ever used the digital images of Baker's negotiable instruments in such a manner. Nor is it likely the Department would have had a need to use those images; the Department deposits hundreds, if not thousands of instruments a day, but research is required on average, less than once a month. CP 152. Consequently, the digital images owned and possessed by the bank are not public records under *Concerned Ratepayers*, absent proof the Department has accessed the bank's system and used these specific records. Of course, the Department did "use" the original paper negotiable instruments and to the extent the Department had these original documents still in its possession on the date of Baker's request, the Department provided those documents.

Baker relies on another case, *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 438, 161 P.3d 428, 430 (2007), for the three part test used to determine whether a record sought constitutes a public record. Opening Br. at 12. But *Dragonslayer* actually supports the Department's position because the financial statements

sought in that case had been filed by a private corporation regulated by the agency and were retained by the agency in its own records. *Id.* at 439, 444.

Here, the records were kept by the Bank of America, not the agency and, unlike the facts in *Dragonslayer*, the Department does not regulate the business of the Bank of America; it operates prisons. More importantly, the *Dragonslayer* Court held that, in order for a trial court to find a record is related to government process, it must base its opinion on *specific* determinations of the agency's use "rather than general assertions" that the records are used. *Id.* at 445. Here, Baker claims that the images in question in this case were used because "[t]he Department relies on access to these images for resolving accounting errors and reconciling accounts." Opening Br. at 19. But this is exactly the sort of general assertion rejected by the court in *Dragonslayer*. There is no evidence that the Department ever requested and paid a fee for the *specific* images that Baker requested. So since the Bank of America is not a public agency, and there is no evidence that the Department used the specific digital images at issue here, the digital images are not public records under the reasoning of the *Dragonslayer* Court.

Baker also asserts that the digital images of instruments meet the definition of public record because, he claims, they were "prepared" by the Department. Opening Br. at 20. But this argument ignores the evidence

that the bank's proprietary software uploads the scan and creates the digital image on the bank's servers. CP 356. The Department does not create the image.

Baker argues that the digital images of former negotiable instruments stored on the bank's server are public records, and that the Department was required to search for the records on the bank's servers. But the digital images are not public records. The digital images are separate documents, owned and possessed by the bank. The PRA does not obligate the Department to search the servers of a private bank to purchase images owned by the bank.

**B. The Digital Images Owned and Possessed by the Bank of America Relate to a Banking, not a Government Function**

Baker argues that the digital images are public records because the "management of inmate trust accounts and deducting funds from money orders received by inmates are functions of government" and "the scanned images of the money orders Baker requested relate to the performance of [a] governmental function." Opening Br. at 14. But as the Court explained in *West*, the critical inquiry is whether the Department actually used the digital images as part of its decision-making process, regardless of any tangential relationship to a governmental purpose. *West*, at 185-86.

Here, there is no evidence that the Department used the particular digital images that Baker requested. The Department keeps track of

prisoner funds through an internal Trust Accounting System, not with the digital images created by the Bank of America. CP 136, 147, and 156. The funds deposited at Bank of America are kept in comingled accounts together with the deposits for other offenders. CP 155. In most cases, inmates can request and receive a Trust Account Statement that allows them to double-check the accuracy of the department's accounting so there is no need to access the Bank of America images for that purpose. CP 143. As Baker admits, the only time the Department might access digital images owned and possessed by the bank are when the documents are necessary for "correcting accounting errors and reconciling accounts." Opening Br. at 20; *see also* CP 138. There is no evidence that the Department ever accessed the specific digital images that Baker requested to perform that function. As in *West*, without any evidence that the Department actually used the digital images to perform a governmental function, those images are not public records.

Likewise, the digital images are not public records because the Bank of America owns the digital images. The bank would charge the Department a fee if the Department searched for and downloaded a copy of the digital image. CP 356. Logically, the Department would not have to pay for records "owned" by the Department.

**C. The Digital Images Are Not Public Records Because the Bank of America Is Not the Functional Equivalent of a Public Agency**

The digital images here are also not public records because the Bank of America is not the functional equivalent of a public agency or employee. In *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249, 259 (2015), the Court considered whether records possessed solely by a private company were public records. The Court applied a four-factor test to determine if the private company was the functional equivalent of a public agency or public employee. *Id.* at 719. The Court considered: “(1) the extent the entity performed a governmental function, (2) the extent public funds paid for the activity, (3) the extent of government involvement or regulation, and (4) if the government created the entity.” *Id.* at 719. The balancing of these four factors, rather than a satisfaction of all four factors, determines if the entity is the functional equivalent of a public agency or employee. *Id.* Here, the factors show the bank is not the functional equivalent of a public agency or employee.

The first factor weighs against Baker. The Bank of America is a large private corporation that performs the private business of banking. The bank does not perform a governmental function. The second factor likewise weighs against Baker. Although the Department pays public

funds to the Bank of America, this is simply the fee charged by the bank to conduct banking activities, just like the bank charges any other customer. CP 355-56. In fact, the Department is just one of many customers using the Bank of America's private banking services. CP 356. In the business arrangement with the Department, the bank does not undertake a public function just because one of its customers is a public agency.

The third factor also tips against Baker. The Department does not regulate the Bank of America. The Department operates prisons, not banks. The Department's only involvement with the Bank of America is its role of a customer. CP 355-356. Finally, for purposes of the fourth factor, it is undisputable that the Department did not create the Bank of America.

Under the functional equivalent test, the Bank of America is not the functional equivalent of a public agency or public employee. The digital images owned and possessed by the Bank of America are private records, not public records subject to the PRA. Accordingly, the Department had no obligation to obtain records from the bank.

Under Baker's argument, the Bank of America's private records are public records because the Department was a customer of the bank. Were this argument to prevail, any private record created when an agency contracts with a private entity are public records, even when the records

are created and possessed solely by the private company. Such an argument is contrary the holdings of the Court of Appeals and the Supreme Court. *See Nissen*, 183 Wn.2d at 882 (the call logs and text message logs prepared and maintained by Verizon were not public records); *Cedar Grove*, 188 Wn. App. at 718 (not all records held by a private company contracting with a public agency are public records). Baker's proposed rule improperly expands the definition of a public record to include wholly private records.

**D. The Records Faxed to the Department Weeks After Baker's Request Were Not Responsive to Baker's Request**

Baker argues that the Department violated the PRA because it did not produce the two money orders that the bank faxed to the Department weeks after Baker's public records request. Opening Br. at 22. But it is established law that an agency has no liability under the PRA for failing to produce a document that did not exist at the time the request was made. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 741, 218 P.3d 196 (2009). Baker submitted his request on April 26, 2015, and the Department received the request on April 30, 2015. CP 286, 293. The bank did not fax the copies of the money order to Mr. Estock until several weeks later, on May 20, 2015. CP 287; 353. The Department did not possess the money orders until Mr. Estock received the faxed copies on May 20, 2015. CP 353. Because the Department did not possess the

documents on the date of Baker's request, the records were not responsive to Baker's request and the Department had no obligation to provide them in response to the request.<sup>4</sup>

**E. The Department Complied with the PRA by Conducting a Reasonable Search and Providing all Responsive Records that It Still Possessed on the Date of Baker's Request**

The adequacy of a search for public records is separate from the issue of whether the requested records are found. *Neighborhood Alliance v. Cty. of Spokane*, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), *affirmed in part, reversed on other grounds*, 172 Wn.2d 702 (2011). As the Court explained in *Neighborhood Alliance*, the standard for determining the adequacy of an agency's search is one of reasonableness:

The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was "reasonably calculated to uncover all relevant documents." Moreover, the agency must show that it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.

*Id.* at 257 (citations omitted).

An agency is not required to search every possible place a record may be "conceivably stored, but only those places where it is reasonably

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<sup>4</sup> As Baker admits in his opening brief, the Department did provide the two money orders to Baker in response to a discovery request in December 2015. *See* Opening Br. at 3.

*likely to be found.*” *Neighborhood Alliance*, 172 Wn.2d at 719. Moreover, a requester’s “‘mere speculation that as yet uncovered documents might exist’ . . . is not enough to ‘undermine the determination that the agency conducted an adequate search for the requested records.’” *Id.* at 738.

As demonstrated by the declarations of Gaylene Schave and Timothy Dodds, the Department’s search for records was vast and thorough. CP 289-291; CP 350-348. The Department conducted multiple searches to make sure no existing records were missed. CP 288-289. The Department searched for records in each facility where Baker was incarcerated during the time periods of his request, and each facility provided the records uncovered by the searches. CP 291. Baker does not dispute these facts. Accordingly, the Department conducted an adequate search for the records in its possession and there was no violation of the PRA in this case.

## **VI. CONCLUSION**

Again, this case is consistent with *West* and *Nissen* where records maintained by a third party were held not to be public records because they had not been used by the agency. By contrast, *Concerned Ratepayers* is inapposite because that case involved records that had clearly been used by the agency. The Department conducted a reasonable search and provided Baker with all responsive records still in the Department’s

possession on the date of the request. The PRA did not obligate the Department to search for and purchase digital images owned and possessed by the Bank of America, and the Department did not have an obligation to produce documents it did not possess until weeks after the date of the request. The Court should affirm the superior court because the Department complied with the Public Records Act.

DATED this 7th day of October, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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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 7th day of October, 2016 at Olympia,  
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**WASHINGTON STATE ATTORNEY GENERAL**

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