

FILED

FEB 14 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 310396

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OF THE STATE OF WASHINGTON

CHRISTOPHER JACK REID, PETITIONER,

V.

PULLMAN POLICE DEPARTMENT, RESPONDENT.

Appeal from the Superior Court
Of Whitman County
Case No. 12-2-00131-4
The Honorable David Frazier

BRIEF OF PETITIONER

Christopher Jack Reid
Petitioner, pro se
H-5-A-87 #324543
S.C.C.C.
191 Constantine Way
Aberdeen, WA 98520

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I. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The Trial Court erred by summarily dismissing Petitioner's PRA Claims.

2. The Trial Court erred by denying Petitioner relief under the Uniform Declaratory Judgment Act.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether a Plaintiff is a prevailing party under the PRA if the Trial Court found that Defendant agency failed to provide requested Law Enforcement Database Records?

(Assignment of Error No. 1)

B. Did the Trial Court erroneously relieve Defendant agency of its burden of proof by deciding the matter without an affidavit from Officer Orsborn?

(Assignment of Error No. 1)

C. Did the Trial Court erroneously relieve Defendant agency of its burden of proof by deciding the matter without a showing of compliance with State Records Management Guidelines and Retention Schedules?

(Assignment of Error No. 1)

D. Did the Trial Court abuse its discretion by denying Plaintiff Declaratory relief stating that the failure of Officers Orsborn and Crow to preserve and retain the Law Enforcement Database Records violated RCW 40.14?

(Assignment of Error No. 2)

II. INTRODUCTION

The Law Enforcement Database Records that are the subject of this appeal substantiate my P.R.P. claims regarding the fact that the accuser identified another suspect from a DOL Photo Lineup, which was not disclosed prior to trial. The Law Enforcement Database Records contain the date and times that police officers obtained DOL Identification and criminal history information pertaining to four individuals whose photos were used in that Photo Lineup (the four suspects).

In 2010, after the State Supreme Court issued a mandate in my criminal conviction, I used the Washington Public Records Act (PRA) to obtain and scrutinize every record created and used by various State and Local agencies to convict me.

The public records I've obtained number ten times that of the discovery in my criminal trial but, most alarming is how they prove other records are missing.

Why would the 911 recording in a rape case just vanish? And the initial audio recorded statement of the victim, how in the world can that not exist?

As I sifted through the (more than 1,000) pages of highly detailed documents that were assembled by the skillful PPD Officers, the lack of details surrounding that particular DOL Photo Lineup --- JUMPED OUT AT ME!!!

Every single Photo Lineup in the case file [except one] have a consistent pattern of details that corroborate with the Police reports/narratives. For example:

- The first Photo Lineup done with witness Aaron Williams at the Pi Beta Phi Sorority includes Officer Crow's signature and the time of 16:45 (CP 103). Those details are consistent with the narratives of Sgt. Sorem and Officer Crow (CP 14, 23).
- The second Photo Lineup done with witness Jenny Gaddy at the Delta Gamma Sorority includes Officer Crow's signature and the time of 16:50 (CP 102). Those details are consistent with the narratives of Sgt. Sorem and Officer Crow (CP 14, 23).
- The third Photo Lineup done with witness Meghan Devolt at the Delta Gamma Sorority includes Officer Crow's signature and the time of 16:55 (CP 101). Those details are consistent with the narratives of Sgt. Sorem and Officer Crow (CP 14, 23).
- The fourth Photo Lineup done with the accuser is missing the Officer's signature and the time on the Instruction Sheet (CP 100). Those details are missing in all Police reports/narratives.

The Photo Lineup with the missing details happens to be one of the most critical records of my case because the accuser identified another man [not me] as the perpetrator of her assault (CP 100). In that Lineup, she identified suspect Colin Davis [Photo # 2] in a separate montage containing DOL photos of Schott's known associates (CP 98).

The only Police report/narrative that comes close to mentioning an officer showing the accuser the Davis montage is the narrative of Officer Orsborn and he did not specify which officer (CP 98, 32).

After complaining of this discrepancy in my Show Cause, Judge Frazier found that "The evidence establishes that Officer Orsborn did not create a record identifying the officers he gave Photo Lineup sheets to...." (CP 126)

Well, we all know she didn't show herself the Davis montage and slip the Lineup Instruction Sheet in the case file undetected but, if no officer has to own up to it, I humbly request this Court to take that deviation into account when reviewing my petitions (CP 98, 100).

III. STATEMENT OF THE CASE

In a Public Records Request served on the Pullman Police Department (PPD) in February 2011, Petitioner sought all records and documents relating to case number 07-P07290, a criminal investigation Respondent conducted concerning Petitioner (CP 63, 124-25).

Among other records, Respondent provided heavily redacted paper copies of e-mail/WEB Messages containing responses to Data Queries from the WACIC, NCIC, DOLDB, and WWCIC databases (Law Enforcement Databases) (CP 20, 29, 43-45, 47-49, 54, 56).

However, one page of the Data Query Responses displayed

the mailing address of the Washington State Patrol Identification and Criminal History Section (WSP) which prompted Petitioner to request the records from the WSP and cross-reference them to determine whether the PPD withheld records, and if the four suspect's names were hidden behind the redactions (CP 47).

Notably, the WSP copies revealed that the PPD did indeed hide each of the four suspect's names behind the redactions, and further, they withheld all of the Data Query REQUESTS made by Orsborn and Crow, as well as most of the Data Query RESPONSES received by Orsborn and Crow. The WSP copies further established that their Data Queries were created and used via e-mail/WEB Message and that each one contained detailed information including: (a) date and time of request; (b) date and time of response; (c) alpha-characters CX61 and CX61 identifying terminals within the PPD used to Query; (d) badge numbers of Orsborn [452] and Crow [457]; (e) database request was sent to; (f) database response was generated from; (g) each of the four suspect's names; and (h) DOL picture number of each suspect. Petitioner attached the WSP copies of Orsborn and Crow's Data Queries as exhibits to his Motion for Order to Show Cause (CP 17-18, 26-27, 35-36, 40-41, 51-52).

After discovering that the PPD had silently withheld such critical evidence (documents proving exactly when and

how officers obtained DOL Identification and criminal history information on the four suspects) by redacting and withholding records, Petitioner was eager to bring it to the Honorable David Frazier. Petitioner brought on a Motion under RCW 42.56.550 alleging that Respondent silently withheld the Law Enforcement Database Records (CP 6). The Trial Court issued an Order directing the PPD to appear before the Court, by affidavit, on oath, and show cause why Defendant has denied Mr. Reid copies of requested records (CP 2).

Respondent appeared through affidavits from PPD Officers David R. Peringer and Michael Crow and offered the following incredulous explanation why the records were not provided:

Peringer: Officers generally do not request that these records be retained unless the information is potentially relevant to a case (CP 134).

Crow: Pullman Police Officers did have the ability to independently pull WSP records on their desktops at the office in 2007...Generally, I do not print out WSP records that I view on my desktop...I do not recall whether I printed out this information.... (CP 137)

Orsborn: NOTHING!

Respondent refused to provide an affidavit from Officer Orsborn, the creator and recipient of most of the Law Enforcement Database Records (CP 74, 107).

The attorneys for Respondent went further. They

claimed:

"The city has no obligation to produce a record that does not exist...The City has no reason to doubt or question the accuracy of the WSP records regarding the transmittal of database records during the initial investigation stage of the case...specifically identified by Plaintiff as between 16:00 and 18:00 hours on September 13, 2007...Plaintiff can produce no evidence to show whether an officer received the WSP records verbally or printed them out at the station." (CP 71-72)

Petitioner countered Respondent's claims by asserting that he was astonished that in the face of the WSP copies he submitted, the City claimed the records were not used or retained and do not exist, and further, that Officer Orsborn's retirement shielded him from the proceedings (CP 117).

The Trial Court Ordered:

"...Plaintiff has shown that a number of these records were not provided pursuant to his public records request...The Court finds Defendant's explanation with respect to the absence of certain database records credible and logical. With respect to Plaintiff's claim that Defendant did not fully provide law enforcement database records, therefore, the Court concludes that Defendant provided every such record in its possession and control at the time the records request was made and that no withholding of records or violation of the Act occurred." (CP 125-26).

IV. ARGUMENT

We review all agency actions challenged under the Public Records Act de novo. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wash.2d 243, 252 (1994) When the record consists only of affidavits, memoranda of law, and

other documentary evidence, the Appellate Court stands in the same position as the Trial Court. Id.

A. Plaintiff was the prevailing party when the Trial Court found that Defendant agency did not provide the requested Law Enforcement Database Records.

When an agency receives a request for disclosure, it must respond as directed by statute. An agency must: "...determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." RCW 42.17.320.

Respondent had "...no reason to doubt the accuracy of the WSP records regarding the transmittal of database records...." (CP 72) How could they? The WSP records that Petitioner submitted clearly show that Officers Orsborn and Crow performed electronic Data Queries via e-mail/web message regarding the four suspects. (CP 17-18, 26-27, 35-36, 40-41, 51-52, 98, 100). Thus, Respondent cannot argue the request was for records that do not exist. When an agency fails to respond as provided in RCW 42.17.320, it violates the Act and the individual requesting the public record is entitled to a statutory penalty. Doe I v. Washington State Patrol, 80 Wash.App. 296, 304 (1996).

The Trial Court acknowledged that Petitioner "...has shown that a number of these records were not provided pursuant to his public records request." (CP 125) But, the

Court concluded that "...no withholding of records or violation of the Act occurred." (CP 126)

The decision was wrong because Respondent produced no facts explaining why the Law Enforcement Database Records were exempt when he requested them.

The State Supreme Court discussed "silent withholding" in Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702 (2011) (Quoting) Progressive Animal Welfare Society (PAWS) v. Univ. of Wash., 125 Wash.2d 243, 251 (1994). The issue was whether an agency could "silently withhold" a record. As the Court pointed out, this is not authorized by the PRA. An agency must give a statement of the specific exemption authorizing its withholding of any record. *Id.* at 270; see RCW 42.56.550(1). The Court said, "The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives the requestors the misleading impression that all documents relevant to the request have been disclosed." *Id.*

B. The Trial Court erroneously relieved Defendant agency of its burden of proof by deciding the matter without an affidavit from Officer Orsborn.

The agency bears the burden of proving that it did not violate the PRA. See Yacobellis v. City of Bellingham 55

Wn.App. 706 (1989), (holding that when agency did not claim exemption from disclosure, but rather "lost" requested record, "the burden of proof is on the agency to justify its failure to disclose").

Petitioner requested that the hearing be conducted solely on affidavits (CP 9). Most of the Show Cause allegations concerning the Law Enforcement Database Records involve Officer Orsborn because his name and badge number are all over the records (CP 3-4). In his Police report/narrative, Officer Orsborn stated, "I obtained Washington DOL Photos of Schott, Pye, VanHorn, and Davis." ----- the four suspects (CP 32).

Petitioner's complaints about the absence of an affidavit from Officer Orsborn describing his retention, use, deletion, and destruction of the records were met by Respondent coming back with: "The affidavits of other PPD personnel regarding retention and use of WSP records...amply demonstrate full compliance with the PRA." (CP 86, 107)

Respondent was wrong. First, Detective Peringer had no involvement with obtaining DOL Information or Law Enforcement Database Records, and further, he didn't conduct any Photo Lineups. The Police reports/narratives show that Officers Orsborn and Crow handled those aspects of the investigation (CP 14, 23, 32). Second, neither Det. Peringer or Officer Crow's affidavits said anything about whether or

not Officer Orsborn retained, used, deleted, or destroyed the Law Enforcement Database Records (CP 133-37).

Therefore, the Trial Court erred by finding Respondent's explanation "credible and logical" because the affidavits did not cover whether the e-mail/web messages sent and received by Officer Orsborn were retained, used, deleted, or destroyed. Notably, the Court's decision did not mention Officer Orsborn's name (CP 125-26).

C. The Trial Court erroneously relieved Defendant agency of its burden of proof by deciding the matter without a showing of compliance with State Records Management Guidelines and Retention Schedules.

According to the Preservation and Destruction of Public Records Act RCW 40.14.070(2)(a)(iii): "The State Archivist may furnish appropriate information, suggestions, and guidelines to local government agencies for their assistance in the preparation of lists and schedules or any other matter relating to the retention, preservation, or destruction of records under this chapter. The Local Records Committee may adopt appropriate regulations establishing procedures to be followed in such matters."

In June 2001, the Washington State Archives and Records Management Division and the Washington State Local Records Committee approved and issued Records Management Guidelines for Local Government Agencies of Washington State

(hereinafter "Guidelines").

During the Show Cause proceeding, Petitioner asserted: "Defendant has not shown the Court that the WSP records were either not preserved or destroyed in accordance with the...Guidelines." (CP 118)

Respondent and the Trial Court both concede that the WSP records are Public Records (CP 72, 126). Therefore, Petitioner shouts from the rooftops that the records sent and received by Officer Orsborn were, and still are, subject to the Guidelines. Petitioner urges this Court to consider the Guidelines as evidence that the Law Enforcement Database Records were subject to release under the PRA.

The "Frequently Asked Questions About E-Mail Retention" section of the Guidelines states that: "...employees can print messages and then delete them, provided [that] you print the following information with the message: name of sender, name of recipient, date and time of transmission and/or receipt. You then file the printed message with the appropriate records series and retain it according to the retention approved for that series by the Local Records Committee." (See Appendix A)

With respect to the e-mail/web messages sent and received by Officer Orsborn, without his affidavit, we still don't know when those public records were deleted or not retained. If a public record request is made at a time when

such record exists but is scheduled for destruction in the near future, the agency... shall retain possession of the record, and may not destroy or erase the record until the request is resolved. See RCW 42.56.100

Furthermore, the affidavits from Detective Peringer and Officer Crow indicate that violating the Guidelines is regular practice at the PPD. For example, Detective Peringer stated "Even if a WSP record was initially printed out, an officer might remove it from the case file and discard it in light of new information that tended to show the WSP record was irrelevant." (CP 134) And Officer Crow stated "Generally, I do not print out WSP records that I view on my desktop." (CP 137) According to Chapter 13, Section 1.4 of the PPD Policies and Procedures Manual, "General records retention schedule is mandated under RCW 40.14."

Most importantly, those statements reveal that the officers violated the Guidelines, as well as their agency policy. But, to the extent this Court is tempted to adopt Repondent's argument that the records were not relevant and are not subject to a retention schedule, Petitioner reminds the Court that the e-mail/web messages were requests for DOL Identification information, and DOL Identification information was used in Photo Lineups of montages containing photos of the four suspects in a Class A felony rape case (CP 98, 100).

D. The Trial Court abused its discretion by denying Plaintiff Declaratory relief stating that the failure of Officers Orsborn and Crow to preserve and retain the Law Enforcement Database Records violated RCW 40.14.

We review a Trial Court's refusal to consider a Declaratory Judgment Action for abuse of discretion. Wash. Fed'n of State Employees v. State, 107 Wash.App. 241, 244 (2001).

As Petitioner set out above, the affidavits produced by Respondent do not prove what happened to the Law Enforcement Database Records. Officer Orsborn has said nothing and Officer Crow said "I do not recall...." (CP 137)

However, the absence of these much needed facts did not stop Respondent's attorneys from arguing that the Data Query e-mail/web message records were not retained (CP 72).

If Respondent's position is to be taken on its face, the Pullman Police Department violated the Records Management Guidelines and Retention Schedules that are promulgated under RCW 40.14.070.

In the Show Cause proceedings, Petitioner requested relief under the Uniform Declaratory Judgment Act stating that, "The failure of Defendant to preserve and/or the destruction of the WSP records violated the Preservation and Destruction of Public Records Act...." (CP 90)

The Trial Court denied Petitioner's request for

Declaratory relief (CP 12B).

"In applying the Uniform Declaratory Judgment Act, [Washington Courts] have firmly maintained that, absent issues of major public importance, a justiciable controversy must exist before a Court's jurisdiction may be invoked under the Act." Nollette v. Christianson, 115 Wash.2d 594 (1994).

Petitioner contends that these matters are certainly of major public interest because if an agency were allowed to appear at a Show Cause hearing based solely on affidavits, without affidavits establishing whether it followed the Guidelines or Retention schedules regarding records not provided upon request, the Act would be rendered meaningless to all Washington citizens.

V. CONCLUSION

Based on the foregoing facts and authorities, Petitioner respectfully urges this Court to reverse the Order concerning the Law Enforcement Database Records, find Mr. Reid to be the prevailing party, and remand for further proceedings.

DATED this 11th day of February, 2013.



CHRISTOPHER JACK REID, Plaintiff
H-5-A-87 #324543
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

APPENDIX A

FREQUENTLY ASKED QUESTIONS ABOUT E-MAIL RETENTION

Can I print messages, and then delete them?

Yes, provided you *print the following information with the message: name of sender, name of recipient, date and time of transmission and/or receipt.* You then file the printed message with the appropriate records series and retain it according to the retention approved for that series by the Local Records Committee.

What about draft documents that undergo several revisions?

Draft documents or working papers that are circulated via e-mail, that propose or evaluate high-level policies or decisions and provide unique information that contributes to the understanding of major decisions of the agency or demonstrate significant revisions should be filed and retained with the appropriate records series. Uncirculated drafts may be destroyed at will by the author.

What do I do with attachments I receive with e-mail?

File and retain them with the appropriate records series.

What about multiple copies of the same document?

If another agency or office has the primary responsibility for keeping the record copy, and if you have no business need to retain it, the document is simply an informational copy and subject to deletion/destruction at will. Example: If you receive the minutes of a meeting that provide you with the authority to travel to a far away place for a special seminar, definitely incorporate it into your project files. Otherwise, informational copies of minutes of a meeting you attended may be destroyed at will. The secretary or other responsible person in the organization, committee or task force must retain the minutes per their retention schedule.

Do I need to keep distribution lists?

If you send to a distribution list, you must also keep a copy of the members of that list for as long as you are required to keep the message itself.

DECLARATION OF SERVICE

I, Christopher Jack Reid, declare that, on February 11, 2013, I deposited the foregoing BRIEF OF PETITIONER, or a copy thereof, in the internal legal mail system of Stafford Creek Corrections Center and made arrangements for postage, addressed to:

Laura DeBacker McAloon
K & L Gates LLP
618 W Riverside Ave Ste 300
Spokane, WA 99201-0602

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

DATED at Aberdeen, Washington on February 11, 2013.



CHRISTOPHER JACK REID, Plaintiff
H-5-A-87 #324543
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520