

**FILED**

AUG 15 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 31568-1

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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KEVIN ANDERSON,

Appellant,

v.

SPOKANE POLICE DEPARTMENT,

Respondent.

---

BRIEF OF RESPONDENT

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## **I. INTRODUCTION.**

Plaintiff, an inmate at a correctional facility, filed suit for alleged violations of the Public Records Act after he failed to pay for and arrange pickup of his completed records. He now appeals the decision of the trial court to grant the Defendant's motion for dismissal and for summary judgment. He raises four issues on appeal: (1) that the trial court considered matters outside the pleadings when it accepted the Defendant's Amended Answers, and that he was therefore entitled to a presumption with respect to his allegation that the Defendant's responses were untimely; (2) that facts set forth in the pleadings present genuine issues of material fact sufficient to defeat summary judgment; (3) that the Defendant did not sufficiently identify records that were redacted; and (4) that the trial court erred in failing to rule on Plaintiff's Motion to Strike evidence.

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

On February 29, 2012, the Defendant Spokane Police Department received Plaintiff Kevin Anderson's first public records request dated February 24, 2012. CP 230 and CP 254. Plaintiff's name appears as an entry on February 29, 2012 on the Records Division's public disclosure log along with a notation based on what

was contained in his request: "B00072895". CP 230, 231, 284 and 307.

The Records Division required more information from the Plaintiff in order to complete his request because his request did not provide information that clearly identified a specific public record searchable by the Records Division. The information Plaintiff provided to the Records Division was insufficient because the only information he provided was a ticket number, which is a number associated with the court and not information that is in the possession of the Records Division. It was not a method by which the Records Division indexes information or by which it can search for requested information. The Records Division indexes by police report number and other specific information identifying individuals, which the Plaintiff did not provide. The Defendant also provided a very common name without a middle initial, a date of birth and no information to identify the incident, such as date, time, location of incident and names of individuals involved and their birth dates.

A letter dated March 4, 2012 was written from the Records Division to Kevin Anderson asking for clarification of the requested documents. CP 231–232, 256. This letter was issued within 5 days from the date Plaintiff's letter was received, as required by law.

The letter explained that, in order to search the records system, the Records Division requires information such as a date, time, location of the incident and names of individuals involved including their birth dates. The letter also stated that a police report number is also helpful, if it is known.

On March 8, 2012 the Records Division received a letter dated March 6, 2012 from Kevin Anderson to the Records Division in response to the request for clarification of his first public records request. CP 232, 258. In this letter, Plaintiff provided his full name, his date of birth and the address where the incident occurred. This response provided the necessary information to search for records that would be responsive to his request. Plaintiff's March 6, 2012 response was recorded or "logged" by Records Specialist Charmaine Dauterman onto a Public Disclosure Log kept by the Records Division. The Plaintiff's name appears in the March 8, 2012 entries of the public disclosure log showing that it was received along with a notation indicating the incident number that was obtained as a reference to his request. CP 232, 309.

Upon receipt of Plaintiff's response on March 8, 2012, a 5 day letter was sent from the Records Division to the Plaintiff providing an estimate of 90 days for records responsive to his

request. CP 233, 260. Charmaine Dauterman authored the March 8, 2012 5 day letter. This letter noted that more time was needed to fulfill this request and that screening is required under RCW's 10.97, 42.56, 46.52 and 13.50 for redactions that may be required by state law.

On March 16, 2012, the Spokane Police Records Unit received a letter from Plaintiff dated March 13, 2012 asserting that 90 business day estimate "seems very unreasonable" and requesting a more timely response. CP 233, 262. In this letter, Plaintiff further stated that he was requesting a report of no more than two pages. He asked whether this request could be expedited based on the simplicity of filling it and requested the agency's fullest assistance in regards to this matter. The Plaintiff's name appears on that March 16, 2012 date on the Public Disclosure Log along with notations relative to this communication. Because he had previously clarified his request, the incident number relative to his request was referenced on this log entry along with the word "duplicate", which referenced his earlier communication, and "put with 0308 request." CP 233 and 312.

On March 17, 2012, a second five day letter was sent to the Plaintiff with explanation of the reason for the 90 day estimate. CP

237, 264. This letter from the Records Division explained that screening would be required and that more time was needed in responding. The letter also explained that requests are handled on a first come first serve basis. Due to budget cuts that affected staffing levels in the Records Division, requests cannot be expedited.

The Plaintiff submitted a second public records request dated March 13, 2012. CP 237 and 271. This public records request was received by the Records Division on March 21, 2012, as indicated by a handwritten memo that authored by Records Manager Theresa Giannetto, giving instructions to her staff person indicating the following:

Please send the 5 day letter, 49 pages, You may ask for 10% deposit, all records are attached here. No redactions necessary. Theresa 3/21/12.

CP 237 and 273. This memorandum authored by Theresa Giannetto was provided to the Plaintiff in Defendant's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, dated October 4, 2012. CP 55 and CP 273.

On March 25, 2012, Records Specialist Charmaine Dauterman logged the Plaintiff's second public records request into a public disclosure log maintained by the Records Division.

Plaintiff's name appears on that log for March 25, 2012, along with the nature of his second public records request: "Records Policies". CP 238 and 319. Plaintiff's request letter was date stamped when the Record Specialist, Charmaine Dauterman, received it for preparation on March 25, 2012, as Ms. Giannetto had not previously done so.

On that same day, March 25, 2012, the Records Division sent the Plaintiff the five day letter indicating that the request is extensive and would require special handling, therefore more time is needed. It gave an estimate of 90 business days. CP 239 and 277. This letter also indicated that there are no responsive documents for item # 6 on the request.

On March 25, 2012, the Records Division also sent the Plaintiff a letter requesting a deposit of 10% for his second public records request. CP 240 and 275. This was done pursuant to RCW 42.56.120. That letter also notified the Plaintiff, pursuant to WAC 44-14-04007, that failure to claim or review the documents within 30 days will result in closure of this request.

The Plaintiff did not send a down payment within 30 days as required, so his request was closed on April 25, 2012. A letter was

sent to him dated April 25, 2012 informing his of this fact. CP 240 and 279.

The Plaintiff finally did send his down payment, however, but it was received after the thirty days and the closure of his request. The down payment was received and the request was reopened. Upon receipt, Ms. Giannetto wrote a handwritten note dated 5/2/12 with instructions to her staff as follows:

5/2/12 Even though this is late, Please send the fee due letter for what is owed \_\_\_\_\_, deposit - \$.60, Balance due \_\_\_\_\_. When we receive the payment we'll send the documents. Thank you, Theresa. Go ahead & give check back to Justin to process as a pmt.

CP 241 and 281.

The next day, on May 3, 2012, the Records Division sent the Plaintiff a fee due notification letter for his second public records request. CP 241 and 283. This document required a fee of \$6.75 to pick up the documents in person (minus the \$.60 deposit previously paid or \$9.02 to have the documents mailed).

These records were never provided to the Plaintiff in response to his public records request because he never responded to the May 3<sup>rd</sup> fee due letter and never sent the remainder of the fee. The Plaintiff never corresponded further with

the Records Division concerning this request and he made no effort to pay for them or arrange for pickup and/or mailing. When asked to admit that just two weeks after he sent a down payment for his March 13, 2012 (second) public records request, he received a fee due notification letter for that same public records request indicating it was ready, the Plaintiff answered as follows:

Admit in part, deny in part. Defendant first informed Plaintiff that his request was being closed and only after did Defendant then inform Plaintiff that while his first request was yet pending his second request was complete. This being diametrically opposite of Defendant's previous statement on how it handled public records requests Plaintiff then sought judicial review of both of his requests.

CP 55 and 61.

On June 4, 2012, the Records Division sent the Plaintiff a fee due notification letter for his first public records request. CP 241, 242 and 266. This document required a fee of \$3.45 to pick up the documents in person or \$5.04 to have the documents mailed. The fulfilled request came to 23 pages. On June 4, 2012, the Records Division also sent the Plaintiff an explanation of the redactions that were made in connection with his first public records request. CP 242 and 268. Those included redactions that were made of information the non-disclosure of which is essential to

effective law enforcement under RCW 42.56.240(1), and information the nondisclosure of which is necessary for the protection of a person's right to privacy under RCW 42.56.230 or RCW 42.56.240 as defined by RCW 42.56.050 (including social security numbers).

These records were never provided to the Plaintiff in response to his public records request because he never sent the fee to pay for the records. He never corresponded further with the Records Division concerning this request and he made no effort to pay for them or arrange for pickup and/or mailing. When asked to admit that he never sent payment or made any arrangements to pick up the records he requested relative to his February 24, 2012 (first) public records request, he provided the following response:

Admit in part, deny in part. Plaintiff filed this action before Defendant informed him that his request was complete and therefore Plaintiff could not have paid for the records as they were still being unlawfully held prior to the suit. CP 55 and CP 61.

#### *Procedural History*

On June 12, 2012, the Plaintiff's lawsuit was filed in Superior Court. CP 1 – 5. The Defendant received service of this lawsuit on August 1, 2012 and filed its Answer on August 17, 2012. CP 6 – 12. On December 19, 2012, the Plaintiff filed a Motion for Partial

Summary Judgment. CP 14 – 21. On December 31, 2012, the Defendant filed Defendant's Response Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. CP 28 – 53. On January 9, 2013, the Plaintiff filed Plaintiff's Reply to Defendant's Memorandum in Opposition to Partial Summary Judgment. CP 224 – 229.

On January 10, 2013, the Defendant filed a Motion to Dismiss or in the Alternative, Summary Judgment, CP 374 – 376, a Memorandum of Authorities in Support of its Motion to Dismiss or in the Alternative, Summary Judgment. CP 328 – 373 and a Declaration of Theresa Giannetto. CP 230 – 251. In her declaration, Ms. Giannetto corrects and clarifies facts that had been already previously disclosed to the Plaintiff in Defendant's Responses to Plaintiff's First Set of Interrogatories and Request for Production of Documents sent to him on October 3, 2012. CP 237 – 239, CP 127 and CP 182. Based on this clarification, the Defendant also filed an Amended Answer to the Complaint. CP 321 – 327.

On January 15, 2013, the Defendant filed a Second Amended Answer to Plaintiff's Complaint in order to correct minor scrivener's errors in the original Answer. CP 377 – 383. On January 30, 2013, the Plaintiff filed a Cross Motion and Response to

Defendant's Motion for Dismissal/Summary Judgment. CP 384 – 389. In the Cross Motion portion of this pleading, Plaintiff moved to strike the Defendant's Amended Answer, Second Amended Answer and Declaration of Theresa Giannetto. On February 5, 2013, the Defendant filed its Response to Cross Motion and Reply to Plaintiff's Response to Defendant's Motion to Dismiss/Summary Judgment. CP 411 – 423. On February 13, 2013, the Plaintiff filed a Reply to Defendant's Response to Cross Motion to Strike. CP 424 – 427.

On February 15, 2013, the Court heard oral argument on the Defendant's Motion to Dismiss/Summary Judgment and the Plaintiff's Motion for Partial Summary Judgment. In its oral ruling, the court indicated that there had been no showing of bad faith and granted the Defendant's motion to dismiss the case in its entirety. RP 6. On March 8, the written order was filed granting Defendant's Motion to Dismiss/Summary Judgment. CP 428 – 429.

### **III. STANDARDS OF REVIEW.**

Challenges to agency actions under the Public Records Act are reviewed de novo. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145 n. 1, 240 P.3d 1149 (2010); RCW 42.56.550(3). Appellate courts stand in the same position as the trial court where the record

consists only of affidavits, memoranda, and other documentary evidence. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) ( *PAWS II* ). Summary judgment orders are also reviewed de novo. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

#### *Dismissal*

Review of a CR 12(b)(6) dismissal is de novo. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). In determining whether the plaintiff can prove any set of facts that would warrant relief, the court presumes the truth of the allegations in the complaint and may consider hypothetical facts not included in the record. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). *Protect Peninsula's Future v. City of Port Angeles*, 43252-8-II, 2013 WL 3071927 (Wash. Ct. App. June 19, 2013).

A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) only if “ ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ ” *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). The court need not accept

legal conclusions as correct. See *Orwick*, at 254, 692 P.2d 793; *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 370, 274 P.2d 852 (1954). *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn. 2d 107, 120, 744 P.2d 1032, 1046 (1987) amended, 109 Wn.2d 107, 750 P.2d 254 (1988).

A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman*, at 183, 704 P.2d 140. A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court could sustain the claim for relief. *Lawson*, at 448, 730 P.2d 1308; *Bowman*, at 183, 704 P.2d 140; *Orwick*, at 255, 692 P.2d 793. Thus, a court may consider hypothetical facts not part of the formal record in deciding whether to dismiss a complaint pursuant to CR 12(b)(6). *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978).

#### *Summary Judgment*

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The court considers all

facts and reasonable inferences in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment. See *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988); *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Once the moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue as to a material fact exists. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 713-14, 248 P.3d 150, 153-54 (2011).

#### **IV. ARGUMENT.**

##### **A. DISMISSAL: THE TRIAL COURT DID NOT ERR IN GRANTING DISMISSAL PURSUANT TO 12(b)(6).**

The Plaintiff's first assignment of error is the trial court's granting of the Defendant's Motion to Dismiss. Plaintiff argues that the court has considered matters outside the pleadings by

accepting the Defendant's Amended Answers, and that consequently the court was obligated to treat the dismissal motion as one for summary judgment and therefore presume Plaintiff's allegations to be true. See CR 12(b) motion is converted into CR 56 summary judgment motion whenever matters outside the pleadings are presented to and accepted by the court.) This argument relies on the notion that an Amended Answer is not a pleading.

An amended answer is in fact a pleading, and its contents would not constitute evidence outside the pleadings. Black's Law Dictionary (4th ed.) 1312, defines 'pleadings' thus:

The formal allegations by the parties of their respective claims and defenses, for the judgment of the court \* \* \*. 'The term 'pleadings' has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties.

*Tiffin v. Hendricks*, 44 Wn.2d 837, 842-43, 271 P.2d 683, 686 (1954). In amending the Answer, the matters subject to amendment become part of the pleadings. As such, it is not outside the pleadings and therefore does not operate to transform the dismissal motion to one purely of summary judgment.

But even accepting the Plaintiff's assumption that the court has considered evidence outside the pleadings, this does not constitute error. While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the Plaintiff would not be entitled to relief, the motion remains one under CR 12(b)(6). See *Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009, review denied, 82 Wn.2d 1011 (1973). In such a case, the presentation of extraneous evidence would be immaterial. *Loger*, at 924, 509 P.2d 1009. In *Loger*, the trial judge considered matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute. *Loger*, at 926, 509 P.2d 1009. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120-21, 744 P.2d 1032, 1046 (1987) amended, 109 Wn.2d 107, 750 P.2d 254 (1988).

In this case, however, it is not clear whether or not the court accepted the Defendant's Amended Answers, as the court did not address this issue on the record nor was the matter included in the order granting dismissal. Plaintiff's argument that the court either

considered this evidence, or failed to exclude it in making the decision concerning dismissal, is unsupported by the evidence. In fact, the transcript of the court's ruling clearly indicates that the court did not address this evidence in its ruling. RP 1 – 9. The court stated:

I understand the public records law, and I've handled several of these cases. And in fact, virtually all of those have been brought by inmates except for one. And my understanding is that the public records rules require that when a person makes a request for a public record, the agency has five days to respond wither with the requests documents or with a letter indicating that they need a reasonable amount of time to compile and send out those records.

My understanding is also that there are certain exemptions to the Public records Act that apply. And there's a laundry list of those, and they generally cover confidential type records of a wide variety. And again, there's certain time frames; there's certain rules with regard to exemptions that need to be complied with. But the overriding – the overriding piece that must be proved by an inmate who brings this kind of an action is that the agency acted in bad faith. So if an agency does violate the Public Records Act by, for example, taking more than five days to response or claiming an exemption, there still has to be proof, some proof of bad faith. And that's a fairly new requirement that was added to the law sometime – I think it was just last year, probably in response to the remarkable amount of these types of cases that were being filed by inmates.

Dismissal is appropriate if “it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.”

*Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230, 1233-34 (2005). In this case, the Plaintiff is held to that standard given to inmates serving a sentence at correctional facilities at the time their public records requests are made. If this class of individuals cannot recover absent facts that explicitly show of bad faith, then CR 12(b)(6) dismissal is appropriate. Here, the Plaintiff's complaint does not offer any factual allegations that show bad faith and would therefore entitle him to relief, even presuming his allegations to be true. RCW 42.56.565(1). As such, he cannot defeat dismissal under CR 12(b)(6).

The Plaintiff asserts that the Defendant provided an "untimely response" and did not identify the redacted material to his satisfaction. These are not factual allegations that rise to the level of bad faith. His question regarding whether his second public records request was received by the department on March 21<sup>st</sup> or March 25<sup>th</sup> does not, under either scenario, change the fact that the Defendant's response was sent within the statutory five days and both requests were completed. Even his allegation that the Defendant agency changed the date as to when his second public records request was received demonstrates no bad faith denial of

records. In fact, the record clearly indicates that the agency fulfilled his requests, both of which he abandoned.

Nor are Plaintiff's allegations entitled to a presumption of truth. They constitute legal conclusions in that they go to the ultimate determination of the case. These are questions of law and are properly decided by the court. But even if the court were to presume Plaintiff's allegations to be true, the Plaintiff is still barred from recovery under RCW 42.56.565(1). For this reason, the CR 12(b) dismissal was proper.

**B. SUMMARY JUDGMENT: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT UNDER CR 56.**

The Plaintiff also assigns error to the court's granting of summary judgment, citing a genuine issue of material fact regarding the date when his second public records request was received. In fact, there is no genuine issue of material fact on this point. Plaintiff alleges that the Defendant failed to respond to his March 13, 2012 public records request within the statutory five day period. This argument is plainly contradicted by the evidence, which shows that Plaintiff's March 13, 2012 public records request was received on March 21, 2012 (CP 237 and 273) and by the issuance of the five day letter on March 25, 2012. CP 239, 240, 275 and 277.

These letters, both issued on day five after receipt of Plaintiff's second public records request, are dispositive that there was no failure to respond to Plaintiff's request within the statutory five days.

Plaintiff, however, argues that this evidence, which was provided to him as documentary evidence in response to his First Set of Interrogatories and Request for Production of Documents and mailed on October 4, 2012, was falsified. This is an argumentative assertion which serves his cause, but for which there is no supportive evidence. There is nothing that would discredit the declaration of Ms. Giannetto concerning when the request was received. Her admitted error does not benefit the Defendant in any way. Although the Defendant's Answer initially acknowledged receiving this request on the March 25, 2012, discovery clarified that the date of receipt was actually March 21, 2012. CP 75 (Answer to Interrogatory No. 3, *Itemized Statement of Documents Used in Answering Interrogatories.*) Defendant later filed an amended answer to clarify this point. Ms. Giannetto also explained that she handwrote the March 21, 2012 note and provided the details of when and how this request was logged. CP 238 – 239. She acknowledged not date stamping it on March 21, 2012 and indicated that it was not date stamped until processed by

her staff person on March 25, 2012. Consistent with this information, the Plaintiff's name was recorded on the Public Disclosure Log for March 25, 2012 with the notation "records policies." CP 238 and 319, SPD Records Unit Public Disclosure Log, date parameter 3/16/12 – 3/26/12, provided to plaintiff in response to his second interrogatories and requests for production.) Counting from March 21, 2012, the responsive five day letter was sent within the statutory five days. Apart from Plaintiff's challenge to the authenticity of this information, there is no evidence contradicting these facts or time frames.

Plaintiff's allegation that the Defendant has altered the facts, in the absence of any supportive evidence, should not be considered when deciding the issue of dismissal or summary judgment. Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that precludes a grant of summary judgment. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 741, 261 P.3d 119, 138 (2011). Judgment should be granted "when there are no issues of material fact, and the moving party is entitled to a judgment as a matter of law." *3550 Stevens Creek Assocs. v.*

*Barclay's Bank of California*, 915 F.2d 1355, 1357 (9th Cir. 1990),  
*cert. den.* 500 U.S. 917 (1991).

**C. THE TRIAL COURT DID NOT ERR IN DENYING MR. ANDERSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.**

The Plaintiff next assigns error to the court's failure to grant his motion for partial summary judgment, alleging that the Defendant engaged in "silent withholding." He argues that Defendant failed to state any specific claim of exemption regarding withheld records associated with his *first* public records request dated February 24, 2012. This argument fails for three reasons: (1) no records were ever withheld, as no documents were ever picked up or paid for by the Plaintiff with respect to either of his two public records requests; hence, the Defendant's attempt to provide them was frustrated; (2) what was ultimately given to the Plaintiff via discovery *only after he rejected his completed records* contained only redactions that were made pursuant to statute; and (3) Plaintiff was provided a letter indicating the basis for the statutory redactions.

In a public records case, the burden is on the government agency to show a withheld record falls within an exemption to disclosure under the Public Records Act (PRA), and the agency is required to identify the document itself and explain how the specific

exemption applies in its response to the request. RCW 42.56.070(1), RCW 42.56.550(1); *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011). A letter dated June 4, 2012 was prepared informing the Plaintiff that they were releasing the portions of the records which are not exempt from disclosure by RCW 42.56.210 and/or other statutes, and that information redacted or withheld was done so as essential to effective law enforcement. CP 268. Of the records uploaded to the records system for the incident number requested by the Plaintiff, 15 pages consist of WACIC and NCIC hits related to vehicle and driver's license information. This is information that comes from protected databases and is not subject to disclosure. Although Plaintiff was dissatisfied with the explanation given to him, the letter of June 4, 2012 does indeed provide a statement of the specific exemption regarding why the record or portion of the record is being withheld. CP 268. Contrary to his assertion, Defendant committed no violation of the PRA.

Plaintiff has also argued that Defendant failed to state any specific claim of exemption regarding withheld records associated with his March 13, 2012 request. As with his first request, no records were ever withheld, as no documents were ever picked up

or paid for by the Plaintiff with respect to either of his two public records requests; hence, the Defendant's attempt to provide them was frustrated. More compellingly, what was ultimately given to the Plaintiff *free of charge* via discovery after he rejected and failed to pay for his records and filed this lawsuit, contained no withheld records or redactions whatsoever.

Even if the court were to find the Defendant's stated exemptions to be unclear, there has been no showing of bad faith on the part of the Defendant, which fully complied with the Act in fulfilling Plaintiff's requests.

**D. THE TRIAL COURT DID NOT ERR IN FAILING TO ADDRESS MR. ANDERSON'S OBJECTION TO, AND MOTION TO STRIKE, EVIDENCE.**

Plaintiff asserts that it was error for the trial court not to address his motion to strike. Specifically Ms. Giannetto's declaration and the Defendant's two Amended Answers. A trial court's decision to admit or exclude evidence lies within its sound discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983); *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120, 1125 (1997). Evidentiary rulings will not be overturned on appeal unless the trial court has manifestly abused its discretion. A ruling on a motion to strike is discretionary with the trial court. *King Cnty.*

*Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994).

Although a “ruling on a motion to strike is discretionary with the trial court,” a “court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774, 780 (2004). In this case, the Plaintiff cannot show that the court considered the evidence addressed in his Motion to Strike nor that the court considered any inadmissible evidence whatsoever in its ruling. RP 1 – 9. The court did not address in its ruling the Defendant’s Amended Answers nor any of the substance of Ms. Giannetto’s declaration. In no manner did the court indicate its reliance on the evidence to which the Plaintiff objects. Instead, the court based its ruling on the fact that no bad faith had been proved. RP 6. As such, the Plaintiff cannot show that the trial court manifestly abused its discretion or that any error resulted.

**E. THE PUBLIC RECORDS ACT SPECIFICALLY BARS THE AWARD OF PENALTIES TO AN INMATE IN THE ABSENCE OF A SHOWING OF BAD FAITH IN THE DENIAL OF RECORDS.**

The Plaintiff is not entitled to recover an award of penalties, as he has made no showing whatsoever that he was denied the

opportunity to inspect or copy a public record. The Plaintiff cites *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 648, 115 P.3d 316, 326 (2005) for the proposition that "any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. This decision predates, and his argument fails to account for, the legislative change in 2009 which enacted RCW 42.56.565(1) and which applies to "all actions brought under RCW 42.56.550 in which final judgment has not been entered as of July 22, 2011."

RCW 42.56.550(4) states:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.565(1), however, makes a specific exception to RCW 42.56.550(4):

“A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.” Plaintiff fails to produce any evidence that would support such an award.

It is an undisputed fact that Plaintiff Kevin Anderson was serving a criminal sentence at Airway Heights Correctional Center on the dates when he made both of the public records requests that are the subject of this lawsuit. CP 55, 58 (Plaintiff’s Response to Defendant’s Requests for Admissions to Plaintiff, Response to Request No. 1.) Before awarding penalties to the Plaintiff for a violation under RCW 42.56.550(4), therefore, the court would have to find that the Defendant acted in bad faith in denying Plaintiff the opportunity to inspect or copy a public record. RCW 42.56.565.

Before bad faith can be found in the denial of a record, however, there must be a denial of records. In this case, there never was any denial of any records. The evidence contained in all supporting documentation not only fails to show Plaintiff was denied an opportunity to inspect or copy a record, it shows clear evidence

that the Defendant completed his requests, made these records available to him, sent him fee due letters with instructions on how to arrange for mailing or pickup of the records, and that the Plaintiff flatly rejected these records which the Defendant prepared for him.

Given the legislature's enactment of RCW 42.56.565 and its purpose of curbing abusive public records lawsuits, a requester who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made should not be able to willy-nilly refuse a completed request on his own determination that a violation has occurred, then advance the spurious claim that the agency withheld the records. This does not square with the legislature's requirement that such individual show bad faith in the agency's denial of the opportunity to inspect or copy a public record. Permitting such an abuse would render it impossible for an agency to avoid frivolous lawsuits by incarcerated persons determined to orchestrate the appearance of a violation where none exists.

Bad faith by an agency has been determined by Washington courts on a case by case basis. *King County v. Sheehan*, 114 Wn. App. 325, 356, 57 P.3d 307, 323 (2002) (finding no evidence of bad faith in the County's refusal to disclose the full names of its police

officers for the protection of their safety and privacy); *Amren v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389, 396 (1997); (declining to resolve the issue of bad faith despite compelling arguments of potential evidence of bad faith since no findings of fact were made by the trial court). The Court of Appeals in *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 79-80, 151 P.3d 243 (2007), in providing the trial courts guidance in locating an agency's conduct within the PRA penalty range, adopted the four degrees of culpability used in the civil context: negligence, gross negligence, wanton misconduct, and willful misconduct. *Yousoufian*, 137 Wn. App. at 79–80, 151 P.3d 243, *Zink v. City of Mesa*, 162 Wn. App. 688, 703, 256 P.3d 384, 392 (2011) *review denied*, 173 Wn.2d 1010, 268 P.3d 943 (2012). Courts in other jurisdictions have required a showing of “evidence sufficient to put the Agency's good faith into doubt.” *Ground Saucer Watch, Inc. v. C.I.A.*, 692 F.2d 770, 771 (D.C.Cir.1981). Agency actions “performed in accordance with specified guidelines would not imply bad faith.” *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 391 (D.C.Cir.2007). *McLaughlin v. U.S. Dept. of Justice*, 598 F. Supp. 2d 62, 66 (D.D.C. 2009).

In this case, the Defendant has never refused to provide records to the Plaintiff and Plaintiff has set forth no set of facts to support his claim that the Defendant acted in bad faith. Under RCW 42.56.565(1), therefore, he is barred from recovering penalties.

**V. CONCLUSION.**

Plaintiff, an inmate at a correctional facility, asserts that he is entitled to recover penalties for alleged violations of the Public Records Act, even though he refused to pay for and arrange pickup of records that were completed pursuant to his two requests. In ruling to dismiss his lawsuit, the trial court properly considered all relevant facts necessary to make this determination, including his status as an inmate, which requires him to show that the agency exercised bad faith in the denial of records. The evidence fails to establish any bad faith and therefore under RCW 42.56.565(1), he is barred from recovering penalties in this matter.

Respectfully submitted this 14th day of August, 2013.



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Mary Muramatsu  
Assistant City Attorney  
Attorneys for Defendant  
City of Spokane Police Department

DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 14th day of August, 2013, I caused a true and correct copy of the foregoing "Brief of Respondent," to be delivered to the parties below in the manner noted:

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Kevin Anderson, #727189	<input type="checkbox"/> VIA FACSIMILE
Coyote Ridge Correction Center	<input checked="" type="checkbox"/> VIA U.S. MAIL
P.O. Box 769	<input type="checkbox"/> VIA OVERNIGHT SERVICE
Connell, WA 98362-0769	<input type="checkbox"/> VIA HAND DELIVERY

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