

FILED

JUL 08 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32012-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

JAMES V. ADAMS,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellant/Cross-Respondent.

RESPONSE TO REPLY BRIEF OF THE DEPARTMENT OF CORRECTIONS

JAMES V. ADAMS
WDOC #881608
Litigant pro se
Coyote Ridge Corrections Center
PO Box 769 H-Unit
Connell, WA 99326-0769
Ph. (509) 543-5800

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. ARGUMENT 1

 A. The Department Acted In Bad Faith When It
 Withheld Mr. Adams' Criminal Records 1

 B. The Department Bears The Burden Of Establishing
 That It Did Not Act In Bad Faith 9

 C. The Trial Court Did Not Provide A Determination
 Of Penalties Based On The Size Of The Department 10

 D. The Trial Court Did Not Provide A Determination
 Of Penalties Based On The Department's Inadequate
 And Unlawful Record Exemption Log 11

III. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Chester v. Dep't of Corrections,
Spokane County Sup. Ct., #11-2-00329-3 2,4,5,6

Francis v. Washington State Dep't of Corrections,
178 Wn. App. 42, 313 P.3d 457 (2013) 1,2,7

Sargent v. Seattle Police Dep't,
Wn.2d _____, 314 P.3d 1093 (2013) 12

Yousoufian v. Office of Ron Simms,
168 Wn.2d 444, 229 P.3d 735 (2010) 10,11

Zink v. City of Mesa,
162 Wn. App. 688, 256 P.3d 384 (2011) 11,12

Statutes & Regulations

28 CFR § 20.34 (Appendix Part 20) 3

28 CFR § 513.11(a)(2) 3

RCW 10.97.050 3

RCW 10.97.080 3,8,9

RCW 42.56.070(1) 3,7

RCW 42.56.550(1) 10

RCW 42.56.565 10

WAC 44-14-06002(1) 3

WAC 44-20-270 3

WAC 137-08-105(2) 3

WAC 446-20-070 3

WAC 446-20-090 3

Other Authorities

Mariam-Webster's Dictionary 260 (New ed. 2004) 3

II. ARGUMENT

A. The Department Acted In Bad Faith When It Withheld Mr. Adams' Criminal Records

The Department asserts that the Court's holding in Francis does not support a finding of bad faith in this case. Francis v. Washington State Dep't of Corrections, 178 Wn. App. 42, 313 P.3d 457 (2013). Specifically, the Department argues that it had sought guidance from the WSP and FBI and continued to seek clarification "throughout the process" to ensure that it was withholding criminal records properly. App's Reply Br., 1. However, all of the Department's inquiries were initiated after Mr. Adams filed his PRA suit. The Department is asking this Court to consider its discovery efforts as if they were in response to Adams' record request. This is a substantial distinction between the instant case and the facts and decision of Francis. The court's holding in Francis does not support the Department's argument that it did not act in bad faith.

first, the Department failed to provide any evidence showing that it had been in continuous discussions with the FBI and WSP regarding criminal records dissemination in response to Adams' request or at any time prior to the date Mr. Adams filed suit (filed October 31, 2011). Referring to the very record cited by the Department, the Declaration of Candis Dibble reads:

Due to the implications raised as a result of the November 18, 2011 order [Chester v. DOC, Spokane County Superior Court No. 11-2-00329-3], I sought clarification and began discussions with the Washington State Patrol (WSP) and Federal Bureau of Investigations (FBI) regarding the dissemination of the "rep sheets."

CP 128 (brackets added).

So by its own admission and reference to the records it provided to the trial court, the Department did not begin to seek clarification from the WSP or FBI regarding its interpretation of federal and state statutes and regulations applied to the ACCESS criminal history information until nearly a month after Mr. Adams filed suit. Thus, the Department's argument that its discovery efforts should be considered in the same manner as an agency responding to a records request, in consideration of the findings of Francis, is fallacious and meritless.

Second, the Department reasserts that so long as its basis for withholding records is not "farfetched," there is no bad faith. App's Reply Br. 1-2 (wherein the Department relies on the appellate court's loosely-applied adjective "farfetched"). The Department's position that it was acting reasonably in withholding Mr. Adams' criminal records is legally indefensible; no statute or authority supports its argument. VRP 6/14/2013, 4-5.

The term 'farfetched' is not a formally defined or

authoritative legal standard for determining agency conduct in a PRA--or any other--case. The term 'farfetched' is defined generally as "not easily or naturally deduced or introduced." Merriam-Webster's Dictionary, 260. The applicable statute, RCW 10.97.050, interpreted harmoniously with other relative statutes of the PRA, renders Mr. Adams' criminal records disclosable, without question.

Accordingly, based on the evidence submitted by the Department, the trial court determined that its criminal record withholding policies do not correlate or coincide with any provision of the PRA. CP 29-33.

At the penalty hearing the lower court found that the Department was simply relying upon the opinion of an unidentified individual in another agency. VRP 6/14/2013, 5. Such defense does not naturally or easily adhere to the many statutes, regulations or codes requiring criminal record disclosure. See WAC 137-08-105(2), RCW 10.97.050, RCW 10.97.080, RCW 42.56.070(1), WAC 44-14-06002(1); WAC 44-20-270; WAC 446-20-070, -090(1); 28 CFR § 513.11(a)(2), sub. sec. (i); 28 CFR 20.34 (Appendix to Part 20). The trial court found the same. VRP 6/14/2013, 4-5.

The Department asserts next that "Mr. Adams ignores the timeline which triggered the Department's need to seek clarification of criminal record dissemination from the WSP

and FBI." App's Reply. Br., 2. The Department's statement infers that its unlawful withholding policies were somehow in compliance with the PRA until a judicial decision determined otherwise, as in the instant case where the Chester court found the Department's withholding practices unlawful. To rule in the Department's favor, this Court would have to find that an agency's illegal withholding policies are permissible absent a judicial ruling to the contrary. However such holding would not reflect the plain language of the statute, nor the legislator's intent to hold agencies accountable for violating provisions of both the Public Records Act and the Criminal Records Privacy Act. The provisions of these Acts are binding on agencies at the time of their enactment, and not necessarily when an agency has been found to have violated them by a court ruling. Accordingly, Mr. Adams contends that the Department should have sought clarification from WSP and the FBI long before Mr. Adams filed his PRA complaint. Therefore, this Court should find that the Department's timeline argument is meritless and frivolous.

The Department also asserts that Mr. Adams' argument that the Department acted in bad faith based on the court's contempt ruling in Chester is wrong. App's Reply Br., 3. Although the final decision of the Chester court was a

contempt order for the Department's sustained refusal to disclose Chester's medical records, Mr. Adams does not, nor did the lower court, substantially rely on the Chester court's contempt ruling as grounds for finding that the Department acted in bad faith in the instant case. The Chester court's finding of the Department's bad faith for sustained withholding of medical records is not of relevance in this case. Here, the relevant issue of law is whether the lower court's reliance on the Chester court's order to disclose criminal records to inmate subjects is an abuse of discretion. Br. of Resp't, 14, 19-22.

Specifically, the lower court found that the Department violated the Chester court's "Memorandum Opinion And Order..." and its "Order Denying Reconsideration" when the Department withheld Mr. Adams' criminal records. CP 29-33; CP 57-68; see CP 345 (records log showing that the Department did not disclose Mr. Adams' criminal records until ten months after the Chester court's ruling, filed 10/28/2011); see also lower court's opinion, VRP 6/14/2013 4-5; and Br. of Resp't, 20. Given the plentiful caselaw precedent which allows trial courts to consider other judgements where the law and facts are similar to a case before it, the Department failed to provide a showing that the trial court abused its discretion in considering the

Chester court's rulings. Accordingly, this Court should find that the lower court did not abuse its discretion in considering the criminal record rulings of the court in Chester.

The Department contends next that it has never taken to the position that the ACCESS user agreement provides exemptions to inmate requestors of ACCESS records and that its interest "has, and continues to remain, its ability to use ACCESS to obtain criminal history information..." App's Reply Br., 5. By its own admission, the Department's primary interest was not in complying with the PRA, or any part thereof, but to uphold the unfounded ad hoc record withholding policy between it, the WSP and FBI. The Department's argument reaffirms the lower court's finding that the Department was "simply relying upon the opinion of someone in another agency." VRP 6/14/2013, 5. Even so, the Department failed to demonstrate that by violating the opinion of someone in another agency that it would jeopardize its future ability to use ACCESS. Therefore, this Court should affirm the trial court's ruling that the Department violated the Act in disregard to any provision thereunder.

The Department had several options available to it to avoid both Chester's and Mr. Adams' lawsuits. For instance,

it could have filed a declaratory action or injunction (reverse PRA action). VRP 5. Instead, the Department repeatedly chose to withhold the criminal records, for untenable legal grounds. The Department was not privileged to do that. Id.

The Department's dramatically claimed "precarious position" was self-inflicted. First, no other agency is accountable for the Department's illegal withholdings or reliance on opinions of unidentified agents. Second, the Department's contention is not a legal defense under the PRA. Third, contrary to its assertion, RCW 42.56.070(1) does not prohibit subjects of any kind from viewing their own criminal records. The Department's reliance on this citation is frivolous and meritless. VRP 4. Therefore, this Court should uphold the lower court's ruling that the Department acted in bad faith when it withheld Adams' criminal records.

The Department argues next that Mr. Adams was not interested in viewing his criminal records otherwise he would have done so at his adjunct file review scheduled by the Department on August 23, 2013. App's Reply Br., 7. The Department's opinion is improper and irrelevant. This PRA suit was active at the time of the adjunct review. Mr. Adams chose not to interact with Department record

officials until after the lower court had provided its ruling on the subject matter. This is not grounds to deny Adams any judicial relief available to him under the PRA, nor is it grounds to provide the Department relief from the trial court's per diem judgment. CP 29-33.

Moreover, the Department failed to provide any evidence, and there is none, which would support its argument that Mr. Adams was seeking to gain some tactical legal advantage for increased penalties by declining to interact with possible disgruntled record officials until after the case had been ruled upon. Further, the Department was still withholding criminal records at that adjunct review: eleven pages of Adams' NCIC out-of-state arrest records. CP 345. These records were discloseable. CP 29-33; Br. of Resp't, 22, 26-27. Thus, the Department's assertion that Mr. Adams sought "windfall" penalties by declining review of his records is entirely speculative, factually unsupported, and frivolous. For these reasons the Department's "windfall" argument fails.

Next, the Department reasserts that RCW 10.97.080 did not place the Department on notice that it was acting in bad faith in violating the statute. App's Reply Br., 7-8. It is well-established that statutes are to be interpreted under plain language. RCW 10.97.080 is not ambiguous, nor

did the Department claim ambiguity of this statute.

Further, and more importantly, Mr. Adams is not required to show how RCW 10.97.080 placed the Department on notice that it was unlawfully withholding criminal records. Caselaw precedent and the statutes prescribe that any statutory burden regarding the dissemination of records lies on the agency withholding the records. Br. of Resp't, 14. Therefore, the Department's defense that RCW 10.97.080 did not put it on notice that it was unlawfully withholding criminal records is frivolous and meritless. See CP 295-306.

B. The Department Bears The Burden Of Establishing That It Did Not Act In Bad Faith

The Department contends that the trial court rulings are "devoid of any ruling requiring Adams [to] bear the burden of showing bad faith by the Department." App's Reply Br., 8. And as such there is no ruling for this Court to reverse. Id. The Department's assertion is false.

On November 14, 2013, the Department filed its Statement of Arrangements for the transcription of the lower court's 12/21/2012 Show-Cause hearing. On page four, line 17 of the transcripts the court stated, "Mr. Adams, as you are probably aware, you are not entitled to penalties unless you can establish the bad faith of the Department of

Corrections." Id. (emphasis added). Though not articulated in its Findings of Fact and Conclusions of Law Order, the lower court applied its oral ruling standard onto Mr. Adams throughout the court's proceedings. And since oral rulings are subject to review in appellate proceedings, this Court should make a determination of the bad faith burden the lower court instituted against Mr. Adams, as a matter of law. The lower court's ruling requiring Mr. Adams to establish bad faith is not supported by RCW 42.56.550(1), nor RCW 42.56.565. Therefore, Mr. Adams asks this Court to reverse the lower court's oral ruling.

C. The Trial Court Did Not Provide A Determination Of Penalties Based On The Size Or Budget Of The Department

The lower court did not consider the size or operational budget of the Department in its analysis of penalties. CP 29-33; VRP 6/14/2013 2-10; Br. of Resp't, 34-38. The Department correctly concedes that Mr. Adams raised this issue before the lower court, however it fails to mention that the court never provided a tenable penalty ruling based on the Department's size or operational budget. See VRP 2-10; CP 495-96; CP 542-545.

Superior courts are required to provide rulings that reflect all of the relevant factors and sub-factors set

forth in Yousoufian v. Office of Ron Simms, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). Contrary to the Department's assertion, the lower court failed to provide a ruling on the size or budget of the DOC, as required by Yousoufian. Id., 168 Wn.2d 467-68. There is no tenable final ruling from which this court can properly review. Such ruling is required in PRA actions. See Br. of Resp't, 35-38. The appropriate remedy for acquiring a missing mandatory ruling from a trial court is remand to that court for further proceedings. Id.

D. The Trial Court Did Not Provide A Determination Of Penalties Based On The Department's Inadequate And Unlawful Record Exemption Log

The Department also contends that the lower court did consider the Department's exemption log in its determination of penalties. App's Reply Br., 10-11. This contention is false. The court record is absent any specific analysis regarding the Department's records exemption log, nor did the court provide any instruction to the Department to modify its log. See VRP 3-10. The Department's exemption log does not provide a nexus narration between the records withheld and the statutory authority prohibiting disclosure. See CP 156, 159, 343, & 345 (record exemption logs); See also Br. of Resp't, 38-41.

The ruling of Zink v. City of Mesa holds that lower courts are required to review exemption log issues, regardless of whether the exemption log was statutorily sufficient or not. Id. 162 Wn. App. 688, 256 P.3d 384, 337-44 (2011); Br. of Resp't, 40. The appropriate remedy for acquiring this missing mandatory ruling is remand to the trial court for further proceedings. Sergeant v. Seattle Police Dep't, _____ Wn.2d _____, 314 P.3d 1093, 1102 (2013); Br. of Resp't, 38.

Reviewing the penalty proceeding as a whole, the lower court's oral rulings were based on the Department's sustained withholdings and defenses regarding the terms of the ACCESS agreement and its authority citations. The court did not reference the Department's exemption log in any way, which is a particular and required analysis in PRA cases. Br. of Resp't, 38-41. Had the court provided a specific instruction or determination of penalties on the Department's exemption log, a ruling on the log would have been specifically provided. The Department never modified its exemption logs to be in compliance with the PRA, which Mr. Adams demonstrated to the lower court. See CP 528-530 (record exemption log of Dave Beesely). Therefore, remand to the lower court is necessary to ascertain an exemption log penalty ruling, and a conditional judgment ordering the

Department to modify its logs in compliance with the PRA.

III. CONCLUSION

Based on the above, this Court should uphold the lower court's ruling finding bad faith, reverse its oral ruling requiring Mr. Adams to establish bad faith, and remand the case to the lower court for determination of increased penalties based on the Department's size and budget and its legally inadequate exemption log.

RESPECTFULLY SUBMITTED this 7 day of July, 2014.



JAMES V. ADAMS, DOC #881608
Coyote Ridge Corrections Center
PO Box 769 H Unit
Connell, WA 99326-0769
Ph. (509) 543-5800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 7, 2014 I deposited in the prison's Legal Mail system for service on all parties, or their counsel of record, a true and correct copy of the following documents:

Plaintiff's Response to Reply Brief of the Department of Corrections,

by United States Mail, postage prepaid, to the following address:

CANDIE M. DIBBLE (WSBA #42279)
Assistant Attorney General
Office of the Attorney General
Corrections Division
1116 W. Broadway Avenue
Spokane, WA 99201-1194.

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

DATED: July 7, 2014; Connell, Washington.


James V. Adams, DOC No. 881608
Respondent/Cross-Appellant, pro se
Coyote Ridge Corrections Center
PO Box 769 / H-Unit
Connell, WA 99326-0769
(509) 543-5800

PLAINTIFF'S RESPONSE TO REPLY
BRIEF OF THE DEPARTMENT
OF CORRECTIONS
CERTIFICATE OF SERVICE
COA No. 32012-0-III