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APR 03 2015

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

No. 323889

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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CHRISTOPHER JACK REID,

Appellant,

v.

CITY OF PULLMAN,

Respondent.

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REPLY OF APPELLANT

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## I. INTRODUCTION

Having failed to prove that it conducted a reasonable search for records requested under the Public Records Act (PRA), Chap. 42.56 RCW, the City of Pullman now claims that identifiable records were never really requested in the first place. At the same time, the City asserts that it reasonably believed the requested records no longer existed, and therefore did not have to search for them. Besides being inconsistent, these excuses are unsupported by the evidence and the law.

An agency cannot just assume records no longer exist without actually looking for them. Nor can an agency escape liability by claiming a request was not clear enough, when it accepted a requester's clarification and then uncovered obvious leads to the location of the requested records.

The City has not met its burden of proving that it conducted a reasonable search. Accordingly, this Court should reverse summary dismissal and order a new search and a determination of fees and penalties.

## II. ARGUMENT

### **A. The City Does Not Dispute That It Never Searched for Relevant Records.**

The City cannot escape the fact that its search for records was far too narrow to net what Christopher Reid requested. The search consisted solely of searching computer archives for certain emails created between

September 10 and September 20, 2007. CP 44. That search addressed only one part of Christopher Reid’s request. In 45 pages of briefing, the City does not point to any evidence describing a search pursuant to the second part of the request – in which Mr. Reid sought whatever records retention schedule was in place when the emails at issue were destroyed. In fact, there was no such search, because the City merely assumed the relevant retention schedule was destroyed without attempting to look for it. Brief of Resp., pp. 36-37. It did so even though, as explained in the opening brief, the City’s current retention schedule merely *permits* destruction of outdated retention schedules and does not *require* it. CP 628.

The City of Pullman “bears the burden, beyond material doubt, of showing its search was adequate.” *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). A search cannot be adequate if it never took place. Due to that fundamental failure, the judgment in favor of the City must be reversed.

**B. Mr. Reid Requested Identifiable Records.**

The City argues that it did not have to search for the retention schedule requested by Mr. Reid because it was not an “identifiable public record.” Brief of Resp., p. 33. This is factually and legally wrong. The City knew Mr. Reid wanted a copy of the retention schedule effective in

September 2007, and simply neglected to look for it in violation of the PRA. RCW 42.56.100 (requiring the “fullest assistance to inquirers”); *Neighborhood Alliance*, 172 Wn.2d at 720 (the PRA requires a search that is “reasonably calculated to uncover all relevant documents”).

1. Mr. Reid’s description enabled the City to find the records.

Mr. Reid’s July 16, 2012 PRA request was easy to understand. First he described five photos previously disclosed by the City, identifying them by name and Bates number. CP 16. Then he asked for copies of records showing how and when City police obtained those particular Bates-numbered photos from the Department of Licensing (DOL). *Id.* Then he said: “In the event that records requested in paragraph 1) above have been destroyed, *please provide the retention schedule that authorized such destruction.*” *Id.* (italics added).

Mr. Reid had reason to believe police had destroyed the photo transmittal records because, as the City points out, he already had received his entire criminal investigation file and the records in question were not in that file. Brief of Resp., p. 26. But there is no way Mr. Reid could have known *when* the DOL transmittal records were destroyed or what retention schedules were effective at that time. Unable to identify a specific retention schedule by name, he did the next best thing – he asked for

whatever retention schedule would have authorized destruction of the records. The PRA requires nothing more.

RCW 42.56.080 says that “agencies shall, upon request for identifiable public records, make them promptly available to any person.” The PRA does not define “identifiable.” However, the PRA is construed liberally to promote disclosure. RCW 42.56.030. To elicit a prompt response, all that is needed is “a reasonable description enabling the government employee to locate the requested record.” *Wood v. Lowe*, 102 Wn.App. 872, 878, 10 P.3d 494 (Div. 3, 2000). A requester is not required to identify the exact record sought. WAC 44-14-04002. Nor is a requester required to “exhaust his or her own ingenuity to ‘ferret out’ records through some combination of ‘intuition and diligent research’.” *Daines v. Spokane County*, 111 Wn.App. 342, 349, 44 P.3d 909 (Div. 3, 2002). When liberally construing the PRA and viewing the facts in the light most favorable to Mr. Reid, as required, this Court must conclude that the requested retention schedule was an “identifiable” record which the City was capable of locating.<sup>1</sup>

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<sup>1</sup> Because the City was the moving party, the evidence must be viewed in the light most favorable to Mr. Reid. *Gendler v. Batiste*, 174 Wn.2d 244, 266 (2012).

In fact, using the information provided by Mr. Reid, the City was able to quickly determine that the photo transmittal records: a) were created between September 13 and September 19, 2007; and b) were destroyed in electronic form some time before June 2009 when the City changed computer systems. CP 37 (explaining how the destruction was determined); CP 44 (showing search terms); CP 568. Thus, by August 15, 2012 – within a month of receiving Mr. Reid’s PRA request – the City knew that the photo transmittal records were destroyed electronically sometime between September 2007 and June 2009. CP 37, 568.

At that point, the City could have – and should have – searched for the law enforcement retention schedule in effect between September 2007 and June 2009. An agency must “follow obvious leads as they are uncovered.” *Neighborhood Alliance*, 172 Wn.2d at 720, citing *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (1999). It was obvious from the City’s own inquiry that the requested retention schedule pertained to the 2007-09 time period. In fact, the City later acknowledged that a law enforcement schedule adopted in 2001 was in effect at the relevant time, and would have governed the destruction of the DOL emails. CP 710, 713 (Reavis testimony that the email transmittal policy in the 2001 “Law Enforcement Agencies of Washington State Records

Management Guidelines and General Records Retention Schedules” was applicable to the DOL emails at issue). Yet to this day, the City has refused to acknowledge any obligation to search for or produce that schedule.

Testimony by Pullman police officer Penni Reavis underscores that the City was capable of locating the requested record. In a deposition, she acknowledged that by asking for the retention schedule pertaining to the DOL emails in question, Mr. Reid indeed made a request for an identifiable record. CP 686-688. Referring to a November 2012 letter to Ms. Reavis, Mr. Reid asked her:

In my letter...I asked: ‘Please provide me with a document showing only the specific records series and retention schedule that an email would fall under given the following circumstances. (A) Email request for the Department of Licensing DOL photos of potential subjects in a rape case. (B) Email responses from the Department of Licensing that include photographs of suspects that were used in photo lineups in a rape case.’ *Was that a request for an identifiable record?*

CP 687-688 (italics added). Ms. Reavis responded, “I would say yes.” *Id.*

Moreover, the City’s attorney knew that Mr. Reid wanted “a copy of the schedules that were in effect in 2007,” but referred him to the State Archives Office. CP 49. The State Archives Office, when asked about the “particular situation” of police investigators obtaining DOL photos on

September 13, 2007, easily identified the pertinent retention schedule and policy. CP 158-159; CP 126 (Reid Dec., ¶12). In sum, viewing the facts in the light most favorable to Mr. Reid, the City easily could have located the relevant retention schedule if it had tried.<sup>2</sup>

2. The City accepted Mr. Reid's clarification.

Although Mr. Reid's July 2012 request was specific enough for the City to find the requested schedule, the City asked for clarification. CP

21. Mr. Reid promptly responded:

...I need copies of all the emails sent to and from the Department of Licensing that validate exactly when PPD officers obtained DOL photos of Schott, Davis, Pye, VanHorn, and Peterson....Also, please provide me with the metadata that is pertinent to each of the emails...

[P]lease provide me with a copy of the retention schedules pertinent to the emails and metadata requested above.

CP 24. If the City still failed to understand this simple request, it should have said so, in order to provide the "fullest assistance" to Mr. Reid. RCW 42.56.100; WAC 44-14-04003(3) (communication is essential). But the City did not ask more questions, and accepted the clarification as sufficient.

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<sup>2</sup> Contrary to City assertions, Mr. Reid's request did not call for legal research. Neither Ms. Reavis nor the State Archive's Office required legal advice to identify the relevant schedule. They simply used their knowledge about records retention schedules. Virtually any records request requires consulting with people knowledgeable about the requested records, and this case is no different.

CP 554, 568. Having done so, the City cannot now rationalize an inadequate search by complaining that Mr. Reid failed to request an identifiable record.

3. *Truitt v. Dept. of Justice* is instructive here.

The City also posits that, because Mr. Reid's clarification used the words "pertinent to" instead of the original language, "authorized...destruction" of, it somehow justified producing only the current retention schedule instead of the one in place at the time of the destruction. Brief of Resp., pp. 33-34. This makes no sense, because Mr. Reid did nothing to indicate he abandoned his original request. He simply stated in a different way that he wanted whatever retention schedule applied to the destroyed DOL emails.

Even if the clarification somehow supplanted the original request, that still would not justify producing only the current retention schedule. That schedule did not take effect until 2010, and therefore could not have been "pertinent to" emails which the City believed were destroyed no later than June 2009.

*Truitt v. Dept. of State*, 897 F.2d 540 (D.C. Cir. 1990), is instructive here.<sup>3</sup> In that case, a historian originally asked the State Department for

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<sup>3</sup> Washington courts have adopted the reasoning of federal courts regarding what constitutes an adequate search under the Freedom of Information Act (FOIA), 5 U.S.C. 552, the federal counterpart to the PRA. *Neighborhood Alliance*, 172 Wn.2d at 720.

information on Albania falling within several categories, without mentioning specific files. *Id.* at 542. In a follow-up letter, the requester expressed interest in the contents of two files. *Id.* at 543. The City refused to search a third file, even after learning that it probably contained requested materials, because the follow-up letter mentioned only the two files. *Id.*

The Court held that the refusal was unreasonable because the original request made clear that the historian wanted all records related to the topics he particularized, and the follow-up letter “did not suggest that he had lost interest in other files” besides the two mentioned. *Id.* Similarly here, Mr. Reid did nothing to indicate that he abandoned his original request.

The *Truitt* court held that once a search has begun and an agency “becomes reasonably clear as to the materials desired,” it must “bring them forth.” *Id.* at 544. The requirement to reasonably describe records is not intended to “obstruct public access to records.” *Id.* at 545. The same reasoning applies here, where the City of Pullman refused to search for retention schedules in effect from September 2007 to June 2009 even after becoming “reasonably clear as to the materials desired.” *Id.* at 544. Like the requester in *Truitt*, Mr. Reid made his request without knowing details that would later come to light – i.e., that the destruction of interest would have been before June 2009. Once the City uncovered those details, it was

obligated to search for retention schedules for the relevant period. *Truitt*, 897 F.2d at 544.

4. Mr. Reid explicitly sought “records,” not information.

Mr. Reid unambiguously sought “records,” not information about records. His request contained the heading: “Public Records Request RCW 42.56”. CP 16 (emphasis in original). It began, “Dear Public Records Officer: Pursuant to the Washington Public Records Act and other state laws, I am requesting copies of the following records/documents:....” *Id.* The letter did not ask any questions. *Id.* Thus, Mr. Reid’s request was nothing like the requests in *Bonamy v. City of Seattle*, 92 Wn.App. 403, 405-406, 960 P.2d 447 (1998), and *Wood*, 102 Wn.App. at 874-875, in which agency employees sought information about personnel matters and did not even mention the PRA.

**C. There is No Proof That The Requested E-mails Did Not Exist in Printed Form.**

The City argues that it was not required to search paper files for the requested email exchanges between Pullman police and the Department of Licensing (DOL) because a prior lawsuit by Mr. Reid allegedly established that the emails did not exist in printed form. Brief of Resp., p. 26. This is wrong. The July 2012 request at issue in this case differed from the February 2011 request at issue in the prior case, and therefore required a

different search. Even if the two requests were identical (which they were not), the City did not raise collateral estoppel as a defense in the trial court and as this Court already ruled, it is too late to raise it now. *See* January 29, 2015 Commissioner’s Ruling (denying City’s motion to submit evidence from the prior case that was never presented to the trial court in this case); RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court”).

1. The 2011 and 2012 requests differed.

In February 2011, Mr. Reid requested from the Pullman Police Department “all...records” of Case No. 07-P07290, his own criminal investigation. CP 83. In June 2011 he asked for files of other suspects. CP 86. By contrast, Mr. Reid’s July 2012 request – at issue here - said:

- 1) In response to my request for all records in case 07-P07290, you sent me DOL photos on single pages that were bates numbered [Schott 00571, Davis 00583, Pye 00594, VanHorn 00599, and Peterson 00603]. Please provide me with copies of records validating how and when these photos were obtained from the DOL including emails.  
....3) In the event that records requested in paragraph 1) above are not kept in the file for cases 07-P07290, 07-P07292, 07-P07299, or 07-P07496, and are kept in some other case file, I still need the records.

CP 16. Thus, unlike the 2011 requests which sought specific case files (CP 83, 86), the July 2012 request expressly avoided limiting the request to any

particular file. CP 16 (mentioning four case files and suggesting that the records might be “in some other” file). This made sense because Mr. Reid did not need to obtain the same records again.

Although Mr. Reid’s 2012 request expressly mentioned “some other file” besides what was produced earlier, the City didn’t bother to look at *any* paper files. And while Mr. Reid agrees that the files produced to him in the prior case did not contain the DOL records he seeks in this case, that is beside the point. The point is that the 2012 request differed from the 2011 request, and the City never honored Mr. Reid’s request to look in “other” paper files not produced previously.

2. The City merely assumes – without proving – that the DOL records were not retained in printed form.

This appeal is necessarily based on the record of *this case*. RAP 9.1(a). If the City wanted to prove that the DOL emails were absent from case files, it should have searched all relevant files and presented evidence of that search to the trial court. It did not do so.<sup>4</sup> The clerk’s papers do not

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<sup>4</sup> See CP 247-248 (declaration stating that Mr. Reid’s “entire case file” was produced in 2011, without addressing whether it contained the records at issue, and “excluding” copies of the records actually produced). The City submitted indexes of Mr. Reid’s criminal file to the trial court in relation to a discovery dispute, but those indexes are too vague to establish the non-existence of the emails used to obtain DOL photos. See, e.g., CP 272-275, 288-291, 295-303 and 312-319. In fact, one index listed nine records referring to DOL. CP 311-319. Although Mr. Reid does not contend that those nine records are responsive to his July 2012 request, the point is that the clerk’s papers do not establish that the requested records do not exist in paper form.

contain the records produced to Mr. Reid in response to the 2011 requests. Nor is there any declaration attesting that *any* case files were searched for the DOL records at issue here.

Having failed to introduce any evidence in support of its theory that the emails do not exist in printed form, the City relies on this Court's unpublished opinion in the prior case, 179 Wn.App. 1017 (2014), as evidence that it "searched for and produced" all printed records related to the criminal investigation and therefore had no obligation to search for printed records again. Brief of Resp., pp. 9-10, 26. This is highly problematic. On November 12, 2014, the City filed in this Court a "Motion to Supplement Record on Review With Clerk's Papers, Appellate Briefing and Division III Unpublished Opinion From the Prior Related Public Records Case." The unpublished opinion was attached to the motion as an appendix. Citing RAP 9.11(a), Commissioner Monica Wasson denied the motion, stating: "The City had the opportunity to present to the trial court in this case evidence of the decision in the prior case, but it did not do so." The ruling properly rejected the City's attempt to raise collateral estoppel for the first time on appeal. Despite that ruling, which the City did not challenge, the City attached the "*Reid I*" opinion to the Brief of Respondent

as an appendix and cited it as purported factual evidence that issues in this case were resolved in the prior case. Brief of Resp., pp. 9-10; Appendix B.

The City's use of evidence outside the record defies this Court's motion ruling and violates RAP 10.3(a)(5), which says that each factual statement in a brief must refer to the existing record. Even if the City's citation of the prior decision was proper, it would not prove the factual premise that the requested DOL emails do not exist. The prior case did not raise that issue, and dealt with a request for police files, whereas this case deals with specific emails that were missing from those files. In sum, the City failed to prove that it searched for the emails in paper files, including the "other" files specifically targeted by the request.

**D. Mr. Reid Did Not Limit His Request to Electronic Records.**

The City also argues that it was reasonable to search only computers because Mr. Reid "never *asked* the City to search for printed emails in the case." Brief of Resp., p. 26. This is factually wrong, as illustrated by the plain language of the July 2012 records request. It also is legally wrong as explained below.

1. "Copies of" emails can be electronic or printed.

Mr. Reid's request said: "Please provide me with *copies of records* validating how and when these photos were obtained from the DOL

*including emails.*” CP 16 (italics added). By asking for “copies of records...including emails,” Mr. Reid made clear that he wanted *not just emails* but any records showing how police obtained the DOL photos. *Id.* Moreover, Mr. Reid told the City that the records he sought might be “kept in some...case file,” suggesting that he wanted file cabinets as well as computers to be searched. *Id.*

The City claims that Mr. Reid “expressly limited his request” to electronic versions of the DOL emails by clarifying that he wanted “emails and metadata.” Brief of Resp., p. 28. In fact, when clarifying the July 2012 request, Mr. Reid simply reiterated that he wanted “*copies of*” emails. CP 566 (italics added). A copy can be either electronic or printed.

2. The law does not support the City’s interpretation.

Mr. Reid asked for “copies of records...including emails,” but even if he had just said “emails,” that would not make it reasonable to search only computers. “The agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Neighborhood Alliance*, 172 Wn.2d at 720, citing *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (1990). An agency must “follow obvious leads as they are uncovered.” *Neighborhood Alliance* at 720, citing *Valencia–Lucena*, 180 F.3d at 326. “The search should not be

limited to one or more places if there are additional sources for the information requested.” *Id.*

Here, the City ignored “obvious leads” that the requested emails might exist in printed form, violating search requirements. *Id.* Mr. Reid’s request specifically stated that the emails might be in a “case file” other than his own. Also, the City knew that Mr. Reid’s case file contained printouts of 22 emails, including an email used to obtain a licensing photo – the same kind sought here. Brief of Resp., p. 26 (noting that 22 emails “had been printed by PPD investigators and placed in the investigative file”); CP 493, 497-514. Those printed emails illustrate that Pullman police had a practice of retaining records in paper form, not just electronic form. Yet the City searched only its computer system and neglected to look in *any* paper files.

The City argues that because an email is created electronically, anyone requesting an “email” must want the record in its original electronic form. Brief of Resp., p. 27. This confuses a record’s identity with its form. A “public record” is defined by its content, not its physical form. RCW 42.56.010(3) (a “public records” is “any writing containing information relating to the conduct of government ...owned, used, or retained by any state or local agency *regardless of physical form or characteristics*”). Under the City’s reasoning, every document requested

under the PRA must be located and produced only in its original form, which makes no sense.

The state's model rules say that, when responsive records exist in electronic form, an agency should produce those records to the requester in an electronic format "*if requested in that format.*" WAC-44-14-05001 (italics added). The rules do *not* say that any request for emails is inherently always for an electronic format. On the contrary, the model rules contemplate that "alternative versions of the same documents" may exist in different places. WAC 44-14-04003(9) (describing search procedures). In sum, construing the evidence in the light most favorable to Mr. Reid as required, he did not limit his request to electronic records.

**E. Failure To Search For Printed Emails *Was* Raised Below.**

Bafflingly, the City argues that failure to search for printed emails cannot be raised now because it "was not squarely raised" in the trial court, whatever that means. Brief of Resp., p. 30. The City actually quotes a portion of Mr. Reid's summary judgment response raising the issue, but dismisses it as a "passing reference" made "post-litigation." *Id.*

This is just silly. Mr. Reid, who was pro se through most of the case, was able to file only one dispositive brief. In that 19-page brief, he devoted half of one page to the issue of printed emails. CP 675 (lines 14-

26). Half a page is not a “passing reference” and nothing else was needed to raise the issue “squarely.” His summary judgment response was certainly not “post-litigation.” The City’s argument is entirely meritless.

#### V. CONCLUSION

For the foregoing reasons this Court should reverse the order granting summary judgment to the City, require a new search for the requested records, and remand the case to the trial court to determine an award of attorney fees and discretionary penalties.

Dated this 1st day of April, 2015.

RESPECTFULLY SUBMITTED,

HARRISON-BENIS LLP

By: 

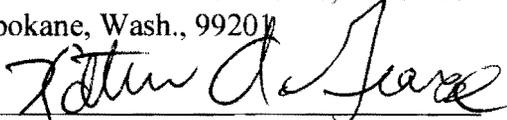
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on April 1, 2015, I caused delivery of a copy of the foregoing Reply of Appellant by U.S. mail to the following:

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