

No. 33191-1-III

FILED

SEP 16 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KEVIN ANDERSON

Appellant

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Anderson hereby replies to the Department of Corrections (“Department”) response.

II. SUMMARY OF THE ARGUMENT

Anderson replies that he viewed his central file in installments. He then provides a rejoinder that an agency like the Department of Corrections (“Department”) is always put on notice of possible PRA claims when it prepares exemption logs showing documents either withheld or redacted. Next he shows this Court that he did place his summons and complaint in the legal mail system at the prison. Then he shows that the “medical” documents were not used for treatment. He finally shows why the Department is liable for acting in bad faith based on this Division’s recent ruling.

III. ARGUMENT

A. ANDERSON VIEWED HIS CENTRAL FILE IN INSTALLMENTS.

The Department argues that Anderson’s May 29, 2012 review was not an installment of his February 9, 2012 review because the documents were not in his central file in February. The Department has failed to define what is considered part of the central file. However, Leyerle clearly identified the missing volume as part of the central file. CP 301. The simple fact that a volume of the central file had been misplaced does not render that volume not part of the central file. The Department also maintains that “[a] request to review the central file is a request to review

all documents in the physical file at the time of the request.” Response Brief, p. 17. If this is the case, then the second review must be an installment because Anderson did not view both volumes, only the misplaced volume.¹

B. THE DEPARTMENT INCORRECTLY CLAIMS IT DID NOT RECEIVE SUFFICIENT NOTICE OF THE ISSUES IN THIS CASE.

The Department acknowledges that a complaint, at a minimum, identify the legal theories upon which claims are raised. The Department states that Anderson’s summary judgment motion raised new claims not in the complaint. In his complaint, Anderson did not mention every document by name, but he identified each relevant request and whether the Department did not did not fail to respond.

Anderson tried to amend his complaint twice pro se. Neither motion was granted. The final attempt to amend the complaint was denied. However, the Department was put on notice throughout that the case consisted more than the initial complaint. Washington is a notice pleading state. It only requires a plaintiff provide a “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.” CR 8(a); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175

¹Comparison of the exemption logs from February 9, 2012, May 31, 2012 and August 8, 2012 show no common records withheld or redacted between February 9th and May 31st. The August 8, 2012 exemption log was compiled from both volumes, minus the so-called medical records. CP 310-15. The May 31st exemption log did not list documents from the first volume. CP 303-06.

Wn. App. 840, 865, 309 P.3d 555, 567 (2013), *review granted sub nom* 179 Wn.2d 1008, 316 P.3d 495 (2014) *and aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014).

Our courts have continually ruled that specific information is not required to make a claim. *See e.g. Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 325 P.3d 237 (2014). In this case, the Plaintiff claimed he should recover for a medical procedure. It was not pled in the complaint. The Court of Appeals ruled that in Washington, “a notice pleading state, Plaintiff is not required to put the particular treatment at issue in order to be able to assert a breach of contract claim regarding that treatment.” *Id.* at 259.

Then there is the fact that the complaint references the exemption logs which are the subject of this appeal. CP 322-37, ¶3.3. Documents referenced in a complaint which are in the possession of the Defendant and for which there is no dispute as to authenticity are considered part of the notice to the Defendant. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 189 P.3d 168 (2012). In *Rodriguez*, a CR 12(b)(6) referenced a document not attached to the complaint. In denying this argument, Division I stated that the “ because the proxy statement was referenced in the complaint, it was not actually outside the pleadings and was properly considered by the trial court.” *Id.* at 726. Here, the complaint referenced the exemption logs which form the basis of this lawsuit. Under the rationale of *Rodriguez*, the Department’s own exemption logs put the Department

on notice of what possible challenges exist on their face. Their authenticity is not in question.²

Anderson has provided the necessary information for the Department to ascertain his claims if they had conducted discovery: the cause of action under the Public Records Act and the dates of documents being challenged. No more is needed.

C. ANDERSON PLACED HIS SUMMONS AND COMPLAINT IN THE PRISON LEGAL MAIL SYSTEM AND IS ENTITLED TO THE FILING UNDER GR 3.1.

The Department tries to cast aspersions on Anderson's declaration he filed with the trial court. It points to the statement it was placed in the internal mail system, not the legal system. While not a shining example of drafting, the evidence shows it was placed in the prison mail system. What is critical though is that Anderson filed a pro se declaration January 15, 2014. In this declaration, he specifically stated he placed the summons and complaint in the prison legal mail system. CP 656-659, ¶2. Because Anderson specifically used the "magic language" he has met the requirements of GR 3.1 and this lawsuit was timely filed.

D. THE DOCUMENTS ARE NOT TREATMENT DOCUMENTS HENCE TO NOT FALL UNDER THE MEDICAL EXEMPTION.

The Department is claiming the documents it pulled from the central file are medical documents and because there is a separate exemption and a policy which permits viewing medical documents in their

²The Department provided the same exemption logs in its summary judgment motion as did Anderson.

medical file, there is no violation. The Department's reasoning is flawed in several ways.

First, the documents had been in the central file for years. The dates of the documents in question range from October 10, 1994 to October 24, 2002. All of a sudden, the Department decides to move these documents to another location. If they were medical records, Anderson still has the right to view them no matter where they are located. RCW 70.02.080. It only requires a written request, which Anderson submitted January 4, 2012.

More technically still, the records are forensic records, not records developed during treatment. CP 387-373. Documents like these used in court proceedings are subject to the PRA. *See Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012) (SSOSA reports in the possession of the prosecutor's office are disclosable).

Then there is the argument using DOC Policy 280.510. In it, an inmate can view both his central and medical files which are located in two different places. But the mere fact that the Department labels a document as belonging to the medical file does not remove the inmate's right to review that document if it was present in the central file at the time he requested it. The Department can move documents from the central file to other repositories as it chooses after the inmate views his file but not before.³

³The Department had many places where documents are found, including an electronic storage file originally labeled "Liberty" but now

E. DOCUMENTS WITHHELD WITHOUT JUSTIFICATION WERE WITHHELD IN BAD FAITH.

Recently, this Division expanded the scope of bad faith to include those situations where an agency failed to engage in an independent analysis of exempt status and that the reliance on a legally indefensible position is a basis for finding bad faith. *See Adams v. Dept. of Corrections*, ___ Wn. App. ___ 2015 WL 5124168 (Div. III, September 1, 2015). The Department argued that an agency’s “reliance on an invalid basis for nondisclosure [was] not a basis for finding of bad faith” but admitted it may be sufficient if “farfetched.” *Id.* at ¶35. The *Adams* Court denied the Department’s reliance on a federal statute because not only did the Federal Bureau of Investigation limit its use but the United States Supreme Court had struck down the very statute cited by the Department in *Adams* when applying it to Freedom of Information requests. *Id.* at ¶38, 39 (*citing Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The critical issue was privacy and the Supreme Court ruled that “[p]rivacy is not invaded when an individual reviews records that are only about himself.” *Id.* at ¶43. The *Adams* court concluded by stating that “[w]e agree with the trial court that by no reasonable reading does *Reporters Committee* suggest that the [Department] was justified in withholding Mr. Adams’s FBI rap sheet information from him.” *Id.* at ¶46.

called “On Base.”

This Court should apply the holding of *Adams* to this case. Like *Adams*, the Department had no justification for withholding from Anderson his rap sheets. Like *Adams*, there is no rational justification for moving the alleged medical records that Anderson would be permitted to view, no matter what file they were located in. This Court must find that the Department acted in bad faith.

IV. CONCLUSION

For the reasons stated above, this Court must find that the Department violated Anderson's rights under the Public Records Act. As the consequence, this Court should find Department acted in bad faith and that penalties for both groups must be awarded Anderson along with reasonable attorney fees and costs.

DATED this 14th day of September, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on date below, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S REPLY BRIEF

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