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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
By \_\_\_\_\_

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Appeal from Honorable Judge Bruce A. Spanner  
Franklin County Superior Court No. 15-2-50374-2

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Jeffrey R. McKee,

Petitioner

v.

Washington State Department of Corrections,

Respondent

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PETITIONER'S REPLY BRIEF

No. 338762

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137-08-090(1) - - - - - 1

A. REPLY

1. The Prison Records Officer incorrectly instructed Mr. McKee to submit his request to the Public Disclosure Unit

The Department still has not addressed the fact that WAC 137-08-090(1) directs "Incarcerated offenders... shall submit requests to inspect their own... central file to the records manager at the facility in which they are currently incarcerated." The Classification Notice specifically directs inmates to "submit a written request for a review of all pertinent official records in the offender file through the Records Manager, using DOC 05-066 Request for Disclosure of Records." CP 119. The local policy specifically notifies inmates how to obtain a review of the pertinent records by "submit[ing] DOC 21-473 Offender's Kite to the Records Department requesting a file review along with DOC 05-066 Request for Disclosure of Records" CP 35. This local policy conforms to both WAC 137-08-090(1) and the Classification Notice. This local policy also makes a distinction between a "review" and "copies" of the records<sup>11</sup> Id., again conforming to WAC 137-08-090(1). Ms. Leaverton was aware of this process stated in her declaration. CP 28 13, CP 35. In Parmelee v. Clark, 148 Wn.App. 748, 201 P.3d 1022 (2009) the court held the Departments adoption of an unpublished policy (such as the Classification Notice, and local policy) complied with the PRA requiring a requestor to follow the unpublished process, the process Mr. McKee followed. It also

recognized that a requestor "may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed." *Id.* at 756.

This case is also distinguishable from Parmelee. In that case Mr. Parmelee was informed by Department staff of the specific person he was required to send his request to. Instead of following that directive, Mr. Parmelee challenged that requirement. Parmelee, 148 Wn.App. at 757. Here, Ms. Leaverton directed Mr. McKee to submit his request to the public disclosure unit. CP 29 ¶¶6-7. Mr. McKee followed that directive. CP 110. Mr. McKee was then directed to submit his request to the local disclosure unit, the process he originally followed. CP 114.

The Department also appears to argue that Mr. McKee knew what specific records he was seeking and where they were located. The only notice Mr. McKee received related to the two Classification hearings were the two notices. CP 115 ¶¶2&4. Mr. McKee had to submit a records request to obtain a copy of the notices. *Id.* The December 1, 2014 notice identified the hearing was for "FRMT". CP 119. Mr. McKee used the verbatim language contained in the notice and directed Department officials to the specific document he was referring to. CP 38, 41, 110. Mr. McKee had no way to know what the specific pertinent official records were or that they would not be located in his central file. Mr. McKee could not have been any clearer in identifying the records he was seeking, records only the Department had

knowledge of. See Beal v. City of Seattle, 150 Wn.App. 872, 209 P.3d 872 (2009) (identifiable record is "one for which the requestor has given a reasonable description enabling the government employee to locate the requested record."). Once Mr. McKee reasonably identified the records he was seeking the Department had a duty to conduct some search to locate the records.

RCW 42.56.520 does allow an agency to seek clarification of a request. The Department admits Ms. Leaverton did not seek such clarification, instead she denied Mr. McKee's request. CP 29. Interestingly the Department now concedes Ms. Leaverton knew the specific document McKee was requesting to review, "As noted by the records technician's first response, she believed McKee was seeking a document which was not located in his central file. CP 38." Response Brief at p. 13. The Department did not seek clarification of what document Mr. McKee requested to view, only to clarify what documents in the central file he wanted a copy of. CP 114.

**2. McKee did not abandon his request to the Public Records Unit**

As previously stated, the unpublished policy notified Mr. McKee that reviews of the offender file were processed locally and if he wished to have copies of any specific document he needed to submit his request to the Public Disclosure Unit. CP 35. This is why Mr. Nagel made the distinction between a "review" and "copies" of specific documents in his central file

"or offender file". CP 114. Interestingly Mr. McKee's letter never mentioned a central file review, it only requested a review of the pertinent records related to the two Classification Notices he had received, notices Mr. Nagel had in hand at the time he received Mr. McKee's request. CP 110, 119-122.

Mr. McKee never requested copies of any specific documents, he only sought a review of the records he was notified he had a right to. Mr. Nagel's letter indicated to Mr. McKee the records he sought to review were located in his central file and that if Mr. McKee desired a copy of any specific document in the central file to write him back and define the specific document. CP 114.

If there are specific copies of documents that you want and do not need an entire central file review, notify the Records Department that you are canceling the request for the central file review. If you are requesting copies of specific documents in your Central File, please define what is meant by 'pertinent official records'.

CP 114 (underline in original)

To obtain documentation from your central file (i.e., Judgment and Sentence) without a central file review, you will need to submit a public disclosure request to the Public Disclosure Unit at Headquarters.

CP 35

### **3. The Department Silently Withheld The Responsive Records**

The Department has the audacity to claim "While the offender classification hearing notice permits an offender's review of the records considered in his classification hearing, it requires that request be made to the Public Disclosure Unit, not the prison records office. CP 119." Response Brief at p. 17. That notice the Department cites to, specifically directs the

request to be made to "the Records Manager". That is the specific process Mr. McKee used. CP 38, 41. Mr. McKee's request identified the specific notice, including Department form name and number, he received and for which hearing each request was related to. Id. The Department knew what hearings Mr. McKee was referring to because they created the notice and reason for such hearing. Additionally, the Department knew what records were pertinent to each review as they, not McKee, created and reviewed them. CP 128-158. The Department, Ms. Leaverton and Mr. Nagel were well aware of what documents Mr. McKee was seeking, where they were located and the process for McKee to view those records. The Department and its staff silently withheld those records. Silent withholding of a record happens when, as here, the agency provides records that are not responsive to a request while withholding the responsive records without notice to the requestor. See Tobin v. Worden, 156 Wn.App. 507, 514, 233 P.3d 906 (2010).

An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal.... The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request... Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requestors the misleading impression that all documents relevant to the request have been disclosed.

PAWS v. University of Washington, 125 Wn.2d 243-44, 269, 884 P 2d

592 (1994).

The Department also appears to be shifting the burden of proof on Mr. McKee. "McKee fails to show the Department silently withheld responsive records..." Response Brief at p. 18. under the PRA the burden of proof is on the agency to justify its withholding of records. "The agency has the burden of proving that refusing to disclose 'is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records... 'The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in light most favorable to the requestor... Moreover, the agency must show that it 'made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Neighborhood Alliance v. Spokane, 153 Wn.App. 241, 224 P.3d 775, 783 (2009) (citations omitted). Additionally, the Department filed a show cause motion, that is statutorily reserved for the person being denied the records which is a summary procedure. CP 1; RCW 42.56.550(1). The party filing a summary proceeding has the burden of proof. Neighborhood Alliance, 224 P.3d at 783.

**4. The Department has failed to prove the redacted victims names were appropriate**

It appears the Department concedes the redactions of the non victims names were inappropriate as they did not address this in their response. Response Brief at pp. 18-20. The Department still fails to meet their burden that disclosing the names of the

victims in the published court of appeals decision, judgment and sentence that is publicly filed, and the Prohibited Contact Review, "would endanger any person's life, physical safety, or property." RCW 42.56.240(2). The Department argues "Considering the perpetrator's identity and then permitting access to these types of records [published court of appeals decisions and perpetrator's Judgment and Sentence] because they would be the 'perpetrator's' own records would make the exemption void as victims would have no protection of their identity information." Response Brief at p. 19. This argument fails as the statute provides this very protection. "If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern." RCW 42.56.240(2). It is clear by the record the victims and witness did not indicate their names to be withheld and the Department does not dispute this fact. CP 73-85. The Department has failed to make a valid claim of exemption for these documents.

**5. McKee did not abandon the withholding of emails**

The Department argues that "During the show cause motion hearing, McKee's counsel failed to make any arguments regarding his claim of improper withholding of the attorney-client emails." Response Brief at p. 20. The Department does not support this claim with any citation to the record.

Arguendo, even if counsel had failed to make oral arguments on this issue, this claim was raised in the complaint, CP 255 at §5.5, was raised in the Departments show cause motion, CP 9, was

addressed in Mr. McKee's response to show cause, CP 232-33, and was assigned error in his opening brief, Brief of Petitioner at p. 18.

The Department selectively quotes from West v. Gregoire, 184 Wn.App. 164, 172, 336 P.3d 110 (2014). In West the plaintiff made a request to Christine Gregoire, then governor of Washington, for records she had asserted executive privilege. Mr. West filed suite to compel Gregoire to produce all records she had claimed such privilege, for statutory penalties and a declaratory ruling that the privilege itself was not a valid PRA exemption. West then moved for a show cause order. He requested that Gregoire appear and show cause why she should not be found in violation of the PRA for failing to (1) produce records in a reasonable time, (2) produce an exemption log citing a recognized exemption, and (3) produce public records in response to his request. In a supporting declaration West alleged that the Governor's office failed to produce the records in a reasonable time. Gregoire filed a response brief requesting the lawsuit be dismissed because West's only claim was related to the executive privilege. Mr. West's brief and supplemental memorandum only focused on the executive privilege. West did not argue in either of his supporting briefs or in his supporting declarations that he had additional PRA claims based on Gregoire's delayed response or any other grounds. After all the parties had filed their briefing but before the court heard oral argument West moved to supplement the record with copies of records and an

exemption log the Governor's office had newly discovered and disclosed responsive to Mr. West's request. West did not move to amend his complaint to assert his new claims. West 184 Wn.App. at 111-12. The court determined "West was required to address all the claims that he wanted to pursue against Gregoire in the show cause proceedings that he initiated. Because he did not even mention any claims not involving the executive privilege in his briefs or in oral argument, he is deemed to have abandoned those claims." West, 184 Wn.App. at 114.

Mr. McKee did not abandon the attorney-client claim. It was raised in his complaint and in response to the Department's show cause motion. This Court should note the West Court recognized the show cause procedure is only available to the person being denied the records not the agency denying such, "Former RCW 42.56.550(1) also provides that a requestor denied the opportunity to inspect or copy a public record may move for an order requiring the agency to show cause why it has refused to allow inspection or copying." West 184 Wn.App. at 113. The Department did not even have the authority in this matter to require Mr. McKee to show cause why he is not entitled to the records.

**B. CONCLUSION**

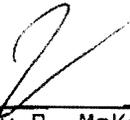
For the foregoing reasons Appellant's appeal should be granted in full.

**C. CERTIFICATE OF SERVICE**

The undersigned declares under penalty of under the laws of

Washington State that today he mailed this document, postage pre-  
paid, via the prison "Legal Mail" system, addressed to; Clerk,  
Court of Appeals Division III, 500 N. Cedar St., Spokane, WA  
99201; AAG Candie M. Dibble, 1116 W. Riverside Ave., Spokane, WA  
99201; Michael C. Kahrs, AAL, 5215 Ballard NW, #2, Seattle, WA  
98107

DATED this 12 day of February, 2016.

  
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Jeffrey R. McKee, appellant