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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

Jeffrey R. McKee,
Petitioner

v.

Washington State Department of Corrections,
Respondent

BRIEF OF PETITIONER

NO. 338762

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I. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred by finding the Department did not violate the PRA because Mr. McKee did not clarify his request.

2. The trial court erred in determining the Department properly redacted the victim information under RCW 42.56.240.

3. The trial court erred in not addressing the withholding of the "Bowman-Brooks" emails.

B. Issues Pertaining to Assignment of Error

1. Did the trial court err in finding the Department was not required to respond within five business days of Mr. McKee's November 24, 2014 and December 1, 2014 requests by either providing inspection of the pertinent records, providing a reasonable estimate of time to compile the records or deny the records request citing to a statutory exemption because Mr. McKee did not provide clarification to his latter December 28, 2014 request?

2. Did the trial court err in finding the Department was not required to provide Mr. McKee inspection of the "pertinent records" related to his two FRMT hearings because Mr. McKee did not clarify what he meant by "pertinent records" if he wanted copies of documents contained in his central file?

3. Did the trial court err in not determining whether the Department silently withheld the pertinent records that are located in Mr. McKee's electronic file?

4. Did the trial court err by finding the Department

properly redacted the victims names from the judgement and sentence, published court of appeals decision and Prohibited Contact Review because the PRA does not allow an agency to respond based on who the requestor is?

5. Did the trial court err in not deciding whether the Bowman-Brooks emails were appropriately withheld?

II. STATEMENT OF THE CASE

The Washington State Department of Corrections "Department" has a classification system. The stated purpose of:

Classification is the management tool used to assign offenders to the least restrictive custody designation that addresses programing and other needs, while providing for the safety of personnel, the community, and offenders. The classification process will be documented in the applicable Custody Facility Plan (CFP) in the offender's electronic file.

CP 137 (underline mine)

The classification process is compiled of a Facility Risk Management Team (FRMT).

The FRMT will address custody designation, programing expectations, offender needs, and facility placement recommendations in the CFP. Offender privileges (e.g. visiting, Extended Family Visits, recreation, escorted leave) may also be addressed.

CP 139

Each inmate has a Custody Facility Plan (CFP).

All CFP's will be initiated by the Counselor/CCO through the FRMT. This includes intake plans, Regular Reviews, Plan Change Reviews, Targeted Reviews, and Re-Entry Plans.

1. Notice of FRMT meetings will be provided to the offender at least 48 hours before the review using DOC 05-794 Classification Hearing Notice/Appearance Waiver, unless precluded for security or other substantial reasons.

CP 141 §(IV)(A)(1)). Inmates are encouraged to participate in

the FRMT meetings. CP 141 §(IV)(A)(2-4).

When a Counselor prepares for an FRMT s/he reviews pertinent records in the inmates electronic file. CP 156-57 Department policy 300.380 identifies several places in an inmates electronic file that they must either review and/or update for FRMT's. "The classification process will be documented in the applicable Custody Facility Plan (CFP) in the offender's electronic file." CP 138 §(II). "Decisions and/or recommendations will be documented in the Recommendations section of the CFP." CP 139 §(III)(C). "Ensure that all descriptions are entered in the CCR for all active causes in the offender's electronic file..." CP 142 §(IV)(B)(4). "All classification reviews will be documented in a CFP in the offender's electronic file..." CP 142 §(V)(A). "The intake plan will be documented in the offender's electronic file." CP 143 §(V)(H)(3). "Regular reviews are used to document an offender's compliance with the current CFP." CP 144 §(V)(I)(1). As explained by Classification Counselor II Jennifer Lynch "[i]n the event of a facility plan,... I will go through the offender's file electronic and hard copy &..." CP 128 &
page 6 lines 23-25

On November 10, 2014, Mr. McKee's Classification Counselor Andrea Husky requested Mr .McKee sign the Classification Hearing Notice/Appearance Waiver ("Classification Notice"). Mr. McKee signed the form and requested his copy. Ms. Husky stated that Mr. McKee would need to obtain his copy by submitting a public records request to Department Headquarters. CP 115 ¶2.

On December 1, 2014 Ms. Husky requested Mr. McKee sign another Classification Notice and again stated he would have to obtain his copy through public records at Department Headquarters. CP 115 ¶4. The record does not indicate what the November 10, 2014 Classification Notice was in regards to, but the December 1, 2014, Classification Notice was for an FRMT. CP 115 ¶¶2-4.

The Classification Notice includes notice under "Offender Rights" that "You [Mr. McKee] have the right 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

Following the notice, on November 11, 2014, Mr. McKee filled out the DOC 05-066 Request For Disclosure Of Records form marking the section "I request to inspect my central file." and notifying the records department that:

I am requesting "a review of all pertinent official records in the offender file" pursuant to the classification notice/appearance waiver DOC form 05-794 for my November FRMT meeting.

CP 38 - 39.

Mr. McKee attached the form to a kite (prison form of communication) addressed to "CRCC Records" requesting confirmation of receipt. CP 37.

On November 25, 2014 CRCC Correctional Records Technician 1 Dena Leaverton responded:

Please contact: Per WAC 137-08-090 Public Disclosure Requests must be submitted through U.S. Mail: Public Disclosure Unit Department of Corrections PO BOX 41118

Olympia, WA 98504

and returned the form stating "If you want more than this one document please re-kite for central file review." CP 37 - 38. The record is not clear what the "one document" Ms. Leaverton is referring to.

On December 1, 2014 Mr. McKee submitted another Request For Disclosure Of Records form attached to a kite addressed to "CRCC Records Manager", again marking the section "I request to inspect my central file" and stating "Per the classification hearing notice/appearance waiver I signed today I am requesting 'a review of all pertinent official records in the offender file" prior to my 12/3/14 FRMT meeting/review." CP 40 - 41. Ms. Leaverton responded on December 3, 2014, again stating that Mr. McKee must make his request through the Public Disclosure Unit in Olympia. Id. Ms. Leaverton made these responses "Because it was unclear to [her] what 'pertinent official records' were, [she] informed [Mr. McKee] 'per WAC 137-08-090 Public Disclosure Requests must be submitted through U.S. mail: Public Disclosure Unit' in Olympia Washington." CP 29.

On December 28, 2014 Mr. McKee sent a PRA request to the Public Disclosure Unit in Olympia requesting:

By this letter and pursuant to the Public Records Act I am requesting to 'a review of all pertinent official records in the offender file' pursuant to DDC form 05-066 related to the 1/24/14 FRMT notice I received on or about 11/24/14 and on or about 12/1/14.

CP 110.

On January 06, 2015 Cary Nagel, Department Public Disclosure

Specialist, responded:

Your request for records dated December 28, 2014, was received on January 05, 2015. This request has been assigned public disclosure tracking number PDU-32422. Please reference that number in any future correspondence regarding this request.

You write to request the following"

1. A review of all pertinent official records in the offender file pursuant to DQC form 05-066 related to the 1/24/2014 FRMT notice you received on or about 11/24/14 and on or about 12/1/2014.

If you are requesting to review records in your central or 'offender file' you must process your request through the records department at your parent facility. You will then be scheduled for review of your file within 30 business days. You will then be placed on the Call-Out list for your place and time to review documents.

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". Upon receipt of your clarification we will proceed with your request.

If no correspondence is received within 30 days of this letter your request will be closed.

CP 114 (underline in original).

Mr. Nagel equated this request as a request to review Mr. McKee's central file, or "offender file" indicating that was the only place the pertinent records would be located because he was aware of the specific FRMT notice Mr. McKee was referring to as it was in his possession at the time of his response. CP 120 - 122.

[i]n order to provide Mr. McKee assistance, I took the initiative to expedite his request for an offender central file review and contacted Coyote Ridge Corrections Center to schedule an appointment for him to review his central file and place him on the Call-Out list. During my discussion

with Ms. Leaverton, she informed me a letter would go out to Mr. McKee letting him know she was preparing his records for review.

CP ~~108~~ ¶6.

According to Ms. Leaverton:

[o]n January 6, 2015, I received a phone call from Public Disclosure Specialist Cary Nagel requesting I schedule McKee for an offender central file review.

The same day, I sent a Central File Review Response Letter to McKee which stated he would be scheduled for review of his file in 30 business days.

I reviewed and prepared McKee's central file. On January 22, 2015, Mr. McKee was given access to his central file and provided with an exemption log identifying any documents redacted or withheld. All documents in his central file which were redacted or withheld were noted on the exemption log provided to him. [Ms. Leaverton] did not redact or withhold any documents from his central file which were not identified on the exemption log. McKee did not state at this time whether the documents produced were what he was or was not asking for. McKee was more concerned about his signed Facility Risk Management Team form.

CP 30 ¶10.

At the January 22, 2015 review, Mr. McKee asked if the file contained his electronic file. Both file clerks stated "no". Mr. McKee then asked if the file contained the "pertinent records to the November 10th or December 1st hearing referenced. They stated they did not know." CP 116 ¶8. At that time Mr. McKee "did not know... a Classification Checklist existed or that any document provided information showing exactly where documents critical to Facility hearings were kept." Id.

At the January 22, 2015 central file review Ms. Leaverton "provided [Mr. McKee] with an exemption log identifying any documents redacted or withheld. All documents in his central

file which were redacted or withheld were noted on the exemption log provided to him." CP 30 ¶10. The redactions from the central file at issue in this matter consist of the names of Mr. McKee's victims in his current criminal conviction contained in his Judgment and Sentence (CP 73 - 74 & 84), in the published opinion of Mr. McKee's appeal (CP 75 - 83), and in a Department form titled "Prohibited Contact Review" (CP 85) the Department provides to inmates notifying them of who they are prohibited from contacting. The Department cited to RCW 42.56.240(2)&(5) for authority (CP 47 & 49). The Department withheld four pages "E-mails Bowman and Brooks" (CP 47) citing RCW 42.56.290; 5.60.060(2)(a); and 42.56.070(1) as authority. CP 49. None of the pertinent records to Mr. McKee's reviews were contained in his central file, rather they were contained in his electronic file. CP 156, 158, 136 - 155.

On May 12, 2015, Mr. McKee filed a complaint alleging the Department had violated the PRA when the Department failed to provide a timely response to his two requests (CP 7 Lines 19-20), failed to provide an exemption log identifying the silently withheld records (CP 8 Lines 25-26), that the Departments redactions and withholding's were improper (CP 224 Lines 20-24), and that these actions or inactions amounted to bad faith.

On July 16, 2015, the Department filed a motion to show cause arguing that Mr. McKee had "failed to show a violation of the Public Records Act." (CP 7), Mr. McKee "received a response to his records requests.", (CP 7) Mr. McKee "was provided

with an exemption log which properly redacted records."
(CP 8), Mr. McKee "has never responded to DOC' clarification request." (CP 10), Mr. McKee "Has Failed To Show defendant's Responses to His Public Records Request Amounted to Bad Faith." (CP 11), and "In the Event the Court Finds A Bad Faith Violation of the PRA, Plaintiff Should Be Awarded No Penalties or Penalties in the Low Range." CP 13

On August 17, 2015, Mr. McKee responded arguing the Department violated RCW 42.56.520 by not timely responding to Mr. McKee's three PRA requests, "failed to provide McKee with an opportunity to review 'officially relevant records' that are used for classification hearings.", "improperly redacting documents", "failed to provide all necessary information in its exemption logs", and that the Department "acted in bad faith" entitling Mr. McKee to penalties and costs for these violations. CP 224 - 25

On August 21, 2015, the Court granted the Departments show cause motion resolving the matter. The court found as a conclusion of law that:

1. Defendant did not violate the Public Records Act as it sent Plaintiff a letter seeking clarification of his public records request and Plaintiff failed to respond to the letter;
2. Defendant did not violate the Public records Act when it redacted Plaintiff's victim information in the documents located in Plaintiff's offender central file. Requiring Defendant to parse out individual victim information would place the Defendant in an untenable position of responding based on who the requestor is which is not authorized by statute.

CP _____

The trial court did not address the attorney client

redactions Mr. McKee had challenged.

III. ARGUMENT

A. STANDARD OF REVIEW

We review challenges to an agency action under the PRA de novo. The PRA requires disclosure of public records upon request, unless an exemption applies. RCW 42.56.070(1). The burden is on the agency to show that such an exemption applies, former RCW 42.56.550, and we narrowly construe exemptions. RCW 42.56.030.

West v. Gregoire, 184 Wn.App. 164, 336 P.3d 110, 112 (2014)

(citation omitted)

In a PRA case, the trial court 'may conduct a hearing based solely on affidavits,' and where, as here, the 'case presents a question of law which was decided by the trial court solely on the basis of documentary evidence and legal arguments, review is de novo.

Gronquist v. Dep't of Licensing, 175 Wn.App. 729, 742, 309

P.3d 538 (2013)

B. THE TRIAL COURT ERRED BY FINDING THE DEPARTMENT DID NOT VIOLATE THE PRA BECAUSE MR. MCKEE DID NOT CLARIFY HIS LATTER REQUEST

1. Dena Leaverton Was Required To Respond To Mr. McKee's November 24, 2014 and December 1, 2014 PRA Requests In Accordance With RCW 42.56.520 Regardless Of Mr. McKee's Failure To Clarify His Future PRA Request

Ms. Leaverton received Mr. McKee's November 24, 2014 PRA request on November 25, 2014. CP 37. Mr. McKee's request was specifically marked "I request to inspect my central file." and further clarified he was seeking "'a review of all pertinent official records in the offender file' pursuant to the classification notice/appearance waiver DOC form 05-794 for my November FRMT meeting.!" CP 38. Mr. McKee's December 1, 2014 request was also marked "I request to inspect my

central file" and further detailed "per the Classification Hearing Notice/Appearance waiver I signed today I am requesting 'a review of all pertinent official records in the offender file' orior to my 12/3/14 FRMT meeting/review." CP

41

An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record...

Under the prompt response provision of the PRA, an agency must respond to a request for public records within 5 business days of receipt by either '(1) providing the record; (2) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; or (3) denying the public records request.'

Beal v. City of Seattle, 150 Wn.App. 865, 872-73, (2009)

(quoting RCW 42.56.520)

Ms. Leaverton's response to the November 24, 2014 request at least identified one document "If you want more than this one document re-kⁱte for a central file review" (CP 38) and directing Mr. McKee to submit both the November 24, 2014 and December 1, 2014 request to the Public Disclosure Unit in Olympia. CP 38 & 40. This did not conform to RCW 42.56.520.

In acknowledging receipt of a public records request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking.

RCW 42.56.520

Ms. Leaverton admitted that Mr. McKee was requesting to inspect his central file, but because she was "unclear" what

pertinent official records were she responded "per WAC 137-08-090 Public Disclosure Requests must be submitted through the U.S. Mail: Public Disclosure Unit". CP 29 ¶¶6-7. Ms. Leaverton did not request clarification and did not provide a statutory exemption for denying Mr. McKee's central file review. "Denials of requests must be accompanied by a written statement of the specific reason thereof." RCW 42.56.520. "Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3). See also Mitchell v. Dep't of Corr., 164 Wn.App. 597, 603-04, 277 P.3d 670 (2011)

2. Ms. Leaverton Had No Authority To Require Mr. McKee to Submit His November 24, 2014 and December 1, 2014 Central File Request's Through The Department Public Disclosure Unit.

The Department has published Washington Administrative Code 137-08-090 which provides:

(1) All requests for the disclosure of a public record, other than requests by incarcerated offenders for inspection of their health records or central file must be submitted in writing directly to the Department of Corrections Public Records Officer at P.O. Box 41118, Olympia, WA 98504...

Incarcerated offenders under the authority of the department of corrections shall submit requests to inspect their own health record or central file to the records manager at the facility in which they are currently incarcerated.

WAC 137-08-090

The same language appears on the Classification Notice that Mr. McKee used in making his request "You have the right 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 . Ms. Leaverton was well aware of this published policy as she the MAC in her response's (CP 38 & 40) and had knowledge of the local policy on how inmates request their central files "Offenders are provided instructions on requesting a review of their central file as part of their orientation." CP 28 ¶3.

You will be entitled to a review of your central file. To review your central file, submit DOC form 21-473 Offender's Kite to the Records Department requesting a file review along with DOC 05-066 Request for Disclosure of Records...

To obtain documents from you central file (i.e., Judgement 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

The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties. An agency must publish its methods of disclosure and the rules that will govern its disclosure of public records. RCW 42.56.040(1)... More generally, an agency's applicable rules and regulations must be reasonable and must provide full public access... RCW 42.56.100. The agency's rules and regulations also 'must provide for the fullest assistance to inquires and the most timely possible action on requests for information.' Id. see also RCW 42.56.520 (agency must respond promptly but can notify requestor it needs a reasonable amount of time to determine appropriate further response).

Resident Action Council v. Seattle Hous. Auth., 177 Mn.2d

417, 431-32, 300 P.3d 376 (2013).

Ms. Leaverton did properly respond to the November 24, and December 1, 2014 requests on January 6, 2015 stating:

I am writing to acknowledge receipt of your request to review your central file, received 11/25/2014 and 12/03/14. These previous requests were responded to on 11/25/14 and 12/03/2014 respectively. This request has been assigned tracking number, CRCC-580. Please reference this number in all future communications with us about your request. You will be scheduled for review of your file within 30 business days. You can expect further response, on or before, January 22, 2015.

CP 45

The Department violated RCW 42.56.520 by their untimely and improper response to Mr. McKee's November 24 and December 1, 2014 PRA requests entitling Mr. McKee to all costs and potential statutory penalty regardless of his failure to clarify a future request. See West v. State Dept. of Natural Res., 163 Wn.App. 235, 243, 258 P.3d 78 (2011) (finding a failure to respond within the five day timeframe violated RCW 42.56.520 entitling Mr. West to costs and potential penalties).

3. There Was Nothing For Mr. McKee To Clarify For His December 28, 2014 PRA Request.

Mr. McKee's December 28, 2014 request specifically requested:

By this letter and pursuant to the Public Records Act I am requesting to 'a review of all pertinent official records in the offender file' pursuant to DOC form 05-066 related the 1/24/14 FRMT notice I received on or about 11/24/14 and on or about 12/1/14.

CP 110

Because Mr. McKee was informed he had to receive his

copy of the two Classification Notices through the Public Disclosure Unit in Olympia he did not have the forms at the time of his request. CP 115 ¶¶2-3. Mr. McKee did not receive the notices until March 6, 2015, after McKee's central file review. CP 116 ¶6. So he used the verbatim language on the Classification Notice. But Mr. Nagel had received, at least, the December 1, 2014 Classification Notice on December 11, 2014 well before Mr. McKee's December 28, 2014 request. CP 116 ¶6; CP 121 - 22

Mr. Nagel's response to the December 28, 2014 request was specific in what he needed clarification for:

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'. Upon receipt of your clarification we will proceed with your request.

CP 114 (underline in original).

The reason Mr. Nagel's responses emphasized copy of documents in the central file is because Department policy mandates request for copies be sent to the Public Disclosure Unit but reviews of central files are directed to the local records manager. WAC 137-08-090(1). This fact was also explained to Mr. McKee in the January 6, 2015 Leaverton response which provided:

If there are specific documents that you need and do not need an entire central file review the response time will be shortened. Notify the Records Department that you are canceling the request for the central file review and send the request for copies of specific documents to:

Department of Corrections Public Disclosure Officer
P.O. Box 41118
Olympia, WA 98504

CP 45

All three of Mr. McKee's requests were specific that he was seeking a review only, not copies, of any specific documents contained in the offender file. Mr. McKee could not identify the pertinent records until he reviewed the offender file. That is why Mr. McKee recited the language on the Classification Notice, which authorized an inmate to review such pertinent records that are contained in his official offender file. Therefore, the trial court erred in finding Mr. McKee failed to provide the Department clarification of his request.

4. The Department Silently Withheld The Pertinent Records Located In Mr. McKee's Electronic File

Department policy 280.500 "Records Management of Official Offender Files" defines the "offender file" as "Offender central files, field supervision files, Work Release resident files, and electronic files". CP 193 §I. Ms. Leaverton explained "[p]aperwork may also be removed from a central file and scanned into a DOC computer database so that it may be maintained electronically." (i.e. the electronic file). CP 28 ¶3

As previously explained, during a classification review Department staff review and consider several records contained in an inmates electronic file. See e.g. Department

policy 300.380. CP 136-55, Classification Checklist CP 156

Per Department policy inmates have a right to review these records by notifying them in their Classification Notice under "OFFENDER RIGHTS: You have a right to submit a written request for a review of the pertinent official records in the offender file through the Records Manager, using DOC 05-066 Request for Disclosure of Records." CP 119. The Department admits that staff did not consider any records in Mr. McKee's central file, rather they considered the records contained in his electronic file. CP 122

Mr. McKee made three separate requests for a "review of all pertinent official records in the offender file" related to his November and December 2014 Classification Notice's. CP 38, 41, 110. The Department only produced Mr. McKee's central file that did not contain any of the pertinent records.

An agency must explain and justify any withholding, in whole or in part, of any requested records. RCW 42.56.070(1), 210(3), 520. Silent withholding is prohibited.

Resident Action Council, 177 Wn.2d 417, 432, 300 P.3d 376 (2013) (citation omitted)

Because the Department never made the pertinent records available to Mr. McKee, and did not make such records known, they have silently withheld the responsive records.

C. THE TRIAL COURT ERRED IN FINDING THE REDACTIONS OF THE VICTIM NAMES IN MR. MCKEE'S JUDGMENT AND SENTENCE, PUBLISHED COURT OF APPEALS OPINION AND PROHIBITED CONTACT REVIEW PROPER AND NOT ADDRESSING

THE WITHHELD BOWMAN-BROOKS EMAILS

1. The Department Has Not Made Any Showing That The Redactions Of Victims And Witness Names From Mr. McKee's Judgment and Sentence, Published Court Of Appeals Decision, and Prohibited Contact Review Were Appropriate

a. McKee's Judgment And Sentence

Mr. McKee's Judgment and Sentence (J&S) provides he cannot have contact with the two victims of his crime. CP 73 & 74. The Department redacted these names citing to RCW 42.56.240(2)&(5). CP 47 & 49.

b. McKee's Published Court Of Appeals Opinion

The Department redacted the names of Jamie Lee Ray and Lyane Korbut, the victims of Mr. McKee's crime from the published court of appeals decision. CP 75-83. The Department also redacted the names of Jearlean Bradford and Muna Absiya two alleged victims that Mr. McKee was found not guilty of. Id. State v .McKee, 141 Wn.App. 22, 28-29, 167 P.3d 575 (2007) It appears the Department redacted these under the witness section of RCW 42.56.240(2).

c. Prohibited Contact Review

The Department provides this form to the inmate and distributes the form to the inmates counselor, visiting sergeant, mail room and to the inmate. This form notifies the inmate and various Department staff who the inmate is to not contact and for how long.

Initially the Department redacted these citing to RCW 42.56.240(2)&(5). CP 47 & 49. The Department then filed

a show cause and argued:

[a]ll information which is exempt from disclosure under RCW 42.56.240(4), ... and RCW 42.56.240 was appropriately redacted. Other than make an unfounded assertion, Plaintiff has no evidence to support his allegation.

CP 9 - 10

The Department abandoned its reliance on RCW 42.56.240(5) and placed the burden of proof on Mr. McKee to show these records were improperly exempt. The Department did not support their assertion by any declarations or statements of how the published court of appeals opinion and J&S, which are always public records or how the Prohibited Contact Review "[w]ould endanger any person's life, physical safety, or property" or "If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or nondisclosure,..." RCW 42.56.240(2).

The Court ruled "Defendant did not violate the Public records Act when it redacted Plaintiff's victim information in the documents located in Plaintiff's offender central file. Requiring the Defendant to parse out individual victim information would place the Defendant in an untenable position of responding based on who the requestor is which is not authorized by statute." CP ___ §2.2.

This ruling was clearly erroneous. First, in Sargent v. Seattle Police Department, 167 Wn.App. 1, 260 P.3d 1006 (2011) Sargent's attorney made a records request for, inter alia, his jail booking records. The Department withheld the

jail records based on RCW 70.48.100(2). The court found this exemption improper because the request was for the persons own jail records. Sargent, 260 P 3d at 1015-16.

Additionally, the courts have held that the Department of Corrections can differentiate between citizen requestors and inmate requestors. See Gronquist v. Dep't of Corr., 159 Wn.App 576, 584-85, 247 P.3d 436 (2011); Sappenfiled v. Dep't of Corr., 127 Wn.App. 83, 110 P.3d 808 (2005); Livingston v. Cedeno, 164 Wn.2d 46, 186 P 3d 1055 (2008).

Next, the court did not consider that the J&S and published court of appeals opinion are always public records unless specifically sealed by the court. No showing that these records had been sealed or that one of the harms articulated in RCW 42.56.240(2) would come to fruit should these names be disclosed. "[t]he common law provides a right of access to court case files." Nast v. Michels, 107 Wn.2d 300, 304, 730 p.2d 54 (1986).

Therefore the court erred in its determination and this court should remand for an order of full disclosure and an award of costs and consideration of a statutory Penalty.

2. The Department Has Failed To Prove The Bowman-Brooks Emails Are Attorney Client Privilege In Their Entirety

The Department withheld four pages of records. CP 96 - 99. The only information provided was "12-20-201 to 01-06-2011 E-Mails Bowman and Brooks" CP 47. The Department initially claimed these were exempt under RCW 42.56.070(1); RCW 42.56.290; and RCW 5.60.060(2)(a). In the Departments

show cause motion they argued

The exemption log also noted four pages of documents were withheld in their entirety because they contained emails protected under attorney client privilege as exempt under RCW 42.56.240(2) [sic] and RCW 42.56.240(5) [sic].

CP 9 Lines 20-22.

The Department does not explain who Bowman and Brooks are, what the litigation or anticipated litigation could possibly be, or how these emails are exempt under the Investigative, Law Enforcement, and Crime Victims portion of the PRA.

The attorney-client privilege applies to any information generated by a request for legal advice, including documents created by clients with the intention of communicating with their attorney's. The privilege does not protect documents that are prepared for some purpose other than communicating with an attorney. The burden of showing the existence of an attorney-client relationship and that the requested information involves privileged communication falls on the party asserting the privilege.

Doehne v .Empres Healthcare Management, LLC, 2015 WL 5714537

*3 (Wash.App. Div. 2 2015) (citations omitted)

"RCW 42.56.070 expressly incorporates into the PRA other statutes such as RCW 43.70.050(2) that either exempt or prohibit disclosure of specific information or records. The 'other statute' exemption avoids any inconsistency and allows other statutes and federal regulations to supplement the PRA's exemptions... (Hangartner v. City of Seattle, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (holding the attorney-client privilege as codified at RCW 5.60.060(2)(a) is an 'other statute')... 'All exceptions, including 'other statutes' exceptions, are narrowly construed.' To show an exemption applies, the burden of proof is on the party seeking to prevent production. RCW 42.56.550(1).

Planned Parenthood of Great N.W .v .Bloedon, 187 Wn.App. 606,

619-20, 350 P.3d 660 (2015) (citations/statutes omitted)

The Department has failed to prove these emails fall under any statute that allows withholding.

Alternatively, the Department could have redacted the privileged communications while disclosing portions, such as the full identity of the senders and recipient(s), dates and times of transmission, meta data, and other non privileged information.

If it is information within a record that is exempt, such information usually can be effectively redacted. On the other hand, if a type of record is exempt the meaningful redaction generally is impossible, unless redaction actually can transform the record into one that is outside the scope of the exemption. For example, a document containing attorney work product may be exempt as a '[r]ecord[] that ...would not be available... under the rules of pretrial discovery.' RCW 42.56.290, but redaction might transform the record into one that actually would be available in pre-trial discovery, and thus, into a different type of record—one that no longer falls under the relevant exemption and which would have to be disclosed in redacted form.

Resident Action Council, 177 Wn.2d at 432-33.

The trial court erred in not deciding this issue and the Department has failed to meet their burden that these emails are either exempt or could not be redacted. The Court should remand for full disclosure of the records, alternatively partial redactions and for the court to order McKee's costs and consider an appropriate statutory penalty.

IV. REQUEST FOR COSTS

RAP 14.2 and RCW 42.56.550(4) provide Mr. McKee is entitled to his costs on appeal as either the prevailing party or substantially prevailing party. See RAP 18.1(b);

Resident Action Council, 177 Wn.2d at 417; Gronquist, 175 Wn.App. at 760. Mr. McKee requests all costs associated with this appeal.

V. CONCLUSION

For the foregoing reasons the Court should find the Department violated the PRA in not timely responding to Mr. McKee's November 24, December 1 and 28, 2014 requests, Mr. McKee was not required to provide clarification to any of the requests as he was not seeking copies of documents, the redactions and withholding of responsive records were improper and not supported by statute, were silently withheld and remand with an order of full disclosure, alternatively partial disclosure, and for the trial court to award Mr. McKee all his costs and consider statutory penalties for Mr. McKee

VI. CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury 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.

DATED this 23rd day of December, 2015 ~~January, 2016~~.


Jeffrey R. McKee, appellant pro se