

NO. 79608-4

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

MICHAEL LIVINGSTON,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. NATURE OF THE CASE

This action is brought solely under the Public Records Act (PRA) even though the Department of Corrections fully complied with the PRA in responding to Michael Livingston's public records request for the training records of Corrections Officer Marlene Amundsen. Because Mr. Livingston was incarcerated at the time the documents were delivered to him, correctional staff reviewed the response, just as it reviews all incoming mail for incarcerated offenders, and rejected the documents before they were delivered to Mr. Livingston. Mr. Livingston wrote letters to prison staff challenging the rejection of his mail, but did not follow through with legal action asserting that the interception and rejection of his mail was improper.

The Department has statutory obligations regarding the safety and security of the prisons it operates and the welfare of all inmates in its custody. The Department's authority to reject mail sent to inmates under RCW 72.09.530 is not displaced by the Public Records Act, nor is the Department's rejection of mail properly challenged in this proceeding.

II. STATEMENT OF THE ISSUES

1. The Department responded to Mr. Livingston's public records request by gathering the requested documents and sending him

copies at his place of incarceration in a timely fashion. Is there no dispute that the Department complied with the Public Records Act?

2. The requested documents were rejected under the prison mail policies at Mr. Livingston's place of incarceration, as authorized under RCW 72.09.530. Did the law provide Mr. Livingston other avenues to challenge the mail rejection that are not at issue in this case?

III. STATEMENT OF THE CASE

A. THE DEPARTMENT COMPLIED WITH ALL ASPECTS OF THE PUBLIC RECORDS ACT IN RESPONDING TO MR. LIVINGSTON'S PUBLIC RECORDS REQUEST.

On February 19, 2003, Michael Livingston, while incarcerated at Olympic Corrections Center (OCC) in Forks, Washington, mailed a request under the Public Records Act, RCW 42.56.001, *et seq.*,¹ to the public records coordinator for OCC. CP 56. The request, which was received on February 20, 2003, was for the training records of Marlene Amundsen, a corrections officer at OCC. CP 119. Sue Gibbs, OCC's Public Disclosure Coordinator, was assigned the responsibilities of: (1) responding to public disclosure requests, including sending the

¹ The portions of 42.17 RCW dealing specifically with the production of public records was recodified as 42.56 RCW effective July 1, 2006. The purpose for the recodification of that portion of 42.17 RCW is noted as follows: "The legislature finds that chapter 42.17 RCW contains laws relating to several discrete subjects. Therefore, the purpose of chapter 274, Laws of 2005 is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records." RCW 42.56.001.

acknowledgment letter to the inmate within five business days, (2) notifying Ms. Amundsen of Mr. Livingston's request, and (3) collecting the documents and determining that no exemption from disclosure applied to the records under the PRA. CP 117-120. Ms. Gibbs then mailed them to Mr. Livingston at Cedar Creek Corrections Center (CCCC), where he had been transferred while his request was pending. CP 118. Mr. Livingston does not challenge any of the actions taken by the OCC records coordinator as being in violation of the PRA.

B. THE DEPARTMENT'S STATUTORILY AUTHORIZED MAIL SCREENING PROCEDURES ARE UNRELATED TO AND DO NOT CONFLICT WITH THE PRA.

Under RCW 72.09.530,² the Secretary of the Department is directed by the Legislature to establish a method to screen all incoming mail to inmates for contraband. In similar fashion, WAC 137-48-040 authorizes the superintendent to restrict an inmate's incoming mail,

² RCW 72.09.530 reads in pertinent part:

72.09.530 Prohibition on receipt or possession of contraband--Rules. The secretary shall, in consultation with the attorney general, adopt by rule a uniform policy that prohibits receipt or possession of anything that is determined to be contraband. The rule shall provide consistent maximum protection of legitimate penological interests, including prison security and order and deterrence of criminal activity. The rule shall protect the legitimate interests of the public and inmates in the exchange of ideas. The secretary shall establish a method of reviewing all incoming and outgoing material consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband.

Id. (emphasis added).

including “any mail or publication that is deemed to be a threat to legitimate penological objectives” WAC 137-48-040(1)(d) and (e).³ Procedures for challenging mail rejections are set forth under WAC 137-48-050. Under this statutory and administrative authority, the Department adopted Policy 450.100, which authorizes staff to inspect all incoming mail to prevent offenders from receiving anything that threatens the security and order of the facility. CP 126-139. If an item prohibited under this policy is received at an institution, it is rejected by mailroom staff and the inmate to whom it was addressed is given a mail rejection notice which explains why the mail was rejected. CP 133-134. The notice also explains the inmate’s rights to appeal the rejection to the superintendent of the prison. CP 140. The notice also explains that, within 30 days, the inmate may direct prison staff to mail the unauthorized mail to a non-incarcerated individual at the inmate’s expense. If an inmate does not designate such a person within that timeframe, the unauthorized mail is destroyed. This policy applies to unsolicited mail addressed to an inmate, packages, and items, as well as documents mailed at the request of the inmate. CP 134.

Mailroom staff at CCCC rejected, under the Department’s Policy 450.100, the documents requested by Mr. Livingston and sent by Ms.

³ See WAC 137-36-010 *et. seq.* (authorizing Department limitations on property possessed by inmates).

Gibbs on March 26, 2003 for two reasons. First, the training records contained personal information about Ms. Amundsen. Second, the Superintendent of CCCC, Ruben Cedeno, determined that possession by an inmate of a correctional officer's training record created a risk of harm to staff. CP 125. Mr. Livingston was notified about the mail rejection, including his right to appeal and to designate a non-incarcerated recipient for these documents. CP 140. Mr. Livingston appealed to Superintendent Cedeno, who upheld the mailroom's rejection of the material. CP 5, 66, 125. Mr. Livingston also appealed Superintendent Cedeno's decision to Departmental Regional Administrator Thomas McIntyre, who also upheld the rejection. CP 74.

On December 14, 2005, Mr. Livingston was released from the Department's custody and was placed on community supervision. On December 13, 2006, Mr. Livingston's community supervision ended and the Department's file on him has been closed. *See* Motion for Discretionary Review at 2 (indicating he has been released from custody).

C. PROCEDURAL BACKGROUND

On July 29, 2003, Mr. Livingston filed a Motion for Order to Show Cause under the PRA, seeking the documents requested and per diem fees and costs. CP 2-12; *see* Appendix. He claimed that since he did not ultimately receive the documents he requested, he was denied disclosure,

and he claimed that the Department's Policy 450.100 must be the "exemption" the Department is relying on. CP 7-8. Mr. Livingston never raised any civil rights claim under 42 U.S.C. § 1983 that the Department's policy, as written or applied, violated his constitutional rights to freedom of speech, nor did he challenge the agency's action in state court. On August 20, 2004, Thurston County Superior Court Judge Christine Pomeroy entered an order denying Appellant's motion, finding the Department had complied with the requirements of the PRA. CP 104-105. The Superior Court's order concluded:

Respondent had complied with the requirements of the state Public Disclosure Act, RCW 42.17.250, et seq., when it deposited Petitioner's requested public records in the United States mail on March 21, 2003. That Petitioner was not allowed to possess such records at the institution where he was incarcerated at the time for safety and security reasons means his remedies lie elsewhere than the Public Disclosure Act.

CP 104-105.

Mr. Livingston appealed the ruling of the Superior Court; the Court of Appeals affirmed. *Livingston v. Department of Corrections*, 135 Wn. App. 976, 146 P.3d 1220 (2006), *review granted*, ___ Wn.2d ___ (2007). In affirming, the Court of Appeals held the Department discharged its obligation under the PRA when it mailed the documents to Mr. Livingston, concluding that the Department:

did not withhold documents or deny Livingston's request for documents. The public disclosure coordinator mailed the requested documents, complied with the PDA, and, in this instance, the DOC was not subject to the show cause provision of former RCW 42.17.340.

Livingston, 135 Wn. App. at 980-81.

The Court of Appeals did not analyze the Department's argument that the documents were rejected pursuant to its statutory authority to keep contraband from entering prisons. *Id.*

IV. SUMMARY OF THE ARGUMENT

The Department, the state agency that received Mr. Livingston's public records request, complied with the Public Records Act. Mr. Livingston makes no contention that the Department's handling or response to his request was deficient in any manner. Rather, he erroneously contends that the prison mailroom's rejection of his requested records violates the PRA, attempting to litigate the validity of the Department's mail rejection procedures within a public disclosure show cause proceeding.

The PRA does not, however, preclude application of RCW 72.09.530. Materials available to the general public under the PRA that are contraband or present security concerns should not be delivered to the offender, whether from a public or private entity.

While numerous cases have upheld the authority of prisons to restrict material coming into a prison, that issue was not before the trial court here and is not before this Court. If Mr. Livingston has a dispute with the Department's actions here, then, as the trial court held, "his remedies lie elsewhere than the Public Disclosure Act." CP 105.

V. ARGUMENT

A. **BECAUSE THE PARTIES AGREE THAT THE DEPARTMENT'S RESPONSE TO MR. LIVINGSTON'S REQUEST FULLY COMPLIED WITH THE PUBLIC RECORDS ACT, MR. LIVINGSTON WAS PROPERLY DENIED RELIEF UNDER ITS TERMS.**

1. **This Action Was Initiated To Enforce Provisions Of The Public Records Act, And There Is No Dispute That The Department Complied With All Applicable Provisions Of The PRA.**

As both the Superior Court and the Court of Appeals recognized, Mr. Livingston has never articulated any violation of the Public Records Act regarding the Department's response to his public records request. It is undisputed that the Department responded timely to the request and cited to no exemptions.

This case was brought by Mr. Livingston to enforce compliance with the provisions of the Public Records Act by filing a Petition for Order to Show Cause. CP 2-12. The remedy sought provides an expedited method of relief when a response to a public records request has been

improperly withheld. RCW 42.56.550.⁴ Mr. Livingston also sought a fine for each day that he was denied access to the records he requested, as well as “all costs incurred in connection with this action and a statutory penalty under RCW 42.17.340(4).” CP 2-3. These specific remedies are permitted when an agency violates the provisions of the PRA. The petition Mr. Livingston filed initiating the action allowed him to receive a ruling from the superior court judge, without the time or expense of a trial, within a month of filing his action. CP 104-05.

Because the Department did not delay or withhold records based on an exemption, the Superior Court properly recognized, and the Court of Appeals agreed, that showing cause as to why a record was delayed or withheld made no sense. CP 105 (“his remedies lie elsewhere than the Public Disclosure Act.”); *Livingston*, 135 Wn. App at 980-81. Mr. Livingston has not identified a single provision of the Public Records Act that has been violated. The Department agrees with Mr. Livingston that the agency may not cite to a statutory exemption that does not exist. In fact, the Department has never taken the position that the records at issue were exempt from disclosure.

The Department did not violate the PRA when it exercised its statutory obligation to screen inmate mail and reject certain mail for

⁴ Formerly RCW 42.17.340.

delivery to inmates. That the mail rejection here pertained to documents the Department sent to him in response to a public records request does not mean that the actions of mailroom staff were taken pursuant to the PRA. The Department complied with its obligations under the PRA regarding Mr. Livingston's public records request. Mr. Livingston has not, and could not, challenge the Department's mail regulations under the Public Records Act. Similarly, if the records withheld by the prison mailroom in this case were provided in response to a public records request to another state agency, Mr. Livingston would have no colorable claim against *that* agency under the PRA. This specific statutory enforcement action under the PRA cannot be used to challenge an agency's actions pursuant to other authority when there is no dispute that it complied with the PRA.

2. **In Rejecting Mr. Livingston's Mail, Which Contained Documents Responsive To His Public Records Request, the Department Acted Pursuant To Its Obligations Under RCW 72.09.530, Which Does Not Conflict With The PRA.**

The Department complied with the PRA, and also complied with another statute in which the Secretary of the Department is directed by the Legislature to "establish a method of reviewing all incoming and outgoing material consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband." RCW 72.09.530.

The Department complies with that statutory directive by hiring and training mailroom staff, and by maintaining a policy defining unauthorized mail, rejecting mail for delivery that meets the definition, and providing a method for inmates to challenge improper mail rejections. CP 126-39 (Department Policy 450.100). Reviewing mail before delivering to an inmate is one way that the Department implements a fundamental agency function, maintaining a safe prison system. RCW 72.09.010 states in pertinent part:

72.09.010 Legislative intent. It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives.

(1) The system should ensure the public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates.

Complying with an agency's essential functions is consistent with the PRA. See RCW 42.56.100 (recognizing that rules and regulations implementing the PRA should "prevent excessive interference with the essential functions of the agency . . ."). The agency's obligations under the Public Records Act do not conflict with RCW 72.09.530.

Statutes must be read in harmony if possible, and each given effect. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ("apparently conflicting statutes must be reconciled to give effect to each

of them”). When there is no conflict between two statutes, there is no need for a court to determine which supersedes. *Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998) (“A more specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized.”); *Omega Nat’l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 425, 799 P.2d 235 (1990) (“Preference is given a more specific statute *only* if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized.”) Here, there is no conflict because application of neither the PRA nor RCW 72.09.530 prevents application of the other. *See Estate of Kerr*, 134 Wn.2d at 343.

Once an initiative is enacted into law, the same principles of statutory construction apply as apply when the Legislature enacts a measure. *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002). One of these principles of statutory construction is that the Legislature is “presumed to have full knowledge of existing statutes affecting the matter upon which they are legislating.” *Martin v. Triol*, 121 Wn.2d 135, 148, 847 P.2d 471 (1993).

The facts of this case reflect that there is no conflict where the agency can – and did – comply with the directives of both the PRA and RCW 72.09. Under the PRA, there is no impediment to the inmate

receiving documents that are not exempt, but under RCW 72.09.530, the Department may reject any mail to an inmate that constitutes contraband, even non-exempt documents provided by an agency in response to a public records request. The reason for the mail rejection is not at issue in this case. Again, if a local agency sent an inmate records in response to a public records request, and correctional staff withheld the mail from delivery to the requesting inmate, there would be no question that such rejection creates no cause of action under the PRA against the local agency and that the inmate's remedy is to challenge the Department's authority to screen mail rather than compliance with the PRA. The determination of whether a document exempt from disclosure is separate and distinct from the determination of whether an item is contraband and cannot be delivered to a prison inmate. This does not mean that the two statutes conflict. On the contrary, each statute has its own independent directives, enforcement mechanisms, and remedies.

3. **The PRA Should Not Be Judicially Amended To Remove The Prison's Authority Under RCW 72.09.530, Adding Additional Requirements To The PRA.**

Under Mr. Livingston's argument, this Court would add an obligation under the PRA requiring the Department to put the response directly into the hands of the requestor *and* to exempt responses to public records requests from review in a prison mailroom. Such extreme

measures are not necessary because the statutes are not in conflict, and do not reflect a reasonable construction of either the PRA or RCW 72.09.530. See *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) (“unlikely, strange or absurd consequences” should be avoided in statutory construction).⁵

Mr. Livingston asks this Court to add a PRA obligation on the Department, not imposed on any other agency. He argues that the Department has an obligation, when responding to public disclosure requests of inmates in its custody, to put the documents in the hands of the requestor. This argument is contrary to RCW 72.09.530. The Department has no additional obligations under the Public Records Act that other agencies do not have, and there is no authority to impose additional obligations under the Act. This Court may not amend the Public Records Act to compel mandatory, enforceable obligations owed by a state agency that are not there.

The PRA does not guarantee that non-exempt records will actually be received by the requestor. For example, in *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 88-89, 110 P.3d 808 (2005), *review denied*, 156 Wn.2d 1013 (2006), the Court of Appeals recognized

⁵ One absurdity of Mr. Livingston’s position is that the same document could be rejected by mailroom staff if it is not received pursuant to an inmate’s public disclosure request but must be delivered to him if it is.

the unique circumstances of incarceration that logistically impact an agency's response to a public records request and an incarcerated person's ability to inspect documents. *Id.* In addition to a requestor's incarceration, other factors may impact a requestor's ability to inspect or obtain the records requested, including the agency's reasonable copying and mailing costs. *Id.*

That documents are sent to inmates under the Public Records Act does not affect the Department's authority to restrict incoming mail under RCW 72.09.530. Harmonizing the PRA with RCW 72.09.530 should not require the Department to abdicate its legal obligations to maintain the orderly operation of its institutions. A proper balance would allow inmates to request and receive documents in response to public records requests, subject to prison mailroom screening, which has not been challenged in this proceeding.⁶

B. MR. LIVINGTON HAD OTHER LEGAL AVENUES IN WHICH TO CHALLENGE THE REJECTION OF HIS MAIL.

An inmate's First Amendment right to send and receive mail is a condition of confinement governed by prison regulations reasonably related to legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878, 104 L. Ed. 2d 459 (1989). Restrictions

⁶ See CP 134 (Department Policy 450.100); WAC 137-48-050.

against incoming mail are conditions of prison confinement reviewable under 42 U.S.C. § 1983, *id.*, provided prisoners have exhausted their available grievances prior to bringing a civil rights action in either state or federal court. 42 U.S.C. § 1997e(a).

Criminal conviction and lawful imprisonment deprives a person of their freedom and many other constitutional rights not compatible with the objectives of incarceration. *Hudson v. Palmer*, 468 U.S. 517, 523-24, 104 S. Ct. 3194, 3198-99, 82 L. Ed. 2d 393 (1984); *Turner v. Safley*, 482 U.S. 78, 95, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64 (1987). A prison regulation that infringes on a prisoner's constitutional right is valid if it is reasonably related to legitimate penal interests. *Turner*, 482 U.S. at 89, 104 S. Ct. at 2261.

Mr. Livingston admits there were no deficiencies in the Department's PRA response, other than the mailroom rejection once the materials arrived at CCCC. The Department's policy allowed him to challenge the mailroom's rejections. CP 74, 140. Mr. Livingston could have also challenged the Department's withholding of his mail under the

Civil Rights Act, 42 U.S.C. § 1983,⁷ or under the Uniform Declaratory Judgments Act,⁸ but he did not do so. Even a liberal interpretation of a civil rights complaint may not supply the essential elements of a claim that plaintiff failed to plead intentionally. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Finally, Mr. Livingston retained some control over the documents he requested. He was given 30 days to mail the rejected mail to a location outside the institution before the rejected mail would be destroyed. CP 134.

Here, Superintendent Ruben Cedeno, an experienced prison administrator, determined Mr. Livingston's receipt of Officer Amundsen's training records posed a safety and security risk to CCCC. Accordingly, he upheld the mailroom's rejection of those documents. CP 125. The constitutionality of Mr. Cedeno's actions in upholding the rejection of Mr. Livingston's mail is not before this Court. Rather, Mr. Livingston has attempted to frame the issue here as a public disclosure case rather than a mail rejection case.

⁷ In order to state a claim under 42 U.S.C. § 1983, two essential elements must be present: 1) the defendant must be a person acting under color of state law; and 2) the defendant's conduct must deprive the plaintiff of his or her constitutional rights. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

⁸ See RCW 7.24.010 and .050.

If Mr. Livingston believed the Superintendent's actions or the Department's Policy 450.100 were unconstitutional, he could have filed a lawsuit alleging a violation of his civil rights, either in state or federal court. Had he done so, the prison officials he sued would be entitled to the protections afforded in the civil rules – including discovery and a jury trial – and his remedies would be dictated by such cause of action. He also could have challenged the state agency action that took place under RCW 72.09.530. The remedies outlined in the PRA are not the forum for litigating the constitutionality of a prison policy, as written, or as applied. Nor is it the proper forum in which to challenge a prison's actions under RCW 72.09.530. Instead, the PRA provides an expedited method for judicial review of an agency's decision to deny disclosure of requested documents, which did not occur here.

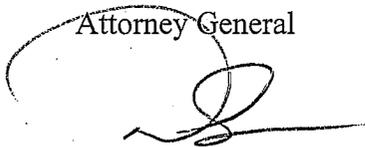
VI. CONCLUSION

The Department responded to Mr. Livingston's request here in a timely manner and did not claim any exemptions from disclosure. Mr. Livingston's only claimed violation of the PRA is the rejection of his mail by CCCC mailroom staff. As this rejection is consistent with the Department's statutory authority and duty not challenged in this proceeding, the Department respectfully requests that this Court affirm

the ruling of the Thurston County Superior Court and of the Court of Appeals.

RESPECTFULLY SUBMITTED this 1st day of November, 2007.

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CERTIFICATE OF SERVICE

I certify that I served a copy of SUPPLEMENTAL BRIEF OF
RESPONDENT on all parties or their counsel of record on the date below
as follows:

- X U.S. Mail, Postage Prepaid
- X Emailed by permission to: DMS@WKDT.law.com

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

EXECUTED this 1st day of November, 2007, at Olympia,
Washington.

Katrina Toal
KATRINA TOAL

APPENDIX 1

EXPEDITE
 Hearing is set
Date: June 25, 2004
Time: 1:00 PM
THE HONORABLE CHRISTINE A. POMEROY

FILED
JUN 17 2004
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

MICHAEL B. LIVINGSTON,)
) No. 03-2-01372-0
)
) Petitioner,)
)
) vs.)
) PETITIONER'S MOTION FOR
) ORDER TO SHOW CAUSE
)
) DEPARTMENT OF CORRECTIONS,)
)
) Respondent.)

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OCT 07 2004

ATTORNEY GENERAL'S OFFICE
CRIMINAL JUSTICE DIV - OLYMPIA

I. IDENTITY OF MOVING PARTY

COME NOW Michael B. Livingston, petitioner pro se, and moves the court for the relief requested in Part II.

II. RELIEF REQUESTED

Petitioner requests this Honorable Court, pursuant to RCW 42.17.340, order the Department of Corrections (hereinafter DOC) show cause for denying petitioner access to public records in violation of RCW 42.17.260(1); show cause for failing to provide a statement of the specific exemption(s) authorizing the withholding of petitioner's public record request or a brief explanation of how the exemption applies to the record sought, in violation of RCW 42.17.310(4); an in camera review of the record sought under RCW 42.17.340(3) and order DOC pay Petitioner all costs incurred in connection with this action

PETITIONER'S MOTION FOR
ORDER TO SHOW CAUSE

and a statutory penalty under RCW 42.17.340(4).

This motion is based on the subjoined declaration, files, records to date and authorities cited herein.

III. FACTS RELEVANT TO THIS MOTION

3.1 October 17, 2002 Mr. Holmberg filed a motion to show cause and compel disclosure of public records with the Grays Harbor County Superior Court in the matter of Holmberg v. DOC, GHC No. 02-2-00960-0 addressing the unlawful obstruction of his access to training records, responsive to CO Shawn Phinney of Stafford Creek Corrections Center, under the guise of DOC 450.100.

3.2 On November 14, 2002 Defendant settled Holmberg v. DOC, GHC No. 02-2-00960-0 out of court.

3.3. On February 19, 2003 Petitioner submitted a Public Disclosure Request to the Olympic Corrections Center (hereinafter OCC) Public Disclosure Coordinator Sue Gibbs, seeking disclosure of the training records of corrections officer (C/O) Marleen Amundson.

3.4 On February 25, 2003 Sue Gibbs responded to Petitioner's PDR by mail, acknowledging receipt of his request and giving an estimate regarding the time needed to gather the requested records.

3.5 On March 4, 2003 Sue Gibbs again communicated with Petitioner by mail, indicating that the requested documents had been gathered, informing him of the cost of copying and mailing the records. Petitioner was instructed that once those funds were received, the documents would be mailed to him.

3.6 On March 16, 2003 Petitioner submitted a "funds transfer" form (DOC 07-12) to the OGC in order to make payment for copying and mailing costs required by Sue gibbs at OGC.

3.7 On March 17, 2003 Petitioner was moved from OGC to Cedar Creek Corrections Center (hereinafter CCCC) via the Washington Corrections Center in Shelton, WA.

3.8 RCW 72.02.045(1) provides: "Subject to the rules of the department, the superintendent is responsible for the management and supervision of the institution . . ., subordinate officers and employees . . ."

3.9 On March 28, 2003 Petitioner received by mail at CCCC Mail Rejection File No. 226, alleging the incoming mail item would not be allowed under number 30: "DOC employees records - which are not allowed per Superintendent."

3.10 On March 31, 2003 Petitioner submitted an appeal of Mail Rejection File No. 226 to the CCCC Superintendent/Field Administrator, per instructions on the mail rejection form. This appeal detailed the nature of the rejected item and that it was a PDR and therefore subject to specific laws under RCW 42.17.310(2) and RCW 42.17.310(4).

3.11 RCW 42.17.260(1) provides in relevant part:

"Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section (or) RCW 42.17.310 . . .(A)n agency shall delete identifying details in a manner consistent with RCW 42.17.310 . . . when it makes available or publishes any public record; however in each case, the justification for the deletion shall be explained fully in writing."

3.12 WAC 137-08-020(5) defines "disclosure" as inspection

and/or copying."

3.13 WAC 137-08-090(3) provides in relevant part: "If the public record contains material exempt from disclosure pursuant to law . . . the department must provide the person requesting disclosure with a written explanation for the nondisclosure, pursuant to WAC 137-08-130."

3.14 WAC 137-08-130(3) provides in relevant part:

"If the file does contain materials exempt from disclosure, the public disclosure coordinator shall deny disclosure of those, exempt portions of the file, and shall, at the time of the denial, in writing, clearly specify the reasons for the denial of disclosure . . . the remaining nonexempt materials shall be fully disclosed."

3.15 RCW 42.17.310(4) provides in relevant part:

"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 sought."

3.16 On April 10, 2003 Petitioner received notification through in-house mail that his appeal of Mail Rejection File No. 226 was denied: "The Superintendent has determined that he is not going to allow an employee training record into the institution to be given to an inmate." The denial was signed by Sergeant Chambers.

3.17 Superintendent Cedeno's denial of Petitioner's appeal of mail rejection File No. 226 constitutes denial of access to the public records requested, since the item was never delivered or disclosed to Petitioner.

3.18 DOC's denial of the Public Records Request in question violates RCW 42.17.260(1).

3.19 DOC's failure to provide a statement of the specific exemption(s) authorizing the withholding of the public records requested or a brief explanation of how the exemption applies to the record sought violates RCw 42.17.310(4).

3.20 DOC's charade of allowing OGC to charge Petitioner \$2.40 for a public disclosure request, only later to block him access to said records under DOC 450.100, constitutes bad faith.

3.21 On April 18, 2003 Petitioner appealed the denial of Petitioner's appeal at the institutional level to Thomas D. McIntyre, Regional Administrator.

3.22 On or about May 1, 2003 Petitioner received Mr. McIntyre's response, which appeared to request more information and/or documents in accord with the requirements of DOC Policy. Without these documents the appeal would not be considered.

3.23 On May 7, 2003 Petitioner mailed an amended appeal to Mr. McIntyre, including the additional information, request by Mr. McIntyre.

3.24 On or about May 12, 2003 Petitioner received a second response from Mr. McIntyre, alleging "after (documents) leave the PDC's office and arrive in an institution's mailroom, mail policy comes into effect . . . superintendent Cedeno has the authority to restrict any item from entering Cedar Creek."

3.25 As of the date below, Petitioner has been denied all access to the public records requested February 19, 2003.

IV. ARGUMENT AND AUTHORITIES RELIED UPON

A. DOC 450.100 is Not a Statutory Exemption Authorized Under the PDA

In July 2003 Petitioner filed a complaint alleging DOC violated the Public Disclosure Act ("PDA") by denying him disclosure; i.e., his right to inspect the public records in question.

In March 2004, after several continuances, DOC responded to Petitioner's complaint, contending it had not violated the PDA.

RCW 42.17.260(1) mandates that DOC, in accordance with published rules, shall make available for public inspection and copying all public records, unless the records fall under a specific statutory exemption. See Declaration of Livingston at p. 3, par. 13.

In response to RCW 42.17.260(1) DOC published WAC 137-08 to ensure compliance by the department with the provisions of RCW 42.17.250 through RCW 42.17.340.

WAC 137-08-020(5) defines "disclosure" as "inspection and/or copying." *Id.* at p. 3, par. 14. The act of disclosure is contingent upon the requestor being given access to the records requested, either through inspection or receiving copies, as access is the underlying theme of the Act. ACLU v. Blaine Schl Dist No. 503, 86 Wn.App. 688, 696, 937 P.2d 1176 (1997).

In the instant case, Petitioner has been denied access; his right to inspect or receive copies of the records at issue - thus, the disclosure process is incomplete.

WAC 137-08-090(3) mandates that if a record is exempt from disclosure pursuant to law, the defendant must provide a written explanation for nondisclosure, pursuant to WAC 137-08-130(3). Id. at p. 3, par.15.

WAC 137-08-130(3) mandates that if any portion of a record is exempt from disclosure, that portion will be deleted and the nonexempt materials shall be fully disclosed. Id. at p. 3, par. 16.

On February 19, 2003 Petitioner submitted a public records request to defendant's agent. Id. at p. 2, par. 5.

On February 25, 2003 defendant's agent acknowledged receipt of Petitioner's public records request. Id. at p. 2, par. 6.

On March 28, 2003 Defendant's agents denied Petitioner disclosure of the public records in question through a mail rejection under the pretense of DOC 450.100. Id. at p. 3, par. 11.

DOC 450.100 is not a statutory exemption. Defendant's reliance upon DOC 450,100 as a means of denying Petitioner access to the records in question is contrary to RCW 42.17.310(2)(4), RCW 42.17.260(1), WAC 137-08-020(5), WAC 137-08-090(3), WAC 137-08-130(3) and legislative intent, as evidenced by the court's reasoning in Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1994)("PAWS"), wherein the court stated: ". . . the intent of this legislature is to make clear that . . . agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records." PAWS,

at 259.

Moreover, defendant claims that the record at issue contains personal information. Petitioner submits this is made in bad faith, as the PDC evidently viewed the file, deleting any personal information contained therein and mailed same to Petitioner. WAC 137-08-090; WAC 137-08-130(3). Id. at p. 2, par. 7.

Petitioner respectfully submits that he has been unlawfully denied access to the records in question, contrary to the PDA, in bad faith.

B. Bad Faith

To prove "bad faith", a party must show agency neglect or refusal to fulfill some duty . . . not prompted by an honest mistake to his rights or duties, but by some interested or sinister motive." Bentzen v. Demmons, 68 Wn.App. 339, 349, Fn8, 842 P.2d 1015 (1987)(quoting State v. Sizemore, 48 Wn.App. 835, 837, 741 P.2d 572 (1987)).

To illustrate evidence of "bad faith", Petitioner will ask this court to consider the agency's "refusal" to fulfill its duty pursuant to RCW 42.17.260(1), WAC 137-08-090(3) and WAC 137-08-130(3) to rely only upon "statutory exemptions" to deny disclosure of the records in question.

Petitioner respectfully submits that defendant's reliance upon DOC 450.100 is a pretense to deny Petitioner access to the records in question, constituting concealment of public records.

RCW 42.52.050(4) provides in relevant part: "No state

employee . . . may conceal a record if the . . . employee knew the record was required to be released under 42.17 RCW, was under personal obligation to release the record, and failed to do so."

Here, defendant's agents knew the record was to be released, and unable to deny access under a statutory exemption, acted to conceal the record under the pretense of DOC 450.100 in violation of RCW 42.52.050(4).

Specifically commenting on RCW 42.52.050(4), the court in PAWS, stated: "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." PAWS, at 269.

In this case the Public Disclosure Coordinator found the record in question to be disclosable, mailing same to Petitioner. *Id.* at p. 2, par. 7. Thus, Petitioner submits that the "weakest link" in this chain is the mailroom staff acting contrary to RCW 42.52.050(4).

Petitioner submits that defendant is aware of this fact, as evidenced by Holmberg v. DOC, GHC No. 02-2-00960-0, wherein defendant agents at Stafford Creek Corrections Center attempted to utilize DOC 450.100 to deny Mr. Holmberg access to similar records, only to settle the matter out of court on November 14, 2002. *Id.* at p. 2, par. 4.

In addition, as recently as October 3, 2003, Mr. Holmberg received similar records from Mr. Peter W. Berney, attorney

for defendant in this case, without violating DOC 450.100. See Decl. of Holmberg at p. 4, par. 19.

Petitioner respectfully submits that the foregoing demonstrates the defendant's refusal to fulfill it's duty under the PDA, RCW 42.17.250 through 42.17.340.

Next the court is asked to ascertain the defendant's "motive" before a finding of bad faith can be made.

On or about January 28, 2000 Eldon Vail, Deputy Secretary for DOC, and Ida bellasiotes, submitted HB 2458, an act prohibiting agencies from making public records available to prisoners. The bill was designed to deny prisoners access to all public records - the bill was defeated.

Petitioner respectfully submits that HB 2458, in conjunction with the defendant's attempt of using DOC 450.100 to deny prisoners access to public records is evidence of the defendant's motive to deny prisoners access to public records at any cost.

Petitioner respectfully submits that the defendant's defeated attempt to deny prisoners access to public records through failed legislation and unlawful concealment of same records under the pretense of DOC 450.100 is motive of defendant's intent to deny disclosure in bad faith.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the court to grant him the relief requested in Part II of his motion.

Done this 4th day of June, 2004.

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