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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 32253-6-II

IN THE COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

MICHAEL LIVINGSTON,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY BRIEF OF APPELLANT

Michael B. Livingston
Appellant pro se

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I. REBUTTAL ARGUMENT

A. Standard Of Review.

Judicial review of all agency actions taken or challenged under the statute shall be de novo. The appellate court stands in the same position as the trial court where the record consists only of affidavits, memorandum of law, and other documentary evidence. Thus, a reviewing court is not bound by the trial court's findings. (emphasis added). Tacoma Public Library v. Woessner, 90 Wn.App. 205,215, 951 P.2d 357 (1998).

B. DOC Compliance With The Public Disclosure Act (PDA) Was Not Complete When It Mailed The Requested Record To The Appellant At His DOC Address.

This case involves the handling of a request for disclosable public records from the agency, made by an incarcerated individual.

Appellant submits that the act of mailing the records in question from the Olympic Corrections Center (OCC) Public Disclosure Coordinator (PDC) to the Appellant was but one step in the overall duty of the agency to provide full access to public records and to provide fullest assistance to inquirers. (Brief of Appellant, pp 5,8,9). The Respondent's ~~position~~ position, that the PDA process was completed by the lone act of mailing the record to the requester at his DOC address, ignores the

intent and purpose of the PDA, ignoring also the DOC agency's own published definition of "disclosure." (CP at 7)(Brief of Appellant, pp 6,7).

The intent of the PDA is to promote broad disclosure of public records. (Brief of Appellant, pp. 4,5). Access is the underlying theme of the PDA. "Disclosure" is defined by the WAC as "inspection or copying." (CP at 7,77)(Brief of Appellant, p.6). The requester being allowed to inspect requested public records, or receive copies, is what completes the PDA process. Only at that point is access accomplished, and broad disclosure of public records effected. The absurdity of the DOC's position is that forwarding public records requests from one agency employee to another, even by mail, somehow completes the PDA process. If the OCC PDC had given the record to her secretary to mail for her, would the PDA process still be complete? If the CCCC mailroom had sent the record to the DOC living unit to be delivered, but unit staff refused to deliver the document, would the PDA process be complete? Here, the OCC PDC sent the document to the CCCC for delivery, but the CCCC mailroom refused to deliver the record. And yet, the DOC claims that the PDA process is somehow complete. The DOC position does

not harmonize with the intent and purpose of the PDA.

Since access to the requested record has not been permitted, by the same agency the record was requested from, the codified definition of "disclosure" has not been satisfied. The PDA process must necessarily be termed as incomplete, until such time as inspection or copying of the requested record takes place.

It is the DOC agency that continues to maintain physical control of the record down to this day, and thus it is the DOC agency who has not fulfilled the requirements of the PDA. The PDA process remains incomplete.

C. RCW 72.09.530 Does Not Apply To The Issues Before This Court.

Respondent DOC cites RCW 72.09.530 as it attempts to excuse its incomplete, if not illegal handling of the Appellant's public records request. (Brief of Respondent, p.5).

RCW 72.09.530 does not apply to the records at issue. It does not fit the "other statute" definition of RCW 42.17.260(1), which provides in pertinent 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, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records."

On the other hand, RCW 72.09.530 simply authorizes the Secretary of the DOC to generate policies regarding contraband material. It is not an exemption of specific information or records, as the PDA requires. Therefore, the DOC's reliance upon RCW 72.09.530 is in conflict with the PDA in this matter.

Even more compelling is the legislature's own enactment, pointedly addressing the intent of the PDA where an apparent conflict arises with the PDA. In fact, in such instances, there actually is no conflict. The PDA governs, as RCW 42.17.920 provides in pertinent part:

"The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern."

Thus, for the purposes of a PDA analysis, RCW 72.09.530 is governed by the PDA and inapplicable. See Spokane Research and Defense Fund v. City of Spokane, 96 Wash.App. 568, 983 P.2d 676 (Wash.App.Div.III 07/13/1999).

II. BAD FAITH AND IN-CAMERA REVIEW

A. Respondent Has Acted In Bad Faith.

The DOC has prevented disclosure of the record at issue, yet not through the use of legitimate means or within the scope of the PDA's authority. The agency actions in this matter instead reflect a strategy far short of any good faith motive, refusing to submit to the will of the legislature.

The DOC has participated in a charade, or guise, designed to circumvent the PDA's requirements from the very beginning of the factual record from which this action results. Following Appellant's public record request in February 2003 from the OCC, Appellant was immediately transferred from the OCC. (CP at 111). Directly following this transfer, the records requested were mailed to him at the CCCC, only to be denied him by the CCCC mailroom. (CP at 111,112).

The reasons for the records disclosure denial have evolved over the past two years. Initially, the denial was that 'employee records will not be allowed into the institution to be given to an inmate.' (CP at 63,66). Once the matter was filed for judicial review, however, the reason for non-disclosure changed. Now, the DOC claims that the record in question contains personal

information. (CP at 112). Despite this claim, the agency has offered no evidence of any personal information in the record, and has failed to demonstrate how the record would actually contain such personal information even after it was screened and prepared for disclosure by the duly trained Sue Gibbs at the OCC.

Once documents are determined to be within the scope of the PDA, disclosure is required unless a specific exemption is applicable. Tacoma, 90 Wn.App. at 215. The DOC readily admits that it received a public records request from the Appellant; Respondent DOC found that no exemption applied, and the OCC PDC mailed the record to the DOC address where the Appellant was housed. (CP at 120,123)(Brief of Respondent, pp.1,2,7,8). The actions of the OCC PDC were consistent with WAC 137-08-130(1) and (2), which provide in pertinent part:

"The public disclosure coordinator shall review file materials prior to disclosure. If the file does not contain materials exempt from disclosure, the public disclosure coordinator shall ensure full disclosure."

Thus, the OCC PDC reviewed the requested record, determined the training of C/O Amundson to be disclosable, and mailed the record after finding

that said record did not contain any exempt information. (CP at 117,118).

Yet, despite the above evidence, the CCCC mailroom initially claimed in its mail rejection notice that DOC employee records are not allowed per the Superintendent. (CP at 63,66). Later, the CCCC Superintendent abandoned the initial reason for denying disclosure of the record, and defended the agency's actions in its legal pleadings by adopting a new excuse, that the training record of C/O Amundson contained personal information about her. (Brief of Respondent, p.4).

The PDA does not allow withholding of records in their entirety. Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions of records which do not come under a specific exemption must be disclosed. Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d at 261, 884 P.2d (Wa. 11/22/94).

Appellant submits that the DOC did not fulfill its duty under the PDA to provide access to the records or fulfill its duty to provide fullest assistance to Appellant, in that it failed to comply with RCW 42.17.310(2) by simply redacting any personal information (should any actually exist) from the records and then disclosing same to

Appellant.

Appellant submits, then, that the action taken by the CCCC mailroom and Superintendent Cedeno are inconsistent with the facts and evidence provided by Ms. Gibbs. That this action by the CCCC mailroom is arbitrary is highlighted by the court record in this matter, wherein the DOC agency has routinely honored requests for officer training records in the past, records which are currently possessed by the declarants. (CP 80-102). All such public records are void of personal information. This raises the question: Does the record at issue actually contain personal information, as Mr. Cedeno has sworn to; i.e., social security number, residential address, or telephone number? Washington cases have already recognized that a public employee's social security number, residential address, and telephone number are exempt from disclosure. Tacoma, 90 Wn.App. at 221. Appellant submits that, based upon the facts and evidence in the record, the public record in question does not contain personal information responsive to C/O Amundson. (CP at 76,77).

In the alternative, if said record does indeed contain personal information, as defined by Washington case law, the CCCC mailroom should have

forwarded the record to the CCCC PDC, who would have then redacted it, and forwarded the remainder to Appellant to ensure complete disclosure and compliance with the PDA.

The agency's own published rules define "disclosure" as "inspection or copying." With this in mind, Appellant submits that the DOC agency has not complied with the intent and purpose of the PDA, nor the plain language of the statute, as Appellant has not been provided access to the record in question, due to the agency's bad faith.

B. Request For In-Camera Review.

RCW 42.17.340(3) provides in pertinent part:

"Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts shall take into account that free and open examination of public records is in the public interest...Courts may examine any record in camera in any proceeding brought under this section." (emphasis added).

As this court stands in the same position as the trial court and is not bound by the trial court's findings, Appellant suggests that the only way to determine if the record in question actually contains personal information would be to have this Court conduct an in-camera review. (CP at 2,77). Further, Appellant respectfully but earnestly urges this Court to review and compare the declarations

of Michael A. Holmberg and Michael B. Livingston (CP at 80-102) with the record at issue, in that nearly identical records have been disclosed in the in the past and are currently possessed by the declarants. These are incarcerated persons, possessing the training record of certain officers of the DOC, records which are void of personal information.

Appellant submits that if this Court finds that the records in question do not contain personal information, that the absence of same constitutes bad faith on the part of the DOC agency.

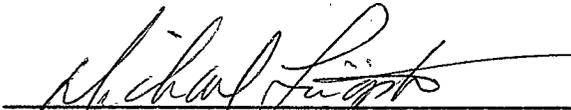
CONCLUSION

The DOC agency does not have authority under the PDA to subdivide itself for the purposes of avoiding compliance with the PDA. Thus, until the agency discloses the record to the Appellant, the PDA process is not complete. Any other consideration used by the DOC agency must conform with specific requirements of the PDA in order for non-disclosure to be compliant with the plain language as well as the intent and purpose of the PDA.

For the reasons stated herein, Appellant respectfully requests this Court grant the relief

designated in Part V of the BRIEF OF APPELLANT,
along with any further costs incurred in connection
with this reply brief.

RESPECTFULLY SUBMITTED this ^{13th}~~14th~~ day of
February, 2005.


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CERTIFICATE OF SERVICE

I certify that I served a copy of REPLY BRIEF OF APPELLANT on the following parties, on the date below:

TO:

Peter W. Berney, Assistant Attorney General
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P.O Box 40116
Olympia, WA 98504-0116

and

THE WASHINGTON STATE COURT OF APPEALS, DIVISION II
Attn: David C. Ponzoha, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

by depositing same in the US Mail, postage prepaid, processed as legal mail at the Stafford Creek Corrections Center in Aberdeen, Washington.

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

Executed this 13th day of February, 2005 at Aberdeen, Washington.



Michael Livingston
Appellant pro se

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