

TABLE OF CONTENTS

I. COUNTER STATEMENT OF THE ISSUES1

II. COUNTER STATEMENT OF THE CASE1

 A. Factual Background.....1

 B. Procedural Background.....4

III. SUMMARY OF THE ARGUMENT.....4

IV. ARGUMENT6

 A. Standard Of Review.....6

 B. DOC Complied With The PDA When It Timely
 Responded To Appellant’s Public Disclosure Request
 And Mailed The Documents To Him Without Claiming
 An Exemption.7

 C. Appellant Has Raised No Claim That A Prison
 Superintendent’s Authority To Prevent Contraband From
 Entering The Institution Is Invalid.8

 1. DOC Is Mandated By Statute To Operate Prisons In
 As Safe A Manner As Possible.8

 2. DOC Policy 450.100 Is Consistent With
 Constitutional Constraints.12

V. CONCLUSION15

TABLE OF AUTHORITIES

Cases

<u>Amren v. City of Kalama,</u> 131 Wn.2d 25, 929 P.2d 389 (1997).....	7
<u>Bell v. Wolfish,</u> 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).....	10
<u>Foss v. Department of Corrections,</u> 82 Wn. App 355, 918 P.2d 521 (1996).....	10
<u>Hudson v. Palmer,</u> 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).....	12
<u>Limstrom v. Ladenberg,</u> 136 Wn.2d 595, 963 P.2d 869 (1998).....	6, 7
<u>Progressive Animal Welfare Society (PAWS) v. University of Washington,</u> 125 Wn.2d 243, 884 P.2d 592 (1994).....	7
<u>Thornburgh v. Abbott,</u> 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).....	12, 13, 14
<u>Turner v. Safley,</u> 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).....	12

Statutes

RCW 42.17.020(1).....	7
RCW 42.17.250	1
RCW 42.17.300	2, 8
RCW 42.17.320	7
RCW 42.17.340(2).....	7

RCW 72.09	10
RCW 72.09.010	8
RCW 72.09.530	5, 6, 9, 12

I. COUNTER STATEMENT OF THE ISSUES

1. Whether the Department of Corrections complied with the Public Disclosure Act when it timely responded to Appellant's request and did not claim an exemption from disclosure for the documents it mailed to Appellant.

2. Whether any cognizable claim is made under the Public Disclosure Act when the sole issue is rejection of the requested documents pursuant to a prison superintendent's statutory authority to control material that enters a prison intended for offenders incarcerated therein.

II. COUNTER STATEMENT OF THE CASE

A. Factual Background.

On February 19, 2003, Appellant Michael Livingston, while incarcerated at Olympic Corrections Center (OCC) in Forks, Washington, mailed a public records request pursuant to the state Public Disclosure Act (PDA) RCW 42.17.250, et seq., to Sue Gibbs, the public records coordinator for OCC. CP 117. The request, which was received by Ms. Gibbs on February 20, 2003, was for the training records of a Corrections Officer (CO) at OCC, Marleen Amundsen. Id.

On February 24, 2003, Ms. Gibbs mailed a response to Mr. Livingston acknowledging receipt of his request and informing him that she would need to contact CO Amundsen to notify her of the request and

to provide her with the opportunity to seek protection of the records in court pursuant to RCW 42.17.330. CP 119. Ms. Gibbs estimated it would take two weeks to do this.

As of March 4, 2003, Ms. Gibbs had not received any response from CO Amundsen concerning the request, therefore, she sent another letter to Mr. Livingston, informing him the records had been gathered and would be mailed to him upon receipt of \$2.40 for copying and postage charges as allowed pursuant to RCW 42.17.300. CP 120. As inmates are not allowed to possess currency, Mr. Livingston had to fill out a form known as a Request for Inmate Transfer of Funds Outside Institution. CP 122. This form authorizes the prison to disburse funds from an inmate's trust account.

Mr. Livingston filled out this form on Sunday, March 16, 2003, and mailed it to Ms. Gibbs with a cover letter requesting the records be mailed at her earliest convenience. CP 121-22. However, on March 17, 2003, Mr. Livingston was transferred from OCC to Cedar Creek Corrections Center (CCCC) in Littlerock, Washington, where he arrived on March 21, 2003.¹ CP 118. On that day, Ms. Gibbs mailed Mr.

¹ All inmates who are transferred from one prison to another go through the Washington Corrections Center in Shelton first prior to going to their new institution. This was the reason it took Mr. Livingston five days to get from OCC to CCCC.

Livingston the records he had requested without claiming any exemptions under the PDA. Id.; CP 123.

All DOC facilities have mailrooms where all incoming mail for offenders is opened and screened. CP 124-25. The purpose of this is to prevent the introduction of contraband into a prison or any other material that could undermine the security and order of the prison. Id. DOC Policy 450.100 governs mail for offenders and section IV lists 32 types of unauthorized incoming mail. CP 126-39. The 31st item prohibits “other items identified by the Superintendent/Facility Administrator and/or facility field instructions.” CP 131. If unauthorized mail 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 125. The notice also explains the inmate’s rights to appeal the rejection to the Superintendent of the prison. CP 140.

According to Ruben Ceden, who was Superintendent of CCCC at the time Mr. Livingston was incarcerated there, and is now the Southwest Regional Administrator for DOC, inmates are not allowed to possess personal information about staff. CP 125. This is because, as Superintendent, he was responsible for the overall safety of staff and inmates at CCCC and personal information in the hands of offenders has been used in the past to retaliate against staff and even create the risk of

personal harm to a staff member. Id. Because the training records of CO Amundsen contained personal information about her, mailroom staff at CCCC rejected the letter from Ms. Gibbs on March 26, 2003, and provided Mr. Livingston with a notice of this action. Id.; CP 140. Mr. Cedeno upheld the rejection.

B. Procedural Background.

On July 29, 2003, Appellant filed a “Complaint” (Motion for Order to Show Cause) pursuant to the PDA, challenging the rejection of CO Amundsen’s training records by the CCCC mail room. On August 20, 2004, the Honorable Christine Pomeroy of Thurston County Superior Court, entered an order denying Appellant’s motion, finding that DOC had complied with the requirements of the PDA. CP 104-05. The court’s order read “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.” Id.

III. SUMMARY OF THE ARGUMENT

This case involves the issue of whether DOC complied with the PDA. Appellant makes no contention that the procedure used by Ms.

Gibbs to process his request was deficient in any manner. Rather, his sole contention is that the ultimate rejection of the documents at the mailroom of CCCC somehow constitutes a violation of the PDA. In other words, he is attempting to litigate the validity of DOC's mail rejection procedures in a public disclosure case.

RCW 72.09.530 directs the Secretary of DOC to adopt a policy establishing a method by which prisons can review "all incoming and outgoing material" for the purpose of confiscating anything determined to be contraband because it poses a risk to prison order and security. Pursuant to this authority, DOC promulgated policy 450.100, outlined above.

Under the PDA, if a request for public records is made, the agency to which the request is addressed determines if the records are disclosable or exempt from disclosure under the law. If none of the records are exempt, and none are withheld under the authority of the PDA, then that statutory process is complete.

This does not, however, preclude application of RCW 72.09.530. Certainly, some materials that are available to the general public may pose concerns for prison order and security and should not be delivered to the offender pursuant to the statute. This would be true whether the materials were from a private party or from a public records request made to a city,

county or state agency – including DOC. Whether the materials are properly determined to be contraband under RCW 72.09.530 and confiscated is a distinct question that should be answered the same regardless of the source of the materials.

Numerous cases have upheld the authority of prisons to restrict material coming into a prison, but that issue was not before the trial court here and is not before this court. If Appellant has a dispute with DOC's actions here, then, as the trial court held, "his remedies lie elsewhere than the Public Disclosure Act."

IV. ARGUMENT

A. Standard Of Review

Where a trial court's order is based solely on documentary evidence, affidavits and memoranda of law, the appellate court's review is de novo. Limstrom v. Ladenberg, 136 Wn.2d 595, 612, 963 P.2d 869 (1998). Here, the training records of CO Amundsen were not before the trial court as there was no issue as to whether all or part of the records were exempt. However, other documentary evidence was before the court such as the exchange of letters among the parties as well as DOC Policy 450.100 and the mail rejection form from CCCC. Also before the trial court were the memoranda of the parties and the Declarations of Michael Livingston, Michael Holmberg, Sue Gibbs and Ruben Cedeno.

B. DOC Complied With The PDA When It Timely Responded To Appellant's Public Disclosure Request And Mailed The Documents To Him Without Claiming An Exemption.

The basic purpose, construction and operation of the PDA is well settled in case law. Limstrom v. Ladenberg, 136 Wn.2d 595, 963 P.2d 869 (1998); Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1997); Progressive Animal Welfare Society (PAWS) v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1994). Respondent DOC does not dispute it is an agency subject to public disclosure as defined by the PDA. RCW 42.17.020(1). When a public records request is made, the agency must respond within five business days of receiving the request by either providing the record, denying the request and provide a written explanation of what exemption is being claimed, or providing a reasonable estimate of the time the agency will need to provide a response. RCW 42.17.320.

Here, Appellant's public disclosure request was received on February 20, 2003, by DOC. On February 24, 2003 (two business days later, as February 20 was a Thursday), Ms. Gibbs responded that it would take two weeks to gather the requested records to allow time for CO Amundsen to contest the request. Appellant makes no claim that the response was untimely or that the two week timeframe was unreasonable. See RCW 42.17.340(2). Twelve days later, Ms. Gibbs wrote Appellant

again and informed him his requested records were ready and would be mailed to him upon payment of the copying and postage costs as allowed by RCW 42.17.300. There was no claim of exemption being made under the PDA. On March 16, 2003, Appellant prepared the form to transfer funds to pay for the records, and on March 21, 2003, Ms. Gibbs deposited the records in the mail. Again, Appellant is not contending that any of these actions violated the PDA. This completed the public disclosure process.

C. Appellant Has Raised No Claim That A Prison Superintendent's Authority To Prevent Contraband From Entering The Institution Is Invalid.

1. DOC Is Mandated By Statute To Operate Prisons In As Safe A Manner As Possible.

Wholly unrelated to DOC's actions in handling Appellant's public disclosure request, was its actions taken to prevent contraband from entering CCCC. As stated above, the validity of such actions here were not challenged by Appellant in the trial court, were not ruled upon by the trial court and are not before this court. Nevertheless, DOC believes some explanation of the issue is needed to understand the actions it took here with the documents mailed to Appellant by Ms. Gibbs. 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.

Thus, safety of the public, staff and inmates is the number one priority of the Legislature for DOC. Consistent with this concern, the Legislature also enacted RCW 72.09.530 prohibiting the receipt or possession of contraband by inmates. It 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.

(Emphasis added.)

By the authority granted by the Legislature pursuant to this statute, DOC promulgated Policy 450.100, among others, which deals in part with unauthorized incoming mail. CP 126-39. This was the policy cited by Mr. Cedeno as the grounds for rejecting the training records of CO

Amundsen when they arrived at CCCC for Appellant.² As Mr. Cedeno stated in his declaration, personal information about staff in the hands of offenders, including training records, creates the potential for the offender to retaliate against the staff person or even create the potential for personal harm to the staff person. CP 125.

Courts traditionally have responded to the unique problems of penal environments by invoking a policy of judicial restraint. This policy is designed to give prison administrators wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Foss v. Department of Corrections, 82 Wn. App 355, 358, 918 P.2d 521 (1996), citing Bell v. Wolfish, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447 (1979).

Appellant has raised no challenge to DOC's authority or duty under RCW 72.09. Rather, he attempts to persuade the court there is only one statute at issue by characterizing DOC's actions as "refusing to disclose" the documents he requested. As such, he claims DOC must cite some statutory exemption under the PDA for its actions even though the

² Appellant claims that at other times, in other situations, staff records have been obtained by other inmates. However, the circumstances surrounding those other alleged incidents are unknown and have no bearing on the situation before this Court where Mr. Cedeno determined there was a safety issue in allowing Appellant to have the training records of CO Amundsen.

authority for rejecting the documents arose under RCW 72.09. Appellant's Brief, pp. 5-7. However, as outlined above, this was not the case. Ms. Gibbs did not refuse to send them. Rather, she mailed them to the prison he was currently incarcerated at and the documents, like all other incoming mail for offenders, became subject to the prison's mail screening procedures.

Further, it is Appellant's contention that mailroom staff are supposed to be able to "discern" when incoming mail is a public records request and when it is not, and if it is, must allow its delivery to the inmate. Appellant's Brief p. 6. The absurdity of Appellant's position is that the exact same document can 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. Or, further, if Appellant had requested a document from another public agency, for example, from a county, and it was rejected by DOC, he would not even have a colorable PDA claim. Would Appellant sue DOC under the PDA for rejection of documents he had requested from the county? No, he could raise a challenge to DOC's authority to do so, and that challenge would not be litigated under the PDA as it was designed for speedy resolution of public records disputes.

2. **DOC Policy 450.100 Is Consistent With Constitutional Constraints.**

Although the issue before this Court is not the constitutionality of DOC Policy 450.100, RCW 72.09.530 does state that policies implemented by DOC to prevent the introduction of contraband into prisons should be consistent with constitutional constraints. Appellant provides no argument that DOC is not constitutionally permitted to do this because, as outlined below, they are so allowed.

Criminal conviction and lawful imprisonment deprives a person of their freedom and many other constitutional rights although prisoners retain rights that are 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. An inmate's First Amendment right to send and receive mail is subject to prison regulations reasonably related to penal interests. Thornburgh v. Abbott, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878, 104 L. Ed. 2d 459 (1989).

The U.S. Supreme Court, as well as Washington courts, have repeatedly acknowledged the need for the courts to defer to decisions of prison administrators on issues of prison security. As stated in Thornburgh:

In particular, we have been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the “outside” who seek to enter that environment, in person or through the written word. . . . All these claims to prison access undoubtedly are legitimate; yet prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is “ill equipped” to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.

Thornburgh, 490 U.S. at 407, 109 S. Ct. at 1878.

Appellant contends Respondent is attempting to “conceal” the requested documents under the “pretense” of safety and security, citing other similar requests from other institutions at other times. Appellant’s Brief, p. 10. However, as stated in Thornburgh:

We agree that it is rational for the Bureau (Federal Bureau of Prisons) to exclude materials that, although not necessarily “likely” to lead to violence, are determined by

the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.

Thornburgh, 490 U.S. at 417, 109 S. Ct. at 1883.

Here, Ruben Cedeno, Superintendent at CCCC while Appellant was there, and an experienced prison administrator, made the decision that the information Appellant requested about CO Amundsen, at that time, posed a safety and security risk to CCCC and rejected the documents. The constitutionality of Mr. Cedeno's actions is not before this Court, rather Appellant has attempted to frame the issue here as a public disclosure case rather than the mail rejection case that it is.

Before the Court is whether Respondent violated the PDA in handling Appellant's request. Yet, even Appellant admits there were no deficiencies in DOC's response other than the ultimate rejection of the letter from Ms. Gibbs to Appellant by CCCC mailroom staff.

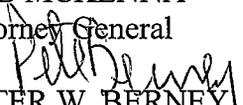
If Appellant believes Mr. Cedeno's actions or DOC Policy 450.100 are unconstitutional, his remedy is to file a lawsuit alleging a violation of his civil rights. The show cause hearing process outlined in the PDA is not the forum for litigating the constitutionality of a prison policy. It is designed to provide an expedited method for judicial review of an agency's decision to deny disclosure of requested documents which did not occur here.

V. CONCLUSION

One of DOC's responsibilities is responding to public disclosure requests. It responded to Appellant's request here in a timely manner and did not claim any exemptions from disclosure. As it would with any other request under such circumstances, it mailed the documents to Appellant. Appellant is also incarcerated and subject to statutorily and constitutionally permitted restrictions on his incoming mail. It was pursuant to this authority that DOC rejected the letter containing personal information of a corrections officer as the Superintendent believed it could possibly compromise the security of the institution at the time. Appellant's only claimed violation of the PDA is this ultimate rejection of his letter by CCCC mailroom staff. As this rejection is consistent with DOC's statutory duty to maintain safe and secure prisons and is not a violation of the PDA, Respondent DOC respectfully requests that this Court affirm the ruling of Thurston County Superior Court.

RESPECTFULLY SUBMITTED this 19th day of January, 2005.

ROB MCKENNA
Attorney General


PETER W. BERNEY, WSBA #15719
Assistant Attorney General
Attorney for Respondent-Appellee
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

05 JAN 20 PM 12: 21

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I certify that I served a copy of BRIEF OF RESPONDENT ^{BY} on all _____
DEPUTY
parties or their counsel of record on the date below as follows:

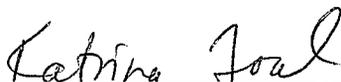
- X U.S. Mail, Postage Prepaid
United Parcel Service, Next Day Air
ABC/Legal Messenger
State Campus Delivery
Hand Delivered by: _____
- X Facsimile to Stafford Creek Corrections Center for hand delivery

TO:

MICHAEL B. LIVINGSTON #786624
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

EXECUTED this 19th day of January, 2005, at Olympia, Washington.



KATRINA TOAL