

64818-7

64818-7

NO. 64818-7-1  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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FREDRICK J. FISCHER,  
Appellant,

DEPARTMENT OF CORRECTIONS,  
Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 APR 15 AM 9:22

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ON APPEAL FROM THE  
SUPERIOR COURT OF SNOHOMISH COUNTY

Before The Honorable Linda Krese

APPELLANT'S OPENING BRIEF

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 APR 20 AM 10:53

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For Pro-se Appellant

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A. ASSIGNMENT OF ERROR

1. The Trial Court Erred In Finding That DOC Met It's Burden Of Proof Under The PRA.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Or Not DOC Can Claim An Exemption Under RCW 42.56.240(1) When It Provides To Inmates The Specific Intelligence Information DOC Professes Is Essential To Prison Security, And Whether Or Not The Trial Court Erred In Failing To Consider The Unique Circumstances Of The Prison.

C. STATEMENT OF THE CASE

1. Appellant is an inmate at the Washington State Department of Corrections, Monroe Correctional Complex (MCC). CP-29, at 1(Trial Court Memorandum Decision). On November 20, 2007, Appellant was assaulted in the prison law library. On December 3, 2007, Appellant's Attorney, Michael Kahrs, submitted a Public Records Act (PRA) request for copies of prison video surveillance records from several DOC cameras. CP-29, at 1. Appellant "specifically" requested that the DOC

preserve all "relevant" surveillance video tapes of the area where the assault took place." CP-29, at 1 (quotation makers added by appellant).

2. Cathy Kopian, a public disclosure coordinator for MCC responded on December 5, 2007, stating that the tapes were exempt in their entirety pursuant to RCW 42.56.420(2) and RCW 42.56.240(1), as specific intelligence information compiled by DOC as a law enforcement and penology agency. CP-29, at 2. There were some additional communications between Mr. Kahrs and DOC staff, including an appeal of DOC's denial of the records. CP-29, at 2. Ultimately, DOC did not provide the tapes that were requested and Mr. Kahrs on behalf of Appellant filed this action in the Snohomish County Superior Court on June 10, 2008. CP-29, at 2.

3. DOC filed an answer on July 2, 2008. Nothing further happened until Mr. Khars filed a notice of withdrawal on July 27, 2009. CP-29, at 2. On July 29, 2009, DOC filed a motion to dismiss for want of prosecution. The motion to dismiss was noted for hearing on August 11, 2009, at which time it was continued by the Trial Court for two weeks to allow Appellant to note it for trial. CP-29, at 2. Before the continued

hearing date, Appellant filed, Pro-se, a motion for PRA violation findings and penalty. CP-29, at 2. The Trial Court denied the motion to dismiss for want of prosecution and issued an Order to Show Cause requiring DOC to show cause why Appellant should not be granted the relief he requested. CP-29, at 2. The show cause hearing was set for October 14, 2009, and was heard on that date. CP-29, at 2. On November 6, 2009, the Trial Court dismissed Appellant's PRA action finding that DOC sustained it's burden that the records in question were exempt under RCW 42.56.240(1) from disclosure. CP-29, at 3.

D. ARGUMENT

1. DOC CANNOT ESTABLISH AN EXEMPTION UNDER RCW 42.56.240(1) WHEN IT PROVIDES INMATES THE SPECIFIC INTELLIGENCE INFORMATION AND FAILED TO MEET IT'S BURDEN OF PROOF.

a. Standard of Review:

1. The PRA is a strongly worded mandate for broad disclosure of public records. Prison Legal News v. Dep't of

Corr., 154 Wn.2d 628, 635 ¶15, 115 P.3d 316(2005)<sup>4</sup>. Washington's PRA requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. Id., at 635 ¶15. Any written information about government conduct is a public record, regardless of its physical form or characteristics. Id., at 635 ¶15.

2. Chapter 42.56 RCW provides, "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 43.56.520 shall be de novo." See RCW 42.56.550(3); Id., at 635 ¶16. Moreover, where the Trial Court record consists only of Affidavits, Memoranda, and other documentary evidence, this Court stands in the same position of the Trial Court. Id., at 635 ¶16. Court's construe the PRA broadly and its exemptions narrowly. Id., at 636 ¶17. The State Agency bears the burden of proving that a specific exemption applies. Id., at 636 ¶17; RCW 42.56.550(1).

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NOTE NO. 1: RCW 42.17 seq. was changed in Law of 2005, c. 274, §1, to RCW 42.56 seq.

b. Trial Court's Exemption Ruling:

1. The Trial Court ruling was there are significant advantages in maintaining security for inmates to be uncertain as to what is being monitored and recorded and exactly the field of view, that some of the monitors can be seen by inmates or others in the facility, but that it cannot be determined from viewing the monitor what is being actually recorded and the quality of the recording, that this lack of knowledge on the part of the inmates is important to maintain security within the correctional facility. CP-29, at 3.

2. Based on those circumstances, the Trial Court found that the video recordings in question, in the location of the assault, constitute "specific intelligence information" compiled by a law enforcement and penology agency and are exempt from disclosure pursuant to RCW 42.56.240(1), that disclosure of such recordings would negatively impact DOC's ability to maintain security in its correctional facilities, and to address infractions in those facilities. CP-29, at 3.

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c. Specific Intelligence Information:

1. RCW 42.56.240(1) exempts certain specific categories of information from public disclosure, it provides:

(1) the following are exempt from public inspection and copying:

(b) specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for protection of any persons right to privacy.

2. The investigative records must also be "essential to effective law enforcement." Prison Legal News v. Dep't of Corr., 154 Wn.2d at 637 ¶21. Again, the burden is on DOC to prove that the records are essential to effective law enforcement, and the exemption must be construed narrowly. Id., at 638 ¶21. Respondent's sole reason for asserting an exemption of the records in this matter in the trial court

was "specific intelligence information" under RCW 42.56.240(1). See CP-19, at 7-11.

d. DOC Did Not Meet Their Burden Of Proof:

1. The case presents a unique question of first impression as to: "whether or not DOC can claim an exemption under the PRA under RCW 42.56.240(1)(specific intelligence information), when DOC provides inmates access to the specific intelligence information it professes is "essential to effective law enforcement" and "essential to maintaining prison security." CP-20, at Exhibit 1, at p. 3, ¶¶6-7(Declaration of Richard Morgan).

2. Richard Morgan, Respondent's sole witness, testified that it is "'mission critical' that offenders and their cohorts not know the capabilities and limitations of DOC's surveillance capabilities," that "'it is a significant advantage' to have offenders uncertain as to what is being monitored, what is recorded, and what is within the field of view." CP-20, at Exhibit 1, at p. 3, ¶¶6-7.

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3. However, Respondent never disputed in the Trial Court the testimony of Appellant that inmates have access to the information Mr. Morgan testifies is "mission critical," and "is a significant advantage." CP-19, at 1-11, (and at Exhibit 1, at pp. 1-4). See Also CP-12, (Declaration of Fischer), at p. 5, ¶¶19-20. Mr. Morgan's testimony in it's proper context is "Blanket Testimony" concerning DOC's "entire surveillance capabilities throughout the department of corrections at every facility" NOT the "specific surveillance capabilities at MCC", not testimony concerning the specific circumstances of this case. In fact, the Trial Court recognized that monitors can be seen by inmates or others in the facility. If inmates can see the monitors, inmates can tell where the blind spots are and the quality of the pictures from those cameras. See CP-12 (Declaration of Fischer), at p. 5, ¶19 ("Everyone can see the camera angles, blind spots, picture quality, and surveillance coverage. Any inmate who goes into the library can take a position at the bookshelf and watch the monitors indefinitely.").

4. In fact, where the Trial Court got the idea that: "it cannot be determined from viewing the monitor what is being actually recorded," CP-29, at 3, such evidence is not found

in the Trial Court pleadings. Respondent admits that cameras in the area where the assault occurred which Appellant can view in the monitor that are requested "record." CP-19, at 2-3 (recodings exists being retained but claiming exemption.) Here, the Trial Court did not interpret the exemption narrowly under the facts and circumstances of this case, but "broadly" as to security in "all correctional facilities," and "all infractions in all facilities." Prison Leagl News v. Dep't of Corr., 154 Wn.2d at 638 ¶21(, .. the exemption must be construed narrowly"); CP-19, at p. 8 (lines 4-8) (Court's should consider the unique circumstances of the prison); CP-29, at 3.

5. Appellant argues that the videos in this matter are not "essential to effective law enforcement" nor "essential to effective prison security," if they were DOC would not allow inmates and their cohorts have access to what their calling "specific intelligence records that are essential." Appellant respectfully submits that DOC's exemption argument is just as "questionable on it's face" as the Washington State Supreme Court found DOC's arguments were in Prison Legal News v. Dep't of Corr., *supra*, at 639 ¶24. DOC has the ability to control specific intelligence information which is "essential" to both law enforcement and prison security and

can keep that information from inmates and their cohorts, and DOC should not be allowed to argue here "over broadly," as they did in the Trial Court with Mr. Morgan's declaration, that the "specific" videos in question under the unique facts and circumstances of this case are exempt from disclosure under RCW 42.56.240(1).

E. CONCLUSION

1. Under the unique facts and circumstances of this case, Appellant respectfully requests that the Court find that Respondent did not meet their burden of proof in the Trial Court and remand this matter to the trial court for a new trial.

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed this 13TH day of APRIL, 2010

Signed: Fredrick J. Fischer III

FREDRICK J. FISCHER, #249868

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