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66042-0

NO. 66042-0-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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John Thomas Entler,

Appellant,

v.

Department of Corrections,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. IDENTITY OF RESPONDENT/INTRODUCTION**

The Appellant, John Entler, is incarcerated by the Respondent, the Department of Corrections (the Department or DOC). Mr. Entler seeks review of a summary judgment entered against him in an action under the Public Records Act (PRA or the Act). Mr. Entler contends that, contrary to well-settled case law, the Department is subject to penalties because it did not provide him with a document that did not exist at the time of his request. For the reasons set forth below, Mr. Entler's argument is without merit.

## **II. STATEMENT OF THE CASE**

### **A. Factual History**

On March 19, 2010, Mr. Entler submitted a public records request to the Department. CP 13 at Exhibit 1. Mr. Entler requested one specific document:

Level 1-Initial Grievance under Grievance Log I.D. Number 09-02542 (not the one that was responded to by Anne Williams on May 8, 2009, I have that one.) I'm requesting the Level 1, Initial Grievance that was responded to by CUS Miller in April 2009 under Grievance Log I.D. Number 09-02542.

*Id.*

The Public Disclosure Specialist, Gaylene Schave, responded to Mr. Entler's request in a letter dated March 24, 2010. *Id.* She

acknowledged receipt of the request and asked for an additional fifteen business days to April 14, 2010, in order to search for the record. *Id.* On April 14, 2010, Ms. Schave notified Mr. Entler that staff searched but did not find the document responsive to his request. *Id.*

**B. Procedural History**

On May 3, 2010, Mr. Entler filed the current PRA Action. CP 1.

During discovery, the grievance that Mr. Entler had requested was found at one time to exist; however, it had been destroyed before Mr. Entler's request by Corrections Specialist Holly. CP 13 at Exhibit 2. Ms. Holly remembered that she had received the grievance response in question sometime in May 2009. *Id.* at Exhibit 2 ¶ 6. She explained that a response to the grievance at had been overdue for some time so she sent a reminder to CUS Miller, and his supervisor, CPM Williams, on May 7, 2009. *Id.* at Exhibit 2. Both Miller and Williams responded to the grievance, both noting that it had been informally resolved. *Id.* at Exhibit 2, ¶ 7-8. Ms. Holly received CPM Williams' response first, so she filed it, closed out the grievance, and forwarded Mr. Entler's file to storage. *Id.* at Exhibit 2, ¶ 9. Some time later, Ms. Holly received CUS Miller's identical response, and, remembering that she had already closed the file with his supervisor's response, she put the response in her box of items to be shredded, which she keeps for approximately six months. *Id.* at Exhibit

2, ¶ 10. The duplicate grievance response was then shredded sometime around November 2009, four months before Mr. Entler made his public records request. *Id.* at Exhibit 2, ¶ 11.

Mr. Entler filed a Motion for Summary Judgment on August 3, 2010. CP 13. The Department responded with a Cross Motion for Summary Judgment. CP 13. The trial court heard argument on the motions on September 10, 2010. The trial court dismissed Mr. Entler's motion, and granted the Department's Motion to Dismiss, noting that "the court concludes that if there is no public record in existence at the time of the [public records] request, there is no basis for a PRA lawsuit." *Id.* The decision was dispositive.

Mr. Entler now appeals the trial court's decision that the Department is not liable under the Act because it could not provide him with a document that did not exist at the time of his request.

### **III. ISSUES PRESENTED**

1. Whether the destruction of a responsive document before a public records request is filed is actionable under the PRA.

2. If so, whether the Department is required to retain a transitory document.

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## IV. ARGUMENT

### A. Standard Of Review

This court reviews a challenge to an agency's actions under the PRA *de novo*. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Mechling v. City of Monroe*, 152 Wn.App. 830, 222 P.3d 808, *review denied*, 169 Wn.2d 1007, 236 P.3d 206 (2009). This is true even when the record in a PRA cases consists only of affidavits, memoranda of law, and other documentary evidence and is decided on summary judgment. *Beal v. City of Seattle*, 150 Wn.App 865, 872, 209 P.3d 872 (2009) (internal citations omitted).

Summary judgment is apposite if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). This court stands in the shoes of the trial court where, as here, the record consists only of declarations, memoranda, and other documentary evidence. *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Facts and reasonable inferences are interpreted in the light most favorable to the nonmoving party. *McNabb v. Department of Corrections*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). Findings of fact in a PRA suit whose

veracity was not challenged were verities on appeal are not reviewed as conclusions of law. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn.App. 803, 225 P.3d 280, *review denied*, 169 Wn.2d 1012, 236 P.3d 205 (2009).

**B. The Public Records Act And Public Records Retention Act**

The Public Records Act (PRA) is a strongly-worded mandate for open government that provides the public with access to public records. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). A public record includes “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency . . . .” RCW 42.56.010 (2). Public agencies are required to provide inspection or copying of public records. RCW 42.56.070.

The preservation and destruction of public records, however, is governed by a separate act. RCW 40.14 *et seq.* This act provides in relevant part that “all public records shall be and remain the property of the state of Washington. They shall be delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed or disposed of, and otherwise managed, only in accordance with the provisions of this chapter.” RCW 40.14.020. Willful violation of this provision subjects a person to felony prosecution. *See* RCW 40.16.010

and .020. In contrast, the only PRA provision that regulates destruction of records provides that “if a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency. . . may not destroy or erase the record until the request is resolved.” RCW 42.56.100.

**C. An Agency Has No Duty Under The PRA To Produce A Record That Did Not Exist At The Time Of The Request**

Mr. Entler alleges that the Department should be held liable under the PRA because it did not disclose a grievance that did not exist at the time he made his request. But the PRA imposes no such liability.

An agency has “no duty to create or produce a record that is nonexistent.” *Sperr v. City of Spokane*, 123 Wn.App. 132, 136, 96 P.3d 1012 (2004). In this way, request for a no longer existing record leaves “no agency action [for a court] to review under the Act”. *Building Industry Ass’n of Washington v. McCarthy*, 152 Wn. App. 720, 734, 218 P.2d 196 (2009) (agency did not deny the requestor an opportunity to inspect or copy a public record because the public record he sought “did not exist.”); *see also Kleven v. City of Des Moines*, 111 Wn.App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act where the agency had “made available all that it could find”); *Smith v. Okanogan County*, 100 Wn. App. 7, 22, 994 P.2d 857 (2000) (when county had

nothing to disclose, its failure to do so was proper); *see also Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004) (public disclosure act requires agencies to produce only identifiable public records). Furthermore, the only time retention is required under the PRA is when a public record request “is made at a time when such record *exists* but is scheduled for destruction in the near future”. RCW 42.56.100 (emphasis added).

There is no dispute that the duplicate grievance that Mr. Entler requested no longer exists. Or that the grievance in question was destroyed before Mr. Entler’s public records request was filed. CP 13 at Exhibit 2. Yet, Mr. Entler alleges that the destruction of a grievance before a public records request is made is actionable under the PRA. But the retention of, and therefore destruction of, public records is governed by RCW 40.14---a section completely separate from the PRA. This means that an action for the destruction of a record lies in a criminal charge. *See* RCW 40.16.010. and .020; *see also* RCW 9A.48.090 (“A person is guilty of malicious mischief in the third degree if he or she knowingly or maliciously causes physical damage to the property of another.”). The result is that Mr. Entler’s claim fails.

**D. Even If A Records Retention Schedule Is Actionable Under The PRA, The Department Is Not Required To Retain Transitory Records**

Even if the records retention schedule is grounds for an action under the PRA (which the Department does not concede), the grievance at issue was a transitory document under the facts of this case, and not required to be retained.

An agency is not required to retain every record it ever created or used. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn.App. 720, 218 P.2d 196 (2009); see WAC 44-14-03005; see also [www.secstate.wa.gov/archives/gs.aspx](http://www.secstate.wa.gov/archives/gs.aspx). One kind of record that an agency need not retain is a transitory one. *Id.* Transitory records are those “that only document information of temporary, short-term value, and provided that the records are not needed as evidence of a business transaction and not covered by a more specific record series.” [www.secstate.wa.gov/archives/gs.aspx](http://www.secstate.wa.gov/archives/gs.aspx) at 162. Under this definition, the duplicate grievance response constitutes a transitory document.

The Department does not dispute that under its retention schedule an inmate grievance response is to be retained for six years. See CP 13 at Exhibit 3. However, the grievance that Mr. Entler requested meets the definition of a transitory record. First, it was not needed as “evidence of a business transaction”: the grievance file already contained a resolution

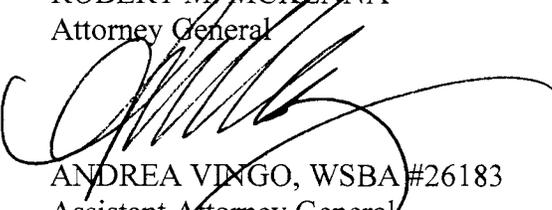
filed by CPM Annie Miller. CP 13 at Exhibit 2 ¶ 8-9. Also, since CPM William's resolution of Mr. Entler's grievance was already in the file, the resolution form filed by CUS Miller was duplicative and was of no value, either to the Department or in resolving Mr. Entler's grievance. *Id.* at Exhibit 2 ¶ 10. Thus, under these facts, and despite the retention schedule, the Department was not required to retain the grievance response that Mr. Entler requested.

#### V. CONCLUSION

For the reasons set forth above, the Department respectfully asks that this Court uphold the summary judgment previously granted and dismiss this appeal.

RESPECTFULLY SUBMITTED this 22nd day of December, 2010.

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**CERTIFICATE OF SERVICE**

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

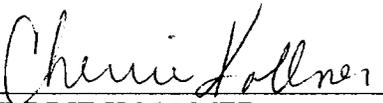
X U.S. Mail, Postage Prepaid  
United Parcel Service, Next Day Air  
ABC/Legal Messenger  
State Campus Delivery  
Hand Delivered by: \_\_\_\_\_  
Facsimile

TO:

JOHN ENTLER, DOC # 964471  
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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 22nd day of December, 2010, at Olympia, Washington.

  
\_\_\_\_\_  
CHERRIE KOLLMER