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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NICHOLAS CLAPHAM, Appellant, v. WASHINGTON STATE PATROL, an agency of the State of Washington; and JOHN DOES 1-10, Respondent.	No. 51263-7-II UNPUBLISHED OPINION

WORSWICK, J. — Nicholas Clapham, an attorney, believes he is the subject of surveillance and harassment at the hands of policing agencies working in concert. In an attempt to investigate his suspicions, Clapham submitted a Public Records Act (PRA)[1] request to the Washington State Patrol (Patrol). The Patrol responded by providing records to Clapham, none of which evinced surveillance or harassment. Clapham sued, and his lawsuit was dismissed on summary judgment.

Clapham appeals from the summary judgment dismissal of his PRA action, arguing that the superior court erred by finding that his request was not for identifiable public records and that the Patrol conducted an adequate search for responsive records. Clapham further argues that the superior court erred in finding that the Patrol provided him a sufficient level of assistance. Clapham seeks fees and costs on appeal. Because no records exist related to his request, we hold

[1] RCW 42.56.010.

that Clapham's request was not one for identifiable public records. We also hold that the Patrol conducted an adequate search under the circumstances here. We affirm the superior court's summary judgment dismissal of Clapham's PRA action, and we deny Clapham's request for fees and costs.

FACTS

I. BACKGROUND

Clapham states[2] that when he volunteered as a legal clinic attorney, a client reported to him that the Bellevue police were "after her." Br. of App. at 10. The client told Clapham that she had been exposed to some sort of irritant in her home that woke her from sleep every night. The client also reported that after being awoken, she would hear loud vehicles outside her residence and would see Bellevue Police Department vehicles drive off.

Clapham claims that the same type of incidents experienced by his client then began to happen to him. Clapham reports that he began to experience nonnatural events which would occur throughout the night while he slept in his home. Clapham states that he began to be woken up at night by some sort of harmful emissions or irritants that were placed in his living space and in his vehicles. Clapham reports that the exposure to the emissions or irritants caused him to experience "a sensation similar to extreme overload of the nervous systems [sic]" and "accompanied by expansion of his nasal cavities" and popping noises in his head. Clerk's Papers (CP) at 244. Clapham reports that the exposures evolved with time, and that his exposure symptoms worsened. Clapham details that his other symptoms included waking up with an

[2] Many of the facts Clapham relies on are located only in appellant's brief.

elevated heart rate and red face, inability to sleep, nausea, tinnitus, headaches, blurred vision, blindness, a lack of spatial recognition, memory loss, and other concussion-like symptoms. Clapham reports that the disturbances would occur as many as eight times per night and that the disturbances had a "profound" and "material" impact on his quality of life. Clerk's Papers (CP) at 245. Clapham also reports that he has experienced exposure to another type of irritant that causes him to fall asleep and causes him to feel as though he has been "knocked out." Br. of App. at 12.

Clapham reports that the disturbances always include a human element. Clapham states that sometimes during the night people would be outside his residence and that vehicles would accelerate and leave the area loudly and quickly. Clapham also reports that the vehicles usually contain a driver and a passenger operating a cell phone. Clapham reports that in conjunction with being awoken by irritation and vehicles, "collateral events" which included "everything from small pranks" to destruction of his property, began to occur. CP at 246. He reports that his tires have been punctured, security cameras have been destroyed with corrosive substances, shrubs have turned black overnight, Christmas light strings have been cut, his residence and vehicles have been broken into, and locks have been damaged.

Clapham also reports that he has moved several times in an effort to "get away" from the occurrences. CP at 246. He states that when he sleeps away from his residence, the irritation from any exposure ceases. However, Clapham reports that when he spent time in Florida, Missouri, California, and other cities in Washington, the irritation and human and vehicular activity would occur in those locations as well. Clapham reports that he was hospitalized in

Florida due to complications from emissions, but that his sleep while in the hospital was uninterrupted.

Clapham also reports that he has been harassed on roadways. He reports that other drivers follow closely behind him and cut in front of him on uncrowded highways. Clapham states that when he pulls his vehicle over, the vehicles following him would leave.

Clapham further reports an incident involving three helicopters with no lights flying over him while he was retrieving items out of a storage unit. Clapham claims that after spreading the contents of the storage unit along the top of his vehicle in view of the helicopters, the helicopters left.

II. REQUEST FOR RECORDS

On May 16, 2016, Clapham submitted a Public Records Act (PRA) request to the Washington State Patrol. The request read:

> Pursuant to the Public Records Act, please provide any copies of the following records, that were prepared, received, transmitted, collected and/or maintained by the Washington State Patrol ("WSP"). The term "records" includes all records or communications preserved in any form, including but not limited to correspondence, documents, data, emails (including attachments and history), text messages, web searches (including search histories), audio/visual (in all formats), faxes, files, guidance/guidelines, evaluations, instructions, analysis, notes, procedures, protocols, reports, rules, technical manuals, training manuals, memorandum, agreements, orders, and technical information and/or data, technical specifications, and/or studies. For each request, I seek records created or collected from January 1, 2005 to the present.
>
> 1. Any records that document any monitoring, surveillance, observation, questionings, interrogation, infiltration, and/or collection of information about the Requester;
>
> 2. Any orders, agreements and/or instructions to monitor, observe, question, interrogate, investigate, infiltrate and/or collect information about or conduct surveillance of the Requester. These are to include but not be limited to those records from association with other [f]ederal

and/or state entities including Fusion Centers in Washington and other states;

3. Any records relating or referring to how, why or when the Requester was selected to be a subject or monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration, and/or collection of information;

4. Any records relating or referring to the names of any other federal, state, or local government agencies participating in any monitoring, surveillance, observation, questioning, interrogation, investigation, infiltration, and/or collection of information about the Requester;

5. Any polic[i]es or procedures in place to protect the privacy of records that refer or relate to the Requester and/or any dissemination of information and/or allegations about Requester to any third persons, including those fellow employees of Requester;

6. Any records relating to communication between any employee, contractor and/or agent of the [the Patrol] and the Washington Joint Analytical Center (WAJAC), the Washington State Fusion Center (WSFC), the Missouri Fusion Center, any Regional Intelligence Office or Group (RIG), or any Regional Intelligence Analysts, United States Military groups, United States Coast Guard and/or other Federal Agencies regarding and/or mentioning the Requester;

7. Any records relating or referring to destruction, disabling, modification of any of Requester's property and/or property in possession of the Requester, including but not limited to descriptions of each such actions, the property that it affected and the outcome. Requester has suffered successive, continuous and consistent damage to electronics, automobiles, cameras, residents [sic] including break-ins and extensive damage to exterior locking systems wherein nothing was taken but the contents of the vehicles and the residents [sic] have been substantially disturbed and items therein damaged; Requester seeks information on involvement of the [the Patrol] or any person or entity the [the Patrol] uses and/or associates with, including but not limited to State Agencies, other Federal Governmental Agencies, contractors and/or other entities interacting with the Requester and/or his property[;]

8. Any records relating or referring to broadcasts, emissions and/or transmissions of any nature and of any frequency on the frequency spectrum, in and around the permanent and/or temporary locations, houses, hotel rooms and/or any other structures and vehicles where

Requester was occupying at the time of the broadcast, emission and/or transmission, including but not limited to those locations listed in attached Exhibit A. This is to include, but not be limited to, any such broadcasts, emissions and/or transmissions that interfere with, modify, interrupt and/or prevent nightly sleep, cause Requester to have various symptoms including but not limited to accelerated heart rate and caused hospitalization of the Requester[;]

9. Any records relating or referring to the creation, generation, emission, and/or release of electromagnetic and/or magnetic fields, stray currents and voltages, electrical harmonics (creation of "dirty electricity"), or any other electrical anomalies of any nature, used, implemented, set off, engaged, turned on, switched on and/or off in and around the permanent and/or temporary locations, houses, hotel rooms and/or any other structures and vehicles where Requester was occupying at the time of the creation, including but not limited to those locations listed in attached Exhibit A. This is to include, but not be limited to, any events of the nature that interfere with, modify, interrupt and/or prevent nightly sleep, cause Requester to have various symptoms including but not limited to accelerated heart rate, and caused hospitalization of the Requester. Because of the effect on the health of Requester, it is important to know the specific nature and magnitude of each such event;

10. Any records relating or referring to any other technology used by the [the Patrol] to disable, physically harm, cause reduction in health, temporarily or permanently reduced the mental or physical capacity of the Requester, including but not limited to any form of interaction, manipulation, stimulation, any portion of the brain or nervous system of Requester;

11. Any records relating or referring to dissemination of allegations, actions, information of any nature about Requester to any third party/parties, including but not limited to co-workers of Requester that are not employed by [the Patrol] and/or any other law enforcement agency;

12. Any records relating or referring to the use of volunteers, private contractor(s), third parties, or private individual(s) (including federal or military agents acting in their individual capacity) to engage in surveillance, investigation or collection of information about Requester.

> I am an individual seeking information for my personal use. Please note that RCW42.56 520 requires agencies to respond to requests for public records within five (5) days. Please contact me at [e-mail address] if you have any questions about the scope of this request.

CP at 29-32. The attached exhibit A contained five Washington addresses.

Gretchen Dolan, the Patrol's public records officer, searched four different databases after receiving Clapham's request. The databases included the Crime Investigation and Tracking Evidence database (CITE), Computer Aided Dispatch (CAD), Statewide Electronic Collision & Ticket Online Records (SECTOR), and Judicial Information System (JIS). To conduct the search, Dolan entered "Clapham" as the search term. None of the databases returned a response except JIS, however, the JIS search only produced a record of a traffic infraction Clapham received in 2015. Dolan responded by e-mail to Clapham's request two days after he submitted his request. Dolan's response e-mail stated:

> The [Patrol] has limited search capabilities by only a person's name. We are not able to conduct an agency wide search for every public record involving a specific individual. Please also note that "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) (emphasis added). We were able to conduct searches in the following locations: [The Patrol]'s public disclosure system, 'our case tracking system, the Computer Aided dispatch system, and our citation tracking system. Enclosed please find the responsive records we were able to locate. No information on the located records has been redacted or withheld from this response.
>
> Because we do not generally maintain records by name, but rather by the date, nature of, and location of a specific incident, your request was otherwise not for clearly identifiable public records, as required by RCW 42.56.080. A request pp. 913, 926 (2008), Bonamy v. City of Seattle, Neighborhood Alliance of Spokane County v. County of Spokane, No. 84108-0 (Wash. Sept. 29, 2011), and Hangartner v. City of Seattle).
>
> If you are aware of a specific incident, please feel free to resubmit your request with clarification, including the date, location, type of investigation, nature

> of [Patrol] involvement ([i.e.,] Crime Lab, State Fire Marshal, Homeland Security, Traffic Enforcement, etc.), nature of the party's involvement, names of other parties involved, or any other specific identifiers, etc.
>
> You may obtain a conviction criminal history report, which is maintained by name, on any individual (Chapter 10.97 RCW). To obtain a conviction criminal history record for Washington State, complete the online form at https://fortress.wa.gov/wsp/watch/. Non-conviction criminal history record information is for law enforcement use only, and restricted from dissemination under provisions of RCW 10.97.050 and 28 USC § 534 and 28 CFR Part 20. For specific public disclosure documents regarding each conviction, please contact the arresting agency.

CP at 148-49 (alterations in original). Along with her e-mail, Dolan included a copy of the traffic citation found in the JIS search.

On May 31, Clapham e-mailed Dolan and requested that she send him a hard copy letter of her earlier response and Dolan complied. Clapham did not provide any other information regarding his request to Dolan.

III. ACTION IN SUPERIOR COURT

In November 2016, Clapham filed a lawsuit against the Patrol in Thurston County Superior Court, alleging violations of the PRA. In his complaint, Clapham alleged:

> PUBLIC RECORDS. Plaintiff has a right to access of the public records sought from the defendant(s) and it is of profound importance that records concerning any broadcasts and/or emissions generated to date within the state and federal constitutionally protected boundaries of the plaintiff's home that alter, eradicate, delay and/or affect the plaintiff's sleep and/or health. As technology and miniaturization progresses, review and oversight of such weapons will only become more important as they cannot be detected by the human senses and leave no physical residue. Plaintiff seeks all records set forth it his request to [the Patrol] attached hereto.

CP at 251. In his lawsuit, Clapham further asked the superior court to compel the Patrol to disclose the "methods, manners, technology, equipment, and other resources used to generate

and receive any such emissions/irritants. This information is integral to the future health and welfare of the plaintiff and is of no law enforcement or investigative value." CP at 251.

IV. PATROL'S MOTION FOR SUMMARY JUDGMENT

In January 2017, the Patrol moved for summary judgment dismissal, asserting that it did not use the emissions technology or surveilling techniques that Clapham described. The Patrol further asserted that the records requested by Clapham did not exist, that it conducted an adequate search for responsive records, and that it provided the fullest assistance to Clapham.

The Patrol filed supporting declarations from Dolan and from Captain Edward Swainson. Dolan declared that she worked for the Patrol since 1990 and served as the Patrol's public records manager since 2001. Dolan stated that during the course of her employment, she had reviewed records from every Patrol bureau or division and was familiar with the types of investigations conducted by the Patrol's officers. Dolan also stated that she interpreted Clapham's request as "asking for records of Patrol officers intentionally destroying Mr. Clapham's property and using technology (such as "emissions") to disturb his sleep or cause health issues." CP at 26 (alteration in original). Dolan declared that the Patrol did not engage in such investigative techniques.

Dolan further explained that the Patrol maintained several databases. Dolan said the databases included:

> Crime Investigation and Tracking of Evidence (CITE), Computer Aided Dispatch (CAD), A Central Computerized Enforcement Service System (ACCESS), Outlook, WSP Requests for Electronic Collision Records (WRECR), and Washington Access to Criminal History (WATCH). Patrol personnel may also have access to other databases that are not maintained by the Patrol. These databases (maintained by other entities) include Judicial Information System (JIS), Washington State Fusion Center databases such as Fusion Core, and the Federal Bureau of Investigation's National Crime Information Center (NCIC).

CP at 24. Dolan also stated that the Patrol maintains SECTOR, a database that contains information regarding traffic-related citations and collisions.

In order to assist Clapham in his request, Dolan queried the CITE, CAD, SECTOR, and JIS databases. Dolan stated that she searched these databases because they can be searched by using a subject's name and were the "most likely databases" to have information regarding a criminal investigation or criminal charges. CP at 26. Dolan declared that the searches did not return any records and that she invited Clapham to clarify his request because she considered his request not one for "identifiable public records." CP at 26.

Dolan also stated that after Clapham initiated his lawsuit, Dolan requested the Investigative Assistance Division, the Criminal Investigation Division, and the Homeland Security Division to search CITE with Clapham's name, driver's license number and addresses. Dolan declared that these searches returned no responsive records.

Captain Edward Swainson also provided a declaration. Captain Swainson stated that he had worked at the Patrol for two decades and in 2015, he became division commander for the Patrol's Homeland Security Division. Caption Swainson also stated that he supervises the Washington State Fusion Center's executive director, manages crime prevention and response for the Washington State Ferry System, and oversees the Patrol's Emergency Management Response.

Captain Swainson also stated that he has supervised surveillance operations and taught detectives how to surveil criminal targets and evaluated their performance. Captain Swainson stated that when officers conduct surveillance they use cell phones, radios, cameras, binoculars, disguises, aircraft, telescopes, and GPS (global positioning system) trackers. Captain Swainson

also declared that the Patrol officers utilize various types of weapons, but that in his experience, the Patrol did not use technology that would cause a "subject to awake from a deep sleep with a sensation similar to an extreme overload of the nervous system" such as the emissions technology Clapham described. CP at 43. Captain Swainson also stated that it is rare for the Patrol to conduct investigations in other states and that the Patrol does not allow volunteers or private contractors to participate in investigations or surveillance operations.

Clapham filed a memorandum in opposition to the Patrol's motion for summary judgment.[3] Clapham argued that his request was "limited to residences" and was not "broad in scope or geography." CP at 189. Clapham argued that the Patrol relied on a "scant" number of documents and that both Dolan's and Captain Swainson's declarations were not "exhaustive or complete and [did] not provide a sufficient basis for summary judgment." CP at 195. Clapham asserted that there were no facts before the court showing that the Patrol "performed a search and/or inventory of all weapons, devices, and for methods used in human compliance." CP at 195. Clapham argued that Dolan's declaration stated other databases that could have been searched but were not, and that this was a "clear failure to abide by the PRA." CP at 195. Clapham also argued that Captain Swainson's testimony did not show that he was the person who would be aware of such devices if they were used by the Patrol.

To support his opposition, Clapham filed his own declaration. In his declaration, Clapham said, "Simply stated: the records sought relate to emissions that correlated human

[3] Clapham also filed a motion to compel discovery and a motion for continuance. Clapham appealed only the court's order granting the Patrol's motion for summary judgment. The court's order does not contain any language regarding the motion to compel or the motion to continue. The record on appeal contains no report of proceedings for the hearing.

involvement with each event." CP at 133. Clapham's declaration also detailed how a nightly occurrence would take place.[4]

Clapham also stated that after he filed his lawsuit in superior court, the episodes "became more numerous and of a more serious magnitude and have continued unabated during the life of this action." CP at 135. Clapham further stated that the Patrol did not perform an adequate search and failed to provide the assistance required. Clapham asserted that the scope of his request was "crystal clear" and that the Patrol should release the records. CP at 142.

[4] Clapham provided the following list to the superior court:

> 1) go to sleep; 2) reach a deep sleep; 3) be awakened between 1:00 am and 5:00 am one or more times and during the wake up and thereafter have the popping noises within the house; 4) hear people speaking and the neighborhood dogs barking (even though at this time of night all is very quiet in the rural neighborhood of Westport, Washington) and hear one to five vehicles leave the area and listen to them drive away; 5) see other vehicles drive by the front of my house with their motors as high revolutions per minute either during this exit or shortly thereafter; 6) attempt to go back to sleep; 7) have an onset of tinnitus (ringing in the ears), feel like I have suffered an impact head concussion, the whites of my eyes will be red and have nausea begin. At times after the dogs begin to bark, I will hear the discharge of one to six rounds from a small handgun. My neighbor, who has hearing damage, has reported to me that she has heard these people discharging guns in the middle of the night. Everything will then return to quiet. I will eventually return to sleep the whole cycle will start again within an hour. This will occur every night between one to eight times; when I resided in an apartment in Missouri, the apartment next door had no occupants and the popping noise would come from the contiguous common wall. The vehicle component in Missouri still existed with a vehicle leaving either as or immediately after I awoke. There are no through streets in my neighborhood in Westport, Washington. If I camp away from the residence, none of these events or the symptoms occur.

CP at 134.

After a hearing on the matter, the superior court granted the Patrol's motion for summary judgment dismissing Clapham's claims with prejudice. The court concluded that:

> 1. [Clapham's] May 16, 2016 public records request to the Patrol was not for identifiable public records.
>
> 2. The Patrol conducted an adequate search for responsive records considering the entire record.
>
> 3. The Patrol provided the fullest assistance to Mr. Clapham.
>
> 4. The Patrol's response to [Clapham's] May 16, 2016 public records request did not violate the Public Records Act (PRA), chapter 42.56 RCW.

CP at 238. Clapham petitioned the Supreme Court for direct review of the superior court's order. The Supreme Court then transferred the case to this court for review.

ANALYSIS

Clapham argues that the superior court erred by granting the Patrol's motion for summary judgment. We disagree.

I. LEGAL PRINCIPLES

We review a trial court's order granting summary judgment de novo. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz*, 175 Wn.2d. at 271. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case and (2) the plaintiff fails to come forward with evidence

creating a genuine issue of fact on an element essential to the plaintiff's case. *Clark Cty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 699, 324 P.3d 743 (2014). If a defendant satisfies the initial burden of establishing the absence of a material fact issue, the inquiry shifts to the plaintiff. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222-23, 254 P.3d 778 (2011). If the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, then summary judgment is proper. *Burton*, 171 Wn.2d at 223.

When the record consists only of affidavits, memoranda of law, and other documentary evidence, the court reviews summary judgment orders under the PRA de novo, undertaking the same inquiry as the trial court. *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009). Mere allegations, argumentative assertions, conclusive statements, or speculation do not raise issues of material fact sufficient to preclude a grant of summary judgment. *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011). Where reasonable minds could reach but one conclusion from the admissible facts, summary judgment should be granted. *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 11 n.2, 98 P.3d 491 (2004).

II. ADEQUACY OF EVIDENCE FOR SUMMARY JUDGMENT

Clapham argues that the superior court improperly found that the Patrol met its burden at summary judgment. Clapham asserts that the Patrol's supporting declarations from Dolan and Captain Swainson were inadequate evidence because the witnesses lacked personal knowledge and the declarations contained only bare assertions and hearsay. Clapham specifically claims that Dolan's declaration shows she had no personal knowledge about the issues he identified and

that her testimony lacked foundation and is hearsay. Clapham also asserts that Captain Swainson's declaration did not supply information about the records request but rather only supplied information about the practices of the Patrol and was therefore a general denial. Based on these assertions, Clapham argues that the evidence supplied by the Patrol is insufficient to support summary judgment. We disagree with all of Clapham's arguments.

To be considered on summary judgment, CR 56(e) requires a declaration to be made by a person competent to testify to the matters stated, be based on personal knowledge and describe facts admissible in evidence. CR 56(e).

Statements made by a "custodian" or "other qualified witness" in a declaration based on the declarant's review of business records satisfies CR 56(e). *Barkley v. GreenPoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015). Declarations satisfy CR 56(e) when the declarants state under penalty of perjury that they had personal knowledge of their company's practice of maintaining business records and had personal knowledge from their own review of records. *Barkley*, 190 Wn. App. at 67.

Here, both of the Patrol's supporting declarations satisfy the requirements of CR 56(e). First Dolan, as the Patrol's public records officer, declared under penalty of perjury that she had personal knowledge of the Patrol's public records and was responsible for all public records releases from the Patrol. She stated that she had sufficient familiarity with the type of investigations and practices conducted by the Patrol's officers to know that the Patrol did not conduct the type of surveillance and practices Clapham alleged. Second, Captain Swainson declared that he had personal knowledge of the Patrol's surveillance operations and of the type

of weaponry used by the Patrol. Captain Swainson also declared that the Patrol did not engage in the type of surveillance suggested by Clapham.

Further, Clapham merely provides bare assertions that Dolan and Captain Swainson lacked personal knowledge about the issues he identified in his requests. As noted above, mere allegations and assertions do not raise issues of material fact. *Spradlin Rock*, 164 Wn. App at 654.

Because the declarations submitted by the Patrol comply with CR 56(e), the declarations were properly considered on summary judgment. Accordingly, Clapham's argument fails.

III. NO VIOLATIONS OF THE PRA

Clapham argues that the superior court erred by concluding that his PRA request was not for identifiable public records. Clapham also argues that the court erred by concluding that the Patrol conducted an adequate search for the records and that the Patrol provided the fullest assistance to him. We disagree.

A. *Legal Principles*

The PRA is a strongly worded mandate for broad disclosure of public records. *Neighborhood All. of Spokane Cty. v. Spokane Cty*., 172 Wn.2d 702, 714, 261 P.3d 119 (2011). We review agency actions under the PRA de novo. *Neighborhood All.*, 172 Wn.2d at 715. The PRA is to be "liberally construed and its exemptions narrowly construed" to ensure that the public interest in free and open examination of public records is protected. *Smith v. Okanogan Cty*., 100 Wn. App. 7, 11, 994 P.2d 857 (2000).

B. *Identifiable Records*

Clapham argues that his public records request was a valid request. The Patrol argues that Clapham's request was essentially a request for information and therefore not a valid request for identifiable public records. We hold that although Clapham's request was for specific records, the records Clapham requested did not exist and, therefore, Clapham's request was not a valid request for identifiable records.

Under RCW 42.56.080, agencies must make "identifiable public records" available for public inspection. A public record subject to disclosure under the PRA includes (1) any writing, (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function, (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(3). "An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." *Beal*, 150 Wn. App. at 872.

We draw a distinction between a request for information about public records and a request for the records themselves. *Smith*, 100 Wn. App. at 12. A request for information is not a request for an identifiable public record. *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000). There is "no agency action to review under the Act" where the agency did not deny the requestor an opportunity to inspect or copy a public record because the public record he sought "did not exist." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004); *see also Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (holding that there was no violation of the PRA where the agency had "made available all that it could find"); *Smith*, 100 Wn. App. at 22 (holding that when county had nothing to disclose, its failure to do so was

proper); *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).

The PRA does not require agencies to explain public records, but only to make those records accessible to the public. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). And when a request is invalid, an agency is excused from complying with it. *Bonamy*, 92 Wn. App. at 412.

Here, Clapham submitted a request for any records related to the surveillance of him and the use of certain technology. Specifically, Clapham, sought records regarding surveillance techniques that employ certain broadcasts and emissions technology which cause physical harm. He also sought records regarding the destruction of his property by the Patrol, and records regarding communications by the Patrol to third parties about him and about alleged surveillances of him.

Although he requested specific records and documentation, the Patrol does not possess the records that Clapham sought. The Patrol does not conduct surveillances of the type described by Clapham and does not utilize emissions technology or that involve destroying property. Dolan declared that the Patrol did not use emission technology during surveillance or investigation of a person and that the Patrol did not intentionally destroy a person's property. Captain Swainson also stated that during surveillance the Patrol does not use the type of technology that Clapham asserted and does not allow third parties to participate in investigations. Therefore, the Patrol would not have any records related to Clapham's request.

Because the Department did not engage in the investigation techniques and did not use the technology cited by Clapham, the records he sought did not exist. It therefore follows that the Patrol would not have any responsive documents relating to any part of Clapham's request. As noted above, an agency has no duty under the PRA to create or produce a record that does not exist. *Sperr*, 123 Wn. App. at 137. Because the records Clapham requested do not exist, his request cannot be classified as a request for "identifiable public records." *Beal*, 150 Wn. App. at 865.

There is no genuine issue of material fact as to whether the records Clapham sought exist; they do not. Thus, his request was not for identifiable records under the PRA. Because the PRA requires an agency to respond to identifiable records, the Patrol had no obligation to conduct a search for records.

C. *Reasonable Search*

Clapham argues that the Patrol's search was inadequate.[5] Clapham also argues that the Patrol's search should have included a search of other databases, including databases that the Patrol shares with municipal, state, federal, and other policing organizations. Clapham asserts that the Patrol was required to search records "prepared, owned, used, or retained" by the patrol and that the PRA does not limit record searching to records generated solely by the Patrol. We disagree and hold that the Patrol's search was adequate under these circumstances.

A search for records pursuant to a RPA request must be "reasonably calculated to uncover all relevant documents." *Neighborhood All.*, 172 Wn.2d at 720. We conduct a fact-

[5] We address this claim despite the fact that the Patrol had no duty to conduct a search in response to Clapham's request.

specific inquiry to determine what is considered reasonable. *Neighborhood All.*, 172 Wn.2d at 720. The issue of whether a search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found. *Neighborhood All.*, 172 Wn.2d at 720.

An agency is not required to search every possible place a record may conceivably be stored, but only those places where a record is reasonably likely to be found. *Neighborhood All.*, 172 Wn.2d at 720. We review the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that he believes would have more accurately produced the records he requested. *Hobbs v. State*, 183 Wn. App. 925, 944, 335 P.3d 1004 (2014), *disapproved of on other grounds by Hikel v. City of Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

On a motion for summary judgment, an agency bears the burden of showing its search was adequate. *Neighborhood All.*, 172 Wn.2d at 721. To prove that its search was adequate, the agency may rely on reasonably detailed, nonconclusory affidavits from its employees submitted in good faith. *Neighborhood All.*, 172 Wn.2d at 721. The affidavits "should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Neighborhood All.*, 172 Wn.2d at 721.

Here, as discussed above, the Patrol had no obligation to conduct a search. Nonetheless, Dolan declared that she ran a search through the CITE, CAD, SECTOR, and JIS databases, the four databases she reasonably considered most likely to contain responsive documents. Based on Clapham's request, this search was reasonable.

Clapham cites to *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) to argue that the Patrol should have searched every database it has access to. However, *Nissen* is distinguishable.

In *Nissen*, the court considered whether an elected county prosecutor's text messages on work related matters sent and received from the prosecutor's private cell phone were public records. *Nissen*, 183 Wn.2d at 873. Nissen's public records request sought "any and all of [the elected county prosecutor's] cellular telephone records for [private telephone number] or any other cellular telephone he uses to conduct his business including text messages." *Nissen*, 183 Wn.2d at 869. The court held that records on private cell phones are subject to the PRA because agencies "act only through their employee-agents" and therefore "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record prepared, owned, used, or retained by" the agency. *Nissen*, 183 Wn.2d at 876, 879.

Although the Patrol may have had access to third-party databases, the Patrol was under no obligation to search those databases under the circumstances here. Clapham's record's request did not identify records that existed or that could be provided, unlike the text messages in *Nissen*. Both Dolan and Captain Swainson declared that the Patrol does not engage in the type of investigations or use the type of technology Clapham described in his request. Thus, the records sought by Clapham do not exist on any database.

Because the question under the PRA is whether an agency's search was reasonable and not whether the requester presented alternatives that he believes would have more accurately produced the records, Clapham's argument fails. *See Hobbs*, 183 Wn. App. at 944. Reviewing the Patrol's search as a whole, and considering the particular request here, the evidence shows

that the Patrol searched all places reasonably likely to contain responsive materials. Because the Patrol established that it searched the databases reasonably likely to contain responsive materials, Clapham has not demonstrated that a genuine issue of material fact exists as to whether the Patrol's search was reasonably calculated to uncover all responsive documents.

D. *Clarification*

Clapham also argues that the Patrol improperly sought clarification of his request. Clapham asserts that his request was clear and specific, and that through its request for clarification the Patrol sought to limit the scope of his records request, which he asserts was improper under the PRA. We disagree.

As discussed above, the PRA requires disclosure only when there has been a request for "identifiable public records." *Bonamy*, 92 Wn. App. at 410. Under RCW 42.56.520, if an agency receives a request that is unclear, an agency may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to respond to an agency's request for clarification, the agency need not respond to the request. RCW 42.56.520.

Clapham cites to *Gendler v. Batiste*, 174 Wn.2d 244, 248, 274 P.3d 346 (2012), to support his argument that the Patrol improperly sought to limit his request by requesting clarification. But *Gendler* is distinguishable.

In *Gendler*, the Patrol had a statutory duty to collect certain types of collision reports and had previously done so. Gendler requested records of collision reports relating to a certain intersection. *Gendler*, 174 Wn.2d at 248. The Patrol responded that it could not locate the requested records by location and then sought clarification from Gendler, requiring Gendler to specifically identify persons involved in the collisions and the precise collision dates. *Gendler*,

174 Wn.2d at 248. The court held that Gendler's request was clearly a request for identifiable records because the Patrol had routinely collected the types of collision reports Gendler requested and also had a statutory obligation to collect the records. *Gendler*, 174 Wn.2d at 253, 260-61.

Gendler does not support Clapham's arguments. Here, Clapham's request was not one for identifiable public records. Further, there is no evidence that the Patrol had a statutory duty to collect records about emissions technology or about the type of surveillance activity Clapham claims occurred. Therefore, *Gendler* is not applicable to show that the Patrol improperly sought to limit Clapham's request when it asked him for clarification of his request.

Because Clapham's request was for nonexistent records, his request was not for "identifiable records." Therefore, because Clapham's request was not for identifiable records, the Patrol was justified in seeking clarification under RCW 42.56.520.

E. *Fullest Assistance*

Clapham argues that the Patrol failed to provide the fullest assistance to him and violated the PRA by spending a brief amount of time on his request before responding to him. We disagree.

Under the PRA, agencies must adopt rules that "provide for the fullest assistance to inquirers and the most timely possible action on requests for information" but still "prevent excessive interference with other essential functions of the agency." RCW 42.56.100. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with

the agency's "other essential functions." WAC 44-14-04003(3). Also, an agency must respond within five business days of receiving a public records request. RCW 42.56.520.

Here, the Patrol did not fail to assist Clapham. Dolan responded to Clapham's request two days after receiving it. She searched the four databases that would reasonably contain the records Clapham requested. Nothing in the PRA requires that an agency spend a fixed or certain amount of time searching for responsive records. The PRA requires only that an agency provide the fullest assistance by timely responding to requests and by searching for records in a "reasonably calculated" manner. RCW 42.56.100; *Neighborhood All.*, 172 Wn.2d at 720.

As discussed above, the Patrol conducted a reasonably adequate search for responsive records. Because the PRA does not require an agency to spend a specified amount of time on a search, we hold that Clapham's argument that the Patrol did not provide the fullest assistance to him fails.

ATTORNEY FEES

Clapham seeks "[f]ees, costs, and penalties" on appeal. Br. of App. at 38. We deny his request.

A prevailing party in a PRA action is entitled to reasonable attorney fees and all costs associated with litigation. RAP 18.1; RCW 42.56.550(4). Here, Clapham is not the prevailing party. Accordingly, Clapham is not entitled to attorney fees and costs.

CONCLUSION

We affirm the superior court's summary judgment dismissal of Clapham's claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Maxa, C.J.

Lee, J.