IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN THOMAS ENTLER, Appellant, v. DEPARTMENT OF CORRECTIONS, by and through its agent DEBRA HOLLY, Grievance Coordinator at MCC/WSR, in her official capacity, Respondent.	)	No. 66042-0-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2011

Appelwick, J. — Entler appeals the summary judgment dismissal of his suit against the Department alleging that the Department violated the Public Records Act, chapter 42.56 RCW. The Department has no liability under the Public Records Act for failing to produce a document that did not exist when the record request was made. We affirm.

FACTS

John Entler is currently incarcerated by the Washington State Department of Corrections (Department). Entler submitted a Public Records Act (PRA) request under chapter 42.56 RCW, to the Department's Public Records Unit. Entler's request was dated March 19, 2010 and date stamped as received by the Department on March 23, 2010. Entler sought the Department's response to a grievance, written by Correctional Unit Supervisor Mark Miller. Entler had

previously requested the document from Correctional Specialist Deborah Holly, who had been unable to find the document and so recorded that fact in an offender kite[1] on March 10, 2010.

On April 14, 2010, the Department notified Entler that it did not have the document he requested. Entler filed suit. Discovery revealed that the requested document had been destroyed.

The initial grievance was filed by Entler on January 27, 2009. Holly explained in a declaration that the response to the grievance was overdue so a reminder was sent to Miller and his supervisor, Correctional Program Manager Annie Williams, on May 7, 2009. Miller then met with Entler, who signed the grievance indicating that he wished to withdraw it.

Unaware that Miller had already responded to the grievance, Williams then also met with Entler, who again indicated that he wished to withdraw his grievance. Williams promptly filed her response. Holly received Williams's response, closed the file, and forwarded the file for storage. About a week later, Holly received Miller's response. She put the response in her box of items to be shredded, which she keeps for approximately six months. The Department asserts (although it is not in the record) that the document was probably shredded sometime around November 2009.[2]

---

[1] An "offender kite" is an internal memorandum to an inmate.

[2] At summary judgment, Entler asserted that he requested a copy of the document, although not through the PRA process, on August 13, 2009. Entler alleged that at that time, Holly admitted that she had the grievance response but that she would only provide it to Entler in response to a public disclosure request. Entler does not allege here that this request should have triggered RCW 42.56.100, which prevents destruction of the document that is scheduled

The trial court denied Entler's motion for summary judgment and granted the Department's motion for summary judgment on the grounds that there could be no liability for the Department in failing to produce a document that no longer existed at the time of the request. Entler appealed.

DISCUSSION

The PRA generally requires state and local agencies to disclose all public records upon request, unless the record falls within a specific PRA exemption or other statutory exemption. RCW 42.56.070(1); Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). The PRA "shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030; Morgan v. City of Federal Way, 166 Wn.2d 747, 753, 213 P.3d 596 (2009). Accordingly, the agency withholding the public records bears the burden of proof to show the applicability of a statute that exempts or prohibits disclosure. Former RCW 42.56.550(1) (2005), amended by Laws of 2011, ch. 273, § 1 (effective July 22, 2011); Bellevue John Does 1-11, 164 Wn.2d at 209. When an agency fails to comply with the PRA, the individual requesting the public record is entitled to a statutory penalty. Former RCW 42.56.550(4); Sanders v. State, 169 Wn.2d 827, 860-61, 240 P.3d 120 (2010). Decisions under the PRA are reviewed de novo. Former RCW 42.56.550(3); Bellevue John Does 1-11, 164 Wn.2d at 208-09.

The preservation and destruction of public records is governed by another

---

for destruction when a public records request is made.

chapter of Washington's code, chapter 40.14 RCW (entitled "Preservation and Destruction of Public Records" (some capitalization omitted)). That chapter generally requires that public records be retained for six years. RCW 40.14.070(2)(a)(i).[3] Willful violations of this provision subject a person to criminal prosecution. RCW 40.16.010; .020. The only PRA provision that regulates destruction of records provides that "[i]f 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.

The trial court granted the Department's motion for summary judgment on the grounds that there could be no liability for the Department in failing to produce a document that no longer existed at the time of the request. A motion for summary judgment also presents a question of law reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). A trial court grants summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We construe the evidence in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We review a ruling on a motion for summary judgment based solely on the record before the trial court at the time of the motion for summary judgment. RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163,

[3] The legislature has amended RCW 40.14.070. Laws of 2011, ch. 60, § 18. That amendment will become effective January 1, 2012. Laws of 2011, ch. 60, § 53.

849 P.2d 1201 (1993). An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); McBride v. Walla Walla County, 95 Wn. App. 33, 36, 975 P.2d 1029, 990 P.2d 967 (1999).

Entler argues that the PRA encompasses the Department's duties to retain documents according to the retention schedules under chapter 40.14 RCW, and therefore improper destruction of documents results in a failure to comply with the PRA. The Department concedes that the document once existed and was not retained. The Department also concedes that generally inmate grievances are retained for six years under the normal retention schedule.

Sanctions for improper destruction of records are governed by chapter 40.14 RCW. The sanctions are criminal. See generally chapter 40.16 RCW. But see Kitsap County v. Smith, 143 Wn. App. 893, 916-17, 180 P.3d 834 (2008) (county sought to impose civil liability on two individuals for removing public records contrary to chapter 40.14 RCW). No civil remedy is available for premature destruction of a document under chapter 40.14 RCW. See, e.g., Daines v. Spokane County, 111 Wn. App. 342, 350, 44 P.3d 909 (2002) ("Mr. Daines has no right under chapter 40.14 RCW that a declaratory judgment would secure."). The PRA does not incorporate chapter 40.14 RCW and does not provide for a civil remedy for destruction of a document.

However, destroying a document after a request for it has been made may constitute wrongfully withholding the document.[4] Under the PRA, if the

requesting party prevails, that party may receive an award, at the discretion of the court, of a sanction for each day that the claimant was denied the opportunity to inspect the public record. Former RCW 42.56.550(4). Also, the requesting party receives reasonable attorney fees. Id.

Entler sought in his complaint only the remedy that the court order a show cause hearing requiring the Department to show cause as to why it was withholding the document. That remedy is not appropriate where the document is shown to have been destroyed prior to the request, as the document is not being withheld when it does not exist. Entler did not amend his complaint to seek any other remedy.

Entler argues a holding in favor of the Department would permit agencies to simply destroy documents which they do not want to disclose in the PRA process. The Building Industry Association of Washington raised this argument in another case. Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 741, 218 P.3d 196 (2009). The court described the argument as "compelling" but found no improper destruction of records at issue in that case, therefore it could not address the argument. Id.

Such an outcome would not be for this court to correct. The legislature

[4] We note that in Yacobellis v. City of Bellingham, 55 Wn. App. 706, 708, 716, 780 P.2d 272 (1989), this court permitted the superior court to give the individual requesting the documents in that case both attorney fees and costs and the statutory penalty for failing to provide documents that had been destroyed. Such a remedy is appropriate where the documents are destroyed after the PRA request has been made, as was likely the case in Yacobellis. See id. at 707-08. Yacobellis does not control where, as here, the Department destroyed or discarded the record prior to the PRA request.

has provided only a criminal remedy in such circumstances, which cannot be prosecuted by a member of the public. We may not create a private civil remedy where the legislature has not provided one.

Also, an agency has no duty to create or produce a record that does not exist. Sperr v. City of Spokane, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004); Smith v. Okanagan County, 100 Wn. App. 7, 22, 994 P.2d 857 (2000) (when county had nothing to disclose, its failure to do so was proper). Smith sought several things that did not exist, including a list of all people employed by the office of the prosecuting attorney with their titles, job descriptions, and rates of compensation, and records relating to the creation of an Okanagan County municipal corporation. Smith, 100 Wn. App. at 14, 20. The court held that an agency is not required to create a record which was otherwise nonexistent. Id. at 13-14. The court relied on Smith in Sperr, where Sperr sought criminal history records that did not exist, to hold that the agency had no duty to produce the records that did not exist. 123 Wn. App. at 134, 136-137.

Entler argues that Sperr and Smith are distinguishable, because in those cases the documents requested never existed. But, whether the document never existed or previously existed and was destroyed prior to the request, an agency cannot turn over a document when it does not exist. In this case, nothing existed at the time of the request that is being withheld in violation of the PRA.

Because we find that destruction of a document prior to a request for it is not actionable under the PRA, we need not address whether the document was

a "transitory record" as argued by the Department. We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

Becker, J.