IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEORGE NERVIK, a single man, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF LICENSING, Respondent.	No. 41834-7-II UNPUBLISHED OPINION

Johanson, A.C.J. — George Nervik appeals both the trial court's grant of partial summary judgment and its later order of summary judgment dismissing his Public Records Act[1] (PRA) claims against the Department of Licensing (Department). Nervik argues that the trial court erred by (1) finding the Department's response sufficient; (2) finding the Department's record search reasonable; (3) finding that the Department did not charge excessive copying fees; and (4) not compelling the Department to answer discovery requests. We affirm because (1) statutory time limitations preclude Nervik's claims based on his December 2005 and January 2006 record requests; (2) Nervik failed to specifically ask for metadata in his November 2008 records requests; and (3) Nervik failed to preserve for appeal claims regarding copying fees, discovery requests, or

[1] Ch. 42.56 RCW.

the reasonableness of the Department's search for records.

FACTS

On December 30, 2005, George Nervik made a public records request to the Department, requesting in part, that the Department provide "a full and complete copy of each and every e-mail transmitted by, received by, copied to, blind copied to or making mention of Elizabeth A. Luce" for the dates December 30, 2005, and all dates prior. Clerk's Papers (CP) at 316. The Department acknowledged Nervik's request. On January 13, 2006, Nervik made a second request renewing his earlier request and stating that he preferred electronic media for efficiency and for environmental reasons but that he would accept paper copies. The Department notified Nervik that because his two requests were identical in content, the latter request would supersede the initial request.

On January 27, the Department notified Nervik that it would provide paper copies because it needed to redact exempt information and that it would produce the records over several months in installments due to the large size of his request. The Department further notified Nervik that it would complete each of his requests in the order received.[2] On January 31, Nervik made another public records request for the same material he had requested on December 30, 2005 and January 13, 2006.

After giving Nervik updates in February and early March, the Department informed Nervik on March 22 that it was examining the e-mail records for exemptions. Between February and the end of April 2006, the Department produced the requested e-mail records in paper record

[2] Nervik had made 45 public records requests beginning in 2002.

installments, responding to Nervik's December 2005 and January 2006 requests. The Department produced the final records installment on April 27, 2006. Although the Department notified Nervik each time an installment was ready, Nervik did not inspect the records until June 2006.

On September 28, 2007, seventeen months after the Department produced the final installment, Nervik wrote the Department, referencing his December 30, 2005 request; Nervik stated, "I want the Liz Luce e[-]mails in MS Outlook PST[3] native format complete with all metadata." CP at 541. On November 19, 2008, Nervik made another public records request, specifically requesting that the Department treat it independently and separately from his December 5, 2005 and January 6, 2006 requests. Nervik requested:

> [P]lease make available for my immediate review on CD-ROM[4] a full and complete copy of each and every e[-]mail transmitted by, received by, copied to, blind copied to or making mention of Elizabeth A. Luce . . . for the dates December 30, 2005 and all dates prior.

CP at 660. The next day, on November 20, 2008, Nervik submitted another, nearly identical public records request, again requesting that the Department treat it independently and separately, this time seeking all Elizabeth A. Luce related e-mails for "December 31, 2005 and all dates later up to and including today's date." CP at 661. Both November record requests specified, "E[-]mails should be in Outlook .pst format only together with all attachments same as previously provided." CP at 660.

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[3] PST is the acronym for Personal Storage Table.

[4] CD-ROM is the acronym for Compact Disc Read-Only Memory.

After updating Nervik in November,[5] December,[6] and February,[7] the Department notified Nervik on April 29, 2009, that he could inspect the first installment, consisting of 2,074 paper record pages from e-mails with attachments, which the Department could not redact in electronic format. The letter also informed Nervik that the Department had assembled and was reviewing another 31,000 responsive records, which it would release in future installments.

On May 13, the Department notified Nervik that he could inspect a second installment, consisting of printed e-mails that included attachments and a compact disc with PDF[8] files, comprised of e-mails that did not include attachments. On May 29, Nervik retrieved the compact disc, which also contained an accompanying redaction log. Nervik returned on June 1 to inspect the 2,074 printed e-mail records and accompanying redactions log.

On October 2, the Department notified Nervik that on October 8 he could inspect the third and final installment, consisting of six compact discs of PDF files with accompanying redaction log. On October 6, Nervik filed a public records lawsuit against the Department, making claims

[5] On November 25, the Department informed Nervik it lacked the technology to redact electronic copies of e-mails and e-mail attachments. The Department also informed Nervik that it would provide the records once they became available and that it was consolidating his "closely related requests" for efficiency.

[6] On December 19, the Department informed Nervik that it was testing redaction software and that it estimated the first installment would be available by the end of January 2009.

[7] On February 3, 2009, the Department informed Nervik that it was still extracting the requested records because the redaction software did not alleviate the Department's need to evaluate each e-mail and any attachments for required redactions. The Department stated it would contact Nervik as soon as the first installment was available.

[8] PDF is the acronym for Portable Document Format.

for failure to adequately respond to six of his requests. On October 15, the Department mailed the final installment of six compact discs to Nervik with a letter notifying Nervik that this final installment completed his November 2008 records request.

In 2010, the trial court granted the Department partial summary judgment, dismissing Nervik's claims relating to his 2005 and 2006 records request as time-barred. In 2011, the trial court granted the Department summary judgment dismissing Nervik's claims regarding his 2008 records requests, finding that the Department was entitled to produce those records in installments and was in the process of doing so when Nervik filed his complaint. The trial court further noted that Nervik never requested metadata in his 2008 request, and that the Department may provide records in the format it chose here. Nervik appeals.

ANALYSIS

I. Standard of Review

We review agency actions under the PRA de novo. RCW 42.56.550(3).[9] We consider the PRA policy that free and open examination of public records is in the public interest. RCW 42.56.550(3); *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). We stand in the same position as the trial court where the record, as here, consists only of affidavits, memoranda, and other documentary evidence. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (PAWS II).

[9] We cite the 2011 version of this statute. Although the dates at issue in this case are prior to 2011, the 2011 version made only one minor amendment to the previous 2005 version. The amendment was to subsection (4) and removed the minimum award amount that can be given to a prevailing party in a PRA action. RCW 42.56.550 (Laws of 2011, ch. 273, § 1).

We also review summary judgment orders de novo. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981, *cert. dismissed*, 129 S. Ct. 24 (2008). Summary judgment is appropriate only "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). We consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

II. Time–Barred Claims

Persons who believe the agency denied them the opportunity to inspect or copy a specific public record or class of records may move the court to have the responsible agency show cause why it refused production. RCW 42.56.550(1). But PRA actions must be filed within one year of the agency's (1) claim of exemption or (2) the last production of a record on a partial or installment basis. RCW 42.56.550(6).

Here, Nervik made public records requests in December 2005 and January 2006. The Department timely responded to the requests, producing the records in installments. The final installment occurred on April 27, 2006, and the Department notified Nervik that the final installment completed his public records request. Nervik then had one year to bring a lawsuit to satisfy RCW 42.56.550's statute of limitations. But Nervik filed his lawsuit on October 6, 2009, well beyond the time allowed. We hold that the trial court properly granted summary judgment and dismissed Nervik's December 2005 and January 2006 public records request claims as time-

barred.

III. Records without Metadata

Nervik next argues that the trial court erred by finding the Department's production of the public records sufficient, despite lacking metadata. Because Nervik's December 2005 and January 2006 requests are time-barred, we examine Nervik's November 2008 request. Nervik's November 2008 requests did not specifically ask for metadata, thus the Department was not required to provide metadata with its response.

"'The PRA is a strongly worded mandate for broad disclosure of public records.'" *Neighborhood Alliance*, 172 Wn.2d at 714. Agencies must disclose public records requested, unless records fall within a specific, enumerated exemption. *Neighborhood Alliance*, 172 Wn.2d at 715. Metadata associated with a public record is subject to disclosure under the PRA. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 148, 240 P.3d 1149 (2010). But a government agency is not required to provide metadata associated with a requested public record unless the metadata is specifically requested. *O'Neill*, 170 Wn.2d at 151. A request for e-mail does not inherently and clearly include a request for metadata. *O'Neill*, 170 Wn.2d at 151.

As an initial matter, Nervik specifically requested metadata once—on September 28, 2007, in reference to his December 2005 records request. As we discussed above, claims regarding Nervik's December 2005 records request are time-barred. Additionally, Nervik's subsequent November 2008 requests specified that the Department treat those requests independently and separately from other requests. Thus, his specific request for metadata in September 2007 does not apply to his November 2008 records requests.

Nervik argues that the Department's record production was incomplete because he

requested e-mails in electronic format, which by his definition contains metadata. But this argument overlooks that government agencies have discretion regarding record formatting and are not required to provide records in electronic format. *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 606-07, 277 P.3d 670 (2011). Nervik's argument also overlooks his own experience demonstrating that electronic format does not necessarily convey metadata (for example, the Department provided Nervik with over 31,000 electronic records, which did not convey metadata). Our Supreme Court held that metadata must be specifically requested and that a request for e-mail is not sufficiently specific to automatically include metadata. *O'Neill*, 170 Wn.2d at 151-52. Because an agency may deny a request for electronic formatting but it may not deny a specific request for metadata, we decline to view a request for electronic formatting as inherently requesting metadata. *Mitchell*, 164 Wn. App. at 606-07. Instead, we conclude that a request for electronic format, like a request for e-mail, is not equivalent to a specific request for metadata.

Here, the Department never refused to produce records; it produced all the requested records in installments. Both Nervik's November 2008 requests asked for a "full and complete copy of each and every e[-]mail" and requested, "E[-]mails should be in Outlook .pst format only together with all attachments same as previously provided." CP at 660, 661. This is a mere format request, not a specific metadata request. The Department has discretion over the format of its responses, so the Department did not violate the PRA by producing records that did not convey metadata information. Therefore, we conclude that the trial court properly granted summary judgment dismissal of Nervik's claim that the Department failed to disclose public

records by not providing metadata.

IV. Failure To Preserve Issues For Appeal

Nervik further argues that the trial court erred by (1) finding the Department's search reasonable as a matter of law; (2) finding that the Department did not charge excessive copying fees; [10] and (3) not compelling the Department to answer discovery requests.[11] But these issues were not raised before the trial court and the trial court had no opportunity to address them. Nervik responded to the Department's summary judgment motions by arguing exclusively that the Department failed to produce the records in a format that included metadata. After the trial court granted summary judgment, Nervik moved for reconsideration, again arguing exclusively regarding metadata. We refuse to review Nervik's appellate arguments regarding (1) the reasonableness of the Department's record search, (2) copying fees, and (3) compelling discovery requests because Nervik failed to raise these claims before the trial court. RAP 2.5(a); RAP 9.12; *City of Puyallup v. Hogan*, 168 Wn. App. 406, 416-17, 277 P.3d 49 (2012).

ATTORNEY FEES

Nervik requests attorney fees. The PRA allows attorney fees to prevailing parties when an agency violates the PRA. *O'Neill*, 170 Wn.2d at 152; RCW 42.56.550(4). Here, the Department did not violate the PRA and therefore we deny Nervik's attorney fee request.

[10] The trial court neither considered copying fees nor made a finding regarding them.

[11] Nervik did not seek to compel discovery.

We affirm.

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.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.