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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES R. DONOVAL,
Plaintiff/Appellant/Cross-Respondent

v.

THE CITY OF SUN VALLEY, IDAHO,
Defendant/Respondent/Cross-Appellant

Supreme Court Case No. 40853
Blaine County Case No. CV 10-600

**RESPONDENT'S/CROSS-
APPELLANT'S BRIEF**

**APPEALED FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BLAINE**

The Honorable Jonathan P. Brody, presiding

James R. Donoval
4110 Eaton Ave., Suite D.
Caldwell ID 83607

Attorney for Appellant

Kirtlan G. Naylor
Jacob H. Naylor
Tyler D. Williams
Naylor and Hales, PC
950 West Bannock St., Ste. 610
Boise, ID 83702

Attorneys for Respondent

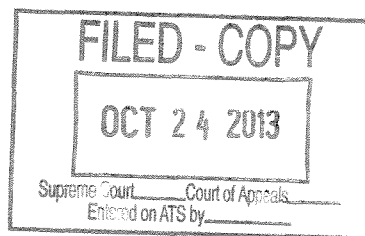


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I. STATEMENT OF THE CASE

A. Nature of the Case

This case was brought under Idaho's Public Records Law, Idaho Code § 9-337 *et seq.* Plaintiff/Appellant/Cross-Respondent James R. Donoval ("Donoval") instituted proceedings pursuant thereto in district court on the basis that he believes Defendant/Respondent/Cross-Appellant City of Sun Valley ("Sun Valley"), through various officials, failed to provide original documents and criminally destroyed and forged documents prior to his public records requests. Sun Valley, however, provided all responsive documents to Donoval's requests. In his pleadings and arguments before the District Court, Donoval did not expressly assert that Sun Valley withheld existing public records. Neither did he seek to compel Sun Valley to produce such documents. Rather, Donoval contended that Sun Valley should be forced to explain, through affidavit or in an evidentiary hearing, what happened to the public records that he believed were criminally destroyed and forged, and that the District Court impose an \$87,000 fine against Sun Valley for forgery and destruction of public documents.

The District Court concluded that Idaho's Public Record Law does not authorize the relief sought by Donoval because its sole remedy is a court order to compelling production of improperly withheld public records. If documents do not exist, they cannot be withheld and therefore cannot be disclosed.

The District Court therefore construed Donoval's Complaint as a request to compel Sun Valley to disclose documents, and accordingly conducted an inquiry into whether Sun Valley complied with Donoval's public records requests. To resolve that matter, the District Court properly reviewed the pleadings, the record, heard oral argument on the matter, and ultimately found that Sun Valley complied with Donoval's requests because it provided him copies of all

responsive documents in existence. More so, prior to the District Court's hearing on the matter, Donoval was permitted to further inspect original documents that were in the possession of the Blaine County Prosecutor. In fact, Donoval conceded below during the hearing on this matter that he had seen everything that exists, yet on appeal he has attempted to obfuscate that fact by objecting to Sun Valley's motion to augment the record to include the hearing transcript containing such concession.

Because Donoval inspected all existing records, the District Court did not issue an order to compel nor did it impose any civil penalties. In all, the District Court rejected Donoval's Amended Complaint in its entirety because the record showed Sun Valley complied with the public records requests and the relief sought by Donoval was either not authorized under the law or was moot.

By his appeal, Donoval maintains that the District Court should have forced Sun Valley to explain and defend itself against his criminal allegations, through affidavits or an evidentiary hearing, and should have imposed penalties against Sun Valley officials. Donoval sets forth three issues on appeal: (1) whether the District Court erred by not recognizing its inherent authority to mandate Sun Valley to respond to Donoval's criminal allegations of destruction and forgery of public records; (2) whether the District court erred by failing to require Sun Valley to respond, under oath, to Donoval's criminal allegations that documents were destroyed and forged; and (3) whether the District Court erred by failing to enter a \$1,000 penalty per document against Sun Valley officials, pursuant to Donoval's criminal allegations.

Sun Valley cross-appeals on the sole issue of whether the District Court applied the correct legal standard when it denied Sun Valley's motion for costs and fees pursuant to Idaho Code § 9-344(2). Despite the District Court correctly acknowledging that what Donoval sought

was not authorized or was moot, and finding that Sun Valley had complied with Donoval's public records requests, the District Court incorrectly denied Sun Valley's motion for costs and fees. Simply put, the statute allows an award of costs and fees for frivolously pursuing an action, but the District Court applied the incorrect standard of whether the "underlying basis" was frivolous.

Sun Valley therefore requests the Court affirm the dismissal of Donoval's Amended Complaint, and remand for further proceedings on Sun Valley's motion for costs and fees.

B. Factual and Procedural History

1. General Background¹

This lawsuit arises generally out of events in Sun Valley related to Sharon R. Hammer's (Donoval's wife) tenure as Sun Valley City Administrator, and various allegations of wrongdoing by her in connection with the management of city affairs. In addition to this case, those events resulted in ten other lawsuits (and counting) involving Donoval as either a party or as counsel for his wife.²

Incident to those events, on or about February 9, 2012, Sun Valley delivered to the Attorney General's Office three boxes of original financial documents for investigation into potential criminal misconduct. Those three boxes contained all existing documents pertaining to:

(a) Sun Valley credit card statements from October 2010 through November 2011; (b) Sun

¹ A succinct timeline is provided in the attached Appendix for the Court's convenience.

² See, *Hammer v. Ribi et al*, Blaine Co. Case No. CV-2011-928, *Hammer v. City of Valley et al.*, Blaine Co. Case No. CV-2012-479; *Donoval v. City of Sun Valley*, Blaine Co. Case No. CV-2011-985, *Hammer v. Idaho Counties Risk Management Program et al.*, Blaine Co. Case No. CV-2011-991, *Ribi v. Donoval v. Roark*, Blaine Co. Case No. CV-2011-1040, *Hammer v. Ek*, Blaine Co. Case No. CV-2012-516, *Hammer v. Frostenson et al.*, Blaine Co. Case No. CV-2013-308, *Hammer et al. v. Sun Valley et al.*, United States District Court for the District of Idaho Case No. CV13-211-S-EJL; *Hammer v. King*, Blaine Co. Case No. CV-2013-0000609, *Hammer v. Sun Valley*, Blaine Co. Case No. CV-2013-0000637.

Valley Fire Department payroll and time card records for 2009, 2010 and 2011, and Sun Valley payroll records for 2010 and 2011. (R. Vol. 3, p. 650.) The documents were then transferred to the Blaine County Prosecutor for purposes of a criminal investigation. (R. Vol. 2, pp. 284-286; R. Vol. 2, p. 386; R. Vol. 2, pp. 466-468.)

2. Donoval's Public Records Requests to Sun Valley and its Response

On March 26, 2012, after the transmittal of the three boxes to the Attorney General's Office and the Blaine County Prosecutor's Office, Donoval submitted six public records requests to Sun Valley, utilizing Sun Valley's established form for such requests. (R. Vol. 1, pp. 43-86 (Request Nos. 1-3 plus attachments); R. Vol. 1, pp. 212-249 (Request Nos. 4-6 plus attachments.)) By these requests, Donoval sought copies of various Sun Valley financial records, i.e., the same records which had been transferred to the Attorney General's Office and then to the Blaine County Prosecutor's Office the prior month. (R. Vol. 2, pp. 284-286; R. Vol. 2, p. 386.)

Specifically, Request Nos. 1 – 3 sought copies of credit card statements, purchase order forms and receipts of credit card transactions for: Sharon R. Hammer (former City Administrator) (R. Vol. 1, pp. 43-56), Michelle Frostenson (former City Treasurer) (*id.* at 57-72), and Jeff Carnes (former Sun Valley Fire Chief) (*id.* at 73-86). Request Nos. 4 – 6 sought, respectively, copies of records for various employees related to PERSI contributions (R. Vol. 1, pp. 212-221), payroll information (*id.* at 222-237), and evidence of (including authorization for) various other city transactions (*id.* at 238-249).³

³ Request Nos. 4 – 6 were not contested below and are not at issue in this appeal.

After Donoval submitted these six public records requests, he and Sun Valley agreed to postpone the production deadline until July 2012⁴, pending settlement negotiations in a different lawsuit. (R. Vol. 1, p. 5, ¶ 14; Appellant’s Br. at 14; R. Vol. 2, pp. 460-461.)

On July 25 Donoval emailed Adam King (“King”) Sun Valley City Attorney, and informed King that he would be at Sun Valley City Hall in two days, on July 27, to inspect the requested documents. (R. Vol. 1, p. 88.) Donoval stated “[p]lease have the original copies available for my review, or copies with redactions available for my review.” (*Id.*) (emphasis added).

Sun Valley compiled over 1,500 pages of applicable documents and made them available to Donoval by July 27, as requested. (R. Vol. 1, p. 254.) On that date, Donoval arrived at City Hall and reviewed the documents. (R. Vol. 1, pp. 90, 92.) He tabbed specific pages for selective re-copying because he considered some copies illegible or after review of all the documents he only wanted certain pages. (*See id.*; R. Vol. 1, p. 250.) Donoval also asked that the documents be reviewed by Sun Valley again because he believed some records were missing. (*Id.*) In two follow up emails to King, Donoval explained that he believed the records were missing credit card purchase request forms (the so-called “yellow sheets”). (*Id.*) In those emails Donoval also demanded that Sun Valley “provide some type of verification as to whether these yellow sheets for each credit card bill is in Sun Valley’s possession, and what happened to them if they are not.” (*Id.*)

On August 2, 2012, Sun Valley provided the copies of the pages Donoval previously tabbed. (R. Vol. 1, p. 96.) Sun Valley also informed Donoval that the files did not contain yellow sheets for Michelle Frostenson for five specific dates. (R. Vol. 1, p. 98.) Two days later,

⁴ Donoval’s briefing states the parties agreed to a June deadline. This is incorrect. (*See* R. Vol. 2, p. 461) (Donoval correcting a typo of “June” to say “July”).

on August 4, Donoval emailed King and alleged that there were various records he had tabbed on July 27 that were missing from what he was provided on August 2, and there were other records provided which he did not request. (R. Vol. 1, p. 100.)⁵ He also stated there were additional documents in excess of the five identified by Sun Valley that he believed were missing. (*Id.*) The email contained an attachment with a list of documents and whether they had been produced or not. (R. Vol. 1, pp. 101-102.) Donoval demanded confirmation of whether unproduced yellow sheets existed or not, and told King he had until August 8 to “figure this out” or Donoval would file suit. (*Id.* at 100.)

Sun Valley again reviewed the documents and discovered that Donoval himself had tabbed wrong pages for additional copies. (R. Vol. 1, pp. 250-251.) Nevertheless, based upon Donoval’s August 4 email, Sun Valley located the documents he wanted. (*Id.*) King emailed Donoval on August 7, 2012, explained the problems associated with locating the requested documents and told Donoval the documents would be mailed to him (*Id.*) Significantly, King explained that the yellow sheets provided “are the only yellow sheets that exist as City records that can be located at this time.” (*Id.*) (emphasis added). He also informed Donoval that the original documents were not currently in Sun Valley’s possession because of an outside criminal investigation. (*Id.*)

Donoval responded to the August 7 email the same night, telling King the original records are required to be available at all times, and demanded that King respond with a full explanation by the next morning. (*Id.*) Oddly, Donoval alleged in both his Complaint and Amended Complaint that he did not receive a response to his August 4 email, despite the fact

⁵ The August 4, 2012 email is also located at R. Vol. 1, p. 251. However, it appears that a page has been omitted from the record such that the full text of the email is not there. In any event, the full email is located in Volume 1 at page 100.

that his own response shows that he plainly did. (R. Vol. 1, pp. 8-9, ¶¶ 25, 26, 31; (R. Vol. 2, pp. 304-305, ¶¶ 47, 48.)) Now, in his Appellate Brief, he no longer affirmatively states he did not receive a response, but still conveniently ignores this significant correspondence, as if it did not happen. (*See* Appellate Br. at 17.)

Donoval followed up his August 7 email with a letter emailed to King on August 8. (R. Vol. 1, pp. 104-107.) The August 8 letter contained various factual misrepresentations, threats of litigation, conclusory and baseless allegations and unfounded inferences of criminal misconduct, including allegations that documents had been destroyed and forged. (*Id.*) Donoval also stated that he had received no response to his August 4 email – even though he plainly did. (*Id.*) Additionally, Donoval demanded for the first time to see the original documents and demanded compliance within two days (*id.*), even though King had already informed him the originals were in the possession of the Blaine County Prosecutor pursuant to a criminal investigation and that Sun Valley had already provided Donoval all records that it had located. (R. Vol. 1, pp. 250-251.) Donoval never submitted any public records requests utilizing Sun Valley’s established form, like he properly did for his six March 26 requests.

The next day, August 9, Donoval emailed another letter to King reiterating his demand and deadline to examine original documents on August 10, along with a list of documents he had or was still seeking. (R. Vol. 1, pp. 110-113.) King responded by email the same day, stating:

The original documents that you have referenced that you are seeking are in the possession of the Attorney General’s Office pursuant to a subpoena served on the City of Sun Valley in the criminal investigation. Therefore, there will be no additional documents to inspect, so you will not need to come to City Hall tomorrow. The City of Sun Valley is continuing to investigate the matter and if any originals that you seek are located, I will let you know.

(R. Vol. 1, p. 115.)

As indicated above, King was actually mistaken. There was not a subpoena for these particular documents. Instead, Sun Valley had voluntarily turned them over to the Blaine County Prosecutor as part of a criminal investigation several months before, in February. (R. Vol. 3, p. 650; R. Vol. 2, pp. 284-286; R. Vol. 2, p. 386.) King corrected his mistake in an email to Donoval on September 4, 2012. (R. Vol. 1, p. 254.)

On August 10, Donoval emailed King, again raising criminal allegations of destruction and forgery of documents and demanded verification that the copies provided to him were true and accurate copies of the originals. (R. Vol. 1, p. 117.) Also on August 10, Donoval sent a letter to Lawrence Wasden, Idaho Attorney General; Scott Birch, Investigator for the Idaho Attorney General's Office; and Jim Thomas, Blaine County Prosecuting Attorney. In that letter, Donoval asked for confirmation as to the whereabouts of the original documents, alleging yellow sheets were destroyed and forged, requesting he be allowed to inspect the originals, and threatened a lawsuit. (R. Vol. 1, pp.119-120.)

Later in the day on August 10, Donoval received a package of additional documents in the mail from Sun Valley, as was promised him by King in King's August 4 email. (R. Vol. 1, p. 250). Sun Valley also engaged in further review of the financial records to confirm whether any pages might have been missed. (R. Vol 1, p. 254.) More documents that were inadvertently overlooked were located and provided to Donoval in an email from King on September 4. (*Id.*) King also explained again in that email that the original documents were in the possession of the Blaine County Prosecuting Attorney as part of an on-going criminal investigation, and corrected his prior mistake that it was pursuant to a subpoena. (*Id.*) The same day, Donoval responded tersely in an email: "You can explain this to the Judge." (*Id.*)

3. Donoval's Complaint and Subsequent Events

On August 20, 2012, Donoval filed a complaint, along with numerous exhibits, in the Fifth Judicial District, Blaine County, against Sun Valley and the Attorney General. (R. Vol. 1, pp. 1-198.) Donoval therein complained of alleged malfeasance, incompetence and criminal misconduct against Sun Valley officials, including criminal destruction and forgery of public documents. (*Id.*) Donoval even went so far as to attach a newspaper article about a break-in and burglary of records that occurred at the fire station (R. Vol. 1, pp. 131-132) and improperly and baselessly suggested that Sun Valley Mayor DeWayne Briscoe, who is not a party to this lawsuit, "allowed" that to happen. (R. Vol. 1, p. 12, ¶¶ 35, 36.)

Donoval's Complaint sought the following remedies, ostensibly pursuant to Idaho's Public Records Act, Idaho Code § 9-337 *et seq.*:

1. Sun Valley be compelled to produce the subpoena referenced by King, and if the subpoena does not exist, to mandate that Sun Valley explain itself, i.e., why it released the original documents, who authorized the release, and why Donoval "has not been allowed to physical inspect the original documents";
2. The Attorney General's Office be compelled to verify whether it did not possess the original documents;
3. The Attorney General's Office be compelled to allow Donoval to inspect the original documents; and
4. If the original documents are not produced that the district court refer the case to the Blaine County Prosecutor for a felony criminal investigation of Sun Valley, Mayor Briscoe, Treasurer Frostenson and any other official or employee responsible for the "destruction, alteration, falsification and/or theft of public records. . . ."

(R. Vol. 1, pp. 17-18.)

In a letter dated September 7, 2012, the Attorney General's Office explained to Donoval that it did not have any original documents. (R. Vol. 2, p. 259.)

Sun Valley filed its Answer on September 10, 2012, along with exhibits that were not included as exhibits to Donoval's Complaint.⁶ (R. Vol. 1, pp. 203-254.) This included a copy of King's August 7 email to Donoval (which explained Sun Valley had provided the records it could locate). (R. Vol. 1, p. 250.) This was the email that was conspicuously missing as an exhibit to Donoval's Complaint and was misrepresented therein as not existing. (R. Vol. 1, p. 8, ¶¶ 25-26.)

On September 25, 2012, Donoval emailed King that he reviewed the supplemental documents sent to him on September 4 and found that they were either already provided or related to a matter that was not part of his requests. (R. Vol. 2, p. 274.) In a letter dated the same day, Donoval wrote the Blaine County Prosecutor and alleged that Sun Valley had criminally destroyed and forged public records, alleged that he had been lied to by King about the location of original documents and the existence of a subpoena, posed several questions to the prosecutor related thereto, and threatened litigation. (R. Vol. 2, pp. 289-293.)

On October 4, 2012, the Attorney General's Office emailed an unsigned affidavit from Scott Birch, the AG investigator, stating that the Attorney General's Office had come into possession of various Sun Valley documents, had logged and photocopied them, but did not retain any originals. Birch also stated that he physically transported documents from Sun Valley to the Blaine County Prosecutor, but he did not log those documents or make copies thereof.⁷ (R. Vol. 2, pp. 284-286.)

Accordingly, on October 10, 2012, Donoval moved to voluntarily dismiss the Attorney General and to amend his complaint to add as defendant Jim Thomas, Blaine County Prosecutor.

⁶ The Attorney General's Office filed its Answer on September 11, along with an exhibit of its September 7 letter to Donoval, which explained it did not have original documents. (R. Vol. 2, pp. 255-259.)

⁷ Scott Birch later executed the affidavit on October 9, 2012. (R. Vol. 2, pp. 466-468.)

(R. Vol. 2, pp. 263-268.) The motion was granted (R. Vol. 2, p. 269) and Donoval filed an Amended Complaint on October 22, 2012, along with several additional exhibits. (R. Vol. 2, pp. 294-321, 270-293.)

The Amended Complaint sought similar relief as the Complaint:

1. Production of a subpoena purportedly issued by the Blaine County Prosecutor's Office;
2. If this subpoena does not exist, an explanation of why public records were released to the prosecutor's office, who authorized such release, and why Plaintiff has not been allowed to inspect the original documents;
3. Mandate that Donoval be allowed to inspect the original documents;
4. If Sun Valley does not produce the documents, and the prosecutor's office does not have possession of the documents, then the Court refer the matter for criminal investigation.

(R. Vol. 2, pp. 320-321.)

In a letter dated October 12, 2012, the Blaine County Prosecutor explained that it would not be releasing any documents during the pendency of its criminal investigation. (R. Vol. 2, p. 386.) The next month, however, in a letter dated November 28, 2012, the Blaine County Prosecutor informed Donoval that the office completed its investigation and therefore Donoval could examine the original documents. (R. Vol. 2, p. 426.) Donoval responded by letter dated November 30 with a list of documents he wished to review. (R. Vol. 2, pp. 428-429.)

On December 31, 2012, Donoval went to the Blaine County Prosecutor's Office on and inspected all original documents that existed. (Tr. pp. 14-15, 19:3-10, 22:6-13, 24:8-12, 25:18 – 26:9.) He consequently voluntarily dismissed the Blaine County Prosecutor as defendant. (R. Vol. 3, pp. 634-636.) However, he did not dismiss Sun Valley, even though at that point he had been given copies of all existing documents and allowed to inspect the originals.

4. July 15, 2013 Public Records Request Hearing

The District Court conducted a hearing on January 15, 2013 (*see* Tr. pp.1-60), at which time Donoval was given a full opportunity to explain his position. Significantly, Donoval admitted during the hearing that that he had seen all existing public records. (Tr. p. 19:8-10 “admittedly, the issue of whether I can see the public records on the invoices is done. I’ve seen them.”; Tr. p. 22:6 (“Now, again, I did see these documents.”); 25:25-26:2 (“I saw the original versions of all the alleged forged yellow sheets when I went to Mr. Thomas’ office on December 31st. . .”). Despite this explicit acknowledgment that by December 31, he had seen everything there was to see, Donoval pressed on. As discussed in more detail below, it is worth pausing here to note that the appellate motion practice thus far shows that Donoval has actually tried to keep his concessions from the January 15, 2013 hearing out of the record. That hearing, however, is significant .

In addition to conceding during that hearing that he had seen all there was to be seen, Donoval did not argue that Sun Valley was improperly withholding documents pursuant to some claimed exemption. Nor did he argue that Sun Valley was hiding documents that existed (as he had already admitted to seeing them). Rather, he argued that Sun Valley criminally destroyed and forged documents and sought to have the District Court force Sun Valley to defend itself against Donoval’s criminal allegations.

In response, the undersigned simply explained that the August 7, 2012 email from King to Donoval informed Donoval all documents that could be located were provided. (Tr., pp. 36:3 – 37:14.) Further, the undersigned pointed out to the District Court, as email and letter communications in the record reflect, that Sun Valley performed an exhaustive search and did not locate more responsive documents. (Tr., pp. 31:24-25 – 32:1.) The undersigned did not refer

to anything not in the record in making that argument. Essentially, the argument presented was that the Public Records Law is not a mechanism for Donoval to bring criminal allegations against Sun Valley and for Sun Valley to defend itself against such alleged criminal misconduct. Rather, the plain language of statute simply provides a mechanism by which to compel production of improperly withheld documents. Because Sun Valley provided all documents that existed and Donoval had seen everything that existed, the matter should have been closed.

5. The District Court's Memorandum Decision and Order

Being fully advised, the District Court issued its Memorandum Decision and Order on February 14, 2013. (R. Vol. 3, pp. 666-675.) In that well-reasoned decision the court explained that Donoval's requests were "almost exclusively for relief that this Court does not have the authority to grant . . . [because] 'the sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court . . . to compel the public agency . . . to make the information available for public inspection.'" (R. Vol. 3, pp. 667-668) (quoting Idaho Code § 9-343(1)) (emphasis added). The court further explained that it is clear the Public Records Law "cannot be used for anything other than compelling a public agency or public body to make previously requested public records available for inspection or copying . . . [and to] order a custodian to show cause why records are being withheld, if it appears records are being improperly withheld." (*Id.* at 668) (citing Idaho Code § 9-344(1)).

The District Court thus patiently construed Donoval's complaint as a request to compel Sun Valley to make available any existing public records it had refused to disclose. (*Id.*) In resolving whether Sun Valley had complied, the district court stated, based upon its review of the record:

There was never a formal denial of [Donoval's] public record request. First, though [Donoval] now assumes that he sought to examine original public records, his formal public record requests only sought a "copy" of the records. *See* Complaint, Ex. H. [Sun Valley] provided [Donoval] a copy of all of the records responsive to [Donoval's] request that it had in its possession. Defendant's Answer, Ex. B. Secondly, the parties agreed to stay the statutorily mandated time period to respond to the records request until the summer of 2012, at which point [Sun Valley] provided copies of the requested records. Complaint, ¶ 15. Therefore, there was no "deemed" denial pursuant to I.C. 9-339(2). Furthermore, even if it could be said that [Donoval] was denied examination of the original records or a copy of those records at any point, that issue is now moot as [Donoval] was allowed to inspect and receive copies [of] the original records he sought.

(R. Vol. 3, p. 671-672.)

After these findings, the only issue left for the District Court to resolve was whether Sun Valley improperly denied Donoval copies of yellow sheets that did not exist, which Donoval alleged were criminally destroyed and forged. (*Id.* at 672.) To that end, the court explained that while some documents may have existed in the past, Sun Valley never denied Donoval the opportunity to receive documents. Sun Valley informed Donoval via King's August 7, 2012 email that it had provided all existing documents. (*Id.*) As further inspection revealed unproduced documents, they were forwarded to Donoval on September 4, and Donoval was again informed that Sun Valley would forward him any further responsive documents if found. (*Id.*) While the District Court explained it was unclear whether the initial problems in providing all responsive documents was the result of poor record keeping by Sun Valley, or "ambiguous, confusing or contradictory requests" by Donoval, or a combination of both, the record showed Sun Valley complied with Donoval's public records requests. (*Id.*)

The court further explained that it "cannot compel the Defendant to make available documents it does not have, nor does the Idaho Public Records Law give this Court the authority

to order the Defendant to explain what happened to those records. This would go beyond the explicit remedy provided in I.C. 9-343(1).” (*Id.* at 672-673.) Accordingly, the court denied Donoval’s request to compel production and denied his requests to levy penalties against Sun Valley officials. (*Id.* at 673)

Despite the District Court’s well-reasoned and correct basis for rejecting the claims in Donoval’s Amended Complaint, it did nevertheless go on to deny Sun Valley’s request for costs and fees, even though “nearly all of the Plaintiff’s requests for relief either cannot legally be granted by this Court or are now moot, [because] the underlying basis of his action for production of public records was not frivolous.” (*Id.*) (emphasis added). As explained below, the underlined language is an incorrect standard. The correct standard is whether the action was frivolously pursued.

II. ISSUE PRESENTED ON CROSS-APPEAL

Whether the District Court abused its discretion in denying Sun Valley’s motion for costs and fees by applying an incorrect standard, contrary to Idaho Code § 9-344(2).

III. ATTORNEY FEES ON APPEAL

Sun Valley is entitled to an award of its fees and costs on appeal pursuant to Idaho Code § 12-117. Sun Valley is a “political subdivision” within the meaning of the statute and is therefore entitled to an award of fees and costs if the Court finds it is the prevailing party and that Donoval acted without a reasonable basis in fact or law. I.C. § 12-117(1). The record demonstrates, and the District Court found, that Sun Valley complied with Donoval’s public records requests. Donoval’s brief contains little support for his arguments and largely reflects nothing but his relentless attempt to improperly utilize the Public Records Law as a mechanism

to personally prosecute Sun Valley officials for alleged criminal violations. As such, fees and costs are appropriate here.

IV. ARGUMENT

As shown below, the District Court properly rejected the claims in the Amended Complaint, but erred in denying Sun Valley's request for costs and fees. Sun Valley therefore requests that the Court affirm the dismissal of Donoval's Amended Complaint and remand for further proceedings on the issue of whether Sun Valley is entitled to its costs and fees in defending against Donoval's frivolous pursuit of his claims.

A. Idaho's Public Records Law

The district court's interpretation of the Public Records Law is a question of law over which the Court exercises free review. *Cowles Pub. Co. v. Kootenai Cnty Bd. of Cnty Cmm'rs.*, 144 Idaho 259, 262 (2007); *Magic Valley Newspapers, Inc. v. Magic Valley Reg. Med. Ctr.*, 138 Idaho 143, 144 (2002). "Interpretation of a statute begins with an examination of the statute's literal words." *Cowles Publ. Co.*, 144 Idaho at 262 (quoting *Idaho Cons. League, Inc. v. Idaho State Dept. of Agric.*, 143 Idaho 366, 368 (2006)). "Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction." *Idaho Cons. League*, 143 Idaho at 368.

The underlying premise of the Public Records Law is that, in the interest of open government, the public has a right to examine and copy public records. I.C. § 9-338(1). "[T]here is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." I.C. § 9-338(1); *Magic Valley Newspapers, Inc. v. Magic Valley Reg. Med. Ctr.*, 138 Idaho 143, 144 (2002); *Federated Publ., Inc. v. Boise City*, 128 Idaho 459, 463 (1996). The law also contains several exemptions, which

recognizes that while open government is favored, there are certain types of documents that require privacy. *See* I.C. §§ 9-340A to 9-340H (setting forth exemptions). For example, for obvious reasons, investigatory records of a law enforcement agency are exempt from disclosure. I.C. § 9-340(B)(1); *see also* I.C. §§ 9-337 and 9-335.

Notably, the Public Records Law does not speak in terms of “original documents” and there is no explicit requirement that a public agency provide original documents. Rather, the law mandates disclosure of “public records”, defined as including, “but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency⁸ regardless of physical form or characteristics.” I.C. § 9-337(13).

A city is permitted to require a formal written request before records are produced for examination or copies are provided to the requester. I.C. §9-338(4). The city can require the request to contain the requester’s name, mailing address, e-mail address, and telephone number. *Id.* Upon receipt of such a request, the city has three working days to respond in the normal case, but may take up to ten working days, upon written notification to the requestor, if additional time is needed. I.C. § 9-339(1). If the city fails to respond within ten working days of the request, the request is deemed denied. I.C. § 9-339(2). When the city affirmatively denies a request in full or in part, written notification to the requestor must be provided. I.C. § 9-339(3). The notification should contain a statement that the city’s attorney reviewed the request or the city had an opportunity to consult with an attorney and chose not to, as well as a statement indicating the

⁸ “‘Local agency’ means a county, city, school district, municipal corporation, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.” I.C. § 9-337(8). There is no dispute here that Sun Valley, as a city, is a local agency subject to the Public Records Law.

statutory authority for the denial, as well as a statement of the requestor's appeal rights. I.C. § 9-339(4).

When a city denies in full or in part a request for public records, and therefore withholds production of documents in its possession, the requester can sue in district court to seek redress. I.C. § 9-343. The statute explicitly and in plain language provides the only available remedy:

The **sole remedy** for a person aggrieved by the **denial** of a request for disclosure for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, **to compel the public agency or independent public body corporate and politic to make the information available for public inspection** in accordance with the provisions of sections 9-337 through 9-348, Idaho Code.

I.C. § 9-343(1) (emphasis added).

If it finds that public records are being improperly withheld, “the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so.” I.C. § 9-344(1). Upon an order to show cause, “[i]f the court finds that the public official’s decision to refuse disclosure is not justified, it shall order the public official to make the requested disclosure.” I.C. § 9-344(2).

Significantly, the Public Records Law expressly sets forth the basis upon which a district court’s decision must be made in an action to compel the disclosure of documents:

The court shall decide the case after examining the pleadings filed by the parties **and such oral arguments and additional evidence as the court may allow**. The court may examine the record in camera in its discretion.

I.C. § 9-344(1) (emphasis added). Thus, the court has broad discretion in what materials it may consider outside the pleadings. There is plainly no requirement for affidavits or an evidentiary hearing.

The district court also has authority to impose a civil penalty of up to \$1,000 against a public official, but only if that public official “has deliberately and in bad faith improperly refused a legitimate request for inspection or copying.” I.C. § 9-345.

If the court finds that “the request or refusal to provide records was frivolously pursued”, it is required to award reasonable costs and attorney fees to the prevailing party. I.C. § 9-344(2) (emphasis added).

The Public Records Law is therefore essentially a proceeding to compel production of records. Obviously, if a document does not exist it cannot be produced. The statute plainly does not authorize the court to compel a government entity to defend itself against allegations of criminal misconduct, e.g., that documents were allegedly destroyed and forged. The law only authorizes the district court to determine whether public records are being improperly withheld and, if so, to compel their production. I.C. § 9-343(1).

B. The District Court Properly Rejected Donoval’s Claims in the Amended Complaint

The specific relief Donoval sought in his Complaint and Amended Complaint is not authorized under the Public Records Law. The statute does not require a government entity in this type of proceeding to defend itself against criminal allegations of destruction and forgery of documents. In addition, in resolving a public records dispute, while the court is required to examine the parties’ pleadings, it has broad discretion in what other materials it may or may not consider; the court is not required to have the parties produce affidavits or to order an evidentiary hearing. Last, civil penalties can only be imposed where there is a deliberate refusal to produce public records improperly and in bad faith, which the District Court did not find here. The District Court correctly interpreted the Idaho Public Records Law and properly exercised its

discretion in resolving the dispute below. Accordingly, the District Court properly rejected Donoval's Amended Complaint.

1. Idaho's Public Records Law Does not Authorize the Relief Sought by Donoval in his Amended Complaint.

The relief Donoval sought from the District Court is not obtainable. As explained above, the sole remedy under the Public Records Law is the person aggrieved by a denial of a request is to sue in district court to compel production. I.C. § 9-343(1). Despite this plain language, Donoval instead sought the following relief against Sun Valley:

1. Production of a subpoena purportedly issued by the Blaine County Prosecutor's Office;
2. If this subpoena does not exist, an explanation of why public records were released to the prosecutor's office, who authorized such release, and why Plaintiff has not been allowed to inspect the original documents;
3. Mandate that Donoval be allowed to inspect the original documents;
4. If Sun Valley does not produce the documents, and the prosecutor's office does not have possession of the documents, then the Court refer the matter for criminal investigation.

(R. Vol. 2, pp. 320-321.)⁹

The only item sought by Donoval in his Amended Complaint that is even remotely contemplated by the Public Records Law would be item (1), the production of a subpoena. However, Donoval never submitted a public records request for any subpoena. (*See* R. Vol. 1, pp. 43-86 (Request Nos. 1 – 3), pp. 212-249 (Request Nos. 4 – 6); R. Vol. 3, p. 667 (District Court's finding thereof)). Moreover, King informed Donoval of King's mistaken belief there was a subpoena in his September 4 email (R. Vol. 1, p. 254), and the Attorney General's Office confirmed this on October 4 (R. Vol. 2, pp. 284-286). As such, Donoval knew well before he

⁹ As set forth above, Donoval sought similar relief in his original Complaint.

filed his Amended Complaint on October 22 that there was no subpoena. In fact, Donoval conceded this in his Amended Complaint, yet still sought to have the subpoena produced. (R. Vol. 2, p. 308, ¶¶ 61-63.)

With respect to items (2) and (3), Donoval never sought original documents in his public records requests (*see* R. Vol. 1, pp. 43-86, 212-249) and when he finally decided he wanted to see originals, he did not submit additional public record requests seeking the same. Additionally, during the time period when Sun Valley was compiling all of the responsive documents for Donoval, King informed Donoval that Sun Valley had transferred the original documents to the Attorney General's Office in connection with a criminal investigation. (R. Vol. 1, p. 250 (August 7 email from King); R. Vol. 1, p. 115 (August 9 email from King)). King later clarified in an email to Donoval on September 4 that there was no subpoena, but rather the documents were voluntarily turned over for a criminal investigation. (R. Vol. 1, p. 254.) Donoval further received confirmation of the same from the Attorney General's Office on October 4. (R. Vol. 2, pp. 284-286.) Moreover, Donoval received confirmation from the Blaine County Prosecutor's Office on October 12, 2012, stating that it had the original documents as part of an ongoing criminal investigation, and would not release them pending the criminal investigation. (R. Vol. 2, p. 386); *see* I.C. § 9-340B (investigatory record exemption).

In fact, it was not until Donoval learned that the original documents were not in the possession of Sun Valley that he demanded access to them. (R. Vol. 1, pp. 104-107) (August 8 letter from Donoval to King.) Even so, Donoval did not submit any additional public record requests utilizing Sun Valley's established forms, like he did for the March 26 requests. Nevertheless, Donoval still filed suit against Sun Valley on August 20, 2012, and continued to frivolously pursue this matter in his Amended Complaint filed on October 22, 2012.

Further, on December 31, 2012, Donoval did actually go the Blaine County Prosecutor's Office and inspect the original documents. (Tr. pp. 14-15, 19:3-10, 22:6-13, 24:8-12, 25:18 – 26:9.) While Donoval consequently dismissed the Blaine County Prosecutor, he did not dismiss Sun Valley. (R. Vol. 3, pp. 634-636.) The Court concluded in its Memorandum Decision and Order that items (2) and (3) were moot because Donoval was able to inspect the original documents. (R. Vol. 3, p. 667.) It remains, however, that Donoval frivolously pursued his lawsuit against Sun Valley seeking original documents even though he never submitted valid requests for inspection of original documents and, in any event, he was able to review the original documents in existence once the criminal investigation concluded.

Last, with respect to item (4), again, the sole remedy under the Public Record Law is to compel production. I.C. § 9-343(1). Sun Valley does not dispute that a court generally has the discretion to refer a matter for criminal prosecution if the court believes such is warranted. However, that is plainly not a remedy provided for private citizens under the Public Records Law. More so, it is inappropriate under the Idaho Rules of Professional Conduct for an attorney to “present . . . criminal charges solely to obtain advantage in a civil matter. . .” I.R.P.C. 4.4 Certainly, Donoval's factually unfounded allegations in this case of criminal misconduct, including that Mayor Briscoe “allowed” a break-in and theft of public records and that Sun Valley officials destroyed and forged yellow sheets (allegedly in violation of Idaho Code § 18-3201 (felony destruction, alteration or falsification of “official government records”)), combined with Donoval's formal request of referral for criminal prosecution, even though plainly not authorized under the Public Records Law, raises concern regarding Rule 4.4, and generally reflects the frivolous nature of this lawsuit.

In sum, Donoval sought relief in his Complaint and Amended Complaint that the District Court could not grant. Nevertheless, in an exercise of its discretion, the District Court construed Donoval's complaint as "a request for [the District Court] to enter an order compelling [Sun Valley] to make any public records it has refused to make available for public inspection now available for public inspection." (R. Vol. 3, p. 668.) In so doing, consistent with the above, the District Court correctly stated that the Idaho Public Records Law does not "give this Court the authority to order [Sun Valley] to explain what happened to those records. This would go beyond the explicit remedy provided in I.C. 9-343(1)." (R. Vol. 3, p. 673.)

2. Idaho's Public Records Law Does Not Require Sun Valley to Defend Itself Against Donoval's Criminal Allegations of Destroyed and Forged Documents.

Despite the plain language of the statute, Donoval argues on appeal that the District Court erred as a matter of law in not recognizing it has inherent authority to mandate Sun Valley to respond to his allegations of criminal misconduct, including alleged destruction and forgery, and in not requiring Sun Valley to do so under oath. (*See* Appellant's Br. at 31-46.)

In support, Donoval cites to a number of federal cases dealing with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for two general propositions: first, the court has broad equitable power to enforce the Public Records Law, such that the court has authority to go beyond the express "sole remedy" provided in the statute (Appellant's Br. at 37); second, it was Sun Valley's burden in the proceeding below to show "beyond a material doubt" and by "convincing evidence" (through non-conclusory affidavit or an evidentiary hearing) that it has conducted a reasonable search for responsive documents (Appellant's Br. at 38-43, 48).

As set forth above, the language of the Public Records Law is plain and unambiguous. The sole remedy is expressly set forth in the statute, as is what the court may, in its discretion,

consider in making its decision. *See* I.C. §§ 9-343(1) (sole remedy), 9-344 (materials considered by the court). It is therefore unnecessary for the Court to refer to federal case law discussing a different statute for guidance on this issue.

More so, the federal cases *Donoval* cites are inapposite. *Donoval* begins by quoting *Renegotiation Bd. v. Bannerkraft Closing Co., Inc.*, 415 U.S. 1 (1974) to support the general proposition that federal district courts have broad equitable power in enforcing the FOIA, but without any wider discussion thereof. (*See* Appellant's Br. at 37.)

Renegotiation Board dealt with the issue of whether the federal district court could enjoin an administrative proceeding pending resolution of a public records request under the FOIA. The administrative board argued that because Congress expressly authorized the court to compel production and nothing more, it could not enjoin administrative proceedings. The United States Supreme Court disagreed, however, stating that the FOIA "explicitly confers jurisdiction to grant injunctive relief of a described type, namely, 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.'" *Id.* at 18 (emphasis added). The Supreme Court explained that if Congress wanted to limit the court's expressly conferred broad equitable power, it could have done so, but plainly chose not to, as the FOIA contains no restrict language. Thus, it was inappropriate to read the FOIA as limiting the district court's authority in light of the language that expressly conferred equitable power and lack of express restrictive language. *Id.* at 19-20.

Unlike the FOIA, Idaho's Public Record Law does not contain an express grant of equitable power. More so, the statute does contain express language that limits the court's authority, as stated repeatedly herein: "the sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings . . . to compel . . . [the government] to make the

information available for public inspection” I.C. § 9-343(1). There is no comparable restrictive language in the FOIA. Thus, while federal case law is not necessary to read Idaho’s Public Records Law, it is also not helpful because the two statutes, even though having a similar underlying purpose, utilize different language.

Donoval cites to several other FOIA cases that generally reflect *Renegotiation Board* but also stand for the proposition that under the FOIA it is the government’s burden to show “beyond a material doubt” and by “convincing evidence” (through non-conclusory affidavits) that the government has conducted a reasonable search for responsive documents. (*See* Appellant’s Br. at 37-39) (discussing primarily *Laughlin v. Comm. of IRS*, 103 F. Supp.2d 1219 (S.D. Cal. 1999); *Island Film, S.A. v. Dept. of Treasury*, 869 F. Sup.2d 123 (D.C. 2012); and *Lazaridis v. U.S. Dept. of State*, 2013 WL 1226607 (D.C. 2013)).

Sun Valley does not dispute that it should take all reasonable efforts to locate documents sought in a public records request. That is consistent with the statute’s underlying purpose to ensure open government. But there is nothing in Idaho’s Public Records Law that requires Sun Valley to prove “beyond a material doubt” and with “convincing evidence” the reasonableness of its search. That standard derives from a burden shifting scheme for FOIA summary judgment proceedings. It has no applicability here.

3. The District Court Has Broad Discretion in What it May Consider when Resolving a Public Records Lawsuit.

Even so, the plain language of the Idaho Public Records Law does not mandate the use of affidavits or an evidentiary hearing. In conducting an inquiry into whether a government entity should be compelled to disclose public records, the statute mandates only that the court must examine the pleadings filed by the parties. I.C. § 9-344(1). Additionally, the court has

discretion to consider “such oral arguments and additional evidence as the court **may** allow.” *Id.* (emphasis added) The use of the word “may” plainly signifies such discretion in what the court can consider beyond the pleadings, and therefore Donoval’s contention that affidavits or an evidentiary hearing were required is meritless.

The three-part standard of review of a discretionary decision is: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of its discretion and consistent with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *E.g., Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991).

First, it is apparent the District Court correctly perceived the issue as one of discretion because it expressly quoted Idaho Code § 9-344(1), including the discretionary language “may”. (R. Vol. 3, p. 670.)

Second, the District Court acted within the outer boundaries of its discretion, consistent with the applicable legal standards. The Court’s Memorandum Decision and Order and the transcript from the January 15, 2013 hearing both show throughout that the District Court properly considered the parties’ pleadings, exhibits attached thereto, and oral argument. (*See, e.g., R. Vol. 3, pp.668-670 (reviewing facts as set forth in pleadings and exhibits), 673 (“Thus, based on information submitted by both parties, this Court finds documents were not improperly withheld.”)*)

Notably, Donoval argues that the District Court improperly relied on statements made by the undersigned during the January 15 hearing. Specifically, Donoval argues: “Attorney Naylor was allowed to assert at the January 15, 2013 hearing that statements in many of the letters and other communications to Mr. Donoval by City Attorney King were truthful or accurate, even

though (unlike Mr. Donoval's sworn to statements) none of the statements made by City Attorney King in letters or emails to Mr. Donoval were verified to be truthful under oath" (Appellant's Br. at 29.) (emphasis in original)

To be clear, while the undersigned did assert during that hearing that based on the record of correspondence it was obvious Sun Valley had performed an exhaustive search (Tr. pp. 31:23 – 32:2) such statements were, in context, plainly argument based upon what the communications in the record show. It was therefore appropriate for counsel to refer to those communications in oral argument, as it was appropriate for the District Court to consider the same in its decision. Further, the District Court's Memorandum Decision and Order makes no mention that it relied completely on oral argument, but rather indicates the District Court examined the pleadings (as is required) and relied upon the record as a whole, which included emails and letters provided by Donoval. This is perfectly consistent with the court's broad discretion in what it may consider under Idaho Code § 9-344(1).

Third, the District Court reached its decision to not require affidavits or an evidentiary hearing through an exercise of reason. The District Court acknowledged correctly that the sole remedy under the public records law is that the person aggrieved by a denial of a request is to sue in district court to compel production. (R. Vol. 3, p. 670.) Next, the District Court identified and quoted the statute stating what it may consider in determining whether to compel production. (*Id.*) The District Court then reviewed the pleadings, all related exhibits, and oral argument, and found that the record showed Sun Valley complied with Donoval's public records requests. (*Id.* at 671-672.) Because the record showed Sun Valley had provided all documents it possessed, and because Donoval sought the affidavits and/or evidentiary hearing for a purpose not contemplated under the Public Records Law (i.e., to force Sun Valley to defend itself), there

would have been no reason for the District Court to require Sun Valley to provide any affidavit or to conduct an evidentiary hearing.

Accordingly, the District Court properly exercised its discretion in not requiring Sun Valley to produce an affidavit and/or to participate in an evidentiary hearing. The pleadings, extensive record and oral argument provided ample and statutorily sufficient bases for the District Court's decision.

4. The District Court Correctly Denied Donoval's Requests for Civil Penalties.

In addition to the various unauthorized remedies Donoval sought, he also demanded that the district court impose a civil fine of \$87,000 against Sun Valley and/or city officials. This demand was based upon an incorrect reading of the Idaho Public Records Law. The statute provides as follows:

If the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for inspection or copying, a civil penalty shall be assessed against the public official in an amount not to exceed one thousand dollars (\$1,000), which shall be paid into the general account.

I.C. § 9-345. (emphasis added)

The District Court denied Donoval's request to for civil penalties in an amount of \$87,000 (1,000 per document) because Sun Valley did not deny Donoval's public records requests. (R. Vol. 3, p. 673.) As set forth above, Sun Valley complied with Donoval's requests by providing him with copies of the responsive documents. Further, Donoval was allowed to inspect the originals, even though he did not formally seek to do so in his public records requests. By December 31, 2012, there was nothing left for Donoval to review. He admits this. (See Tr., p. 19:8-10 ("the issue of whether I can see the public records on the invoices is done. I've seen them."), 22:6 ("Now, again, I did see these documents."), 25:25-26:2 ("I saw the

original versions of all the alleged forged yellow sheets when I went to Mr. Thomas' office on December 31st ...").

Nevertheless, Donoval still relentlessly seeks through this appeal to have fines imposed against Sun Valley, in an amount grossly exceeding the statutory limit of \$1,000, because he believes Sun Valley officials engaged in criminal misconduct by allegedly destroying and forging public records.

The District Court, however, did not abuse its discretion in denying Donoval's demands to impose such a fine. The statute requires there first be a refusal to allow inspection or copying of records, and second that such refusal be deliberate and improper, as well as in bad faith. In this case, the District Court properly considered the pleadings and submissions in the record, heard oral argument, and found that Sun Valley complied with Donoval's requests by providing everything in existence that was requested. Plainly, there can be no deliberate, improper and bad faith refusal to disclose public records where a request is not denied.

It makes no sense for Donoval to admit he received or saw everything that exists, and at the same time argue civil penalties should be leveled against Sun Valley because he believes officials have committed crimes. Donoval seeks to criminally prosecute Sun Valley by putting officials on the stand so that he can inquire into his personal allegations of criminal activity and have civil penalties imposed. This attempt to commandeer the role of the prosecutor and/or attorney general, and to expropriate a civil penalty scheme to stand in for criminal sanctions, has no basis in the law. It is up to the county prosecuting attorney, or at times the Attorney General, to prosecute alleged crimes, not Donoval. *See* Idaho Code §§ 31-2604 (duties of prosecuting attorney); 67-1401 (duties of Attorney General).

5. The District Court Erred in Denying Sun Valley's Request for Costs and Fees.

While the District Court's Memorandum Decision and Order was overall well-reasoned and correctly concluded that Sun Valley complied with Donoval's public records requests, it did err in one regard. Idaho's Public Records Law requires the district court to "award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued." I.C. § 9-344(2) (emphasis added).

In other words, an award to Sun Valley was mandatory in this case upon meeting two conditions: (1) that Sun Valley was the prevailing party; and (2) that Donoval frivolously pursued his public records requests. There is no dispute in this case that Sun Valley was the prevailing party. The District Court rejected the claims in the Amended Complaint in their entirety. Sun Valley appeals only the issue of whether the District Court erred in not finding that Donoval's pursuit of his case was frivolous.

The determination of whether a matter is frivolous is committed to the discretion of the district court. *Sun Valley Shopping Ctr., Inc.*, 119 Idaho at 91. As such, the three-part standard of review of a discretionary decision applies: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of its discretion and consistent with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *Id.* Specifically, the issue here is with respect to the second-prong: whether the District Court acted consistent with the applicable legal standard.

Sun Valley argued below that it was entitled to reasonable costs and attorney fees pursuant to Idaho Code § 9-344(2) because the record showed Donoval frivolously pursued this action. (*See R. Vol. 2, pp. 409-410.*) Nevertheless, the District Court stated in its Memorandum Decision and Order:

[Sun Valley] has requested costs and attorney fees pursuant to I.C. 9-344(2), claiming that [Donoval] frivolously pursued his request for documents against [Sun Valley]. The Court denies [Sun Valley's] request for costs and fees. [Donoval] has provided evidence that the documents he was seeking from the Defendant may have been in its possession at some point. The affidavits submitted by [Donoval] generally address issues outside the public records statute. They do, however, show a basis to seek additional documents. Moreover, there is some evidence of poor record-keeping on the part of [Sun Valley], so [Donoval] had some reason to think that such records may still be in the possession of [Sun Valley]. While it is true that nearly all of [Donoval's] requests for relief either cannot legally be granted by this Court or are now moot, the underlying basis of his action for production of public records was not frivolous.

(R. Vol. 3, p. 673.) (emphasis added)

The District Court erroneously focused on the underlying basis of Donoval's complaint. However, the proper focus under Idaho Code § 9-344(2) is on whether the pursuit was frivolous, not whether the underlying basis was frivolous. The record contains ample evidence to support the contention that Donoval frivolously pursued his public records request, and this matter should therefore be remanded for the District Court to reconsider the record under the correct legal standard.

In sum, Donoval frivolously pursued this action from the beginning. Both his Complaint and Amended Complaint either sought relief regarding things he did not seek in his public records request (i.e., a subpoena and original documents), or relief plainly not authorized under the law (i.e., Sun Valley explain the nature of its transmittal of documents to the county prosecutor for a criminal investigation and referral for a criminal investigation of Sun Valley officials). (*See* R. Vol. 1, pp. 17-18 (Complaint); R. Vol. 2, pp. 320-321 (Amended Complaint)).

Further, his pleadings referred to irrelevant and baseless criminal allegations, including that Sun Valley Mayor Briscoe "allowed" the burglary of documents from the fire station, and that documents were otherwise destroyed and forged at the direction of Sun Valley officials.

These allegations served no proper purpose and, in fact, reflect questionable ethical issues under Rule 4.4 of the Idaho Rules of Professional Conduct, which prohibits attorneys from threatening criminal action in order to obtain an advantage in civil proceedings.

Additionally, Donoval relentlessly maintained below (and now on appeal) not only that Sun Valley officials should be referred for criminal investigation and prosecution based upon his criminal allegations, but that Sun Valley should also be forced to provide an affidavit and/or present testimony at an evidentiary hearing in this matter defending itself against Donoval's criminal allegations. He also sought civil penalties in gross excess of that allowed for under the statute so as to penalize Sun Valley for the alleged criminal misconduct.

In short, both Donoval's Complaint and Amended Complaint sought relief that was not authorized. Donoval's only saving grace was that the District Court patiently construed his Amended Complaint as a request for withheld documents. The extensive record, however, showed that Sun Valley had conducted a search for the responsive documents and provided him all documents in existence. In fact, King informed Donoval in his August 7 email that it had provided him all known responsive documents that existed, but would provide further supplementation if more documents were found. (R. Vol. 1, pp. 250-251.) King also informed Donoval that the original documents had been transferred to the Attorney General for purposes of a criminal investigation. (*Id.*)

Thus, by August 7, Donoval was informed that Sun Valley had given him all responsive documents in existence, and that Sun Valley did not have original copies (of course he also knew he did not formally request original documents). Nevertheless, Donoval filed this lawsuit on August 20, 2012, conspicuously ignoring the August 7 email. (R. Vol. 1, pp. 1-198.)

After additional correspondence, and even though not a part of Donoval's public records requests, King clarified in an email to Donoval on September 4 that Sun Valley had turned over the original documents voluntarily, rather than pursuant to a subpoena. (R. Vol. 1, p. 254.) Donoval then verified this with the Attorney General's Office, who responded on September 7 that it had no original documents (R. Vol. 2, p. 259) and on October 4 that there was not a subpoena. The office had photocopied and sent on the boxes of documents to the Blaine County Prosecutor for criminal investigation (R. Vol. 2, pp. 284-286.)

Thus, by September 4 – or at the latest October 4 (when Donoval received confirmation) – Donoval knew there was no subpoena (and he also knew he never formally requested a subpoena), and it was reiterated to him that Sun Valley did not have original documents. At that point, instead of dismissing both the Attorney General and Sun Valley, Donoval only amended his complaint to replace the Attorney General with the Blaine County Prosecutor. (R. Vol. 2, pp. 270-321.)

The Blaine County Prosecutor thereafter explained to Donoval that the documents were subject to an ongoing criminal investigation (which Sun Valley had already told him) and the office would not allow him to inspect the documents until the close of the investigation. (R. Vol. 2, p. 386.) On November 28, 2012, the prosecutor informed Donoval the prosecution was complete and on December 31, 2012, Donoval inspected all original documents in existence. (Tr. pp. 14-15, 19:3-10, 22:6-13, 24:8-12, 25:18 – 26:9.) Donoval accordingly dismissed the Blaine County Prosecutor. He did not, however, dismiss Sun Valley, despite the fact that he admitted that on December 31 he had seen all existing documents. (*See id.*; R. Vol. 3, pp. 634-636.)

Thus, by December 31, 2012, even though he never formally requested to inspect original documents, Donoval had actually done so and such inspection was therefore a moot point.

During or prior to the January 15, 2013 hearing, instead of simply informing the District Court that the matter was resolved, Donoval insisted that Sun Valley officials had committed criminal wrong-doing, that Sun Valley should be forced to explain itself through affidavit or an evidentiary hearing, and civil penalties should be imposed. Based upon the plain language of the Idaho Public Records Law, the District Court concluded this was not a remedy provided for under the statute and further found that the record supported that Sun Valley had complied with Donoval's public records request and therefore denied Donoval's request for civil penalties.

The Idaho Public Records Law is straightforward and plain on its face and provides a sole remedy: the court can only compel production of improperly withheld documents. Nothing more. I.C. § 9-343(1). Despite this straightforward language, and the District Court's finding that Sun Valley complied with Donoval's public records request, Donoval appealed. His appeal is just as frivolous as the underlying pursuit of this action.

Not only is the appeal frivolous, but appellant has actively sought to keep significant facts out of the appellate record, which shows the underlying pursuit of this case was frivolous as well as the appeal. Specifically, on July 24, 2013, Sun Valley filed a routine motion to augment the appellate record to include a copy of the transcript from the January 15, 2013 hearing, during which Donoval made the concessions highlighted above. This transcript is highly relevant to this matter and appellant himself refers to the hearing substantively in his own appellate brief, but without citation thereto. (*See* Appellant's Br. at 45)

Nevertheless, appellant inexplicably filed an eight-page objection to the inclusion of the hearing transcript, arguing vehemently that it contained nothing of relevance. (*See* Appellant's August 1, 2013 Objection to Motion to Augment.) The motion to augment was of course granted

and now the hearing transcript is in the record for the Court to review, especially Donoval's concessions that show his pursuit below and this appeal are frivolous.

There is ample basis for the District Court to revisit the issue of costs and fees in light of the correct standard of whether Donoval frivolously pursued this action. Likewise, there is ample basis for this Court to find that Donoval frivolously appealed the District Court's decision, and therefore award costs and fees on appeal.

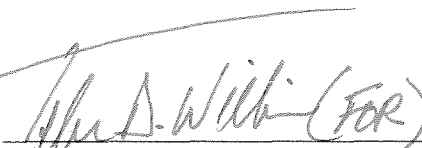
V. CONCLUSION

As argued above, Sun Valley respectfully asks the Court to affirm the District Court's dismissal of Donoval's Amended Complaint, and remand for further proceedings on the issue of whether Sun Valley is entitled to its costs and fees pursuant to Idaho Code § 9-344(2). Additionally, Sun Valley requests its costs and fees on appeal pursuant to Idaho Code § 12-117.

DATED this 24th day of October, 2013.

NAYLOR & HALES, P.C.

By:

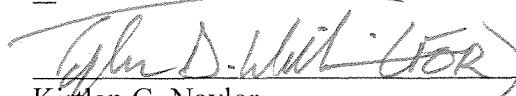

Kirtlan G. Naylor
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

James R. Donoval
4110 Eaton Ave., Suite D.
Caldwell ID 83607

- U.S. Mail
- Hand Delivered
- Email:
- Fax Transmission


Kirtlan G. Naylor

APPENDIX

February 9, 2013. Transfer of three boxes of financial documents from Sun Valley to Attorney General. (R. Vol. 3, p. 650; *see also* R. Vol. 2, pp. 284-286; R. Vol. 2, p. 386; R. Vol. 2, pp. 466-468.)

March 26, 2012. Donoval's six public records requests (followed by agreement to postpone production). (R. Vol. 1, pp. 43-86, 212-249; R. Vol. 1, p. 5.)

July 25, 2012. Email from Donoval to King demanding production of copies within two days. (R. Vol. 1, p. 88.)

July 27, 2012. Donoval goes to City Hall to review 1,500 pages of compiled documents. Tabs pages for re-copying. (R. Vol. 1, pp. 90, 92, 250, 254.)

August 2, 2012. Sun Valley provides Donoval tabbed pages and informs him there are some missing yellow sheets. (R. Vol. 1, pp. 96, 98.)

August 4, 2012. Email from Donoval to King re: tabbed pages not being in documents provided; stating he believed there were more pages that he believed were missing; demands confirmation of whether unproduced yellow sheets existed or not. (R. Vol. 1, p. 100.)

August 7, 2012. Email from King to Donoval explaining Donoval had tabbed wrong pages and other problems associated with locating documents; informs Donoval he would mail him additional documents; informs Donoval the yellow sheets provided are the only yellow sheets that exist and that the original documents were not in Sun Valley's possession due to an outside criminal investigation. (R. Vol. 1, pp. 250-251.)

August 7, 2012. Email from Donoval to King demanding that King respond with a full explanation as to why the original documents are not with Sun Valley by the next morning. (R. Vol. 1, pp. 250-251.)

August 8, 2012. Letter emailed from Donoval to King alleging criminal misconduct and threatening a lawsuit and demanding to see original documents for the first time. (R. Vol. 1, pp. 104-107.)

August 9, 2012. Email from Donoval to King reiterating accusations and demands from August 8 letter; demands an August 10 deadline. (R. Vol. 1, pp. 110-113.)

August 9, 2012. Email from King to Donoval again telling him the original documents were not in Sun Valley's possession due to a criminal investigation. (R. Vol. 1, p. 115.)

August 10, 2012. Email from Donoval to King raising criminal allegations of destruction and forgery of public records and demanding verification that the copies provided him were true and accurate. (R. Vol. 1, p. 117.)

August 10, 2012. Letter from Donoval to Attorney General, AG Investigator and Blaine County Prosecutor asking for confirmation as to whereabouts of original documents, alleging criminal misconduct, demanding to see original documents and threatening a lawsuit. (R. Vol. 1, pp. 119-120.)

August 10, 2012. Donoval receives in the mail a package of additional documents as was promised by King in his August 4 email. (R. Vol. 1, p. 250.)

August 20, 2012. Donoval files first Complaint. (R. Vol. 1, pp. 1-198.)

September 4, 2012. Email from King to Donoval containing additional documents and correcting his mistake that there was a subpoena; rather, the documents were voluntarily turned over to the AG and then the prosecutor for criminal investigation. (R. Vol. 1, p. 254.)

September 4, 2012. Email from Donoval to King: "you can explain this to the Judge." (R. Vol. 1, p. 254.)

September 7, 2012. Letter from Attorney General's Office to Donoval re: original documents. (R. Vol. 2, p. 259.)

September 9, 2012. Sun Valley files its Answer. (R. Vol. 1, pp. 203-254.)

September 25, 2012. Letter from Donoval to Blaine County Prosecutor accusing Sun Valley officials of criminal destruction and forgery of public records, threatening litigation and demanding the prosecutor answer his questions. (R. Vol. 2, pp. 289-293.)

September 25, 2012. Email from Donoval to King regarding the records King provided him on September 4. (R. Vol. 2, p. 274.)

October 4, 2012. Letter from Attorney General's Office containing an unsigned affidavit explaining what it did with the original documents. (R. Vol. 2, pp. 284-286.)

October 10, 2012. Donoval voluntarily dismisses the Attorney General. (R. Vol. 2, pp. 263-268, 269.)

October 12, 2012. Letter from Blaine County Prosecutor to Donoval stating it will not release any documents until the investigation closes. (R. Vol. 2, p. 386.)

October 22, 2012. Donoval files Amended Complaint adding Blaine County Prosecutor as defendant. (R. Vol. 2, pp. 294-321.)

November 28, 2012. Letter from Blaine County Prosecutor to Donoval informing him the investigation was concluded and Donoval could now examine original documents. (R. Vol. 2, p. 426.)

December 31, 2012. Donoval examines all existing original documents. (Tr. pp. 14-15, 19:3-10, 22:6-13, 24:8-12, 25:18 – 26:9.)

January 8, 2013. Donoval voluntarily dismisses Blaine County Prosecutor. (R. Vol. 3, pp. 634-636.)

January 15, 2013. Hearing. (Tr. pp. 1-60.)

February 14, 2013. Memorandum Decision and Order. (R. Vol. 3, pp. 666-675.)