

FILED
SUPREME COURT
STATE OF WASHINGTON
4/24/2023 4:00 PM
BY ERIN L. LENNON
CLERK

No. 101689-1

SUPREME COURT
OF THE STATE OF WASHINGTON

JEREMY CONKLIN, DO, an individual,

Petitioner,

v.

UNIVERSITY OF WASHINGTON SCHOOL OF
MEDICINE, a Washington public educational institution;
UNIVERSITY OF WASHINGTON MEDICINE,
a Washington public health system; and UNIVERSITY
OF WASHINGTON MEDICAL CENTER, a Washington
public hospital,

Respondents.

ANSWER TO MEMORANDUM OF *AMICUS CURIAE*
WASHINGTON COALITION FOR OPEN GOVERNMENT

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A. INTRODUCTION

Amicus curiae Washington Coalition for Open Government (“WCOG”) demonstrates that review is necessary in this case. As they explain, a “serious course correction is required” to ensure that major public agencies like UW devote sufficient energy and resources to their statutory obligation to provide the “most timely possible action on requests for [public] information.” *Amicus mem.* at 5-7. WCOG is a preeminent non-profit made up of journalists, local officials, attorneys, and business representatives across Washington. WCOG highlights the importance of this case on an issue that has ramifications statewide.

WCOG also thoughtfully observes that UW’s failure to timely respond to Dr. Conklin’s PRA requests was its own fault. UW deliberately underfunds and understaffs its Office of Public Records (“OPR”) resulting in the slowest PRA response times of any agency in the state. A course correction is required. This Court should grant review and reverse with a strong message to

lower courts that such delays for no reason other than an agency refuses to devote enough resources and attention to complying with the PRA are impermissible

B. ARGUMENT

(1) Timely Production of Public Records Is an Issue of Substantial Public Importance, RAP 13.4(b)(4)

WCOG's memorandum makes clear that the issue in this case – the timely production of public records – is one of substantial public importance, warranting review by this Court. RAP 13.4(b)(4).

WCOG is the premier non-profit advocacy group dedicated to open government in Washington. Its board includes prominent journalists, professors, business advocates, attorneys, and members of state and local government. *See* Our Board, Washington Coalition for Open Government, <https://www.washcog.org/board> (last visited April 20, 2023). It includes members from well-respected entities across the state including the Tacoma News Tribune, the Seattle Times, Spokane

Public Radio, Western Washington University, and much more. That WCOG chose to support Dr. Conklin's petition for review shows that it presents issues of substantial public importance – namely the timely access to public records.

It is no surprise that WCOG supports this case; the public importance of this issue is evident. Dr. Conklin will not repeat every point made in his petition and briefing, but the open administration of government is of paramount importance to the people of Washington as shown in the Public Records Act and numerous other sunshine laws. By enacting the PRA, the Legislature declared:

The people...do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. Fundamental to the right to stay informed is the right to stay *timely* informed. Without timely information, a citizen cannot effectively participate in the democratic process –

a citizen cannot comment on pending Legislation, lobby their legislator, or run an informed campaign if public agencies can shield public information for over 900 days.

Neither “overbreadth” nor “inconvenience” are valid excuses to timely turn over public records. RCW 42.56.080(2); 42.56.550(3). Public agencies have an obligation to make records “promptly available,” and “provide for the fullest assistance to inquirers and the most timely possible action on requests for information.” RCW 42.56.080(2); RCW 42.56.100. WCOG correctly observes that no court has condoned delays as long as UW took in this case, creating conflicts that further warrant review under 13.4(b)(1) and (2). *Amicus* mem. at 8-9; *see also*, pet. at 21-29 (citing many cases where agencies responded to extremely complex or broad requests within dozens of days, not hundreds).

Without the requirement that responses be timely, the PRA is toothless. As Dr. Conklin explains in his petition, UW could avoid a scandal by delaying production of records for hundreds

of days to wait out a distasteful news cycle. Pet. at 20-21. No wonder WCOG, an organization supported by numerous journalists across the state, supports Dr. Conklin's position.

It should also not be lost that Dr. Conklin sought hiring data relevant to his claims that UW discriminated against him as a doctor of osteopathic medicine, seemingly violating RCW 70.41.235. Discriminatory hiring is also a forefront public topic for Washingtonians as evidenced by the Washington Law Against Discrimination. RCW 49.60.030. The PRA is a vital tool to uncover discriminatory practices by public agencies and ensure that law also has teeth.

WCOG's memorandum shows that review is appropriate under RAP 13.4(b)(4).

(2) WCOG Correctly Observes that UW's Failure to Timely Respond to Dr. Conklin's Requests Was Self-Inflicted

WCOG correctly observes that UW "deliberately shirks its PRA duties" and its failures to comply with the PRA's timeliness requirements are "self-inflicted." *Amicus* mem. at 10-15

(capitalization removed). Review and guidance from this Court are necessary to instruct state agencies that they must devote sufficient resources to producing public record responses timely, not delay up to 917 days claiming that populating an exemption log is difficult. This is an issue of broad, statewide impact on an issue of paramount importance. RAP 13.4(b)(4).

First, Dr. Conklin has already pointed out that UW is among if not the single slowest agency in the state in responding to PRA requests. Pet. at 8-9 (citing CP 526-95 (UW takes nearly four times as long as the average agency in the state to complete a PRA request – 63 days for UW versus 16 days as the statewide average)). WCOG, the advocacy group with the most experience in PRA cases in Washington, confirms that these numbers reflect its experience in other cases dealing with UW. Allowing Division I’s opinion to stand will not only incentivize UW to keep up its lax practices, but other agencies will follow suit, citing Division I’s decision that condones delays as long as **917 days**. That cannot be the standard in our state.

Second, despite knowing for years that it is slow to respond to PRA requests, UW fails to devote adequate staffing to its PRA department. It funds just nine staff members to deal with PRA requests for *all of UW*. That is not just the undergraduate school. That means nine staff members cover *all* of UW's 50+ schools, departments, subdivisions, agencies, hospitals, clinics, campuses, and more under the giant UW corporate umbrella.

UW boasts that as of 2015, it was the third largest overall, and largest non-federal public employer in the state, directly employing over 34,000 jobs and indirectly supporting another 44,000. Victor Balta, *Study: University of Washington generates \$12.5 billion, nearly 80,000 jobs for the state*, UW News (Jan. 8, 2015) <https://www.washington.edu/news/2015/01/08/study-university-of-washington-generates-12-5-billion-nearly-80000-jobs-for-the-state/#:~:text=The%20UW%20employs%2034%2C668%20people,jobs%20related%20to%20UW%20Medicine>. As UW has

grown so large over the years, so must its Office of Public Records scale accordingly.

One could easily imagine a myriad of publicly relevant requests from those vast and disparate agencies that all get filtered through one, nine-member office – perhaps a patient seeking medical records, a prospective undergraduate student seeking unreleased admission data, a faculty member seeking tenure data, a student-victim seeking information about on-campus sexual assault, a newspaper reporting on costs of the athletic department, a contractor seeking information on bids for campus construction projects, an advocacy group investigating Title IX compliance, a law student seeking clerkship statistics, a business school or engineering school student seeking post-graduate employment data, or a prospective medical fellow, like Dr. Conklin, seeking information on prior hiring practices. It is no wonder UW's OPR faces multi-million-page-backlogs in recent years, with just nine staff members to cover all the requests its 50+ institutions receive. Division I was wrong to

condone delaying production of such records, should UW claim it is backlogged or needs up to 917 days to produce an exemption log. Guidance from this Court is necessary to ensure the public has timely access to these important records.

Third, relatedly, UW has *decreased* its commitment to responding to PRA requests in recent years. UW admitted that it slashed its public records budget by \$600,000 despite allowing a backlog of 3.6 million pages of records to pile up. CP 486; resp'ts br. at 9. This is inexcusable. Again, as discussed in Dr. Conklin's petition and briefing, UW's annual revenue in fiscal year 2018 was \$6.426 *billion* dollars. University of Washington, *2018 Financial Report*, at 10 <https://finance.uw.edu/uwar/annualreport2018.pdf>. From 2013 to 2018 its endowment alone rose by *over one billion dollars*. UW must devote more to its OPR, who caused the delays here by sitting on collected records for at least as long as 232 without making any release of records because it needed to find the staff hours to devote to exemption review. *Compare* CP 388-92 with

397-402. UW was not diligent by delaying over seven months to review and produce any of those records to Dr. Conklin due to its own lack of staffing.¹

WCOG is entirely correct to point out these many self-inflicted failures that the trial court wrongfully condoned.

If there was any doubt, Dr. Conklin's case and WCOG's arguments have been strengthened by recent published case law. Just months ago, Division III issued a published decision in *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022). In that case, the Yakima School District was found liable under the PRA for failing to respond to a PRA request for 172 days, forcing the requestor to file a PRA complaint. *Id.* at

¹ As discussed in Dr. Conklin's petition, Division I improperly dodged these budgeting issues, wrongfully claiming that Dr. Conklin only raised the adequacy of UW's staffing/funding in his reply brief. Petition for Review at 28-29 n.9. Dr. Conklin has argued UW's inadequate staffing from *day one*, including in his opening brief. *E.g.*, CP 227, 470, 1258; RP 18-19; Appellant's br. at 39-42. And on *de novo* review in a case where UW has the burden of proof, it is inappropriate to sidestep arguments merely because the party without the burden of proof elaborates on a point in reply to the other party's response.

96. The Court reaffirmed that such impermissible denial is actionable, amounts to a constructive denial of records, and that eventually producing records after a lawsuit is filed does not absolve an agency of liability.

The court made clear that overwork is no excuse for an agency's failure to respond to the PRA's timeliness requirement. "[A]dministrative inconvenience or difficulty in producing records does not excuse lack of diligence." *Id.* at 94-95. And, as WCOG argues, an agency is not excused for delays caused by its own "insufficient allocation of resources and lack of priorities." *Id.* at 95. Division III recognized that large, sophisticated state agencies have no excuse for failing to devote enough resources to the PRA:

Yakima School District No. 7 is the 15th largest school District in Washington State. The District's operating budget for 2017-2018 exceeded \$200 million with a \$20 million budget surplus which was consistent year after year. The District employs close to 2,000 people and educates approximately 16,000 students. Given this size, Yakima School District should be allocating sufficient resources to respond to public records requests. Instead, the

District failed to train its personnel, failed to provide adequate staffing, and failed to make public records requests a priority.

Id. at 105.²

This case is just like *Cantu*. UW is a large agency, with a large budget, that necessarily generates and oversees *many* public records. Washingtonians have an absolute right to inspect such records promptly, and UW cannot delay productions by many hundreds of days because it lacks sufficient staff to prevent the multi-million-page backlogs it lets accumulate in its OPR.³ The backlogs have caused UW to lag behind its peers even when

² On top of affirming a finding of liability, Division III overturned a penalty of just over \$6,000 because it would not sufficiently motivate a large agency like the school district to do better to comply with the PRA. *Id.* at 101-07.

³ UW does not necessarily even need to hire more full-time staff. Theoretically, it could contract with outside document review companies more often, which it eventually did in this case, only after Dr. Conklin had to drag it to court on a show cause hearing. It could also adequately train backup or overflow staff, which it did not do in this case, instead hiring a temp worker when a key staff member at OPR went on maternity leave. Resp'ts br. at 20.

it has implemented policies antithetical to the PRA, RCW 42.56.100, such as its policy refusing to process multiple requests from the same requestor concurrently. CP 396. This directly caused over *900 days* of delay in responding to one of Dr. Conklin's PRA requests, only because UW fails to fund and support its efforts to comply with the PRA.

Division I and UW tried to distinguish *Cantu* because the Court found that the School District did not work on the PRA request at issue "diligently" during a period of summer break. *Cantu*, 23 Wn. App. 2d at 94. But here, UW was not working on Conklin's PRA requests diligently. It waited *307 days* before providing *any installments of records to any* of Dr. Conklin's requests, even though the records were gathered and waiting in its OPR for months. It refused to process his third request for *917 days* doing *zero work* with respect to that request due to its self-imposed policy not to process concurrent requests from the same requestor, policies other agencies do not have. *See* Pet. at 8 n.4.

No reasonable person would consider UW's delays to be reasonable in any other legal setting. Would a *307 day* delay in producing discovery be diligent under the Civil Rules? Would *307 days* be diligent work by a law clerk or staff attorney to produce a first draft of a memorandum or opinion in chambers? Would a party be diligent in asking for a *917 day* extension on a brief because they have lots of other work to get to first? The answer of course is no. Division I's opinion does not just *lower* the bar for PRA compliance, it *removes it* altogether.

Change is needed. An incentive is needed for UW to make that change and comply with the PRA. This case is the perfect opportunity to provide that incentive to UW and other agencies across the state going forward. Review of this issue of statewide public importance and to square conflicting authorities among the courts is needed. RAP 13.4(b)(1), (2), and (4).

C. CONCLUSION

WCOG's helpful *amicus* memorandum highlights the public importance of this case and that UW has no one to blame

for its failures under the PRA but itself. Washingtonians like Dr. Conklin should not suffer for its failure to devote adequate resources to complying with the PRA, forced to wait in PRA purgatory while UW lets its backlogs pile up. Review and reversal is necessary to affirm the policies, goals, and blackletter commands of the PRA, fundamentally important public issues in Washington state.

This document contains 2,459 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of April, 2023.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Answer to Memorandum of Amicus Curiae Washington Coalition for Open Government* in Supreme Court Cause No. 101689-1 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 24, 2023 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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