702122-2

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Superior Court No. **12-2-38553-0** SEA
Appeals Court No. **702122**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CITY OF SEATTLE, a local agency and

SEATTLE CENTER DEPARTMENT a local agency,

Respondent,

v.

HOWARD J. GALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

HOWARD J. GALE
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The City's repeated claim that "An agency that conducts a reasonable search is not liable under the PRA" (Brief of Respondents ("BR") 27; also see CP 18, lines 11-12 and CP 145, lines 7-8) could be seen as irrelevant given that he City has failed to conduct a reasonable search in this case (see pages 4-6). However, the absence of legal support for that claim, along with the City's assertion that

> "Without citation to authority, Gale argues that adoption of this well-established precedent that liability does not attach to an agency that conducts a reasonable search is 'absurd' and 'would make the PRA meaningless'" (BR 28).

indicates the degree to which the City is willing to misrepresent a well established law and is indicative of the City's bad faith in this case.

Gale does cite legal authority – RCW 42.56.550(1), see page 25 – in arguing that the fundamental cause of action under the PRA concerns the failure to disclose, or the improper withholding of, documents, and not the adequacy of the search (Brief of Appellant ("BA") 33-34). The only citation to authority presented by the City for this genuinely absurd claim is *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 288 P.3d 384, 388 (2012) (BR 27). Yet there is nothing in *Forbes* – not on page 388, or on any other

page – that can even remotely be used to support this claim by the City. The City has repeatedly failed to quote a relevant finding by the court in *Forbes*. In *Forbes* the court found that there were no documents responsive to the PRA request withheld by the City of Gold Bar (the documents in question were strictly personal e-mails that did not discuss government business). *Forbes* is irrelevant to both the particular claims by the City and to Gale's appeal in general.

"Gale concedes that he did not provide the requested clarification or any additional information to assist the City in locating responsive documents. CP 186, 189." (BR 8)

Among the diverse and egregious errors made by the trial court in this case, Gale's Notice of Appeal missed one of the twenty errors in the trial court's order. The trial court's finding of fact that "Gale did not provide the requested clarification or any additional information to assist in locating responsive documents" is a partially true statement and is fully discussed in BA 15-19 (Assignment of Error 5). In summary: (a) the City never requested "clarification or any additional information" prior to violating the PRA (BA 15-16); (b) after violating the PRA Gale provided the City with substantial information concerning the types and categories of missing

documents (BA 16-18); and (c) the City improperly requested information concerning specific documents rather than the information necessary to clarify an already clear PRA request (see page 4-6).

Gale's Notice of Appeal (CP 186) specifically requested review of the following findings of fact in the court order: page 3 (CP 190), lines 9-13; page 3 (CP 190), lines 14-20; and page 4 (CP 191), lines 12-16. These three findings of fact are directly related to the finding of fact in question here.

The finding of fact in question here also logically contradicts the finding of fact in the same court order stating:

> "Upon request, on January17, 2013 the City was granted a continuance to allow the Law Department to conduct an expanded search to include some of the **search terms that Gale supplied** for the first time in his reply filed with the Court on December 26, 2012" (CP 190, lines 3-5; emphasis added).

It is a logical contradiction for Gale to **have not** provided "additional information to assist the City in locating responsive documents," and yet **have** provided the City "search terms" (i.e., "information") to aid in searching.

If deemed necessary by the Appellate Court, Gale respectfully requests, under the provisions of RAP 5.3(h)

> "The appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include additional parts of a decision in order to do justice."

that the Appellate Court permit Gale's Notice of Appeal to be amended to include this single finding of fact from the trial court order (CP 181, lines 21-22).

"Gale suggested for the first time search terms that he claimed the City should have used in its records searches. CP 24. All of these terms are related to electrical outlets and power..." (BR 8)

and

"The trial court reconvened the show cause hearing on February 12, 2013. During oral argument, Gale suggested for the first time that the City should have used the search terms 'homeless' and 'transient' in conducting its searches." (BR 10)

The City refers to a page (CP 24) from Gale's December 26, 2012 reply to the City's response to Gale's Motion for Order to Show Cause in the continuing attempt to mis-characterize Gale's PRA request. However, on the cited page, **prior** to listing potential search terms relating to AC outlets (in an effort to demonstrate the City's lack of selecting alternate search terms in this one specific area), Gale states:

> "the core issue motivating the SCD to restrict access to AC power at the Seattle Center Armory (aka 'atrium') was in fact to '***restrict or control the access of***' a '***particular group of people***' (referred to by

> SCD staff variously as homeless or transients) to ***'space or services'*** at Seattle Center. This fact gives my PRA request item (2) central importance. Yet the Defendants' Response.. indicates that Wells restricted her PRA search to the terms "outlet' and 'outlets"... Hence, from the beginning, the choice by the SCD to ignore item (2) in my PRA request guaranteed that many, if not most, relevant documents in SCD's possession would be missed." (CP 24; emphasis in original)

(also see pages 8-9 below)

Nine months later the City persists in these cynical and transparent attempts to excuse their failure to do an adequate search. The above quoted section from December 26, 2012 was clearly sufficient to alert the City, prior to the February 12, 2013 show cause hearing, that search words related to "homeless" or "transient" were central to the PRA request. The City's claim that a requestor needs to specifically state the precise words to use for a records search, and to do so in a sentence that specifies "these are search terms you should use" contradicts both common sense and prior court findings that "an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'" *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002).

Gale worded item (2) is his PRA request with great care and forethought when he requested records "addressing the following issues"

> "(2) putting any changes into effect (policies, staff behavior, signage, etc.) that might restrict or control the access of any particular group of people to space or services (including access to AC outlets) at Seattle Center" (CP 2)

This portion of Gale's PRA request was designed to avoid precisely the Catch-22 behavior that the City is engaging in: either restricting searches to very specific words (e.g., "outlet(s)") or claiming that Gale has not provided specific enough search terms. The City has variously labeled the populations it targeted for discriminatory behavior at Seattle Center as "homeless", transient", "outlet user community" (CP 521, second paragraph), or people using the Armory as a "day shelter" (CP 405). Gale could never have known what terms the City might use prior to the release of records. Indeed Gale had no responsibility to "'ferret out' records on his or her own" (WAC 44-14-04003(9) and *Daines*, 111 Wn. App. at 349).

"Of the 104 previously unproduced documents, only 38 contained any new information that had not been previously disclosed to Gale. Id. Some of those records were not responsive to Gale's specific response, such as calendar meeting dates for subject "CH Armory outlets" CP381-85, a request for a copy of the "email sent to Council re outlets" CP 416, and an article regarding a New York Starbucks blocking access to outlets CP 417. The remaining records were either substantially similar to documents previously disclosed to Gale... or were wholly incorporated into or substantially similar to the 38 new records" (BR 10)

This statement contains some extraordinary claims: (a) that there were "only" 38 newly released documents containing new information in the fourth document release, minimizing the fact that significant PRA violations can involve a single document; (b) that the City gets to decide which of 104 newly produced documents "contain any new information"; and (c) that the City would disclose documents under the PRA "not responsive" to a PRA request (or that the City gets to decide what is "not responsive" in an arbitrary and unexplained fashion).

In regards to this last claim, the City cites three documents (CP 381-85, CP 416, and CP 417) as exemplars of documents "not responsive" to Gale's PRA request. In all of these documents – given the time frame, the people involved, and the context – it is clear that the word "outlets" refers to the AC outlets that were being disabled at Seattle Center. The first document is dated March 30, 2012 and helps establish when Seattle Center was meeting to discuss "Armory outlets" and who was asked to attend those meetings, providing valuable information as to when decisions were being made and which Seattle Center staff were involved. The second noted document concerns an email that Seattle Center Director Robert Nellams had sent to the City Council concerning outlets, providing Gale

with information as to when and with whom Nellams was communicating about the AC outlets, critical information in the context of a vast array of missing documents. The third noted document, concerning customer backlash for Starbucks in New York City restricting access to AC outlets, raises questions concerning: possible Seattle Center preparations for dealing with complaints, who this information was communicated to and why, if there were any follow up emails, etc. All three of these documents were precisely responsive to Gale's PRA request, despite City claims to the contrary.

The above indicates the danger of City officials using objective search terms and then determining, using undocumented criteria, what documents are "really" responsive. In this case the City arbitrarily reclassifies documents as not responsive to a PRA request in order to confuse the issue and limit liability for PRA violations.

"using those search terms ['homeless' and 'transient'] would have produced numerous records that have nothing to do with what he actually requested - records concerning electrical outlets and/or power at Seattle Center or putting any changes into effect that might restrict or control the access of any particular group of people to space or services at Seattle Center." (BR 10-11)

This claim (repeated at BR 29-30) is another example of the City's bad

faith (and CR 11 violations), for either the City has (a) conducted a search using "homeless" and "transient" and failed to inform Gale, the trial court, and the Appellate Court, of the search and its results, or (b) not done such a search and is making a claim without any basis in fact. Regardless, it is not for the City to decide not to do a search (or not disclose the results of a search) because it might produce "numerous records that have nothing to do" with a PRA request if there is a chance it might also produce records responsive to the request.

Given the February 3, 2012 Seattle Center email (CP 23, line 24 – CP 24, line 2) stating that certain employees:

> "agreed to meet weekly for the foreseeable future to begin digging into the larger policy issues & operational concerns. The topics that surfaced repeatedly as 'biggies' were: How to manage our resident transient population? (includes making decisions about power outlets in the atrium)."

it should have been overwhelmingly clear that these search terms -- homeless, transient, as well as other euphemistic terms created by Seattle Center (noted on page 6) -- were central to fulfilling Gale's PRA request and would have produced many of the missing documents.

"**Gale's assignments of error do not warrant appellate review because they lack factual or legal support as required by RAP 10.3**" (BR 12)

The City cites RAP 10.3(a)(6) and RAP 10.3(g) (BR 12). To the best of his knowledge, Gale, acting pro se, has adhered to both of these provisions in his opening brief: see BA 13-40 as regards RAP 10.3(a)(6), and BA 3-9 as regards RAP 10.3(g).

"Gale has not challenged significant findings of fact and conclusions of law in this case" (BR 13-14)

Of the four findings of fact and two conclusions of law cited by the City all are irrelevant to the issues before the Appeals Court save one finding of fact. This single finding of fact is contradictory with another finding of fact and is related to other findings of fact that were listed in Gale's Notice of Appeal. The issue with this one finding of fact is addressed on pages 2-3.

"The trial court correctly found that Gale's PRA request was for 'information concerning AC outlet access in the Armory.'" (BR 16-24)

This specific claim has been addressed in Gale's BA 20-21 and BA 23-24. Item (2) in Gale's PRA request is clear and unambiguous in the context of who it was addressed to (see top of page 6 or CP 2).

The City makes trivial claims ("Gale uses the word 'outlet' or 'outlets' six times in his request" (BR 16) – the actual number is five) while ignoring the specific 35 word request in item (2) of Gale's PRA request, and ignoring that Seattle Center's attempt to prevent AC outlet access at the

Armory was specifically directed at a particular population of citizens (with Seattle Center using various terms as outlined on page 6). The City's claim that

> "the only reasonable way to interpret the request was that it sought 'information concerning outlet access in the Armory'" (BR 17; emphasis in original)

is itself unreasonable given the context of the agency's prior knowledge.

The City also makes the unambiguously false claim that

> "More importantly, the City did not limit even its first search only to records containing the terms "outlet" or "outlets" in order to provide records responsive to his entire request" (BR 17).

directly contradicting the City's earlier assertion that

> "Wells restricted her PRA search to the terms "outlet' and 'outlets" and that 'To my knowledge, staff used the term 'outlet' or/and 'outlets' to search for responsive documents'" (CP 24, lines 7-10).

In the fourth document release by the City there is a newly released document, dated April 17, 2012, which refers to the weekly meetings of the "Armory Operations Board," stating that

> "Juanda took our brainstorming list and created **a spreadsheet for us to document our discussion topics and track our decisions & progress**" (CP 432, paragraph 3; emphasis added)

This establishes that documents, still not released by the City, were created by the City to track decisions. This is in contrast to the City's claim that

> "Based on his unsupported suspicion regarding the City's motive for the decision to cover outlets, Gale presumes there must be more records explaining that decision and syllogistically interprets the absence of records as evidence the City is withholding them. Whether or not a record should exist, however, is a different question than whether it does exist. The fact that there is no record of how a decision is made does not indicate a missing record, but rather that such a decision was not reduced to writing." (BR 19; emphasis in original)

As is obvious from the April 17, 2012 email, such decisions were reduced to writing (in digital form), the documents do exist, and the City has failed to produce them.

A more important document, provided for the first time in the City's fourth release, is labeled "Center House Operations Team Meeting Notes – 2/22/2012" and lists as a decision "Policy change: no public outlets in CH except for rental clients and/or staff use" (CP 523; "CH" referring to the Seattle Center House, later renamed the "Armory"). This newly released document establishes three important facts: (a) that a decision was made as early as February 2012 to, (b) block ***all*** outlets in the Armory, and (c) that the decision was made by the "Center House Operations Team" with the names of those attending the meetings provided. Once more, documents that Gale believed were missing, as noted in his December 12, 2012 Complaint (CP 4, lines 13-28), did indeed exist, despite the City's

protestations to the contrary. The information in this document also proves that the email from Seattle Center Director Robert Nellams five months later (CP 521) misinformed the Seattle City Council as to the availability of AC outlets in the Atrium and as to how recently the decision was made to prevent public access to those outlets.

In an attempt to justify its wholly inadequate search the City cites a US Freedom of Information Act ("FOIA") case in which the court stated that an agency "is not required to look beyond the four corners of a request for leads to the **location** of responsive documents." *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996); emphasis added (BR 22). In *Kowalczyk* the court considered whether the national headquarters of the FBI was responsible for searching for responsive documents in a particular field office, i.e., literally in a specific geographic location.

The court found that the requestor provided no information in his request to lead the FBI to search for documents in a particular field office. Whereas the FBI is a huge national agency with over 35,000 employees and about 436 offices in the US, Gale's PRA request was directed to a relatively small City department in a specific location within which 28 employees were central to the issue in question (CP 368, lines 2-7). These

facts severely limit the applicability of *Kowalczyk*.

Where *Kowalczyk* may be relevant is in the court's admonition that "This is not to say that the agency may ignore what it cannot help but know." *Id.* Gale has demonstrated that the very City employees tasked with fulfilling the PRA request knew precisely the nature of the issue and the appropriate search terms (BA 20-21), thereby ignoring what they "cannot help but know."

The City claims that "*Citizens for Fair Share v. State Dept. of Corrections*, is directly on point. 117 WnApp. 411, 434, 72 P.3d. 206 (Div. 2, 2003)." (BR 23). In *Citizens* the PRA request was to the State Department of Corrections (DOC) for "policies" related to managing "political opposition" to the siting or operation of correctional facilities. The DOC failed to release a booklet that was designed to "assist DOC staff in hosting a community meeting" *Id.* 72 P.3d. 218. This provides no basis for comparison with Gale's PRA request, as Gale did not make a specific request for only "policies," but instead more broadly requested records relevant to planning or effecting any policy changes (see top of page 6 or CP 2).

If in response to Gale's PRA request the City had withheld a booklet

describing how staff should host a community meeting concerning the treatment of the homeless at Seattle Center, with the intention of using information collected at those meetings to change policy, the City would have still been be in violation of the PRA.*Citizens for Fair Share* is not on point, for the aforementioned reason, as well as for the fact that the City has withheld scores of documents directly related to developing new policies for managing the treatment of the homeless and their access to services (as has been documented above).

"**The trial court correctly found that despite repeated requests from the City, Gale did not provide clarification regarding documents he believed were responsive to his request that had not been provided or any additional information to assist in locating responsive documents.**" (BR 24-26)

In general, these claims by the City have already been addressed in this brief.

In particular the City claims that "Without citation to authority, Gale argues that his obligation to clarify his request ended with the City's November 14, 2012, production" (BR 24-25). Gale has noted WAC 44-14-04003(7) and WAC 44-14-04003(9) at BA 15-19. Additionally, *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) held that "an applicant need not exhaust his or her own ingenuity to 'ferret out' records

through some combination of 'intuition and diligent research.'" RCW 42.56.520 requires an agency to respond to a PRA request within five business days and allows "Additional time required to respond to a request may be based upon the need to clarify the intent of the request." The City never asked for additional time, nor did they request clarification, prior to November 14, 2012, when the City considered Gale's PRA request fulfilled. Most significantly, as outlined on page 22, no information Gale provided proved necessary for the City to produce scores of unreleased responsive documents with its later searches.

The City asserts that the facts in Gale's case are similar to those in *Bartz v. Dep't of Corrections*, 173 WnApp. 522, 297 P.3d 737 (Div. 2, 2013) (BR 25). In *Bartz*, the appeals court affirmed the trial courts dismissal of Bartz's complaint, finding that the Department of Corrections (DOC)

> "made multiple attempts to produce the requested records, even asking Bartz to provide specific names and dates for the emails he was seeking and performing another futile search when he refused to supply this information" *Id.*, 173 WnApp at 539.

The City misinterprets the court ruling in *Bartz*, claiming that these findings by the court were the basis for the court's finding that the DOC "had not violated the PRA" (BR 26). Rather, the Appeals court affirmation of the superior court's dismissal was due to Bartz's claim being "time barred and,

alternatively, for failure to state a claim under CR 12(b)(6)" *Id.*, 297 P.3d at 742. The relevance of *Bartz* to Gale's case is not apparent.

Regardless of the basis for the courts decision in *Bartz*, Bartz's claim involved two very specific emails which were eventually produced by the DOC. Since Bartz was seeking the release of two specific documents it makes sense for the agency to request information about those specific documents. This sharply contrasts with Gale's claim -- supported by documents produced in the City's fourth release -- that broad categories of responsive documents were not produced by the City when it had claimed to have produced all documents on November 14, 2012, and then again on December 6, 2012.

"**The trial court correctly concluded that upon being put on notice by Gale on November 19, 2012 that he believed additional responsive records existed, the City acted reasonably and conducted a legally adequate expanded search for responsive records and provided the responsive records it reasonably located to him on December 6, 2012.**" (BR 26-30)

The City asserts it "conducted a legally adequate expanded search" for the second search (BR 28). This claim conflicts with the fact that the City ignored the substance and appropriate search terms relevant to Gale's item (2) in his PRA request (see top of page 6 or CP 2), and that the City failed to uncover documents that were found with the third search.

In presenting its argument for what constitutes an adequate search the City relies heavily upon*Neighborhood Alliance of Spokane Co. v. County of Spokane*, 111 Wn.2d 702, 261 P.3d 119 (2011), noting that

> "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Id.*, 111 Wn.2d at 719-720.

The City conveniently leaves out the court's findings that the:

> "search must be reasonably calculated to uncover all relevant documents.. What will be considered reasonable will depend on the facts of each case... Additionally, **agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.. The search should not be limited to one or more places if there are additional sources for the information requested**.. Indeed, 'the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'" *Neighborhood Alliance*, 261 P.3d at 128; emphasis added.

The court also noted in *Neighborhood Alliance*:

> "an inadequate search is comparable to a denial because the result is the same, and should be treated similarly in penalty determinations" *Id.*

The *Neighborhood Alliance* case involved a two part PRA request from the Neighborhood Alliance to the County of Spokane. The second part involved a request for documents that would reveal the identities of two individuals listed on a "seating chart" with only their first names. The County responded that the PRA "does not require agencies to explain

public records. As such, no response is required" *Id.* at 123. This parallels the arguments that the City has used to deny Gale's claims (see BR 18, last paragraph, and BR 20). In *Neighborhood Alliance* the court found

> "This violates the PRA. The request sought public records, not explanations, and if the agency was unclear about what was requested, it was required to seek clarification." *Id.* at 132.

Further, the court notes in *Neighborhood Alliance* that the County:

> "does not refer to such things as 'seating charts,' instead, they are called 'floor plans,' 'reconfiguration charts,' or 'cubicle layouts.' The adequacy of this second search is not before us, but it is worth noting that **some courts have found searches inadequate when the searcher limits the search to the terms provided by the requester, even though the searcher uses synonyms to refer to those items, and if the synonyms had been used, the search would have proved fruitful**." *Neighborhood Alliance*, 261 P.3d at 144, footnote 10; emphasis added.

The County of Spokane's claims and behavior in the *Neighborhood Alliance* case closely parallels the City's actions with Gale. If the City was unclear as to the meaning of Gale's item (2) they should have sought clarification for that, rather than playing a game of hide-and-go-seek by using severely limited search terms, failing to produce responsive documents, and then requesting that Gale disclose the documents in his possession or provide specific search terms (some of which, noted on page

6, only the City would have known). It is obvious, given the City's refusal to do an adequate search, and their later attempts to rationalize it, that if Gale had provided the specific information requested by the City, the City would have produced only those documents and then claimed "we gave Gale exactly what he asked for."

It appears the City has conflated missing documents with "explanations." The record, as detailed here, clearly demonstrates that the City failed, after three attempts, to provide "the records themselves" and still has not done a reasonable or adequate search, thereby leaving innumerable records yet to be produced.

"**The trial court correctly concluded that City Law Department's voluntary search employing additional search terms provided by Gale in reply briefing on the motion to show cause exceeded the reasonable standard of a legally adequate search.**" (BR 30-31)

The City states that their last search (a) expanded "the scope of the search beyond records related to the Armory," and (b) utilized "the Law Department's more sophisticated system" (BR 30). Statement (b) is a stunning assertion, and an implied admission, by the City that they have a two tiered approach to responding to PRA requests: their default system and then a "more sophisticated system." Though the City extensively cites

the *Neighborhood Alliance* decision they ignored the courts admonition in that case stating

> "The search should not be limited to one or more places if there are additional sources for the information requested.. Indeed, 'the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested'" *Neighborhood Alliance*, 261 P.3d at 128.

The claim made by the City in (a) above ignores that Gale's PRA request specifies "Seattle Center" and not just the "Armory" (CP 2, lines 20-24), and additionally ignores, as argued earlier, that most, if not all, documents produced from this last search were directly responsive to Gale's PRA request despite the City's erroneous claim to the contrary.

The claim that the City has "exceeded the reasonable standard of a legally adequate search" with their last search is patently false and predicated on the assumption that the use of an inferior search system would be legally adequate. Additionally, this claim of a search which "exceeded" the standard is a transparent and brazen attempt by the City to avoid liability for producing responsive documents 86 days after claiming it had fulfilled Gale's PRA request, and 63 days after claiming it had finally produced the documents (on December 6, 2012) resulting from an "adequate" search.

The City states that their last search produced "38 documents that have never been produced to Mr. Gale" (CP 370, lines 10-11), out of the 104 "previously unproduced **responsive** documents" (CP 369, lines 14-15; emphasis added). These claims are confusing, in part due to the City's claim that some of the 104 documents contain information similar or identical to documents released earlier. Nonetheless, the City states that

> "Only 6 of the responsive documents were found using the search terms suggested by Mr. Gale... while all other documents were found using the term 'outlet' or 'outlets' " (CP 370, lines 7-9).

Hence over 84% of the newly released documents were produced using the identical search terms the City had used in its two prior searches, demonstrating both the inadequacy of the earlier searches by the City and the inappropriateness of expecting or requiring the requestor to provide search terms (especially when the City staff central to the controversy know precisely the terms they have been using, as noted on page 6).

"The trial court did not abuse its discretion in awarding a $10 per day penalty against the City for a period of 22 days." (BR 31-42)

Gale has already presented his arguments regarding the trial court's abuse of discretion in evaluating the *Yousoufian* factors (*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010)) in this case (BA

14-32). The City's argument is based on erroneous claims regarding (a) re-characterizing Gale's PRA request as solely about "outlet(s)"; (b) the necessity for Gale to provide clarification where none was needed; and (c) asserting that "Gale conflates his records request with a desire to know the underlying reason for the City's decision to restrict outlet access" (BR 40). All these issues have been addressed above.

One statement by the City in this section deserves special mention:

> "The City does not question the importance of Mr. Gale's issue, but the City's actions here stand in sharp contrast to Yousoufian where the requester waited years for a response to a request regarding a $300 million, publicly-financed project that was subject to an upcoming referendum at the time of the request." (BR 41)

It is not clear what metric the City uses to suggest that a $300 million publicly financed project is of greater importance then a City agency attempting to dispossess an already under served and needy group of its citizens. Ironically, the City also appears determined to repeat the violations of the PRA that King County engaged in with *Yousoufian.*

"The trial court correctly limited Gale's award of costs to the filing fee and by not award Gale's labor costs, to which he was not entitled a pro se party." (BR 42)

On February 26, 2013 Gale submitted a Proposed Order to the trial court noting the legal basis for "all costs" (CP 176, line 23-29), and

requesting $2,600 in costs (CP 177, lines 17-18). Prior to that Gale raised this issue with the trial court (CP 156, line 27 to CP 157, line 12). Gale's costs have increased substantially since then, and he should be fully entitled to the provisions of RCW 42.56.550(4) providing a prevailing plaintiff with recovery of "all costs" (see BA 36-37 for argument).

"The Court should not consider issues raised for the first time on appeal." (BR 42-46)

The City claims that Gale has raised three issues for the first time on appeal: (a) CR 11 sanctions against the City; (b) a request for in camera review of documents the City claims are fully or partially exempt from disclosure; and (c) a request that the City produce missing email attachments. (BR 43).

The extensive and continuing nature of CR 11 violations were not apparent to Gale until after the trial court gave its ruling. It is clear from the City's claims in their brief before the Appeals Court that no prior notice would have changed their behavior. Additionally, the City, and its attorneys, should be held to a higher standard of conduct given that while they are tasked with defending the City they are also tasked with protecting its citizens by upholding the law, specifically RCW 42.56 in this case.

Gale had requested that the trial court review documents that the City

considers exempt or subject to redaction (CP 156, lines 21-25) due to the City's overly broad exemption claims. RCW 42.56.550(1) states:

> Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

These documents are noted in CP 586-587.

Gale had also requested that the trial court require the City to produce missing email attachments (CP 156, lines 18-19). Attachments are missing from emails at CP 386, 397, 452, 454-55, 474, 539, and 540 (and possibly others).

Conclusion

Given the numerous and glaring errors by the trial court, and the continued bad faith claims made by the City, Gale respectfully requests this court adopt Gale's Proposed Order to the trial court (CP 174-178). Returning this case to the trial court will almost certainly encourage the City to repeat the kind of behavior that caused repeated appeals in the *Yousoufian* case.

DATED this 21st day of August, 2013, at Seattle, King County, Washington.

Respectfully submitted,

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DECLARATION OF SERVICE

Howard J. Gale states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and make this declaration based on my personal knowledge and belief.

2. I certify that I mailed a copy of the foregoing REPLY BRIEF OF APPELLANT (Court of Appeals case number 702122) to Sara O'Connor-Kriss, respondent's attorney, at the Seattle City Attorney's Office, 600 4th Ave., PO BOX 94769, Seattle, WA 98124-4769, postage prepaid, on August 21, 2013 at the US Post Office at 415 1st Ave. N., Seattle, WA 98109-4503.

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

DATED this 21st day of August, 2013, at Seattle, King County, Washington.

Howard J. Gale