No. 45812-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

ARTHUR WEST,
appellant,

Vs.

CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON, et al,
respondents

APPELLANT WEST'S CORRECTED SUPPLEMENTAL BRIEF

Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

CONSTITUTIONAL PROVISIONS

ARTICLES

Comes now the plaintiff and respectfully provides supplemental briefing in response to the direction and Order of the Court on the issue of whether the Superior Court had authority to ignore the claims made in the Complaint and whether plaintiff waived or failed to preserve the issues regarding the relief he sought in the Trial Court.

Plaintiff maintains the record amply demonstrates that he documented his claims in declarations and memoranda, filed a Motion for a Show Cause Order concerning the claims, argued them and made a formal objection to the Court's ruling refusing to grant the requested relief, and even proposed an Order detailing the claims that the Trial Court declined to sign, and that plaintiff further filed and served a notice of appeal prior to the entry of the final Order which notice, and it's attachment, clearly stated his objections to the ruling of the Court.

Plaintiff believes that there were no claims not briefed or argued, or which were not apparent in the record of the case that the Court was required to review in making its "de novo" determination on affidavits pursuant to RCW 42.56.550(3) whether the agency met its "burden of proof" (Under RCW 42.56.550(1)) "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."

In any case, "[W]aiver by conduct 'requires *unequivocal* acts of conduct evidencing an intent to waive.' "American Safety Casualty Insurance. v. City of Olympia, 162 Wn.2d 762, (2007), citing *Mike M. Johnson*, 150 Wn.2d at 391 (emphasis added) (quoting *Absher*, 77 Wn. App. at 143)

No unequivocal acts are present in this case evidencing an intent to waive

on the part of the plaintiff/appellant. On the contrary, many clear statements and writings of the appellant in the trial court evinced an unmistakeable intent not to waive the issues of noncompliance with the PRA asserted in the Complaint and Motion to Show Cause, and attested to in the various declarations and supplemental documents filed by the appellant in addition to the complaint.

There is one extraordinary circumstance in this case that involves the record of the proceedings on June 17, 2012. By some judicial mistake, a court reporter was not present at the June 17 Hearing. When plaintiff requested a copy of the transcript in 2012, he was informed by Ms. Davidson that the recording was inaudible and un-transcribable.

However, in response to this Court's direction for further briefing, West obtained a copy of the recording for forensic analysis, and determined that it was never defective or inaudible to begin with. Under these circumstances, appellant respectfully moves the court to accept this transcript as a necessary adjunct to its order seeking further briefing, or admit it as newly discovered or supplemental evidence that was concealed due to no fault of the plaintiff. The unique and extremely extraordinary circumstances by which the record of this critical hearing was temporarily suppressed justify a waiver of the rules under RAP 1.2 or inclusion in the record under RAP 9.10 (2). The plaintiff has arranged for, paid for, and arranged for the transmission of the Transcript of the June 17, 2012 hearing in time to meet the August 29 deadline set by this Court.

It is undeniable that the Original Complaint and Order to Show Cause contained specific claims of withholding and failure to respond to a specific records request. The Original Complaint stated at Section 3.1...

On January 19 of 2010, plaintiff filed a request for disclosure of public

records concerning records withheld under claim of executive privilege.

Section 3.2 states...

The Governor has failed to timely respond or disclose relevant records.

At page 4 of the Complaint. At line 11, the plaintiff seeks the following relief:

That the Governor be required to disclose the records requested by the plaintiff, and plaintiff be awarded costs and per diem penalties under the PRA for each day that any single record or records has been withheld, and/or for each day since January 29, 2010 that a proper exemption log citing actual exemptions to disclosure under the public records act has not been produced.

The plaintiff's Motion for an Order to show Cause, filed March 7, clearly sought the following:

That an Order enter under the seal of this court compelling the defendants to appear through counsel, and show cause why they should not be found to be in violation of the public records act for failing to produce records in a reasonable time, for failing to provide an exemption log citing to an actual exemption to disclosure recognized under RCW 42.56, and for failing to produce public records in response to plaintiff's request.

The declaration incorporated in the motion referenced an attached...

"true and correct copy of (a) response and denial of public record(s) under the authority of an executive privilege exemption. The office of the Governor has failed to produce the records in a reasonable time (over 8 months) and has asserted that executive privilege bars disclosure of many remaining records (see attached, a true and correct copy of correspondence of September 27, 2010, with exemption log.

It is clear from the declarations and pleadings on file[1] and in the record on appeal that plaintiff briefed and/or argued the issues of the state's failure to disclose records, the unreasonable delay in producing records, silent withholding and failure to produce a timely exemption log. It is also clear that the Court failed to require the agency to meet its burden under RCW 42.56.550 or conduct a de

1 See Plaintiff's March 11 Motion for Show Cause Order, (CP 11-14), Plaintiff's Supplemental declaration, (CP 46-519) plaintiff's June 17 proposed Order (CP 1001-1002) and Notice of Appeal (CP 999-1000), Plaintiff's Motion to File Exhibit (CP 45) Plaintiff's June 12 Motion to Supplement (CP 697-997), The July 1, 2012 Motion to reconsider sua sponte dismissal of PRA claims, (CP 1010-1021), Plaintiff's June 6th Declaration, (CP 661)

novo review of the affidavits and records in the Court file as required under the PRA.

In particular, it cannot be reasonably contested that appellant complied with CR 46, which provides...

> EXCEPTIONS UNNECESSARY
> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary **it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor**; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

The transcript of June 17, 2012 demonstrates there was no "unequivocal" waiver of appellants claims under the Complaint as the Court expressly stated that these issues could be raised in the Court of Appeals. On June 17, 2012, Plaintiff West stated...

> WEST: I'd just like to point out for the record **I respectfully object. I have not waived my right to relief under the complaint** I asked for disclosure of records under the complaint. Records were disclosed following the filing of this suit, as a result of the filing of this suit. Under the public records act – its black letter law- the plaintiff prevails under those conditions. I do not believe the court... has a right to amend the plaintiff's complaint and read in the manner that it has been described today. Thank you.
>
> THE COURT: All Right. Well, **you can certainly raise that in front of some other Court** if you choose to do so.

This is, by any measure, was sufficient to comply with the requirements of CR 46. The respondents did not object to this ruling of the court and are bound by the doctrines of collateral estoppel and res judicata to the determination that the appellant has preserved the issue of whether the relief sought in the complaint should have been granted. Prior to the entry of the Order on June 23, plaintiff also stated more specifically..

> It was my understanding that we were here on that motion for a show cause order, Your Honor. I thought that was the tenor of your ruling, that there wasn't a violation and that that was what the Court ruled. If that wasn't, I apologize, but that was what I got from the ruling.
> I'd point out that it's necessary to rule on all the claims in a complaint in that if you don't dispose of all the claims there would be CR 54 problems, that any order, no matter how designated, that doesn't deal with all of the claims raised isn't dispositive. So in the hopes of making sure the Court of Appeals realizes what the Court has ruled, I'd like to make sure very clearly what has been ruled on and what hasn't. **The original complaint specifically alleged violations of the Public Records Act involving the response, the privilege log, and the production of documents. In this case we have seen a privilege log and documents that weren't produced until June 9th after the briefing was closed, which I don't think can be defended as a reasonable response under the Public Records Act.** Transcript of June 23, 2012,Page 12 line 12 - page 13 line 9

Again, at page 15, lines 9-22, the appellant states,,,

> (T)he wording of the complaint and the wording of the March 4th motion to show cause very clearly identified what sections of the Public Records Act were alleged to be violated: **(the) Requirement of a prompt response, the requirement of a prompt production of a privilege log, the withholding of records until after the suit was filed, and in this case again now we have the silent withholding of records until after the briefing was closed on July 9th when the final disclosure and privilege log was produced, which technically, regardless of how that came to be, do present a violation of the Act.** An agency is not allowed to wait until a requester files suit and then sometime later, in this case after the briefings were closed, produce a privilege log and produce the records. That's not what the Act requires. June 23, 2012 Transcript, Page 15 line 9-22

In addition, the Supplemental Brief filed by the plaintiff, at page 4, lines 2-9, states...

> In (his) records request, plaintiff West requested written documents from the office of the Governor... which identified the records in its denial letter and exemption log. Based upon the description of the records provided by the office of the governor the records pertain to the conduct of government. **The question then is whether any exemption justifies withholding the records or portions of records requested**. Supplemental Brief page 4, line 2-9 (emphasis added)

The Supplemental Brief concludes...

> Based upon the foregoing, **plaintiff West respectfully requests the court order immediate disclosure of all responsive records in unredacted format. The plaintiff also requests the Court grant (his) request for reasonable costs, fees, and statutory penalties**. (emphasis added)

On the 17th of June, 2012, plaintiff further argued, at page 16, line 20...

> But if you look at what has been disclosed--- obviously we can't at this point look at what has been withheld, but I don't see anything in the several hundred pages of documents that have been disclosed that needs to be secret. I don't see any overriding reason why discussions about highways in Seattle or a 60 day supply of marijuana or any of the various other things needed to be secret for the Governor to do her job properly: in fact I think the argument is completely the other way.

Even the State, at argument on June 17, identified the records at issue.

> I think we have seen, in the number of records that you have dealt with here -- it may be several hundred records with the number of pages there...Transcript of June 17, page 14, lines 4-7

This again operates as an estoppel to prohibit the State from denying that the court dealt with specific records.

Further, in regard to the records and exemption log belatedly produced on June 12, 2012 after the briefing schedule had been closed, it is mendacious of counsel to allege that they should have been the subject of briefing at the Show Cause hearing that took place just 5 days after their extremely tardy disclosure.

Although this Court's request for further briefing does not mention it, it must also be noted that at CP 1010-1021, there appears a Motion for Reconsideration which also argued all of the "disputed" issues specifically and at great length. The Order denying this Motion appears at CP 1022.

The refusal of the Court to even entertain the plaintiff's claims denied due process of law and violated the express terms of RCW 42.56.550 that provides that the agency bears the burden of proving that refusing to disclose is in

accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

The Court's procedure was especially objectionable in that the legislature has made clear the principles governing the construction of the public disclosure act.

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, 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. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy. Former RCW 42.17.251 (2005).

Consistent with this legislative directive, the Washington public disclosure act has been interpreted as

> "a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe* , 90 Wn.2d 123 , 127, 580 P.2d 246 (1978). Not only are the act's disclosure provisions are to be construed liberally and its exemptions narrowly, *Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 125 Wn.2d 243 , 251, 884 P.2d 592 (1994) (*PAWS*), but... **The agency must carry the burden of proving the information sought falls within one of the act's exemptions.** Former RCW 42.17.340 (1); *Spokane Police Guild v. Liquor Control Bd.* , 112 Wn.2d 30 , 35, 769 P.2d 283 (1989). Agency determinations are reviewed de novo. Former RCW 42.17.340 (3). When reviewing agency actions, "[c]ourts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." Former RCW 42.17.340 (3). Koenig v. City of Des Moines 181, 158 Wn. 2d. 173, (2006)

The Superior Court erred, and committed reversible error, when it transferred the agency's burden to the plaintiff and refused to consider issues apparent in the Complaint, Motion for an Order to Show Cause (and numerous other declarations and pleadings filed by the plaintiff) that it was charged with determining, which issues had been briefed and argued, and the subject of an alternate proposed Order, and specific exceptions taken by the plaintiff in open court.

Plaintiff maintains that under the 5th and 14th Amendments and in conformity with Due Process of law, and the Cannons of Judicial Conduct, the Court had an absolute constitutional and ethical duty to determine the issues in the complaint. the due process clauses of the United States[2] and Washington[3] Constitutions require 'notice and opportunity for hearing appropriate to the nature of the case.' " *Olympic Forest Prods., Inc. v. Chaussee Corp.* , 82 Wn.2d 418 , 422, 511 P.2d 1002 (1973) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.* , 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950))

The Superior Court denied this clearly established due process requirement when it refused to consider the issues raised in the complaint and sworn declarations, denying West notice and opportunity for a hearing appropriate to the nature of the case.

In addition to abridging Due Process, the Court further violated its duties under the Cannons of Judicial Conduct. Cannon 2.6 provides, under the heading, "Ensuring the right to be heard"...

> (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law

Cannon 2.7 provides, under the heading "Responsibility to decide"

> A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by Rule 2.11 or other law.

The Court, in refusing to adjudicate issues raised in the Complaint and pleadings, denied Due Process and failed to act in the manner required under the Cannons of Judicial Conduct to ensure the right to be heard and to execute its

---

2 The Fifth Amendment to the United States Constitution provides: [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .Section One of the Fourteenth Amendment to the United States Constitution provides:[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

3 Article I, Section 3, No person shall be deprived of life, liberty, or property, without due process of law.

responsibility to decide. It also manifestly abused its discretion, to the extent any discretion might be seen to exist to refuse to adjudicate issues and abridge due process in an invidious and arbitrary manner.

Justice Benjamin Cardozo, in his series of lectures collected in The Nature of the Judicial Process 141 (1921), reflected on the nature of judicial discretion:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

By this definition, the Honorable Judge in this case transcended the bounds of any possible discretion that might have existed when he innovated at his pleasure to pursue his own ideals of beauty and goodness by refusing to adjudicate issues that were squarely before him for resolution.

Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. *Braam v. State*, 150 Wn.2d 689, 706, 81 P.3d 851 (2003). The misunderstanding of the requirements of due process by the Court in this case is just such an untenable ground, even assuming, which the appellant does not, that a Judge has discretion to refuse to adjudicate issues appearing in a complaint.

CONCLUSION

Justice may be blind, but it is violative of due process of law and a manifest abuse of discretion for the honorable Judges of the State of Washington to act as

the judicial counterparts of Commander Nelson at the Battle of Copenhagen[4], turning a blind eye to matters of record that they, for their own arbitrary reasons, do not deign to consider in their service to her Royal Majesty the Queen, or the Governor, as the case may be.

This Court should proceed in accord with CR 46 and RAP 1.2(a) to review the issues raised by the plaintiff in his Complaint and Motion for an Order to Show Cause, which were briefed and argued in open court, with formal exceptions being taken and a specific alternate proposed Order incorporating the very same issues prepared and filed prior to the entry of the final order in this case, and which were further the subject of a timely Motion for Reconsideration.

Respectfully submitted this day of September 2, 2014.

s/ Arthur West
Arthur West

CERTIFICATE OF SERVICE

I certify that this document was served on counsel for the respondents electronically on September 2, 2014.

s/ Arthur West
Arthur West

4 *You know, Foley, I have only one eye,*— I have a right to be blind sometimes... ***The Battle of Copenhagen, Nelson and the Danes****, 1801*, Ole Feidbaek, Naval Institute Press (October 2002)