COA Division I No. 70597-1-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ARTHUR WEST,
appellant,

Vs.

PETE HOLMES, SEATTLE CITY ATTORNEY'S OFFICE, CITY OF SEATTLE,
respondents

APPELLANT WEST'S PETITION FOR DISCRETIONARY REVIEW

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

A. IDENTITY OF PETITIONER

Appellant Arthur West respectfully moves the Court for relief designated in Part B of this petition.

B. RELIEF REQUESTED

West respectfully requests review of the decisions of the Washington State Court of Appeals for Division II in Case No. 70597-1-I filed January 20 and February 18, 2015. The Washington State Supreme Court should accept review, and reverse the Division II published opinion and remand the case.

A copy of the decisions are appended as Appendix A.

C. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under prongs one, two, three and four of this rule. The issue of whether interoffice calendar records of public officials relevant to an ongoing investigation of illegal campaign activity should be disclosed when found to be responsive is an issue of substantial public importance that should be decided by the Supreme Court.

The Appeals Court ruling conflicts with precedent concerning virtually identical conduct by the City in Fischer Broadcasting v. City of Seattle as well as the Courts' rulings in Neighborhood Alliance, WPPS, PAWS II, and Nissen v. Pierce County The Supreme Court should also accept review.

D. ISSUES PRESENTED

I Is the question of whether public officials' electronic interoffice calendar related correspondence and records should be disclosed when they are responsive to a PRA request and material to an investigation of illegal campaign activity an issue of substantial public importance?

II Does the Appeals Court decision below conflict the ruling of the Supreme Court in a very similar case, Fischer Broadcasting v. City of Seattle, 180 Wn.2d 515, 326 P.3d 688 (2014), finding the City of Seattle in violation of the PRA for failing to provide records from a database, Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011) which requires an adequate search for and produce all responsive records, PAWS v. University of Washington, 125 Wn.2d 243, 262, 884 P.2d 592 (1994), and Nissen v. Pierce County, 183 Wn. App. 581, 333 P.3d 577 (2014), which broadly defines records in accord with RCW 42.56.010(4) ?

E. STATEMENT OF THE CASE

On August 27, 2012, Appellant West made a request for records to the City of Seattle. Section 3 of the request sought

> "**All records,** communications or correspondence (see above) **about or concerning I-502 or** between the City Attorney or City Attorney's office and any sponsor or representative of the I-502 campaign, January of 2011 to the present."

On / / 2012, plaintiff West filed a complaint for violation of the PRA. The Original Complaint clearly alleged unreasonable delay in the production of records, and withholding of records, (See Complaint at 1.1, 2.2, 3.8, 4.1, 5.1) claims that included within their scope delays and nondisclosure caused by silent withholding. (CP)

On January 7, 2013, the PDC and Pete Holmes entered an agreed order stipulating to 3 violations of the Public Disclosure Act involving lillegal use of City resources by Pete Holmes to campaign for I-502 (CP)

The records that the PDC used to establish the violations principally featured the calendars owned, used in correspondence between staff, and retained by City Attorney Pete Holmes (and his secretary) to simultaneously manage his duties as Seattle City Attorney and campaign for ballot measure I-502. (CP)

These critical records of the activities of a public official, although responsive to West's request for records and correspondence , and known to exist by the city, were not disclosed to West until he specifically requested them under discovery. (CP)

Like the actual calendar of the Honorable Judge Linde, (CP 224) which was created by a judicial assistant and used to coordinate the administration of justice in the King County Court in May of 2013, the withheld records in this case, the actual calendars of the activities of the Seattle City Attorney, (CP 86-

90) were **"created"** by a public official (his assistant Kim Garrett, (CP 93, 96)) **"maintained"** by the City, and **"used"** by being in used "correspondence" and shared with other officials (Angelica Mendoza and John Schochet (CP 96)) to coordinate and conduct the operations of Mr. Holmes and the City Attorney's office.

It is beyond reasonable dispute that the City Attorney had a regular business practice of a weekly "calendar perusal sessions" (CP 231-279, 282, 295, 305, 310) where the calendars were **"used"** to coordinate the activities of the office. Clearly, the withheld records were the subject of electronic correspondence, and were used and controlled by the City. It could hardly be otherwise, as without calendars, it would be impossible for an office like the Seattle City Attorney to operate in a coordinated manner in coordination with its many support staff.

On / / 2013, the defendants filed a Motion for Summary Judgment. (CP)

On / / 2013, the court granted summary judgment of dismissal. An Order was signed on / / 2013. (CP)

Plaintiff moved for reconsideration on / / /2013. (CP)

Plaintiff filed a declaration re new evidence on / / / 2013. (CP)

On / / 2013 the Court entered an Order denying reconsideration (CP)

On / / 2013, the Plaintiff filed a timely Notice of Appeal (CP

On January 20 2015 Division II of the Court of appeals issued an unpublished opinion affirming the trial court.

On February 18, 2015, an order denying reconsideration was entered. West files this timely Petition for Review to the Washington State Supreme Court.

F. SUMMARY OF ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issue of whether public officials' Outlook calendar related records and correspondence should be disclosed when they are discovered to be responsive to a public records request and an ongoing investigation of illegal campaign activity is an issue of substantial public importance.

Production of correspondence such as interoffice electronic appointment calendars is extremely important due to the increased use and access of electronic information and materials, especially when those materials are maintained on an agency's internal computer system[1]

The questions presented in this case concerning whether public officials' interoffice calendar records should be disclosed when found to be responsive to a public records request and an investigation under the Public Disclosure Act are of substantial public interest.

When construing statutes, the goal is to ascertain and effectuate legislative intent. The People and the Legislature both intended to require that the Public Disclosure and Records Act be liberally interpreted to ensure that records

1 Patricia Fallon, The Freedom of Information Act and electronic calendars examined in Consumer Federation of America v. Department of Agriculture, (455 F.3d 283, (2006)) *The Public Servant, Vol. 8, No. 4, (2007)*

concerning the funding of ballot propositions be disclosed and the public interest be protected.

These matters present issues of substantial and statewide public importance.

2. The decision of the Court is in conflict with the precedent of Fischer, Neighborhood Alliance, Utter, WPPS, and Nissen.

The decision of the Court of Appeals in this case was directly at odds not only with the recent decision of this Court in Fischer, but also with the precedent of Neighborhood Alliance, Utter, PAWS, WPPS, and Nissen requiring that the PRA be interpreted liberally to ensure that the liberal intent of the people be fulfilled and to require the disclosure of electronic records and correspondence concerning publicly funded support of a ballot proposition.

3. A significant question of law of the State of Washington is involved.

The issue of whether interoffice calendar correspondence and records demonstrating illegal use of public resources to support a ballot measure are responsive to a records request for all records related to the balot measure is a significant question of law.

1.

G. ARGUMENT

The issue of production of interoffice electronic correspondence such as electronic appointment calendars is extremely important due to the increased use and access of electronic information and materials, especially when those

materials are only maintained on an agency's internal computer system[2].

This case concerns the refusal of the City of Seattle to produce known responsive records, the calendars transmitted between the staff at the Seattle City Attorney's office which were owned, used, exchanged and retained to manage the schedule of a prominent elected law enforcement official, Seattle City Attorney Pete Holmes.

As the Supreme Court recently ruled in a similar case involving the City of Seattle's refusal to provide law enforcement related records...

> We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But "public record" is broadly defined and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. Id.; see also WAC 44–14–04001. **Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.... (T)he uncontroverted evidence presented showed that a partially responsive response could have been produced at the time of the original denial. The failure to do so violated the PRA.** Fischer Broadcasting v. City of Seattle, 180 Wn.2d 515, 326 P.3d 688 (2014) (Emphasis added)

In the present case, as in the Fischer Broadcasting case, once the City of Seattle realized that responsive information existed in a database it had a duty to produce the information or face potential violations of the PRA.

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2 Patricia Fallon, The Freedom of Information Act and electronic calendars examined in Consumer Federation of America v. Department of Agriculture, (455 F.3d 283, (2006)) *The Public Servant, Vol. 8, No. 4, (2007)*

The Court of Appeals in its January 20, 2015 ruling creates new precedent in conflict with the ruling of the Supreme Court in Fischer, and appears to have also created a new "These are not the droids you're looking for" exemption of unprecedented scope-one that will be used to justify agencies across the State turning a blind eye to known responsive records and interoffice correspondence contained in electronic databases.

The technological advancements of recent years have radically changed the capability for storing information as well as agency practices in sharing and exchanging correspondence in the form of electronic records such as the weekly outlook calendars exchanged by the staff of the Seattle City Attorney to simultaneously manage his public duties as City Attorney and his private affairs as a leading proponent of ballot proposition I-502.

The exhibit appearing at CP 224 of this case[3] demonstrates unequivocally that the maintenance and disclosure of the calendars of elected public law enforcement officials such as Judges and City Attorneys are essential to the sound operation of the government of this State, even when they are produced and maintained as electronic databases in programs such as Microsoft Outlook©.

This conclusion is supported by the reasoning of this Court in Fischer Broadcasting, Neighborhood Alliance, and WPPS as well as Division II in Nissen and the Court of Appeals for the District of Columbia.

In Consumer Federation of America v. Department of Agriculture, 455 F.3d 283, (2006) the D.C. Court of Appeals noted that there did not appear to be any practical distinction between the former practice of distributing calendar

3 The Calendar of the Honorable Judge Linde for the week of May 10, 2013

information in paper format or in hard copy versus the modern practice of allowing access to electronically stored information through an internal network.

As even the Honorable Judge Linde recognized, at the hearing held pursuant to the calendar provided by the Court to the parties to ensure their attendance and participation at the hearing calendared for May 10, 2013...

> Seeing... how those scheduled events fit in and to a calendar is key to understanding what our public officials are doing... (See transcript of May 10, 2013, at page 37, lines 20-22)

The records at issue in this appeal are these same "key" calendar records of the official weekly calendars of the Seattle City Attorney, responsive records that were created, used, exchanged between Mr. Holmes, his secretary, and other staff members, and maintained by the city, yet withheld from plaintiff in violation of the Public Records Act.

Significantly, while these records were withheld from West, they were provided by the City to the Public Disclosure Commission in response to a PDC investigation related to enforcement of violations of the Public Disclosure Act by the Seattle City Attorney and his staff concerning the calendaring of I-502 campaign activities (CP 101-103)

The PDC, in its investigation of Seattle City Attorney Holmes (CP 95-100) clearly found the calendar records maintained and used by the City were key to an understanding of what the City Attorney was doing in regard to I-502.

The only question that remains is: WHY were these known and responsive records not produced to plaintiff in the first place so he could share in these "Key" understandings, as required by the manifest remedial intent of the Public Records Act?

This case underscores the reason the drafters of I-276 combined campaign finance and reporting law with the requirement that government records be public, in order that the information necessary to establish compliance with the law be available, so that the broad remedial intent of new law, that the people be informed of the conduct of government, and be able to hold it accountable, could reasonably be effectuated.

The official interoffice calendar records (containing initiative related campaign information) of a senior law enforcement official such as Seattle City Attorney Pete Holmes are obviously responsive to a request for "all records" related to the same initiative and the activities of the selfsame City Attorney.

If the broad remedial policy of the Public Records and Public Disclosure Acts are to be effectuated, it is essential that such key responsive records as the official electronic interoffice calendars of senior elected officials like Seattle City Attorney Pete Holmes be readily disclosed, prior to citizens having to go to court to attempt to compel disclosure.

I. The Court erred in failing to interpret the PDA and PRA liberally to effectuate the express intent of the people "that... lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided" by the City of Seattle.

This Court recently reaffirmed the intent of the Public Disclosure Act expressed in RCW 42.17A.001[4], and the requirement that the Act ...be liberally construed to promote complete disclosure of all information respecting the

4RCW 42.17A.0001.1 provides...It is hereby declared by the sovereign people to be the public policy of the state of Washington: (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

financing of...lobbying...and full access to public records so as to assure continuing public confidence..and so as to assure that the public interest will be fully protected...

> The provisions of the FCPA, moreover, "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.OO1. Utter and Ireland. v. Building Industry Association of Washington, No. 89462-1, January 22, 2015 Slip Opinion at 5-6

The Court of Appeals ruling in the present case is irreconcilable with this Court's ruling in Utter and Ireland in that in failed to interpret the Public Disclosure Act liberally to ensure that Seattle City Attorney Pete Holmes' use of public resources on behalf of a ballot measure, I-502 were fully disclosed to the public and that secrecy was to be avoided, and to effectuate the remedial and hands on intent of the people in adopting what was, in 1974, billed as "The Spirit of I-(2)76".

> The basic rule is that a statute should be construed in light of the legislative purpose behind its enactment... being remedial in nature, (a statute) is entitled to a liberal construction to effect its purpose. Nucleonics Department v. WPPS, 101 Wn.2d 24, 677 P.2d 108, (1984)

As the Supreme Court ruled on the PDA only 4 years after it was overwhelmingly approved by the Voters..

> A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. Hearst Co. v. Hoppe, 90 Wn.2d 123, 138, 580 P.2d 246 (1978), (cited in WPPS)

The attached Article demonstrates that the manifest intent of the People's

Initiative billed as the Spirit of I (2)76" was to provide accessible, hands on, citizen driven remedies for campaign finance violations and secrecy.

II. The ruling of Division I conflicted with the holdings in Neighborhood Alliance and PAWS II by not requiring the City of Seattle to make a diligent search for and produce known responsive records when West's original request for "All records, communications or correspondence...about or concerning I-502" reasonably encompassed the City Attorney's interoffice Outlook calendar that reflected unlawful campaign activity on behalf of I-502.

It is beyond reasonable dispute that West's original request for **All records,... about or concerning I-502"** reasonably included any existing "writings" of interoffice calendar records of campaign activities unlawfully scheduled and placed on the City Attorney's official work calendar.

Examination of the request demonstrates that it sought "**All records.. about or concerning I-502..**". Such a request necessarily includes "writings" maintained and used by the agency related to I-502, especially when they were the official interoffice Outlook calendars of the Senior law enforcement officer of the City, Seattle City Attorney Pete Holmes.

In consideration of the above, it is obvious that the City's attempts to deny that the request included "records" and that the Outlook calendars showing I-502 related meetings and events were not-responsive to a request for I-502 related records are simply not within the pale of reasonable argument.

Further, the City completely misrepresents the facts and the contents of the Brief filed by the appellant when it attempts to allege that the City performed a valid search and West failed to argue this issue. As the Appellant argued in the Opening Brief...

"The City simply cannot be allowed to hide behind the spurious

smokescreen of a "reasonable search" when records known to exist were concealed, for, as the Supreme Court and the federal judiciary have recognized, the agency bears the burden, beyond material doubt, of showing its search was adequate in cases involving disclosure of public records.

> To do so, the agency... should establish that all places likely to contain responsive materials were searched. Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), citing Valencia-Lucena, 180 F.3d at 325.

The City in this case did not meet this burden because they did not conduct a search of, or produce the interoffice Outloook calendar records of, the of governmental functions of the Seattle City Attorney that they have certified were known to exist, and the City records officer did not contact the Seattle City Attorney or staff and Search their paper records or review even the most basic records as the interoffice Outlook calendar correspondence that staff accessed and exchanged to manage and coordinate the schedule of the Seattle City Attorney..

These were places that were reasonably likely to have responsive records, especially since it was no secret that Mr. Holmes was an outspoken and active proponent of I-502.

As the Supreme Court underscored in the Neighborhood Alliance decision...

> ...(A)gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. Valencia-Lucena v. U.S. Coast Guard, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999). The search should not be limited to one or more places if there are additional sources for the information requested. Valencia-Lucena, 180 F.3d at 326. 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."

Oglesby v. U.S. Dep't of Army, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

The City should not have been allowed by the Court of Appeals to veil nondisclosure of responsive records behind a perfunctory search and claim that they believed that only isolated entries existed when they were very well aware that actual "calendars" and interoffice correspondence was available in the form of weekly Outlook calendar records that were "Used" by the City Attorney and his staff to manage and coordinate their activities..

Significantly, the defendants have not alleged that they were unaware of the existence of these tabular registers in the form of weekly calendars. In fact, the declaration of Mr. Jaeger demonstrates that the City was well aware of the existence of these "records" but deliberately decided not to disclose them. (See Jaeger Declaration at page 2, lines 9-10)"

Under such circumstances it is evident that the ruling of the Court of Appeals in this case violates clear black letter precedent of this Court..

III. The interoffice Outlook calendar records withheld by the city were "records" and "existing data compilations from which information may be obtained or translated." as recognized by Division II in Nissen and defined in RCW 42.56.010(3) and (4)

RCW 42.56.010 (3) and (4) define public "records" to include "**existing data compilations** from which information may be obtained or translated" (emphasis added),

This definition cannot be misrepresented to omit records such as the **existing Outlook calendar data compilations** from which calendars were

created, shared, used, perused and retained to coordinate the administration and operation of the office of the Seattle City Attorney.

The Settle City Attorney is not akin to a wild antelope[5] freely roaming the African savannah, subject to the vicissitudes of a predator-prey relationship, but is, conversely, a senior elected law enforcement officer whose duties on behalf of the public are governed by the documentation[6] of his official interoffice Outlook calendar records.

For the public and the PDC to be fully informed of the activities of their government so that the policy of the Public Disclosure and Public Records Acts can be effectuated, it is imperative that key records such as a senior law enforcement official's interoffice Outlook calendar records be available after the meetings have been attended.

The fact that these known responsive records were not disclosed by the city of Seattle may not have been malicious or the product of a conspiracy to hide illegal capaign activity, but it was a serious omission of relevant and critical data nonetheless.

The withheld Outlook calendar records were known responsive records meeting the definitions of RCW 42.56.010 (3) and (4).

As the Supreme Court held in PAWS II, the failure to produce responsive records known to exist constitutes silent withholding. The City violated the PRA in refusing to provide the known responsive Outlook calendar records to the

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5 *The Lady and the Antelope:* Suzanne Briet's Contribution to the French Documentation Movement, Library Trends 52, no. 4 (March 22, 2004):

6 Suzanne Briet, *What is Documentation ?.* the *Journal of the American Society of Information Science*, v. 48, no. 9 (Sept 1997), pp. 804-809.

plaintiff, particularly when they were the only existing record of the official activities of the City Attorney for the City of Seattle.

IV. The fact that Outlook Calendar records are responsive and subject to disclosure is recognized by the EPA, the federal government, and the D. C. Court of Appeals, sources of indisputable integrity and veracity.

ER 402 allows notice of adjudicative facts to be taken at any point. In this case it is subject to judicial notice that the United States EPA, a source of unimpeachable veracity, states the following in its official guidance on public disclosure.

> **I keep my calendar on the Microsoft Outlook e-mail system. Is it still a record?**
>
> The same rules apply to calendars that are maintained electronically as for those maintained in paper. Until EPA has an electronic recordkeeping system, the record copy of your calendar in Microsoft Outlook must be printed out on a regular basis (at least once a month) and filed in your paper recordkeeping system. This is especially important for calendars of senior officials since they are permanent records.

This conclusion is shared by the Justice Department and the White House, both of which make calendar information of their senior officials available online.

The characteristics of electronic calendars were closely examined by the Court of Appeals for the D.C. Circuit in Consumer Federation of America v. Department of Agriculture, 455 F.3d 283, (2006).

In that case, the court recognized that, as in the instant case...

> The technologically savvy... officials kept their calendars "on the... computer system,", thus necessarily subjecting them to the control of that system's administrators.

The Court in the Consumer Federation case found there to be no practical difference between distributing paper copies of calendars and allowing access to electronic copies in the manner that Pete Holmes' calendar was disclosed to and used by his assistants to coordinate the functions of the City Attorney's office. As the Court noted...

> However, there does not appear to be any practical difference between the former practice of distributing information in printed form on hard copies and the modern practice of allowing others access through network computers. In any meaningful sense, the USDA calendars were electronically "distributed" to the listed recipients and were used by them to schedule agency meetings and prevent conflicts.

Additionally, the Consumer Federation court observed...

> Allowing others to have routine computer access to a calendar, however, is more like distributing hard copies than it is like permitting occasional glances at a document on a desk. In allowing computer access, the official surrenders personal control over the document and indicates that it will be used by others to plan their own workdays.

As the federal courts and the federal government recognize, the disclosure of officials' electronic calendars are a critical component of agency responsiveness to the Sunshine Laws.

Such disclosure is just as essential, or even more so, in the case of our more expansive and inclusive State Public Records Act.

This Court should take judicial notice of the circumstance that the federal government requires disclosure of the calendar information of senior law enforcement officials and that the electronic records at issue would have been subject to the FOIA under the precedent of the Consumer Federation decision as well as the precedent of the Supreme Court of the State of Washington.

V. The I-502 related Outlook calendar records withheld by the city were known to exist by the defendants

It is clear from the defendant's own representations at trial, and from the Declaration of Mr. Jaeger (CP 31-42) that the existence of the outlook calendar database was known to the City, so there can be no "reasonable search" defense.

Despite the fact that the outlook calendar database was a "writing" as clearly defined in the PRA, and that it admittedly contained known responsive information different from what was disclosed to West in discreet appointment records produced separately and out of context, the City continues to defend the deliberate silent withholding of this key information.

The electronic calendars silently withheld in this case were material to the enforcement of a pattern of violations of the campaign laws by the Seattle City Attorney and his staff, manifested by the selfsame calendars that were not disclosed to begin with.

Significantly, while withholding these public records from West, the City provided the very same City Attorney's calendar records to the Public Disclosure Commission, where they were employed as the crucial evidence to establish violations of the Campaign laws regarding the use of City resources to conduct partisan campaign activity on behalf of I-502, in a formal enforcement proceeding by the PDC.

VI. The I-502 related interoffice weekly Outlook calendar records were created, maintained, and regularly used, exchanged, perused and relied upon by the Seattle City Attorney and members of his staff to coordinate government activities.

Like the actual calendar of the Honorable Judge Linde, (CP 224) which was created by a judicial assistant and used to coordinate the administration of

justice in the King County Court in May of 2013, the withheld records in this case, the electronic interoffice Outlook calendars of the activities of the Seattle City Attorney, (CP 86-90) were **"created"** by a public official (his assistant Kim Garrett, (CP 93, 96)) **"maintained"** by the City, and **"used"** by being transmitted to and shared with other officials (including Angelica Mendoza and John Schochet (CP 96)) through "correspondence" to coordinate and conduct the operations of Mr. Holmes and the City Attorney's office.

It is apparent in the record that the City Attorney had a regular business practice of a weekly "calendar perusal sessions" (CP 231-279, 282, 295, 305, 310) where the electronic interoffice Outlook calendar records were the subject of correspondence and "used" to coordinate the activities of the office. Clearly, the withheld records were "correspondence" used and controlled by the City.

It could hardly be otherwise, as without electronic exchange of calendars, it would be impossible for an office like the Seattle City Attorney to operate in a coordinated manner in coordination with its many support staff.

H. CONCLUSION

The production of electronic interoffice records such as Outlook appointment calendars under the Sunshine Laws is extremely important due to the increased use and access of electronic information and materials, and such disclosure is especially necessary when such records are the only available record of a senior official's public job functions and are created, maintained, altered and exchanged on an agency's internal computer system.

The City's actions in this case violated both the letter of the law and the broad remedial intent of the Public Disclosure and Public Records Acts that citizens like plaintiff West be informed of the campaign related activities of their elected public officials such as Seattle City Attorney Pete Holmes, who illegally campaigned for a ballot measure on the public's dime.

The Seattle City attorney is not akin to the wild antelope described by Suzanne Briet; freely roaming the African savannah, subject only to the uncertain constraints and vicissitudes of the predator-prey relationship, but is, conversely, a senior elected law enforcement officer whose duties on behalf of the public are governed and defined by the official documentation of the electronic interoffice correspondence of his Microsoft Outlook calendar records.

For the public and the Public Disclosure Commission to be fully informed of the activities of their government so that the policy of the Public Disclosure and Records Acts can be effectuated, it is imperative that key records such as a senior law enforcement official's interoffice correspondence and Outlook calendar records be readily available, without recourse to the judiciary.

Division I's conclusion that electronic Outlook calendar records exchanged between Staff members for weekly calendar perusal sessions and showing initiative campaign activities are not responsive to a request for "all records" and correspondence relating to the same initiative should be overturned.

Based on the forgoing arguments, West respectfully requests the Supreme Court accept review of this case. Respectfully submitted March 20th, 2015

ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that this document has been Mailed to and/or Emailed to counsel for the respondents at their address of record on or before March 20, 2015.

Done March 20, 2014.

ARTHUR WEST

APPENDIX A

STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112 • TDD Line 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

Results of Brief Enforcement Hearings – January 18, 2013

PDC Case No: 13-021

Pete Homes, Seattle City Attorney, and Kim Garrett, City of Seattle employee:

A 45-day citizen action letter (Citizen Action Complaint) was filed on October 24, 2012, alleging that the City of Seattle, Pete Holmes, (Seattle City Attorney), Kim Garrett (Specials Assistant to Pete Holmes), and City of Seattle staff (Kimberly Mills and John Schochet) violated RCW 42.17A.555 by using the city email network and paid city staff to write and transmit email communications for the purpose of promoting Initiative 502, a 2012 statewide ballot measure concerning the legalization and regulation of marijuana that was presented to voters in the November 6, 2012 general election.

Pete Holmes and Kim Garrett - Mr. Holmes was a sponsor of I-502, and was active with New Approach Washington (NAW), the political committee formed to support passage of I-502. PDC staff found that Pete Holmes forwarded, from his private email address to the city email address of Kimberly Mills or Kim Garrett, or to his own work address, information concerning Mr. Holmes' schedule. The evidence indicated that the purpose of Mr. Holmes' emails was to keep his public schedule free from conflicts, and to register his location at the times he would be engaged in campaign activity. Kim Garrett, Mr. Holmes' scheduler, responded to the majority of these emails by passively recording information concerning the campaign-related appointment on Mr. Holmes' public calendar. However, on two occasions, Ms. Garrett proactively contacted persons outside city government to schedule or discuss the logistics of Mr. Holmes' participation in campaign activity. On a third occasion, she used her city computer to research a magazine in order to vet Mr. Holmes' participation in a campaign-related interview. Ms. Garrett acted under the direction and with the authorization of Mr. Holmes, for what they believed to be a legitimate city purpose. In the three instances where Ms. Garrett's scheduling activities went beyond the passive, ministerial placement of campaign-related events on Mr. Holmes' official calendar, staff found that the violations were inadvertent and unintentional, and resulted in little or no cost to the public.

Kimberly Mills - Staff found that on two occasions, Kimberly Mills, Mr. Holmes' Communications Director, received media inquiries regarding I-502 and forwarded them to Mr. Holmes. In one of these instances, Ms. Mills informed the reporter that as a city

employee, she could do nothing more than forward the inquiry to Mr. Holmes. PDC staff found no evidence that Ms. Mills used city facilities for the promotion of I-502, or in any other manner prohibited by RCW 42.17A.555.

John Schochet - Assistant City Attorney John Schochet was implicated in the complaint and the attached evidence only in the sense that his private email address was listed as a recipient on an email sent by Alison Holcomb of NAW. PDC staff found no evidence that Mr. Schochet used public facilities in a manner prohibited by RCW 42.17A.555.

City of Seattle - The Citizen Action Complaint alleged that the City of Seattle violated RCW 42.17A.555 by using its facilities for the promotion of I-502. The prohibitions in RCW 42.17A.555 apply to elective officials, their employees, and persons appointed to or employed by public agencies, not to entities, such as the City of Seattle. The complaint included no allegation that any other city official or employee violated RCW 42.17A.555, and PDC staff found no evidence of other violations.

Results & Penalty: The Presiding Officer accepted a Stipulation of Facts, Violations and Penalty from PDC Staff and Respondents Pete Holmes and Kim Garrett that provided for a waiver of any monetary penalty as allowed by RCW 42.17A.755(5) for first-time violations. **See attached Stipulation.**

The Presiding Officer dismissed the allegations regarding alleged improper use of City of Seattle facilities for the promotion of I-502 by Kimberly Mills, John Schochet, and the City of Seattle. The Presiding Officer agreed to recommend that the Attorney General and Prosecuting Attorney take no further action concerning this matter.

PDC Case No: 12-109

New Americans for Accountable Government

New Americans for Accountable Government (NAAG) is a local political committee that made independent expenditures supporting candidates in the 2010 general election. The Committee Registration (Form C-1pc) listed Conrad Lee and Norm Wietting as NAAG's principal officers, and disclosed that NAAG was formed to support four Republican candidates for the Washington State Legislature in the 2010 general election that included the following:

- Greg Bennett, a candidate for State Senate in the 48th Legislative District;
- Phil Wilson, a candidate for State Representative in the 48th Legislative District;
- Steve Litzow, a candidate for State Senate in the 41st Legislative District; and
- Peter Dunbar, a candidate for State Representative in the 41st Legislative District.

PDC staff alleged that New Americans for Accountable Government violated:

1. RCW 42.17.080 and 42.17.090 by failing to timely file a 2010 Post-General Election Campaign Summary Receipts & Expenditures report (Form C-4) with relevant schedules disclosing contribution and expenditure activities undertaken during the period October 26 – November 30, 2010, including monetary expenditures totaling $3,681 and debts totaling $1,161; and

2. RCW 42.17.103 by failing to timely file a Reporting Form for Independent Expenditures, Independent Expenditure Ads, and Electioneering Communications (Form C-6) disclosing independent expenditures for political advertisements totaling $7,816 during the 2010 general election.

Results & Penalty: The Presiding Officer found that New Americans for Accountable Government violated: (1) RCW 42.17.080 and 42.17.090 by failing to timely file a 2010 Post-General Election C-4 report and assessed a $200 penalty for violating this section of statute; and (2) RCW 42.17.103 by failing to timely file a C-6 report disclosing independent expenditures and assessed a $100 penalty for violating this section of statute.

The Presiding Officer assessed a total of $300 in civil penalties against New Americans for Accountable Government. He also dismissed the allegation that New Americans for Accountable Government violated RCW 42.17.640 by making over-limit in-kind contributions to candidates Greg Bennett, Phil Wilson, Steve Litzow, and Peter Dunbar.

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

In the Matter of Enforcement Action Against: Pete Holmes and Kim Garrett Respondents.	Case No. 13-021 STIPULATION AS TO FACTS, VIOLATION AND PENALTY

The parties to this Stipulation, namely, the Public Disclosure Commission Staff, through its Executive Director, Andrea McNamara Doyle, and Respondents Pete Holmes and Kim Garrett, submit this Stipulation as to Facts, Violations and Penalty in this matter. The parties agree that the Commission has the authority to accept, reject or modify the terms of this Stipulation. The parties further agree that in the event that the Commission suggests modification to any term of this agreement, each party reserves the right to reject that modification. In the event either party rejects a modification, this matter will proceed to hearing before the Commission.

JURISDICTION

The Public Disclosure Commission has jurisdiction over this proceeding pursuant to RCW 42.17/42.17A, the Public Disclosure Act; RCW 34.05, the Administrative Procedure Act; and WAC 390.

FACTS

1. Respondent Pete Holmes is the Seattle City Attorney. He was elected to office in the November 3, 2009 General Election.

2. Respondent Kim Garrett is a City of Seattle employee, and serves as Special Assistant to Mr. Holmes.

3. Initiative 502 (I-502) was an initiative to the Washington State Legislature, proposing the reform of state marijuana laws. I-502 was placed before voters in the November 6, 2012 General Election, where it was approved by approximately 56 percent of

votes cast. Mr. Holmes was a sponsor of I-502, and was active with New Approach Washington, the political committee formed to campaign for the initiative.

4. During the 2012 election, Mr. Holmes authorized a City of Seattle staff person to place appointments related to the I-502 campaign on his public calendar, in order to keep his public schedule free from conflicts, and to register his location at the times he would be engaged in campaign activity.

5. Mr. Holmes believed that such authorization complied with oral guidance he received from Wayne Barnett, Executive Director of the Seattle Ethics & Elections Commission, at the time Mr. Holmes became a sponsor of I-502. In an April 14, 2005 and June 11, 2008 letter from Mr. Barnett, expressing the same guidance, Mr. Barnett advised city officials, *"[W]hen your scheduler's actions are limited to those necessary to ensure that your public schedule is complete and accurate, and that your whereabouts are known at all times, the primary beneficiary of your scheduler's actions is the City[.]"* The April 14 letter further advised, "*Campaign scheduling must be performed by campaign personnel, who can and should coordinate scheduling with your City staff to ensure that you are not double-booked and can be reached on important City matters. Your staff can and should communicate with the campaign regarding open time slots on your public schedule (to be sure you aren't double-booked), and to place campaign events on your public schedule (to ensure you can be reached). Scheduling campaign events, however, cannot be done on City time or using City resources.*" The June 11 letter clarifies that, "*You may include the name of the event, the address of the event, and duration of the event, and a contact telephone number.*" It also states that *"[d]etails such as how you will be transported to the event, the format of the event, and other event attendees* ***may not*** *appear on your public calendar.*"

6. Mr. Holmes believed it was consistent with Mr. Barnett's guidance to use city facilities to contact persons outside city government to schedule certain of his I-502 campaign-related appointments to avoid his being double-booked with city duties.

During the 2012 election, Mr. Holmes authorized Kim Garrett, his Special Assistant, to use city facilities for this purpose.

7. The Public Disclosure Commission has previously found that "*it is legitimate for an elected official's scheduler to place campaign related events on their calendars. For business and security purposes, it is important to know that [the official's] staff know where [the official] is at all times. However, to go beyond such ministerial acts and actually arrange and plan a campaign event is a violation of state law.*" PDC Case No. 95-126 (re: Chris Gregoire).

8. The Commission Staff has investigated allegations that Mr. Holmes' and Ms. Garrett's I-502 campaign-related activities constitute violations, and has received full and open cooperation from Mr. Holmes and Ms. Garrett with that investigation. The investigation yields the following relevant incidents, where Ms. Garrett, at Mr. Holmes' direction, used paid city time, and Ms. Garrett's city telephone, computer, and email account to work on the following campaign-related appointments for Mr. Holmes:

   a. On February 1, 2012, Ms. Garrett sent an email from her city email address to two documentary filmmakers, following a request by New Approach Washington for Mr. Holmes' participation in a video interview about I-502. Mr. Holmes understood that the interview would not be released until after the election and therefore would not be used to support or oppose the ballot measure or to influence the election in any way. In her email to the filmmakers, Ms. Garrett states, *"Riley & Nils—Feel free to call me directly at your convenience to set up time to meet with Pete—I'd be happy to assist with this!"* Ms. Garrett then received a call from one of the filmmakers, on her city phone during city business hours, and scheduled their interview with Mr. Holmes. Under these circumstances, Ms. Garrett did not commit a violation by scheduling the interview.

   b. On February 21, 2012, Ms. Garrett exchanged emails with Mr. Holmes at his city email address, and discussed a request to Mr. Holmes for an I-502 interview with the magazine *City Living Seattle*. Although Mr. Holmes states he merely wanted Ms. Garrett to accept the appointment if he was available in his work schedule during the requested times, Ms. Garrett construed Mr. Holmes' request to "pls

check this out" as a request to visit the magazine's website to verify its existence. Ms. Garrett interpreted this as a valid request to ensure that Mr. Holmes' schedule would not include a false appointment. This research, while undertaken based on a misunderstanding, went beyond mere calendaring and thus was an inappropriate use of public facilities.

c. On July 31, 2012, at Mr. Holmes' direction to schedule a campaign appointment with a campaign photographer, Ms. Garrett sent an email to an independent photographer retained by the New Approach Washington campaign offering to schedule a photographic portrait sitting for Mr. Holmes for use on the I-502 campaign website. In the email to the campaign photographer, Ms. Garrett states, *"Mychal—Please contact me at the number below and I'd be happy to schedule time for you to meet with Pete Holmes."* Ms. Garrett then received a call from the campaign photographer on her city phone during city business hours, and scheduled the photo shoot for Mr. Holmes. Because Ms. Garrett acted proactively to schedule a campaign-related appointment, rather than recording the date and time of a previously arranged event, there was a violation.

d. Prior to August 6, New Approach Washington asked Mr. Holmes to participate in a panel discussion on marijuana legalization with *High Times* magazine. The goal of the event was "to have a fact-based, respectful, informative discussion of I-502 and other issues related to marijuana and the law," and Mr. Holmes directed Kim Garrett to schedule the appointment. On August 6, 7, and 8, 2012, Ms. Garrett exchanged emails with David Bienenstock, an editor of High Times magazine. In an August 6, 2012 email to Mr. Bienenstock, Ms. Garrett relayed Mr. Holmes' availability but also went into logistics: *"Pete Holmes is interested and available to take part as a panelist in High Times' Medical Cannabis Cut* [sic] *on September 15 – 16 at Fremont Studios. Please include me in any logistical and follow up information concerning this event."* Following this, Ms. Garrett and Mr. Bienenstock exchanged one email discussing access to the event, arrival times, and the number of tickets Mr. Holmes would need. Ms. Garrett confirmed that this exchange took place during city business hours, through her city email address. She stated that her intent was to gain information to ensure that Mr. Holmes' calendar included relevant information as to time, place and access. Because Ms. Garrett's involvement in scheduling went beyond the ministerial act of placing the event on Mr. Holmes' calendar, and also included logistics and access to the event, there was a violation.

9. In every case, Ms. Garrett acted under the direction and with the authorization of Mr. Holmes, for what they believed to be a legitimate city purpose: ensuring that Mr.

Holmes was available, that his public schedule was complete and accurate, and that his whereabouts were known at all times. In the three instances where Ms. Garrett's scheduling activities went beyond the passive, ministerial placement of campaign-related events on Mr. Holmes' official calendar, the violations were inadvertent and unintentional, and resulted in little or no cost to the public.

10. Although Mr. Holmes authorized Ms. Garrett to perform the scheduling work described above, he did so because he believed such activity was part of the normal and regular conduct of his office. He instructed Ms. Garrett that her scheduling work was city business, and separate from the I-502 campaign.

11. Mr. Holmes' and Ms. Garrett's efforts to keep the I-502 campaign separate from city work were complicated by the fact that marijuana policy is and has been a constant focus of the City of Seattle and Mr. Holmes' office. Seattle voters approved a local initiative making marijuana enforcement the lowest priority for the Seattle Police Department and City Attorney's Office. Then, in 2009 when Mr. Holmes ran for election to the City Attorney's office, he made a campaign promise to comply with the initiative and to stop prosecuting misdemeanor possession of marijuana. After taking office he took steps to keep that promise. Mr. Holmes has testified before the state legislature regarding both medical and recreational marijuana laws. He stated that while acting in his official capacity, he has taken part in media interviews and speaking engagements related to marijuana possession and marijuana policy generally. He stated that all of these activities are clearly official city business, and have required the support of his staff, including Ms. Garrett. He said that I-502 concerned the same issue that has occupied the City Attorney's Office since before his election, and found that I-502 was novel only in that it also involved a ballot proposition. He said that Ms. Garrett's calendaring activity during the I-502 campaign was consistent with her normal and regular workplace conduct outside of any election campaign.

12. Pete Holmes and Kim Garrett have both stated that they take seriously the obligation not to use public resources in any election campaign, and that they did not intentionally violate any such restriction.

13. Neither Pete Holmes nor Kim Garrett has previously been found to have violated any provision of RCW 42.17 or 42.17A.

STATUTORY AND RULE AUTHORITY

14. **RCW 42.17A.555** states: No elective official nor any employee of his [or her] office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

> (1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
>
> (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
>
> (3) Activities which are part of the normal and regular conduct of the office or agency.

15. **WAC 390-03-273** states: Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some

extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

16. **RCW 42.17A.755(5)** provides that the commission has the authority to waive a fine for a first-time violation.

VIOLATION

Based on the Stipulation of Facts set forth above, Respondent Pete Holmes stipulates that he violated RCW 42.17A.555 by authorizing use of City of Seattle facilities in a manner that assisted the campaign in support of I-502. Respondent Kim Garrett stipulates that she violated RCW 42.17A.555 by using City of Seattle facilities in a manner that assisted Mr. Holmes' work supporting I-502.

PENALTY

Based upon the above Stipulated Facts and Violations, the parties agree that no monetary penalty should be imposed for either Respondent and that the Commission should waive any monetary penalty as allowed by RCW 42.17A.755(5).

Respondent Holmes and Respondent Garrett re-affirm their intention to comply in good faith with the provisions of RCW 42.17A in the future.

Andrea M. Doyle — 1-16-2013

Andrea McNamara Doyle, Executive Director, Public Disclosure Commission — Date Signed

Pete S. Holmes — 1-15-2013

Pete Holmes, Seattle City Attorney — Date Signed

Kim Garrett — 1-15-2013

Kim Garrett, Special Assistant to Seattle City Attorney Pete Holmes — Date Signed

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARTHUR WEST, Appellant, v. PETE HOLMES, SEATTLE CITY ATTORNEY'S OFFICE, CITY OF SEATTLE, Respondents	)	DIVISION ONE No. 70597-1-I UNPUBLISHED OPINION FILED: January 20, 2015

DWYER, J. – Under Washington's Public Records Act (PRA), chapter 42.56 RCW, a government agency's search for records is adequate if it is reasonably calculated to uncover all relevant documents. Viewed in light of its interpretation of Arthur West's PRA request for Initiative 502 (I-502) related records and its procedures for identifying relevant search terms and locations likely to contain responsive records, the City of Seattle (City) satisfied its burden of demonstrating an adequate search. Because the trial court record failed to establish a material factual dispute, the court properly dismissed West's PRA claims on summary judgment. We affirm.

I

On August 26, 2012, Arthur West submitted a three-part request to the Seattle City Attorney's public records officer entitled "PRA Request for Inspection of I-502 Related Correspondence." Among other things, West requested

> All records, communication or correspondence (see above) about or concerning I-502, or between the Seattle City Attorney or City Attorney's office and any sponsor or representative of the I-502 campaign January of 2011 to present.

West's request also specified that the records were to include "any paper records, or records of telephone calls, LUDs, text messages, PDA communications, or emails from any mobile or stationary device."

By e-mail dated August 31, 2012, the City's public disclosure officer informed West that based on the subject line of his request, the scope of the City's search would encompass the "records, communications, and correspondence" as West had defined them: "any paper records, or records of telephone calls, LUDs, text messages, PDA communications, or emails from any mobile or stationary device." The City also identified the specific search terms that it would use to search the relevant e-mail accounts. The City asked West for clarification if it had misinterpreted his request.

On October 31, 2012, and December 27, 2012, the City updated West on the status of the ongoing search and reiterated the relevant search terms. West never objected to the scope of the City's search or the proposed search terms and never clarified his records request.

Through December 27, 2012, the City provided West with five installments comprising 469 records with 1,911 pages. The records included the full text of 39 individual Microsoft Outlook calendar entries that were related to I-502. The City did not redact any of the disclosed records or claim any exemptions.

On October 8, 2012, after receiving one installment of records, West filed a complaint in King County Superior Court. He alleged that the City had violated the PRA by unreasonably delaying the release of some records and withholding the release of other records without identifying a lawful exception.

The City provided a second installment of records on October 15, 2012. On October 24, 2012, West filed a citizen's action complaint with the Washington Public Disclosure Committee (PDC), alleging that the Seattle City Attorney and his assistants had violated RCW 42.17A.555 by authorizing the use of City resources for the promotion of I-502. In response to a PDC request, the City provided the PDC with printouts of five weekly views of the City Attorney's Outlook calendar. Both the PDC and the City eventually provided West with copies of the five calendar printouts.[1]

The City moved for summary judgment in the PRA action. In response, West alleged that the City had deliberately and silently withheld the five calendar printouts and that the 39 Outlook appointment entries had therefore been "edited." On May 10, 2013, the trial court granted the City's motion and dismissed West's PRA claims. The court denied both West's motion for reconsideration and his motion to supplement the record. West appeals.

---

[1] The City Attorney and an assistant eventually stipulated to three violations of RCW 42.17A.555 involving the scheduling of I-502 related appointments. The PDC imposed no monetary penalty and recommended that the attorney general and prosecutor take no further action.

II

We review agency actions under the PRA and issues of statutory interpretation de novo. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 715, 261 P.3d 119 (2011); Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). We also review the trial court's decision on summary judgment de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate only if the supporting materials, viewed in the light most favorable to the nonmoving party, demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

III

West contends that the City Attorney's weekly calendar views fell within the scope of his PRA request. He argues that the City deliberately and silently withheld these responsive records, thus violating the PRA. We disagree.

The City initially contends that West's challenge to the calendar printouts is not properly before us because it was not included in his complaint and was first raised in response to the City's motion for summary judgment. But West's complaint alleges both an improper delay in disclosing requested records and the withholding of responsive records. Under Washington's liberal pleading rules, the allegations were sufficient to provide notice of the general nature of West's

claims. See Lightner v. Balow, 59 Wn.2d 856, 858, 370 P.2d 982 (1962); CR 8(a).

The City's reliance on West's failure to assign error to the trial court's findings of fact and conclusions of law is also misplaced. Because we review summary judgment de novo, the trial court's findings of fact and conclusions of law are superfluous and are not to be considered. See Sherman v. Kissinger, 146 Wn. App. 855, 864 n.4, 195 P.3d 539 (2008).

Under the PRA, government agencies must disclose any public record upon request, unless it falls within a specific, enumerated exemption. Neighborhood Alliance, 172 Wn.2d at 715. Courts liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. See RCW 42.56.030; Soter v. Cowles Pub. Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007).

West's primary contention is that printouts of the City Attorney's weekly calendars fell squarely within his request for "All records, communication or correspondence . . . about or concerning I-502." This argument is misleading, however, because it focuses solely on a brief excerpt and ignores the full context of his PRA request.

Under the PRA, the adequacy of an agency's search "is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Neighborhood Alliance, 172 Wn.2d at 720. The focus of this inquiry "is not whether responsive documents do in fact exist, but whether the search itself was adequate." Neighborhood Alliance, 172 Wn.2d

at 719-720. The determination of reasonableness necessarily depends on the circumstances of each case, and to prevail on a motion for summary judgment, the agency bears the burden of demonstrating "beyond material doubt" that the search was adequate:

> To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched. An agency may wish to include such information in its initial response to the requester, since doing so may avoid litigation.

Neighborhood Alliance, 172 Wn.2d at 721.

As the City noted in its original response, West identified the subject matter of his request as a "PRA Request for Inspection of 1-502 Related Correspondence." All three parts of West's request specified that the records were to include "any paper records, or records of telephone calls, LUDs, text messages, PDA communications, or emails from any mobile or stationary device." Nothing in the request referred to calendars or even calendar entries.

A party requesting public records under the PRA must, "at a minimum, . . . identify the documents with reasonable clarity to allow the agency to locate them." Hangartner v. City of Seattle, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Viewed in context, including his own identification of the subject matter and the specified types of records, West's PRA request does not reasonably suggest that he was seeking complete calendar views, whether daily, weekly, or monthly.

Moreover, in its initial response, the City notified West of its understanding of the scope of his request, identified the specific search terms to be used, and asked West for clarification if it misunderstood the scope of his request. In subsequent communications, the City informed West of additional search terms and advised him that the search had encompassed "electronic and manual searches of hard files, email databases, hard-drives, offices, and personal devices of relevant CAO personnel." West never objected to the scope of the City's search or to the proposed search terms. Neither did he provide any clarification of his request.

In supporting declarations, City employees described in detail the procedure utilized to identify specific individuals likely to have records responsive to West's request and the likely location of those records, including both City and personal electronic devices. The City also documented the development of the relevant search terms and the process used to evaluate responsive records.

Finally, the City explained that the Microsoft Outlook electronic calendar entries exist only as individual files in the electronic database. Consequently, a search of the relevant databases will retrieve only the individual appointment entries that satisfy the search criteria. The City provided West with all of those entries, which, contrary to his assertions, were complete and unedited. Although the Outlook software can display and print appointment entries in various formats, including a weekly view, the display draws all of its entries from the

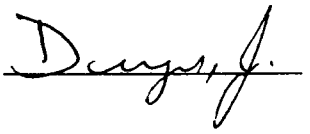
same individual appointment files in the electronic databases that the City searched.

In response to summary judgment, West failed to submit any relevant evidence disputing the adequacy of the City's general search process or its specific response to his PRA request, including the scope of the search, the relevant search terms, or specific locations that the City searched. Nor has he disputed the City's explanation of the structure of the Outlook electronic database. Under the circumstances, there was no material dispute that the City's search was reasonably calculated to discover all relevant documents. Because the search was adequate, the trial court properly dismissed West's PRA claims on summary judgment. See Neighborhood Alliance, 172 Wn.2d at 721-23.

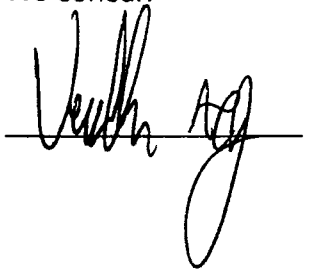
At oral argument on the City's summary judgment motion, West conceded that the City provided him with all responsive individual calendar entries that also appeared on the printed weekly calendar views that the City provided to the PDC. He argues, however, that a proper assessment of public officials requires reviewing the relevant individual scheduled events in the context of other calendar entries. But such a function necessarily encompasses appointment entries that were clearly beyond the scope of West's PRA request for records related to I-502. Whatever the benefits of complete calendar views, they do not relieve West of the obligation to identify the records that he seeks with sufficient clarity to permit the City to locate them. The PRA does not "require public

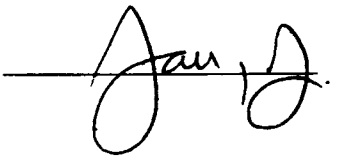
agencies to be mind readers." Bonamy v. City of Seattle, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

The City acted lawfully and the superior court ruled properly. Affirmed.



We concur:





APPENDIX C

Initiative 276

The history and intent of Initiative 276, which was passed by voters in Washington state to create the Public Disclosure Act

By David Cuillier, David Dean & Dr. Susan Dente Ross
AccessNorthwest, Edward R. Murrow School of Communication, Washington State University
May 4, 2004 – updated Aug. 24, 2004

Abstract

Initiative 276 was overwhelmingly approved by voters in 1972, leading to what would become the Washington Public Disclosure Act. This summary of the initiative's history, based on newspaper accounts from the time, initiative organizers' documents and memorandum housed at the University of Washington Special Collections, and interviews with principal players involved in the initiative, describes how the measure was publicly described, debated, and organized. The initiative focused primarily on campaign-finance disclosure. However, the general tenor of the public discussion also expressed a societal interest in open records for all government entities, including the executive, legislative and judicial branches at the state and local levels.

"Spirit of Initiative (2) 76"

It was the early 1970s, and the time was right for government reform. Even before Watergate became common knowledge in late 1972, the League of Women Voters, Common Cause and other national groups were calling for government accountability, particularly in campaign finance.[2]

In Washington state, concern arose regarding political contributions for candidates, whether it involved Seattle city politics or utility boards in Eastern Washington. Interested citizens came together under the group called the Coalition for Open Government. The group would become a broad-based cooperative effort, operating from 1971 until 1975, representing a variety of organizations: League of Women Voters, American Association of University Women, Municipal League of Seattle and King County, Washington Environmental Council, Common Cause, Young Republicans of King County, Metropolitan Democratic Club, Washington State Council of Churches, Citizens for Better Government, Young Lawyers, Washington Democratic Council, and 18 individuals, including Jolene Unsoeld, a leader of Common Cause who later went on to become a state legislator and U.S. representative for the 3rd District in Southwest Washington.[3]

Bennett Feigenbaum, coalition chairman, remembered the overall feeling of the times: "The concern was where do you draw the line between a campaign contribution and a bribe," said Feigenbaum, who lives in New Jersey. "Very early on there was a meeting of the minds. We were at the forefront nationally. This was to be a classic use of the initiative process because asking the Legislature to adopt laws to regulate themselves is asking a lot. It's human nature."[4]

In 1971 the Legislature approved public disclosure laws but they were not to the satisfaction of the coalition. So the coalition started its own initiative, drafting its final version by April 1972. The coalition hired a staff member, Michael T. Hildt of Seattle, to organize their efforts. Hildt, Feigenbaum and others traveled the state to hold forums and talk to civic organizations about the initiative.[5] They gathered 162,710 signatures, far more than the 101,229 needed to put the measure on the ballot.[6]

Early on the measure was termed in the media as the "Spirit of Initiative (2) 76" for its intention on opening government. It was hailed in the press as the "toughest campaign and lobbying disclosure law in the nation."[7]

The Legislature put its own measures on the ballot, Referendums 24 and 25, but they were discounted in newspaper stories and editorials as weaker. Feigenbaum was quoted in a news story as saying, "Initiative 276 fills in the loopholes left by Referendums 24 and 25. Our initiative requires everything the referendums require and more."[8] A clause in Initiative 276 stated that if it passed it would supercede the two referendums, which it did.

Campaign-finance disclosure

The impetus and main focus of the initiative was on campaign finance disclosure, according to Feigenbaum, newspaper reports, and the memorandum and meeting minutes from the Coalition for Open Government.[9] Newspaper articles typically labeled Initiative 276 in headlines as the "campaign-finance disclosure measure."[10]

In a letter to the editor in The Seattle Times, Feigenbaum thanked the paper for its editorial support and thanked the signature gatherers for "giving Washington voters an opportunity in November to vote on disclosure of campaign financing and lobbyist activities."[11]

In the voters pamphlet the initiative was labeled as "Disclosure – campaign finances, lobbying, records." The first three of the four-part initiative related to campaign finance, including the establishment of the Public Disclosure Commission. Specifically, the initiative required that campaign contributions be made public, including the name of the contributor and amount. The initiative also required lobbyists to register and report their expenditures, and required all elected officials and candidates to disclose substantial financial and ownership interests. The statement for the initiative started with this paragraph:

The People Have the Right to Know

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

Open public records

A less talked about part of the initiative regarded public records in general. Feigenbaum recalls that most of the initiative discussion focused on campaign-finance disclosure but a section was added stating that public records shall be open. "I can't remember exactly why we put it in there. It was really uncontroversial. I don't remember any opposition."[12]

The voters pamphlet included discussion of this fourth section: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential government functions."

Public discussion included references to open records in general. For example, a letter to the editor in The Seattle Times praised the initiative because "The people – all the people – have a right to know and to participate in government."[13] Another letter writer the same day stated, "This strong legislation drafted by the people, not the politicians, will open government. And an open government must be a cleaner, better government than one locked in secrecy."

The limited discussion regarding this section of the initiative was the focus of a Seattle Times story explaining the implications of the measure. The story started:

Talk about Initiative 276 and it rings two bells with the average voter: the disclosure of campaign financing and lobbyists' funding.

But another section in the initiative concerning access to public records has been the least discussed aspect of the open-government measure with appears on the November 7 ballot.

It may prove to be a "sleeper" for the public.[14]

The article then described the public records section and its implications, particularly regarding copying and retrieval costs. Also, concerns were raised in the article regarding the vague wording of the exemptions covering privacy and working papers.

For all government entities

In recent years, some legal scholars and court rulings have interpreted the Public Disclosure Act to exclude judicial records, but that is not the understanding of the initiative's proponents or what is portrayed in news articles written at the time.

Initiative 276 was considered to apply to all government entities, executive, legislative and judicial, at the state and local level, Feigenbaum said. "It applied to everyone. Absolutely. It didn't really have to come up and be discussed because it was assumed." Karin Gates Hildt, who worked on the initiative with her husband, initiative organizer Michael T. Hildt, agreed.[15] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in 2004 that he does not remember specific discussions about whether the law would apply to the judiciary, but it was his belief that it should. "It should involve judges. Judges are a pain the butt as far as I'm concerned and if the law applied to me (as a legislator) it should apply to them."[16]

The voters pamphlet included language that implied oversight over all government agencies: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying." (emphasis added). Further, in the pamphlet's statement against the initiative, one stated drawback was the "added cost of government. Virtually every office of State and Local Government will incur added expenses... It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying."

In a Seattle Times story four days before the election, the implications of the public records section of the initiative were discussed in relationship to a variety of different kinds of records and agencies, including court records. Harold Potter, chief deputy to the clerk at the King County Courthouse, lamented in the article that the initiative would cost his department $100,000 a year because he would no longer be able to charge $1 per page to photocopy court records. The Public Disclosure Act limits photocopying costs of applicable public records to 15 cents per page.[17]

Feigenbaum said he remembers specifically that the courts would be subject to the law because after the election he and other coalition organizers met to figure out how to handle the legal challenge of the

measure's constitutionality. Because the law, in their mind, applied to the judicial system and every other government agency, they discussed how the matter could be litigated fairly in Washington.

"A few of us discussed the issue of conflict of interest for the judiciary because the law applied to the judges. We talked through where that would lead us, whether we should have the entire state judiciary recused from the case. Ultimately, we said we'll let's see what happens and let the chips fall."[18]

Overwhelming approval

While most groups and politicians endorsed Initiative 276, some opposed it. Opponents said the initiative was "overkill" and "would threaten individual privacy." They also said it would be costly to enforce.[19] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in a 2004 interview that he opposed the initiative because it would add more regulations and more costs to government. "I don't think we need the damn thing anyway. We don't need more regulations. Too many RCW's as it is. Book after book of them."[20]

State Rep. James P. Kuehnle of Spokane challenged the constitutionality of the initiative, asking Attorney General Slade Gorton for an opinion. Kuehnle stated that the initiative was unconstitutional because it included more than one subject.[21] The constitutionality of the measure would eventually be taken to court following the election, but the measure would stand.

In the state general election, Nov. 7, 1972, voters approved the initiative with 959,143 votes in favor and 372,693 opposed, a 72 percent approval rate.

The battle after the battle

Following the passage of Initiative 276 the Coalition for Open Government worked for three more years to battle efforts to repeal or gut the Public Disclosure Act.

Dozens of amendments were proposed to the Legislature by the Association of Washington Business. School districts throughout the state wrote articles in education publications and newspapers explaining how the campaign finance disclosure requirements scared away potential school board members and caused some current board members to resign to avoid reporting who funded their campaigns. Corporate and business interests lobbied for changes to the campaign finance reporting laws.[22]

Lee Sanders, a Common Cause leader from California and an initiative proponent, wrote following the election: "It is obvious that a well-financed campaign is underway to change public opinion in Washington. Misleading statements have been made by lobbyists and some legislators... The battle for the public mind continues although the election has passed. The special interests are uniformly aligned against 276. Virtually all their wealth and power are combined. Typical examples of the financiers of this campaign include, but are not limited to, the Boeing Company, Port of Seattle, Seattle First National Bank and the Association of Washington Business. The proponents of 276 are not financed and are suffering as a result of this campaign. If the efforts of the critics of 276 go unmatched, then it is reasonable to anticipate that public opinion will be reversed. Once the polls show a change in popular support, then the legislators will feel inclined to seriously alter or actually repeal 276... the capacity of the people to govern themselves hangs in the balance."[23]

Four lawsuits were filed against the initiative, but the initiative was upheld by the state Supreme Court in Fritz v. Gorton (83 Wn.2d 275, Fritz v. Gorton, January 4, 1974). Since the passage of Initiative 276 in 1972, hundreds of exemptions and changes to the Public Disclosure Act have been made and court rulings have modified its application. The Act in 2004 included more than 80 exemptions (RCW 42.17.310).

Endnotes

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[1] AccessNorthwest is committed to providing research and education regarding access to public records and meetings. David Cuillier is a doctoral student and research assistant, David Dean was an undergraduate intern who graduated May 2004, and Dr. Susan Dente Ross is executive director. For more information, contact Cuillier at davidc@wsu.edu, accessnw@wsu.edu or 509-335-2979. The Web site is at www.wsu.edu/~accessnw.

[2] Common Cause was launched in 1970 to revitalize government and push for accountability. The press release announcing its beginning is at http://www.commoncause.org/about/jg_letter.htm

[3] Coalition for Open Government Organizational Representatives membership list, Dec. 1, 1974, University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1976.

[4] Telephone interview with Bennett Feigenbaum on April 30, 2004.

[5] Ibid.

[6] Final number available at the Secretary of State Web site: http://www.secstate.wa.gov/elections/initiatives/statistics_initiatives.aspx:

[7] "3 to 1 OK for 276," Seattle Post-Intelligencer, Nov. 8, 1972, p. A8.

[8] "Court battle predicted on '276'," The Seattle Times, Nov. 8, 1972, p. A16.

[9] Coalition for Open Government records, 1972-1975, University of Washington Libraries, Special Collections.

[10] "150,000 sign campaign-finance petition," The Seattle Times, July 6, 1972, p. A1.

[11] "Initiative 276" The Seattle Times, July 26, 1972, p. A13.

[12] Interview with Feigenbaum, April 30, 2004.

[13] "Smoke screen against 276," The Seattle Times, Oct. 20, 1972, p. A13.

[14] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[15] Interview with Karin Gates Hildt on May 3, 2004. Michael T. Hildt, of Port Townsend, died in 1999.

[16] Interview with Charles E. Newschwander, May 4, 2004.

[17] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[18] Interview with Feigenbaum, April 30, 2004.

[19] "Campaign financing, access to records," The Seattle Times, Nov. 5, 1972.

[20] Interview with Charles E. Newschwander, May 4, 2004.

[21] "Gorton's office responds to constitutionality query," The Seattle Times, Oct. 22, 1972, p. E11.

[22] Historical sketch of 276 and Common Cause, written by Jolene Unsoeld, 1973. University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1975.

[23] Ibid, p. 2.