NO. 92161-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MIKE BELENSKI,

Petitioner,

v.

JEFFERSON COUNTY,

Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

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Petitioner Mike Belenski ("Petitioner") hereby provides his Reply to the Answer to Petition for Discretionary Review by Respondent Jefferson County ("County") as follows:

I. ARGUMENT

The County's Answer to the Petition for Review shows exactly why this appeal involves an issue of substantial public interest and conflicts with Supreme Court precedent involving the withholding of records under the Public Records Act ("PRA"). Washington State citizens would be substantially interested to know if an agency can avoid accountability under the law if it can keep records hidden from a public records requestor for two years and whether the Court of Appeals application of the statutes of limitations in this case are in conflict with the Supreme Court precedent in *Rental Housing Association v. City of Des Moines*, 165 Wn.2d 525 (2009).

The County's Answer raises at least three new issues in an attempt to cloud its failure to follow the mandates of the PRA.

A. The County falsely asserts that inaction by the Petitioner bars his claim for the September 27, 2010 request for Internet Access Logs (IALs).

The County claims the Petitioner requested "*public records*" and since the County did not believe the IALs were so defined, *ipso facto* they were not "*responsive*" to Petitioners request. (Answer to Petition, page 2). This is false because Petitioner's September 27, 2010 request for these IALs made no claim

that the requested IALs were "*public records*", rather his request clearly states that the request for the IALs is being made pursuant to the PRA. (CP 211).

It is irrelevant that the County did not believe that the IALs were public records because the County does not have the authority to determine whether or not IALs are public records. *Hearst Corp v. Hoppe,* 90 Wn.2d 123, 131 (1978) ("*leaving interpretation of the act to those it was aimed would be the most direct course to devitalization*"). (CP 26, 70, 78, 173).

Rather than advising Petitioner that the County did not believe that the IALs were public records, the County lied to the Petitioner and told him there were "*no responsive records*" for his request. (CP 214). RCW 42.56.520 requires that "*Denials of requests must be accompanied by a written statement of the specific reasons therefor.*" The County had every opportunity to advise Petitioner that it believed the IALs were not public records, but instead chose to advise him that the County had "*no responsive records*" and deceive Petitioner into thinking that the County did not have the IALs he requested. This deception denied Petitioner an opportunity to timely pursue judicial review under RCW 42.56.550(3). (CP 25-26).

There was no inaction on the part of the Petitioner that would bar his claims involving the September 27, 2010 request. Petitioner did exactly what he was required to do under the PRA to obtain the records (IALs) he requested. Any inaction by the Petitioner was the direct result of the County's deception and bad faith. The County has repeatedly failed to state exactly what action(s) Petitioner

should have taken to discover that the IALs he requested existed and were being silently withheld from him. Under the PRA, Petitioner was not required to try and "*ferret out*" the IALs. *Daines v. Spokane County*, 111 Wn. App 342, 349 (2002) ("*an applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research*").

Despite the County's historically vulgar language and conduct towards Petitioner (CP 306 ¶16), Petitioner has tried to deal with the County in good faith and has tried in the past to negotiate or argue with the County, involving withholding records or not providing him with the records he requested, but it does no good. If the County decides Petitioner is not going to get the requested records, it is a useless act to continue. (CP 306 ¶16). ("*The law does not require a party to do a useless act*"), *University Properties Inc. v Moss,* 63 Wn.2d 619, 622 (1964).

If Petitioner would have known from the start that the IALs existed and that the County did not believe the IALs were public records, he would have promptly sought judicial review pursuant to RCW 42.56.550(3). On at least two other occasions, the County provided a written response to a public records request Petitioner had made, with the explanation that the County believed the records he requested were not public records. (CP 125, CP 141-142). The County has never explained why Petitioner received a response of "*no responsive records*" for his September 27, 2010 request for IALs (CP 214), rather than a response stating that the County did not believe the IALs were public records. The time, energy and

money required for a lawsuit should not have been necessary to receive an honest response from the County.

Although Petitioner had no duty to take any action after the County's "*no responsive records*" response to his September 27, 2010 request for IALs, he did engage the County several times in trying to make sense of its "*no responsive records*" response. (Petition for Review, pages 2 to 6).

The record in this case does not support the County's contention that the Petitioner's inaction bars his claim involving the September 27, 2010 request. Although the Petitioner had no duty to try and figure out what was going on with his request for IALs, he did engage the County for answers and was either told lies or ignored. The County had many opportunities to provide Petitioner with the truth, but chose deception.

B. The County falsely asserts that Petitioner had knowledge of the existence of IALs responsive to the September 27, 2010 request in October 2010.

On page 3 of the Answer to Petition, the County states: "*The County disputes any assertion by Belenski claiming that he had no knowledge of the existence of IALs responsive to Request #1 until December 2011, when he concedes that he knew of their existence. CP 238.*" CP 238 contains no information that Petitioner had knowledge of the existence of IALs responsive to Request #1 (September 27, 2010 request) prior to December 2011 or that Petitioner conceded he knew of their existence prior to that date. Petitioner had no

knowledge and the fact that the County has to point to nonexistent proof in the record, illustrates the lack of merit of its argument.

The County's also asserts that Petitioner "*admits that he knew the IALs were generated at the time he made his requests in September 2010 because he had previously made received logs from the County prior to September 2010.*" (Answer to Petition, page 3). None of the clerk's papers cited by the County (CP 12, 13, 120) support this assertion. These clerk's papers document events involving County Internet use from 2000 and 2008 (CP 12-13) and that Petitioner had requested IALs several years ago (CP 120). The County combined its bare allegation with the fact that Petitioner did not receive any responsive records and concluded "*At that time, in October 2010, he knew enough to have challenged the County's response, but chose not to do so for over two years.*" (Answer to Petition, page 3).

Petitioner did not know IALs responsive to his September 27, 2010 were in existence in October 2010. The County appears to argue that because Petitioner received IALs several years ago and was advised "*no responsive records*" existed involving his September 27, 2010 request, that he knew enough to have challenged the County's response. What proof or facts did Petitioner have in October 2010 that the IALs were being silently withheld from him? Absolutely none. And the County fails to point to any part of the record that support its assertion. The County had already advised Petitioner that it had "*no responsive records*". Therefore, Petitioner believed that there were no IALs responsive to his request.

If the County believed the IALs requested by the Petitioner were not public records then why did it just not advise Petitioner of that determination, so he could seek judicial review pursuant to RCW 42.56.550(3)? On at least two other occasions, the County provided a written response to a public records request Petitioner had made, with the explanation that the records he requested were not public records. (CP 125, CP 141-142).

Also, the County has never explained why the IALs requested on September 27, 2010 were not public records (CP 211, 214), but the IALs requested on November 2, 2011, (CP 231) were public records.

Petitioner was not required to be a mind reader or make repeated inquiries involving his request in order to determine if there were records responsive to his request. The County was required to disclose the existence of the IALs because they were records relevant to Petitioners September 27, 2010 request. *PAWS v. UW*, 125 Wn.2d 243, 270 (1994) (*"The Public Records Act clearly and emphatically prohibits silent withholding by agencies of* ***records relevant*** *to a public records request.")* (emphasis added). (CP 24-25). Petitioner's request specifically stated it was for IALs for the time frame of February 1, 2010 to September 27, 2010 (CP 211), and the County had IALs for that time frame (CP 125, 138-140), (CP 123 ¶18, 129). The IALs were used to create the Webspy summary report provided to Petitioner on January 19, 2012 (CP 56 ¶5, CP 62) and this report showed the dates of several "*First Hits*" prior to September 27, 2010, such as "9/7/2010" and 9/16/2010" (CP 65), indicating that the IAL existed prior

to Petitioner making his request and that those existing IAL were used to create the Webspy report. (CP 76, CP 56 ¶9, CP 65-67). And the "*Old Drive*" contained IALs from 09-07-2010 to 10-20-2010, (CP 57 ¶10, CP 68) which further documents that IALs responsive to the September 27, 2010 request existed.

The record clearly shows that Petitioner did not have knowledge that the IALs responsive to his September 27, 2010 request existed in October 2010.

Lastly, the County also mischaracterizes the Court's analysis in *Forbes v. Gold Bar,* 171 Wn. App. 857 (2012). (Answer to Petition, page 9, footnote 3). The *Forbes* Court held that the personal e-mails were not responsive to the Forbes' request, and, therefore, nothing was withheld and no log document needed to be created. The IALs withheld by the County were responsive to Petitioner's request and therefore an exemption log needed to be provided in order to trigger RCW 42.56.550(6).

C. Petitioner's position regarding the statutes of limitations has been consistent since his first brief.

The County falsely stated that Petitioner's Motion for Reconsideration "*reversed his position arguing that the PRA statute of limitation was applicable, and argued for the time that the PRA statute of limitations was applicable, and argued for the first time that a discovery rule should be applied. His motion failed to explain why he did not address this matter in his earlier briefing and did not address the applicability of RCW 4.16.130 or Johnson v. Department of*

Corrections, 164 Wn. App.769 (2011), review denied 173 Wn.2d 1032 (2012) ". (Answer to Petition, page 5).

The position of the Petitioner regarding the statutes of limitations have been consistent since his first brief. (CP 165-172), (CP 184), (CP 192 ¶8), (CP 451). The trial court made no ruling regarding statutes of limitations. In the County's Response Brief, on pages 46 to 49 it alleged Petitioner's actions were untimely, to which Petitioner responded in his Reply Brief. On page 20 of the Reply Brief the Court of Appeals was directed to CP 170-172, which contained arguments involving the "*Discovery Rule*", RCW 4.16.130, RCW 42.56.550(6) and *Johnson v. DOC*, 164 Wn. App. 769 (2011). Pages 20-21 of Petitioner's Reply Brief specifically argued the applicability of RCW 42.56.550(6). The record clearly shows Petitioner has not "*reversed*" his position involving the applicability of the PRA statute of limitation (RCW 42.56.550(6) or for the first time argued the "*Discovery Rule*" should be applied.

With regards to *Johnson v. DOC*, (CP 171), (MT for Reconsideration, page 14), the County made no argument to the Court of Appeals regarding *Johnson,* except in using it as authority for the Court of Appeals to affirm the trial court on any ground the record supports (Response Brief, pages 48-49). The County claimed the controlling precedent was *Bartz v. State Dept. of Corrections Public Disclosure Unit*, 173 Wn. App. 522 (2013). (Response Brief, page 46). Petitioner responded to the County's argument regarding *Bartz*. (Reply Brief, page 20). Both *Johnson* and *Bartz* received at least one record responsive to their requests.

Neither claimed application of the "*Discovery Rule*" to RCW 4.16.130, nor were any records silently withheld from them. Both these cases are easily distinguishable from Petitioner's case.

Lastly, Petitioner has never argued "*that there is no statute of limitations for him to bring his claim and that he can bring claims anytime if he simply alleges "silent withholding"*". (Answer to Petition, page 9). Petitioner has made clear the applicability of the statutes of limitations involving his claim and has never stated he can bring claims anytime if he simply alleges "*silent withholding*".

II. CONCLUSION

The County is trying to shed responsibility and accountability for its unjustified failure to follow the basic requirements of the PRA and PRA case law. This Court should not allow that to happen and Petitioner respectfully requests that the Court grant review.

Respectfully submitted this 15th day of October, 2015.

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