No. 92198-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS, DIVISION II, NO. 47359-3)

NORBERT SCHLECHT,

Petitioner,

v.

CLARK COUNTY WASHINGTON,

Respondent.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

Cases

Statutes

A. IDENTITY OF PETITIONER

Petitioner Norbert Schlecht, Pro Se, requests this Court to accept review of the Order of the Court of Appeals, Division II, terminating review of this Public Records Act (PRA) case.

B. COURT OF APPEALS DECISION

Schlecht seeks review of the Court of Appeals' decision consisting of the August 18, 2015 ORDER DENYING (appellant Schlecht's) MOTION TO MODIFY (Appendix). The underlying decision being the July 9, 2015 RULING GRANTING (respondent Clark County's) MOTION ON THE MERITS TO AFFIRM.

C. ISSUE PRESENTED FOR REVIEW

> Does an agency violate the PRA under *Neighborhood Alliance of Spokane County v. County of Spokane* by conducting a search for records and authoring an affidavit that was not made in good faith?

D. STATEMENT OF THE CASE

On November 8, 2013, Mr. Schlecht made a public records request to the Clark County Sheriff's Office (CCSO), pursuant to Chapter 42.56 RCW, in efforts to learn the identities of certain individuals engaged in activity referred to as "casing the neighborhood". CP 14. The basis of the public records request is a CRESA 9-1-1 document. CP 15-17. With a letter dated 11/22/2013, the CCSO

responded that such entity does not have documents that are responsive to Mr. Schlecht's request. CP 18-19.

On November 27, 2013, Mr. Schlecht appealed the initial determination encouraging the entity to expand its search vis-à-vis format of records and jurisdiction. CP 20. With a letter dated 12/18/2013, the CCSO responded that such entity had not discovered any records responsive to Mr. Schlecht's request. CP 21.

As Mr. Schlecht at this point had exhausted his administrative remedies, he filed a lawsuit for disclosure of public records. CP 3-26. The focus of Mr. Schlecht's complaint of non-compliance with the Act's requirements is primarily two-fold: inadequate search by the agency (CP 6, lines 17-20); and bad faith exhibited by the agency (CP 10, lines 5-7). Mr. Schlecht limited his lawsuit to items 2)A) and 2)B) of subject public records request. CP 4, lines 18-19.

Respondent Clark County subsequently moved for summary judgment which the trial court on July 18, 2014 granted without oral argument (CP 224-225). The applicable Order granting summary judgment (CP 213) subsequently had to be revised (CP 88-89).

Schlecht appealed on August 15, 2014. Respondent Clark County moved to affirm on the merits. On July 9, 2015, a Court of Appeals commissioner issued a

ruling granting the motion. Subject ruling never addressed Schlecht's contention that the agency's affidavit was submitted in bad faith.

Schlecht timely moved for modification which was denied by the Court of Appeals on August 18, 2015.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' Decision Conflicts with Supreme Court PRA Precedent.

Schlecht seeks review under RAP 13.4(b)(1) of the Court of Appeals' decision, which conflicts with the Supreme Court precedent cited below and threatens confusion for the public agencies, not limited to law enforcement agencies, over the PRA's parameters for public access to records. The Supreme Court review is necessary to provide clear guidance that will ensure agency, not limited to law enforcement agency, compliance with the PRA's strongly worded mandate for broad disclosure of records. See Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) ("judicial oversight is essential to ensure government agencies comply with the [PRA]").

The Court of Appeals' decision conflicts with the *Neighborhood Alliance of Spokane County v. County of Spokane* holdings that a public records requestor can still prevent summary judgment in favor of the agency, namely by producing evidence "that the agency's search was not made in good faith". Such case references Maynard, 986 F.2d at 560; see Pietrangelo v U.S. Army, 334 Fed.Appx. 358, 360 (2d Cir.

2009) (requestor can rebut agency's adequate affidavits by a showing of bad faith sufficient to impugn the agency's affidavits or declarations).

Offered in support of respondent Clark County's motion for summary judgment is the declaration of Mary Ann Gentry. CP 37-39. Subject affidavit asserts that "[the Sheriff's Office] *verified that the PERS search done by the 911 operator on the "WF curly HR" and "WM carrying gas can" were done on those identical search parameters, not by name".* In his response, Schlecht questions such and offers a more realistic scenario of what actually happened (CP 52-53).

The affidavit describes the records search as yielding no responsive records to include confirmation that the names of the relevant individuals were never obtained by responding CCSO deputies O'Dell and Smyth. CP 38, lines 4-5. This statement however is contradicted by an email authored by CCSO Deputy Eric O'Dell more than one hundred days after subject 5/9/2013 event confirming that at least one of the relevant individuals had been "id'd" (identified). CP 62.

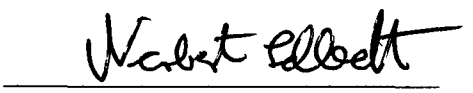
As per Schlecht's December 17, 2014 appellate opening brief, subject declaration of Ms. Gentry also insists that Mr. Schlecht's 11/8/2013 public records request was not received by the CCSO until 11/20/2013. CP 37, lines 26-27. In his response to Clark County's motion for summary judgment, Mr. Schlecht in great detail (CP 53, line 11 - CP 54, line 6), supported by relevant

documentation (CP 68-74), disproves such assertion. Again as per subject opening brief, the fact that Mr. Schlecht's public records request was not responded to in a timely manner does not necessarily indicate bad faith on the part of the agency. It is the deliberate backdating of documents (plural) that casts a shadow of bad faith over the entire process.

F. CONCLUSION

Because the Court of Appeals' decision (and underlying ruling) conflicts with controlling Supreme Court PRA precedent review should be granted. Under RCW 42.56.550(4), RAP 14.3 and 18.1, Schlecht requests reimbursement of all costs, expenses and fees (if applicable) on appeal.

RESPECTFULLY SUBMITTED September 1, 2015.



Norbert Schlecht, Pro Se
Petitioner

CERTIFICATE OF SERVICE

I, the petitioner Norbert Schlecht, hereby certify that on September 1, 2015, I deposited following documents in the mails of the U.S. Postal Service, postage prepaid, directed to the below named individuals as shown below:

Original (for filing) and one copy of Petition for Review to include this Certificate of Service along with $200.00 filing fee sent to:
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Copy of Petition for Review to include this Certificate of Service sent to:
Jane Vetto
Clark County Prosecuting Attorney, Civil Division
1300 Franklin ST., Suite 380
PO Box 5000, Vancouver, WA 98666-5000

Dated September 1, 2015.

NORBERT SCHLECHT, PRO SE
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORBERT SCHLECHT,

Appellant,

v.

CLARK COUNTY,

Respondent.

No. 47359-3-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated July 9, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 18th day of August, 2015.

PANEL: Jj. Worswick, Sutton, Melnick

FOR THE COURT:

PRESIDING JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORBERT SCHLECHT, Appellant, v. CLARK COUNTY, Respondent.	No. 47359-3-II RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Norbert Schlecht appeals the trial court's grant of summary judgment to Clark County in his Public Records Act action. The county filed a motion on the merits to affirm. RAP 18.14(a). Pursuant to RAP 18.14(e)(1),[1] this court affirms.

[1] RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

FACTS

In November 2013,[2] Schlecht made a public records request pursuant to the Public Records Act (PRA), chapter 42.56 RCW, to the Clark County Sheriff's Office (CCSO). Schlecht's request sought to obtain information related to the identities of individuals he described as "casing the area.'" Clerk's Papers (CP) at 65. His request, based on a Clark County Regional Emergency Services Agency (CRESA) document that detailed a May 9, 2013 911 call, included a purported description of two individuals as (1) "WM 30s carrying gas can"; and (2) "WF curly red HR M20s BRO shirt BJS." CP at 14 (capitalization altered from original); CP at 115.

By letter dated November 22, 2013, the CCSO responded that it did not have responsive documents to Schlecht's PRA request. Schlecht challenged the CCSO's determination. The CCSO reconfirmed that it did not have responsive documents and further instructed that Schlecht should contact the Department of Licensing for vehicle owner identity.

Schlecht filed a lawsuit pursuant to the PRA, alleging that the CCSO conducted an inadequate search and demonstrated bad faith. He moved for summary judgment. The

[2] Schlecht states he submitted this request on November 8, 2013. The Clark County Sheriff's Office states that it received the request on November 20. In his reply brief, Schlecht contends that the sheriff's office did not respond to his request within five days, a statutory requirement. RCW 42.56.520. Schlecht, however, did not argue the timeliness issue in his opening brief. This court will not consider arguments raised for the first time in reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (stating that an issue raised and argued for the first time in a reply brief is too late to warrant consideration).

trial court denied Schlecht's motion. Schlecht filed a Motion for Reconsideration and the court denied the motion.

Clark County then filed a motion for summary judgment. In support, it filed Mary Ann Gentry's declaration describing the CCSO's search. The CCSO: (1) Identified the responding officers; (2) checked the officers' logs, which showed that neither filed a report; (3) confirmed with the officers that neither officer obtained the suspects' names; (4) ran the name of the 911 caller to ensure that neither officer filed a report under the caller's name; (5) called CRESA[3] to confirm that any searches they conducted were based on the suspects' descriptions and not names; and (6) confirmed that CRESA records did not contain any names.

Schlecht responded to the summary judgment motion. His response included e-mail correspondence between Deputy Eric O'Dell, who was an investigative officer of the 911 call, and Schlecht from August 26, 2013. In the e-mail, Schlecht asked O'Dell about a female the officers questioned in connection with the 911 call. See CP at 16 (911 call notation stating "VAN GOA....FEMALE SAYS SHE NOT WITH THEM....SHES ON A WALK AND THEY ARE TRYING TO PICK HER UP...SHES AT 7710 NW ANDERSON"). He wanted to know if O'Dell followed up with a police report or identification of the female who stated that she was taking a walk. O'Dell responded that the woman was contacted in the driveway of 7710 NW Anderson Avenue, was staying there, and had a vehicle in the driveway registered to her. O'Dell added, "She was id'd, there was no report, and no

[3] An agency "separate" from the county. CP at 38.

reason to pursue further." CP at 62. Schlecht claimed that this e-mail correspondence is a "smoking gun" showing that identification records exist. CP at 5.

Schlecht did not appear at the summary judgment hearing. The trial court granted the county's motion. Schlecht appeals. The parties both filed briefs on the merits. The county also filed a motion on the merits to affirm. RAP 18.14.

ANALYSIS

I. Public Records Act

The PRA requires state agencies to make all public records[4] available for public inspection and copying upon request unless the record falls within a specific exemption. RCW 42.56.070(1). Courts liberally construe the PRA's disclosure provisions and narrowly construe the PRA's exemptions. *See Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). An agency, however, does not have a duty to create or produce a record that does not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13 14, 994 P.2d 857 (2000)).

II. Summary Judgment

A. Standard of Review

This court reviews summary judgment orders *de novo*. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions

[4] A public record is defined, in relevant part, as "any writing." RCW 42.56.010(3) and (4).

on file, together with the affidavits, if any, show 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). This court considers facts and reasonable inferences in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

Affidavits submitted in support of summary judgment motions "shall set forth such facts as would be admissible in evidence." CR 56(e). Affidavits must be based on the affiant's "personal knowledge." CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Mere allegations, argumentative assertions, conclusory statements and speculation do not raise issues of material fact that preclude a grant of summary judgment. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Once the moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue as to a material fact exists. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008) (citing *Seven Gables Corp.*, 106 Wn.2d at 13, 721 P.2d 1), *review denied*, 165 Wn.2d 1051 (2009).

B. Adequacy of the Records Search

Schlecht argues that the CCSO's search was not "reasonable beyond a material doubt." Br. of App. at 13 (citing *Neighborhood Alliance of Spokane County v. County of Spokane*, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), *aff'd in part, rev'd in part*, 172 Wn.2d 702 (2011)). Specifically, he contends that because the CCSO never confirmed

with O'Dell that he could not "retrieve the identity" of the individual mentioned in the August e-mail, the CCSO's search was not reasonable.[5] Br. of Appellant at 14.

In *Neighborhood Alliance*, our state Supreme Court determined:

> The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. . . . What will be considered reasonable will depend on the facts of each case. . . . When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found. . . .

172 Wn.2d 702, 720, 261 P.3d 119 (2011) (citations omitted). Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. *Neighborhood Alliance*, 172 Wn.2d at 719. The search should not be limited to one or more places if there are additional sources for the information requested. *Neighborhood Alliance*, 172 Wn.2d at 719. "This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found." *Neighborhood Alliance*, 172 Wn.2d at 720 (emphasis in original).

Where, as here, the concern is the adequacy of the search in the context of a summary judgment motion, the agency bears the burden, beyond material doubt, of showing that its search was adequate. *Neighborhood Alliance*, 172 Wn.2d at 720. "To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in

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[5] The County contends that Schlecht failed to perfect the record on appeal. Gentry's affidavit, however, is in the record on appeal, as is O'Dell's e-mail. In addition, the county supplemented the record on appeal, allowing this court access to the documents that the county believes are necessary to decide this appeal. Accordingly, this court will reach the merits of Schlecht's arguments. RAP 1.2(a).

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." *Neighborhood Alliance*, 172 Wn.2d at 720. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013).

Gentry's affidavit confirms that the CCSO's search was reasonably calculated to uncover all relevant documents that Schlecht requested in November 2013. She searched the CCSO's records and the CRESA's records both for suspect names and using descriptions, and also using the name of the 911 caller. She spoke with the responding officers in addition to reviewing their logs.

The August e-mail held up by Schlecht as a "smoking gun" that O'Dell identified the female suspect is insufficient to rebut the county's contention that its search was reasonable and disclose that a genuine issue as to a material fact regarding the adequacy of the county's search exists. *See Terrell*, 147 Wn. App. at 384; *Neighborhood Alliance*, 172 Wn.2d at 720. In the e-mail, O'Dell once again confirms that he did not create a police report about the incident. That a person whom O'Dell believed was not one of the suspects involved in the 911 call[6]—a female out for a walk—identified herself to him does not undercut the reasonableness of Gentry's search. In sum, the CCSO's searches here of multiple record systems using multiple search terms was reasonably calculated to uncover all relevant documents that Schlecht requested and the evidence does not raise

[6] O'Dell specifically stated that with respect to his encounter with the female, there was "no reason to pursue further." CP at 62.

material issues of fact that would defeat summary judgment related to the adequacy of the search. *Forbes*, 171 Wn. App. at 866.

The county requests attorney fees pursuant to RAP 18.9 because Schlecht filed a frivolous appeal. The request is denied. Although the county's main argument that it does not have to create a nonexistent record in response to a PRA request—in the form of an affidavit from O'Dell—is well taken, this argument is irrelevant to whether O'Dell's August e-mail shows that the CCSO's search was inadequate in that it should have caused the CCSO to follow up on the "id" he says was made. *Neighborhood Alliance*, 172 Wn.2d at 720-21 (stating that the focus of the inquiry is not whether responsive documents exist, but whether the search for them was adequate). In light of the specific facts of this case, although this court determines to grant the county's motion on the merits, it cannot conclude that Schlecht's appeal is sanctionable pursuant to RAP 18.9. Accordingly, it is hereby

ORDERED that Clark County's motion on the merits to affirm is granted.

DATED this 4th day of July, 2015.

Aurora R. Bearse
Court Commissioner

cc: Norbert Schlecht, Pro Se
Jane E. Vetto
Hon. Suzan Clark