

73626-4

73626-4

No. 73626-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CARLOS BENITEZ, JR.,
Appellant,

v.

SKAGIT COUNTY,
Respondent.

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

The Honorable Charles R. Snyder, Judge

APPELLANT'S REPLY BRIEF

Carlos Benitez, Jr. #715131
Appellant

AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. Box 2049 L-B-19-L
Airway Heights, WA 99001

2016 FEB 11 11:07
CLERK OF COURT
STATE OF WASHINGTON
JUDICIAL CENTER
SPRINGFIELD

January 28, 2016

Carlos Benitez, Jr. #715131
A.H.C.C. L-B-19-L
P.O. Box 2049
Airway Heights, WA 99001

Richard D. Johnson, Clerk
Court of Appeals
Division One
One Union Square
600 University Street
Seattle, WA 98101-4170

RE: Carlos Benitez, Jr. v. Skagit County, Cause No. 73626-4-I

Dear Mr. Johnson:

Enclosed is an original of Appellant's Reply Brief for filing in the above-referenced cause. Also enclosed is a prefranked SASE for the return of a conformed copy of the cover page to the brief.

Again, thank you for your time and assistance in this matter.

Sincerely,



Carlos Benitez, Jr.

cc: File

2016 FEB -1 11:11:07

TABLE OF CONTENTS

I. ARGUMENT.....1

 A. The County acted in bad faith when it relied on
 invalid and/or inapplicable exemptions to deny
 Benitez' public records request.....1

 B. The County acted in bad faith when it failed to
 promptly respond to Benitez' public records
 request.....5

 C. The County acted in bad faith by distinguishing
 among persons requesting public records.....8

 D. The County acted in bad faith when it failed to
 provide Benitez with an explanation of how the
 claimed exemptions applied.....9

II. CONCLUSION.....11

TABLE OF AUTHORITIES

Washington Supreme Court

Amren v. City of Kalama, 131 Wn.2d 25, 929 P.2d 389 (1978)..3
Brouillet v. Cowles Pub. Co. 114 Wn.2d 788, 791 P.2d
526 (1990).....3
City of Lakewood v. Koenig, 182 Wn.2d 84, 343 P.3d
335 (2014).....9,10,11
Hearst v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978).....3
Progressive Animal Welfare Soc'y v. University of
Washington, 125 Wn.2d 884 P.2d 592 (1995).....10
Servais v. Port of Bellingham, 127 Wn.2d 820, 904 P.2d
1124 (1995).....3
Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 229
P.3d 735 (2010).....5

Washington Court of Appeals

Adams v. Dept. of Corrections, 189 Wn.App. 925,
___ P.3d ___ (2015).....4
Faulkner v. Dept. of Corrections, 183 Wn.App. 93, 332
P.3d 1136 (2014).....4,6,7
Francis v. Dept. of Corrections, 178 Wn.App. 42, 313
457 (2013).....4,6,7
DeLong v. Parmelee, 157 Wn.App. 119, 236 P.3d 936 (2010)....8

Statutes

RCW 42.56.080.....8
RCW 42.56.100.....5
RCW 42.56.210(3).....10
RCW 42.56.240(1).....10
RCW 42.56.240(2).....10

RCW 42.56.520.....5

RCW 42.56.565.....2,4

Court Rules

CrR 4.7.....10

I. ARGUMENT

- A. The County acted in bad faith when it relied on invalid and/or inapplicable exemptions to deny Benitez' public records request.

The County misconstrues Benitez' argument. Benitez' argument is not that the County acted in bad faith simply because it erroneously withheld the requested records. See Skagit County's Response (County's Response Brief) at 13, 24. Rather, Benitez' argument is that the County acted in bad faith because it relied on exemptions it knew were invalid and/or did not apply to withhold the records Benitez was requesting.

As argued in the Appellant's Brief, DPA Miller knew to what extent the exemptions applied and that she was relying on an indefensible position to withhold the records, as would any competent lawyer with DPA Miller's skills and training in the Public Records Act (PRA).

The County does not refute that DPA Miller knew that the exemptions were invalid or inapplicable and that DPA Miller relied on an indefensible position to advise Molitor to deny Benitez the requested records. Instead, the County argues, "that ... DPA Miller's analysis was reconsidered and a differing opinion resulted in the release of the requested records does not demonstrate that DPA Miller acted in bad faith. County's Response Brief at 24. Thus, the County seeks

to justify DPA Miller's actions as an honest mistake and not actions demonstrating bad faith. County's Response Brief at 16-17. Considering the facts of this case, however, were this Court to agree with the County, RCW 42.56.565(1) would be rendered meaningless and there would be no incentive for the County or other agencies to produce non-exempt public records.

As the County asserts, DPA Miller is "a lawyer with considerable ... PRA experience." County's Response Brief at 6. In fact, DPA Miller is very highly skilled and trained in the PRA. CP 277-78. As such, it is not likely that a lawyer with DPA Miller's skills and training would make the mistake the County argues. Moreover, the issue of whether the records were exempt was not as complex as the County purports. A.O. Denny, the County's counsel in the trial court and in this appeal, and who is not as adept in the PRA as DPA Miller is, easily determined that the records were not exempt from production, were wrongly withheld, and should have been released to Benitez. CP 213, 335-36. Thus, under these circumstances, the record does not support the County's argument that DPA Miller's actions were the result of an honest mistake or misinterpretation of the PRA.

Additionally, other than DPA Miller's own self-serving affidavit, there is no evidence in the record that she conducted a comprehensive and independent review of Benitez'

June 17, 2012 public records request. Although DPA Miller claims she discussed Benitez' request at a PRA conference and with other lawyers and public records officers, the County has not provided any evidence, such as affidavits, etc., supporting DPA Miller's claims. Moreover, the response DPA Miller suggested to Molitor claimed the same exemptions DPA Miller relied on previously to deny Benitez' 2011 request for the same records, although now citing the October 26, 2012 order. CP 311-13. Essentially, after conducting her claimed comprehensive and independent review, DPA Miller arrived at the same conclusion to claim the same exemptions she relied on in 2011 to deny Benitez the same records.

Regardless of DPA Miller's analysis and her safety concerns, DPA Miller was without authority to determine the scope of exemptions under the PRA. Hearst v. Hoppe, 90 Wn.2d 123, 129, 580 P.2d 246 (1978). Our Supreme Court has stated many times that "leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization." Id. at 131; Amren v. City of Kalama, 131 Wn.2d 25, 34 n.6, 929 P.2d 389 (1997); Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995); Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990). It was for the court, and not DPA Miller, to determine whether the records were exempt. Hearst, 90 Wn.2d at 130. And DPA

Miller was well aware of this, yet she still relied on her own determination that the records were exempt to advise Molitor to deny Benitez the records. CP 8.

"A determination of bad faith under RCW 42.56.565(1) does not require commission of some intentional, wrongful act." Francis v. Dept. of Corrections, 178 Wn.App. 42, 51, 313 P.3d 457 (2013). It requires a finding of a "wanton or willful act or omission" by the agency. Faulkner v. Dept. of Corrections, 183 Wn.App. 93, 105, 332 P.3d 1136 (2014). As such, Benitez need not show that the County's analysis were far-fetched or that the County's actions were prompted by some interested or sinister motive.

Furthermore, an agency acts in bad faith where it relies on an "indefensible position" to deny a requester public records. Adams v. Dept. of Corrections, 189 Wn.App. 925, ___ P.3d ___ (2015). And "penalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA." Faulkner, 183 Wn.App. at 105. Such is the case here.

DPA Miller's actions were not an honest mistake. Being a lawyer with considerable experience in the PRA, she was well aware that the records Benitez requested were not exempt from production and she was well aware that she was relying on an indefensible position to advise Molitor to deny Benitez the records. DPA Miller was also well aware that it was not

for her to determine whether the records were exempt from production. Yet DPA Miller advised Molitor to deny Benitez the records anyway. Such action was wanton or willful and supports a finding that the County acted in bad faith when it relied on invalid and/or inapplicable exemptions to deny Benitez' June 17, 2012 public records request.

- B. The County acted in bad faith when it failed to promptly respond to Benitez' public records request.

The County's denial of Benitez' records request is not the only basis for finding that the County acted in bad faith. The County's noncompliance with the response requirements of the PRA is also a basis for finding that the County acted in bad faith.

RCW 42.56.100 requires that agencies "shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." The PRA unequivocally commands an agency to respond promptly to a public records request. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 464, 229 P.3d 735 (2010); RCW 42.56.520. If the agency does not provide the records, it must respond by acknowledging that the agency received the request and providing a reasonable estimate of time required to respond or denying the request. RCW 42.56.520. The agency may have additional time to respond if it claims one of the four

statutorily justified reasons for additional time to respond.
Id.

In this case, after the County's initial response to Benitez' record request, Molitor provided Benitez with non-responsive documents and blank pages. CP 142-169. Thereafter, several different county officers provided notices of additional time needed to respond to Benitez' records request. CP 139, 140, 174, 177, 178. Each notice of additional time needed failed to comply with the response requirements of the PRA. Id. And each estimate of time went unmet. Id. The County's actions were nothing more than a deliberate effort to delay a response to Benitez' records request.

The County does not refute that its delayed response and noncompliance with the PRA were deliberate. Rather, the County argues only that its response was imperfect. County's Response Brief at 23 n.4.

In Francis, the Court of Appeals upheld a finding of bad faith where the agency had "delayed disclosure well short of even a generous reading of what is reasonable under the PRA" and where the agency failed to comply with the PRA procedural requirements, there was lack of supervision, there was sufficient clarity in Francis's request, and the agency sent Francis documents plainly not responsive to his request. 178 Wn.App. at 63-64. In Faulkner, the Court of Appeals

endorsed the decision in Francis. Faulkner, 183 Wn.App. at 105.

This case is factually analogous to Francis. The County delayed a response well short of what is reasonable under the PRA. The County failed to comply with the procedural requirements of the PRA. The County sent Benitez not only blank pages but documents non-responsive to his request. The County claimed it could not locate certain documents, which it later provided. And there was no supervision of the County's officers who were handling Benitez' request.

The County's notices of additional time needed to respond to Benitez' records request were unjustified, were unreasonable, and were never met. There is no excuse for the County's officers not to comply with the PRA's response requirements. Again, DPA Miller has considerable experience in the PRA and was well aware of its requirements. Yet DPA Miller ignored those requirements, and, as the advising officer, she ignored her duty to supervise the County's officers.

Clearly, the County's failure to comply with the PRA's response requirements was nothing less than a deliberate effort to delay a response to Benitez' request. Such action was certainly "wanton or willful." Faulkner, 183 Wn.App. at 105. Consequently, the County acted in bad faith when it failed to promptly respond to Benitez' public records request.

C. The County acted in bad faith by distinguishing among persons requesting public records.

That the County distinguished Benitez from any other person making the same records request, is another basis for finding that the County acted in bad faith in denying Benitez the requested records.

RCW 42.56.080 requires an agency to provide a public record to "any person." "And the PRA specifically forbids agencies from distinguish[ing] among persons requesting records." DeLong v. Parmelee, 157 Wn.App. 119, 146, 236 P.3d 936 (2010)(citing RCW 42.56.080), review granted, cause remanded on other grounds, 171 Wn.2d 1004 (2011).

The statute specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure.

Id.

DPA Miller's affidavit clearly establishes that her determination that the records were exempt was based on who Benitez was and what he might do with the records:

From all the information I held, including the detailed findings from the trial court in its 2011 order barring release of the records to Mr. Benitez, I determined that nondisclosure was essential to effective law enforcement and to the safety of officers and informants. In this case, based on Mr. Benitez' record of intimidation which I learned from DPA Johnson, the very high risk of retaliation against the undercover officers and informants, including neighbors who provided information about the gang's activities...

CP 281. Had anyone else requested the same records, DPA Miller

would not have made the same determination. And the County has not presented any argument, or evidence, to show otherwise.

Because the County used information the PRA forbids from being used to determine if the records were subject to disclosure, i.e., Benitez' identity and intent, and which information the County would not have used if any other person requested the same records, the County acted in bad faith by distinguishing among persons requesting public records.

- D. The County acted in bad faith when it failed to provide Benitez with an explanation of how the claimed exemptions applied.

"When an agency withholds or redacts records, its response 'shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'" City of Lakewood v. Koenig, 182 Wn.2d 84, 87, 343 P.3d 335 (2014). It is improper under the PRA to provide exemption information in such vague terms that "the burden [is] shifted to the requestor to sift through the statutes cited ... and parse out possible exemption claims." Id. at 95.

As argued in the Appellant's Brief, Molitor's letter claiming the records were exempt gave no explanation how the exemptions applied, it simply cited the court rule and statutes Molitor relied on. CP 333.

In Lakewood, the Supreme Court set forth the Standard for an agency's response claiming exemptions. The Court stated:

The plain language of RCW 42.56.210(3) and our cases interpreting it are clear that an agency must identify with particularity the specific record or information being withheld and the specific exemption authorizing the withholding.

Additionally, the agency must provide sufficient explanatory information for requestors to determine whether the exemptions are properly invoked.

182 Wn.2d at 94-95 (citations and quotation marks omitted).

The County's response claiming exemptions does not meet this standard. It simply cites the trial court's orders and findings, CrR 4.7, and RCW 42.56.240 (1) and (2), without any explanation of how the exemptions apply. County's Response Brief at 38.

The County argues that this issue need not be addressed because it raised for the first time on appeal. However, because this Court "stands in the same position as the trial court," it can address this issue. Progressive Animal Welfare Soc'y v. University of Washington, 125 Wn.2d 243, 252, 884 P.2d 592 (1995).

The County's failure to explain how the exemptions applied was not a mistake. It was a willful omission of the requirements of RCW 42.56.210(3). Moreover, the effect of the County's failure to explain how the exemptions applied was to

place the burden on Benitez to "sift through the statutes cited ... and parse out possible exemption claims." Lakewood, 182 Wn.2d at 95. Therefore, the County acted in bad faith when it failed to provide Benitez with an explanation of how the claimed exemptions applied.

II. CONCLUSION¹

Benitez has presented sufficient evidence establishing that the County acted in bad faith at all times in handling his PRA request. Therefore, this Court should find that per diem penalties for three groups of records must be awarded to Benitez along with fees and costs.

DATED this 28 day of January, 2016.

Respectfully submitted,



Carlos Benitez, Jr.
Appellant

1. Benitez does not claim that the County failed to conduct a reasonable search for records; therefore, Benitez provides no argument on this issue.

DECLARATION OF FILING AND SERVICE

I, Carlos Benitez, Jr., declare that, on January 28, 2016, I deposited the foregoing Appellant's Reply Brief, or copies thereof, in the internal mail system of Airway Heights Corrections Center and made arrangements for postage addressed to:

Richard D. Johnson, Clerk
Court of Appeals
Division One
One Union Square
600 University Street
Seattle, WA 98101-4170

A.O. Denny
Skagit County Prosecuting Attorney's Office
605 South Third Street
Mount Vernon, WA 98273

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

Dated this 28th day of January, 2016, at Airway Heights, Washington.

Carlos Benitez

Carlos Benitez, Jr.

Carlos Benitez, Jr. #715131
A.H.C.C. L-19-L
P.O. Box 2049
Airway Heights, WA 99001

2016 FEB - 1 AM
AIRWAY HEIGHTS, WA