

FILED
Jan 20, 2017
Court of Appeals
Division I
State of Washington

NO. 76012-2-I

In the Court of Appeals of the State of Washington
Division I

CHRISTOPHER COOK, Respondent,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT COOK

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A) ARGUMENT

***Hikel's Holding that No Freestanding Penalties Are Available
for Procedural Violations Inapplicable Because Department Did Deny
Mr. Cook's Public Records Request.***

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4). In other words, the Public Records Act “does not provide for penalties unless some 'final agency action' denies inspection or copying of a public record.” *Hikel v. City of Lynnwood*, No. 74536-1-I, slip op. at 14 (Wn. Ct. App. Div. 1, Dec. 27, 2016). The PRA “does not provide for a freestanding penalty for procedural violations.” *Id.* Rather, procedural violations are considered “aggravating factor[s] when setting penalties for withholding records.” *Id.*, slip op. at 14-15.

In *Hikel*, the agency “never denied [the requester] the right to inspect any records.” *Id.*, slip op. at 14. The agency's only violation of the Public Records Act in that case constituted a failure to “provide a

reasonable estimate of the response time it needed within five days of [the] request.” *Id.*, slip op. at 15. Therefore, that requester was “entitled to fees [and costs] incurred in litigating the issue on which he prevailed, but...not entitled to a penalty award.” *Id.*, slip op. at 15.

Here, in contrast, Mr. Cook was denied the right to inspect or copy public records. CP 148. Indeed, the Department of Corrections stipulated its initial response constituted a denial. *Id.*; *see also* CP 6 (Department “concedes that the requested phone logs were public records and should have been produced in response to [Mr. Cook's] public records request”). Therefore, looking only at the limitations of RCW 42.56.550(4) as interpreted by *Hikel*, the trial court *had* the discretion to award Mr. Cook an amount not to exceed one hundred dollars for each day that he was denied the right to inspect or copy a public record.

The *Hikel* opinion simply does not address the additional restriction on the availability of PRA penalties imposed by RCW 42.56.565(1). Presumably this is because the requester in *Hikel* was not serving a criminal sentence on the date he made his request. Additionally, the *Hikel* opinion does not address the presence or absence of “bad faith” for any other purpose (e.g. as a *Yousoufian* factor). In short, the *Hikel* opinion has no impact on this case.

B) CONCLUSION

The *Hikel* opinion did not address RCW 42.56.565(1) or bad faith. The *Hikel* opinion did hold that RCW 42.56.550(4) requires a requester to be denied the right to inspect or copy a public record before being eligible for penalties, and that freestanding penalties are not available under the Public Records Act where an agency only committed procedural violations of the Act. However, Mr. Cook *was* denied the right to inspect or copy a public record. Therefore, the *Hikel* opinion has no impact on this case.

DATED this 20th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20th, 2017, I caused to be electronically filed the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I delivered a true copy of the same to ABC Legal Messengers,

with appropriate instructions to forward the same to counsel for the Appellant, TIMOTHY FEULNER, Assistant Attorney General, Corrections Division and counsel for Respondents Evans, Jones, and Robinson, MICHAEL KAHRS.

/s/ Christopher Taylor _____
Christopher Taylor