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No. 96424-6

**SUPREME COURT
STATE OF WASHINGTON**

JOEL ZELLMER

Petitioner,

v.

KING COUNTY, ET AL.,

Respondents,

SUPERIOR COURT No. 16-2-11607-8
KING COUNTY
HONORABLE BARBARA LINDE

PETITIONER'S REPLY

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A. ISSUES RAISED BY RESPONDENT'S ANSWER

1. NEW ISSUE PRESENTED: Does an award of costs and fees to Zellmer conflict with the Rules of Appellate Procedure and Revised Code of Washington?
2. NEW ISSUE PRESENTED: Does an agency's response to a separate and distinct request for records negate a finding of bad faith when responding to a separate subsequent records request?

B. ARGUMENT

1. *In this unique circumstance, an award costs and fees to Zellmer conflicts with neither the RAPs nor the RCWs.*

The County's Answer raises the issue of strict compliance with RAP 18.1, despite procedural flexibility incorporated in other relevant RAPs. In its Answer, the County acknowledges the unique circumstances at issue, Resp. Br. at 10, and appears to suggest that strict compliance with the procedural requirements of RAP 18.1 promotes justice and is in line with case law interpreting the PRA. Resp. Br. at 4-10. In its argument, however, the County omits any discussion of the procedural flexibility described in Zellmer's Petition. *Compare* Pet. for Rev. at 14-16 *with* Resp. Br. at 4-10. Due to this omission, the County tacitly concedes the existence of the procedural flexibility described by Zellmer. The County further suggests

that allowing a violating agency to escape penalty does not conflict with PRA jurisprudence nor does it create a matter of public interest. *Id.* at 10. In support of this assertion, the County cites several cases which reference RAP 18.1, Resp. Br. at 7-8, however all these cases analyze a discretionary award of costs and fees under RAP 18.1, not a mandatory award like the PRA demands. Also, none of those cases discuss any instances where an agency escaped penalty under the PRA due solely to a requester's failure to strictly adhere to the procedure of RAP 18.1. Such a question has yet to be expressly discussed by this Court.

Gendler v. Batiste is the case that is the most relevant to RAP 18.1 practice in the context of PRA violations, however it merely states that an award of costs and fees was appropriate due to the requester's strict compliance with RAP 18.1. 174 Wn.2d 244, 264 (2012). The *Gendler* Court did not reach the question proposed by the facts at issue here: whether an appellate court should award costs and fees under the PRA absent a request per RAP 18.1.

Here, Zellmer requested the lower court to reverse the lower court and "to provide any other relief this Court deems just and equitable". Opening Br. at 37. The lower court elected to grant Zellmer's request to reverse, but then went further and found that a PRA violation had also occurred. The lower court, however, did not "follow through" with the

logical conclusion of its decision, but simply elected not to apply the mandatory penalty. Such a result tosses out the proverbial “baby” (statutory relief) with the “bathwater” (adjudication of PRA violation), and conflicts with the established case law precedent described in Zellmer’s Petition: penalizing agencies for violating the PRA.

Consequently, and for the above reasons, Zellmer requests that this Court hold that an award of costs and fees are mandatory under the PRA, whether or not a requestor strictly adheres to RAP 18.1, and that such an award does not conflict with the RAPs, nor the RCWs. Zellmer reiterates his request for costs and fees as requested in his Petition.

2. Each request for records is unique unto itself and requires its own unique response.

In responding to Zellmer’s claims of agency bad faith, the County submits a specific instance of a separate and distinct response to one of Zellmer’s other requests for records. Resp. Br. at 11. Such a response, however, amounts to little more than an ad hoc, post-litigation rationalization of the agency’s incomplete response to Zellmer’s requests at-issue. In responding to Zellmer’s requests, the County never mentioned the productions to Zellmer’s former attorney, Nancy Collins. All references by the County to the Collins production occurred after Zellmer filed suit, so

it cannot be pointed to as support for a good faith response to the requests-at-issue. Also, despite never referencing the Collins production in its responses to Zellmer's requests, the County presents this prior instance as evidence of the agency's propensity for good faith responses, however, such an example has the opposite effect by supporting Zellmer's claims of agency bad faith: the County acted out of the ordinary in responding to Zellmer's requests-at-issue. The County also fails to address a key factor in bad faith analysis under the PRA: departure from the agency's own policy. Any discussion of this departure from policy is also omitted in Respondent's Answer. In the context of PRA violations, departing from agency policy is evidence of bad faith. *Francis v. Dept. of Corr.*, 178 Wn. App. 42, 56-57 (2013) (quoting *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 241 (1908)).

Here, the County has an express agency policy of addressing requests for public records. CP 132-38. Employees of the County understood that policy as requiring employees to treat each request as unique and separate unto itself. *See* CP 252-53, 268-69. Both the Public Records Officer and the Public Records Specialist of the King County Prosecuting Attorney's Office state that both of Zellmer's requests-at-issue were construed as distinctly separate from other requests and each other. *See* CP 204, 252-53, 268-69. In its Answer, however, the County reverses

its position by attempting to repurpose a response to completely separate request as evidence of no bad faith. The County does this without addressing, discussing, or reconciling the fact that its employees departed from the agency policy when responding to Zellmer's September 2015 and January 2016 records requests in a manner that erred on the side of under-producing/withholding and without any clarification or follow-up correspondence with the requester. Expending minimal effort, failing to communicate or clarify, under-producing and silently withholding responsive records, and departing from its own agency policy are all facts that support a finding of agency bad faith.

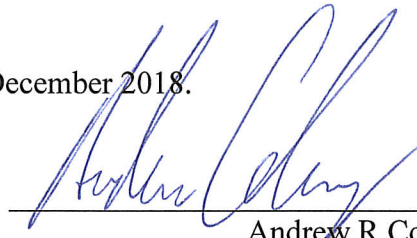
Consequently, for the above reasons, Zellmer requests that this Court hold that each request for public records requires its own unique (and complete) agency response, and to hold that the County committed bad faith by failing to provide an adequate response to records requests-at-issue.

C. CONCLUSION

For all of the foregoing reasons, Zellmer respectfully reiterates his requests that this Court grant his petition for review and to: (1) reverse the lower court's decision to not award any attorney fees to Zellmer, the prevailing party; (2) award Zellmer all his costs and fees incurred in connection with his successful legal action, including his appeal; (3) hold

that KCPAO did act in bad faith; and (5) remand to the trial court to assess penalties consistent with this Court's rulings, including a determination if additional records are still being wrongfully withheld by KCPAO.

DATED THIS 19th day of December 2018.



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CERTIFICATE OF SERVICE

I, Andrew Corsberg, certify that on the 19th day of December, 2018, I caused the foregoing *Reply Brief* was sent via the electronic filing system of the Supreme Court of Washington to the following:

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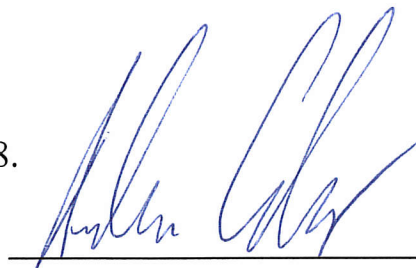
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DATED this 19th day of December, 2018.



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