No. 97005-0

THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERIC HOOD,

Appellant

v.

CITY OF LANGLEY,

Respondent,

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF CASE 1

IV. ARGUMENT 4

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT OR PUBLISHED COURT OF APPEALS CASES. 4

B. THERE IS NO SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE RAISED IN THIS MATTER. 6

V. CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Block v. City of Gold Bar, 189 Wn.App. 262, 271, 355 P.3d 266 (2015)……..5, 6

Cerrillo v. Esparza, 158 Wash. 2d 194, 142 P.3d 155 (2006)……5

Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)……7

STATUTES

RCW 42.56.100……...6, 7

RCW 42.56.550 ……..3

I. INTRODUCTION

Petitioner Eric Hood seeks review of a decision reversing Summary Judgment in favor of the City of Langley. Hood seeks to have the Supreme Court grant judgment in his favor even though Hood never moved for Summary Judgment in the trial court and there are material factual issues in dispute concerning Hood's request for electronic calendars of the City's former Mayor.

This case presents garden variety factual disputes that precluded summary judgment on the issue of production of electronic calendars. The Court of Appeals decision to remand this matter is proper and necessary to address these disputed factual issues concerning these calendars. As such, it is not suitable for review by the Supreme Court pursuant to RAP 13.4.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals conflicts with Supreme Court or Court of Appeals decisions under RAP 13.4 (b)(1), (2)?

2. Whether there is an issue of substantial public interest meriting review of the court of appeals decision?

III. STATEMENT OF THE CASE

This case concerns a series of broad requests by petitioner Eric Hood for records from the City of Langley. The request was made initially on January 5, 2016. The request sought, inter alia, personal

calendars for former Mayor Fred McCarthy. The request also sought personal journals which Mayor McCarthy maintained as well as various notes and documents which the Mayor maintained during his term, which expired on December 31, 2015.

The City had previously assembled the Mayor's files in his office for response to a similar public records request. After receiving his request, the City Clerk, Debbie Mahler, arranged for Mr. Hood to review these records in the Mayor's office on January 15, 2016. During this time, they discussed his request for electronic record which were contained on the former Mayor's laptop computer. The contents of that discussion are disputed by the parties.

The City Clerk provided declarations testifying that during his January 15, 2016 visit to inspect the records assembled in the Mayor's office, Hood modified his request for electronic records to seek only those concerning or relating to him, thereby narrowing his previous public records request. Hood disagreed, filing a contrary declaration that did not discuss his conversation with Mahler that the City believed modified his records request. Instead, he contended that he never intended to modify his request and disputing the City's treatment of his request for electronic records, including the electronic calendars maintained by the City. He contends that the e-mail submitted that same day was not related to his

prior request, but was a completely separate request, contrary to Mahler's understanding.

The City moved for summary judgment of all claims which was granted by the trial court on July 11, 2017. The trial court concluded that the request for personal journals was not a request for public records. The trial court concluded that the City had done an adequate search for responsive records and had produced them to Mr. Hood. The court also rejected Hood's claim that it was a violation of RCW 42.56.550 to produce records which could have been withheld as exempt when it allowed Mr. Hood to review the records in the Mayor's office.

The Court of Appeals opinion agreed with the trial court's rulings on summary judgment, except for its ruling concerning the adequacy of the City's search for electronic records, particularly the calendars maintained on Mayor McCarthy's laptop. The court found that the record concerning the search for responsive electronic records was "less clear" and that factual issues remained concerning the adequacy of the City's search. Opinion at 7. The Court of Appeals noted that Hood claimed the City failed to search the laptops for daily calendars, creating issues of fact as to how they were searched for and produced. Opinion at 8. Mahler testified that the records request had been modified and that she searched the computers for responsive records in response to the modified search.

The court found that it was unable to determine whether the search was adequate and found that the record did not contain any affirmative testimony concerning access to McCarthy's electronic calendars. Opinion at 8. Thus, the Court of Appeals ruled that granting summary judgment to the City was error. *Id.* at 9.

The Court of Appeals further ruled that there was a material factual dispute as to whether Hood narrowed or modified his January 5, 2016 request. Opinion at 9-10. Thus, the court concluded that it was error to grant summary judgment on whether the City violated the PRA by failing to produce the electronic calendars. *Id.* at 10. The court, however, disagreed with Hood's contention that the City was obligated to provide unfettered access to the laptop so that he could review its contents, which Hood demanded. *Id.*

IV. ARGUMENT

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT OR PUBLISHED COURT OF APPEALS CASES.

RAP 13.4(b) establishes the factors governing consideration of petitions for review from decisions of the courts of appeal. Petitioner cites RAP 13.4*b)(1) and (2) as grounds for such review, claiming that the Court of Appeals decision in this matter conflicts with a Supreme Court

and Court of Appeals published decisions in *Cerrillo v. Esparza*, 158 Wash. 2d 194, 142 P.3d 155 (2006) and *Block v. City of Gold Bar*, 189 Wn.App. 262, 271, 355 P.3d 266 (2015).[1] The Court of Appeals decision does not conflict with either case.

Cerrillo v. Esparza, is not a public records act case and does not involve the reasonableness of a search for public records. Instead, it involved claims for unpaid overtime wages under the Washington Minimum Wage Act. The petition does not state how this case conflicts with the Court of Appeals decision or why it is relevant to the petition for review. It is cited for the unremarkable proposition that summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled ot judgment as a matter of law.

Cerrillo is not in conflict because these rules were followed by the Court of Appeals. Opinion at 5. Moreover, the "moving party" in this case was the City of Langley. Hood did not file any cross motion for summary judgment. Thus, the Court of Appeals did not err in not granting judgment to Hood sua sponte, because Hood never sought summary judgment in the first instance.

[1] The petition provides an incomplete citation to *Cerrillo*, which is not cited by the Court of Appeal opinion, nor was it cited by any party's briefing to the Court of Appeals.

Similarly, there is no conflict between the Court's opinion and its prior opinion in *Block v. City of Gold Bar*. Again, petitioner does not explain how the Court of Appeal opinion here conflicts with *Block,* merely citing page 271 of the court's opinion as the source of the alleged conflict. *Block* involved a summary judgment granted and affirmed on behalf of the City. As such, it is factually dissimilar to the opinion here, which overturned the trial court's summary judgment in part due to factual disputes. The cases presented different facts, but consistently applied the familiar rules applicable to summary judgment. The Court of Appeals opinion in this case cited to and followed the rules set forth in *Block* to determine the reasonableness of a search, finding that the City's search of the Mayor's paper records was adequate, but ultimately found that factual issues remained concerning the search for electronic records, particularly the calendars. Opinion at 6. The Court of Appeals opinion therefore follows *Block* and does not conflict with any of the rules announced therein.

B. THERE IS NO SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE RAISED IN THIS MATTER.

Hood argues that there is an issue of substantial public interest in how a court should consider RCW 42.56.100, which sets forth standards to guide an agency's rules for processing public records requests to include

providing of fullest assistance to the requester. This issue is not properly raised in this matter, was not briefed or argued to the court of appeals. Neither Hood's opening brief nor his reply brief cited to RCW 42.56.100. He cannot fault the Court of Appeals for failing to consider a statute that he never cited to.

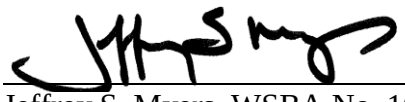
This case does not involve challenges to the rules used by Langley that are governed by the "fullest assistance" provisions of the PRA. Hood now contends, for the first time in his petition for review, that the Court should find that the "fullest assistance" standard should be applied to guide how an agency searches for records and how it interacts to a requestor demanding unfettered access to agency computer resources. This court has held that issues concerning the reasonableness of a search are highly factual and depend on the specifics of each case. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011).

Given the unclear state of the record concerning the request and search for electronic records and calendars, these arguments are better directed to the trial court on remand. The Court should deny the petition for review.

V. CONCLUSION

The petition for review does not identify any conflict with decisions of the Supreme Court or other divisions of the Court of Appeals that justify review by this court. Instead, petitioner demands that the Court grant judgment to him even though he never moved for summary judgment in the trial court and there are evident issues of material fact that must be resolved. The Court should reject the petition for review and allow this matter to be remanded to the Island County Superior Court for resolution of those factual issues.

Respectfully submitted this 9th day of May, 2018.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I have caused to be served via US Mail, the above attached document, upon the Appellant at the address below:

Eric Hood, Pro Se
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DATED this 9th day of May, 2019.

/s/ *Lisa Gates*
Lisa Gates

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

May 09, 2019 - 4:16 PM

Transmittal Information

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Appellate Court Case Number:	97005-0
Appellate Court Case Title:	Eric Hood v. City of Langley
Superior Court Case Number:	16-2-00107-1

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