FILED
SUPREME COURT
STATE OF WASHINGTON
3/10/2022 2:28 PM
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No. 100424-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DAVID O'DEA,

Petitioner,

vs.

CITY OF TACOMA, a public agency; and TACOMA POLICE DEPARTMENT, a public agency,

Respondent.

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
No. 53613-7-II

ANSWER TO CROSS PETITION FOR REVIEW

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I. INTRODUCTION

A. Facts

O'Dea relies upon the statement of facts set forth in his amended petition for review as well as the facts set forth in the Court of Appeals' decision that relate to the notice the City received of O'Dea's PRA requests. As the Court of Appeals held, the City received "fair notice" of O'Dea's PRA requests.

II. JUSTIFICATION FOR COURT TO DENY CROSS REVIEW

A. The City Fails to Set Forth Any Facts Establishing it Did Not Receive "Fair Notice" of O'Dea's PRA Requests.

Although the City urges that the Court of Appeals incorrectly held that "the trial court properly concluded that the City violated the PRA when it failed to respond to the two PRA request letters when they received them as attachments to the complaint", the City fails to address the case law cited by the Court of Appeals in support of its decision. The reason is quite clear: no case law supports the City's position.

The City's argument to the Court of Appeals was as follows: The "exhibits attached to a PRA complaint do not give an agency 'fair notice' that the exhibits themselves [were] new PRA requests." Court of Appeals' decision at 10. The Court of Appeals, however, appropriately held that the City received fair notice of O'Dea's two PRA requests.

> "'[T]he P[R]A only applies when public records have been requested. In other words, public disclosure is not necessary until and unless there has been a specific request for records.'" Germeau v. Mason County, 166 Wn.App. 789, 804, 271 P.3d 932 (2012) (alterations in original) (internal quotation marks omitted) (quoting Wood v. Lowe, 102 Wn.App. 872, 876-77, 10 P.3d 494 (2000)). *"No official format is required for making a records request;* however, agencies may recommend that requestors submit requests using an agency provided form or web page." RCW 42.56.080(2). A requester need not expressly reference the PRA. Germeau, 166 Wn.App. at 806. Nor must a requester submit their request to a designated PRA coordinator. Id. at 806 n.17 [emphasis added].

Court of Appeals part published opinion at 10-11. With regard to when the City received the PRA requests, the Court held as follows:

Although the City received the letters as attachments to a complaint, when read in context with the substance of the complaint, it was obvious that the plaintiffs had already attempted to submit these letters as public records requests. The complaint explicitly referenced the attached letters and stated that Purtzer mailed two "Public Disclosure Request[s] to the . . . Department" and "[n]o response was ever received." CP at 18. O'Dea's complaint asked the trial court to "order that all records requested . . . be provided promptly." CP at 21. Regardless of whether the original letters were lost in the mail or somehow misplaced, O'Dea's complaint made clear that he sought public records and he was awaiting a response to the PRA request letters. And the City could not reasonably have believed O'Dea sought the records under an independent non-PRA authority, given that both letters expressly referenced the PRA. See Germeau, 166 Wn.App. at 807.

To the extent the City argues that the way it received the PRA request letters attached to a complaint made them ambiguous, no authority limits the context under which a PRA request may be received, so long as the request provides fair notice, which these letters clearly did. Although the City argues its attorney could not have treated the attachments as PRA responses without abdicating her duty to defend her client, we disagree. She could simultaneously argue the City did not receive the letters until it received the complaint and instruct the City to respond to the letters as PRA requests as soon as it received them. In fact, starting the PRA response, rather than waiting nine months for confirmation of something the City already knew—that O'Dea was seeking these records under the PRA—was the only reasonable course.

Id. at 12-13.

As the Court of Appeals noted, no uncertainty existed that the letters were PRA requests and under the "fair notice" standard, the City clearly received these PRA requests and should have recognized them as such. The complaint was for a Public Records Act violation and the exhibits were letters specifically making PRA requests. The Complaint further requested the Court issue an order that all records requested be provided promptly. *The request could not have been clearer*. The City's attempt to deflect by asking if O'Dea still wanted the documents nine months later, after the complaint specifically asked the Court to issue an order for their production, *left zero doubt that the documents should have been provided* as of November 2017. That the City *chose to ignore* those letters upon receiving them does not excuse the City's conduct as the court indicated. The opposite is true. Response to a complaint in a civil matter does not discharge its duty under the PRA to respond. Accordingly, this Court should not

disturb the Court of Appeals' decision that the City received "fair notice" of the PRA requests and that O'Dea is entitled to penalties.

B. O'Dea Prevailed on His Appeal.

Interestingly, the City believes that because it failed to respond to Mr. O'Dea's PRA requests, even though it recognized them as such, its failure to respond will invite "litigation shenanigans." Given that the City had full knowledge about how to address PRA requests, regardless of how they are received, the only shenanigans engaged in were the City's attempts to first ignore the PRA requests and then 9 months later acknowledge them as PRA requests and start to respond. The Court of Appeals was not swayed by such argument as such argument lacks merit. Respectfully, Mr. O'Dea clearly prevailed on his appeal, and under such circumstances, RCW 42.56.550(4) states as follows:

> 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.

RCW 42.56.550(4).

The City fails to acknowledge that its primary argument at the trial court, on appeal, and again in its cross petition is that the PRA requests attached to the O'Dea complaint were not valid PRA requests. The Court of Appeals clearly denied the City's position. As this court is aware, before penalties can be awarded, a PRA violation must first be found. Here, not only did the trial court find that a PRA violation occurred, such finding was affirmed by the Court of Appeals.

The City's secondary argument focused on the premise that if, in the unlikely event the court finds a PRA violation, the trial court's assessment of penalties was erroneous . Accordingly, given that O'Dea was the prevailing party when the court found that a PRA violation occurred, this Court should deny the City's cross-petition on its prevailing party claim.

As the Court of Appeal succinctly held:

> In sum, the trial court did not err when it granted partial summary judgment to O'Dea, concluding that the City violated the PRA when it failed to begin responding to the PRA request letters as soon as it received them in November 2017 as attachments to the complaint.

Court of Appeals part published opinion at 14.

Respectfully, Mr. O'Dea is the prevailing party.

C. <u>O'Dea Should Be Awarded Fees For His Answer.</u>

O'Dea respectfully requests attorney fees and costs incurred in connection with this answer to the cross petition for review.

III. CONCLUSION

Based on the arguments, records and files contained herein, O'Dea respectfully requests that this Court deny the City's cross petition for review.

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IV. CERTIFICATE OF COMPLIANCE

This document contains 1,288 words.

Respectfully submitted this 10th day of March, 2022.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: *_/s/ Brett A. Purtzer_*
Brett A. Purtzer
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 10th day of March, 2022.

By: */s/ Kathy Herbstler*
Kathy Herbstler

HESTER LAW GROUP, INC., P.S.

March 10, 2022 - 2:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,424-9
Appellate Court Case Title:	David O'Dea v. City of Tacoma, et al.
Superior Court Case Number:	17-2-13016-3

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