NO. 91994-1

Supreme Court of the State of Washington

JEFFREY R. MCKEE, Petitioner

v.

KING COUNTY, Respondent

PETITION FOR DISCRETIONARY REVIEW

COURT OF APPEALS, DIVISION I, NO. 70901-1

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases:

A) IDENTITY OF PETITIONER

Jeffrey McKee, plaintiff in the underlying action, seeks review of the decision described in Part B, below.

B) COURT OF APPEALS DECISION

Mr. McKee requests this Court accept review of the Washington State Court of Appeals, Division I's June 22, 2015 Order Denying Motion for Reconsideration and May 18, 2015 affirmation the dismissal of *McKee v. King County*, Snohomish County Superior Court Case No. 12-2-08128-8.

C) ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where an opinion of a Court of Appeals panel found Mr. McKee to be the prevailing party in a Public Records Act judicial review, but not entitled to costs due to his inmate status, in conflict with decisions of this Court and other decisions of the Court of Appeals? RAP 13.4(b)(1) and (2).

2. Assuming this Court accepts review, is Mr. McKee entitled to costs, including reasonable attorney fees, incurred in connection with seeking this review.

D) STATEMENT OF THE CASE

On April 1, 2011, Petitioner Jeffrey McKee mailed a public records request to Respondent King County's prosecuting attorney's office,

requesting "[t]he complete case file in *State v. McKee*, King County Superior Court Cause No. 03-1-01734-1 KNT," as well as more specific requests for "audio and/or video recordings," "deals made and/or agreements made and/or payments made to any of the alleged victims" and "phone recordings" related to the same case. CP 96. At that time, Mr. McKee was incarcerated at "Coyote Ridge Corrections Center." *Id.* On December 27, 2011, King County responded to Mr. McKee, indicating it had "identified 2177 pages of documents that are responsive to [his] request." CP 114. One of those records, identified as "KCDAD Booking Sheets," was withheld in its entirety as a "[j]ail record" pursuant to "RCW 70.48.100." CP 114, 59.

On November 12, 2012, Mr. McKee filed a "Public Records Complaint" against King County under Snohomish County Superior Court Case No. 12-2-08128-8. CP 89-90. On June 17, 2013, King County moved to dismiss pursuant to CR 56. CP 73-82. On July 10, 2013, in its reply brief, King County acknowledged the KCDAD Booking Sheets were not exempt under RCW 70.48.100 if it had "written permission" from Mr. McKee, but argued Mr. McKee's public records request did not constitute such written permission. CP 22-23. King County, however, did consider Mr. McKee's response to King County's summary judgment motion to constitute "written permission," and "mailed the jail record to [Mr.

McKee] along with [its] reply." CP 23, fn. 5. On August 21, 2013, the Court "granted" King County's "motion for summary judgment dismissal" and ordered that "[a]ll remaining claims against [King County] in this action are dismissed with prejudice." CP 5-6.

On September 19, 2013, Mr. McKee, still an inmate at Coyote Ridge Corrections Center, signed, dated, and placed a Notice of Appeal in the Washington State Department of Corrections' internal mail system. CP 1. The Notice of Appeal was filed with the Washington State Court of Appeals, Division I on September 25, 2013. *Id.*

On May 18, 2015, Judge Becker wrote in an unpublished opinion for the Court of Appeals that the "superior court decision to dismiss a Public Records Act case" was "affirm[ed]." *McKee v. King County*, No. 70901-1-I, slip op. at 1 (Ct. App. May 18, 2015); appx. 9-14. The Court of Appeals acknowledged "[a] person's [public records] request for his own booking record amounts to written permission." *Id.* at 3 (citing *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 20 (2011), *aff'd in part & rev'd in part*, 179 Wn.2d 376 (2013)). The Court of Appeals went on to indicate the only "point in further proceedings requested by McKee would be for an assessment of penalties against the County." *Id.* And the Court of Appeals held that "under these circumstances, there is no basis for finding that the County acted in bad faith by withholding the jail booking record."

Id. at 4. Therefore, the Court of Appeals reasoned, because "[a]n inmate may be awarded penalties under the Public Records Act only if 'the court finds that the agency acted in bad faith in denying the person an opportunity to inspect or copy a public record," further proceedings are unnecessary. *Id.* at 3 (citing RCW 42.56.565(1)).

On June 5, 2015, Mr. McKee filed a Motion for Reconsideration. Appx. 15-18. On June 22, 2015, the Court of Appeals "denied" Mr. McKee's "motion for reconsideration." Appx. 19.

Discretionary review is now sought under RAP 13.4(b)(1) and (2).

E) ARGUMENT

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals." RAP 13.4(b).

"Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). Whether a party is "'prevailing' relates to the legal question of whether the records should have been disclosed *on request*." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 726 (2011) (emphasis in

original) "Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at the time." *Id.* "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure [does not] eviscerate the remedial provisions altogether." *Id.* at 727.

Furthermore, "prevailing party status [under the Public Records Act is not conditioned on the requester] causing the disclosure." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103 (2005). Prevailing party status is not conditioned on whether the requester "substantially prevail[s]." *Id.* at fn. 10; *see also* RCW 42.56.550(4) ("Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy *any* public record" is a prevailing party entitled to "costs, including reasonable attorney fees") (emphasis added). Prevailing party status is not conditioned on a "showing of bad faith." *Id.* at 101. And prevailing party status is not conditioned on whether any penalty is awarded. *Francis v. Dept. of Corrections*, 178 Wn. App. 42, 67 (2013). "[T]he PRA's cost-shifting provision is mandatory." *Id.* at 65.

Here, the Court of Appeals essentially held Mr. McKee was the prevailing party in finding King County wrongfully withheld the jail booking record. *McKee*, No. 70901-1-I, slip op. at 2-3. That the Court of

Appeals also found "no basis for a finding that the County acted in bad faith by withholding the jail booking record" does not affect Mr. McKee's prevailing party status. *Id.* at 4. Moreover, that King County subsequently produced the jail booking record does not affect Mr. McKee's prevailing party status. Furthermore, that the Court of Appeals held King County's claims of exemption as to other records were held appropriate does not affect Mr. McKee's prevailing party status. Finally, that the Court of Appeals held Mr. McKee is not entitled to penalties does not affect Mr. McKee's prevailing party status. And yet the Court of Appeals, by affirming the superior court's dismissal and declining to remand for further proceedings, essentially held that although Mr. McKee is the prevailing party, he is not entitled to costs.

And as the prevailing party, Mr. McKee is entitled to costs, including attorney fees. RCW 42.56.550(4). Therefore, further proceedings are necessary, even if penalties are inappropriate; and the Court of Appeals' decision is in conflict with decisions of this Court and the Court of Appeals.

Additionally, "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). A

prevailing party must also be awarded costs, including reasonable attorney fees, incurred in bringing an appeal or discretionary review. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 114 Wn.2d 677, 690 (1990); *see also Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 461-62 (2009). Here, Mr. McKee is the prevailing party. Thus, he is entitled to costs, including reasonable attorney fees, and including costs and attorney fees incurred in seeking this review. If the Court accepts review, an affidavit of fees and expenses will be filed pursuant to RAP 18.1.

F) CONCLUSION

For the reasons stated above, petitioner Jeffrey McKee respectfully requests the Court grant discretionary review under RAP 13.4(b)(1) and (2), and award costs, including attorney fees, incurred in this action.

DATED this 16th day of July, 2015.

Christopher Taylor, WSBA # 38413
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing PETITION FOR DISCRETIONARY REVIEW was delivered this 16 day of July, 2015

to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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Christopher Taylor

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY R. McKEE, Appellant, v. KING COUNTY, Respondent.	No. 70901-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2015

BECKER, J. — This appeal seeks reversal of a superior court decision to dismiss a Public Records Act case. We affirm the dismissal.

The requester and appellant is Jeffrey R. McKee. On April 1, 2011, McKee requested documents held by the King County Prosecutor. McKee's request sought jail records and copies of documents held in the litigation file related to the State's case against him in State v. McKee, No. 03-1-01734-1 KNT. The prosecutor responded on April 13, 2011, initially stating that there were about 4,000 pages of records responsive to McKee's request. After some months of corresponding with McKee, the prosecutor narrowed that estimate down to 2,177 pages. On December 27, 2011, the prosecutor mailed a letter to McKee. The letter indicated that certain redactions had been made and stated that a privilege log detailing those redactions was being provided as an enclosure. The letter

also requested $266.55 for reproduction costs. McKee admits he never paid this fee and did not collect the records.

On November 29, 2012, McKee filed suit against King County under the Public Records Act, chapter 42.56 RCW. The County's first motion for summary judgment was granted, dismissing McKee's claim that the County's charge for reproducing the records was unreasonable. The County's second motion for summary judgment was filed on June 17, 2013, with respect to McKee's general claim that documents had been improperly exempted. McKee responded by identifying 31 records that he believed were improperly described as exempt. The County provided the trial court with copies of these documents in case the court determined an in camera review was necessary. After a hearing on July 18, 2013, the court decided an in camera review was unnecessary and dismissed McKee's case with prejudice. McKee appeals.

Judicial review of challenged agency action under the Public Records Act is de novo. RCW 42.56.55(3); Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014).

One of the records McKee requested was his own jail booking record. A person's jail records are generally exempt from disclosure under RCW 70.48.100 without the person's written permission. The County's privilege log identified RCW 70.48.100 as the reason for withholding McKee's booking record. In response to the County's second motion for summary judgment in July 2013, McKee stated that his request for the jail record was his written permission.

Even though McKee had not paid the copying and collection charges, the County sent him a copy of the jail booking record at that time.

A person's request for his own booking record amounts to written permission. Sargent v. Seattle Police Dep't, 167 Wn. App 1, 20, 260 P.3d 1006 (2011), aff'd in part and rev'd in part, 179 Wn.2d 376, 314 P.3d 1093 (2013). McKee contends the County's withholding of his nonexempt jail record between December 2011 and July 2013 was wrongful under Sargent and that the trial court therefore erred by granting summary judgment to the County. He asks that the case be remanded for further proceedings. The point of the further proceedings requested by McKee would be for an assessment of penalties against the County.

An inmate may be awarded penalties under the Public Records Act only if "the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1).

McKee, who was an inmate when he made his request, did not raise an issue about the jail record when he received the privilege log. He did not pay for collection or copying, calling into question whether he had a right to a copy of the jail record even after he asserted that it had been wrongfully withheld. See RCW 42.56.120. After McKee filed suit in November 2012, the County sent him an interrogatory asking him to identify documents he believed had been exempted from disclosure. He did not answer. It was not until the County filed its final motion for summary judgment that McKee specifically identified the jail record as a document he believed was improperly exempted. The County immediately

provided him with a copy of it. Under these circumstances, there is no basis for a finding that the County acted in bad faith by withholding the jail booking record.

The remaining documents are one memorandum and 29 e-mails contained in the prosecutor's litigation file. They are all described in the privilege log as attorney work product, exempt under RCW 42.56.290. For each document, the identifying information included the type of record, date, number of pages, and the author and recipient.

Further descriptive information was provided to the court in an affidavit submitted by a senior prosecuting attorney in support of the motion for summary judgment. The memorandum is identified as a two-page memorandum from a deputy prosecutor, requesting further investigation by the lead detective in an investigation of McKee. Five e-mails are identified as communications among prosecutors that describe criminal allegations against McKee, aspects of an investigation of McKee, and McKee's arrest. Four e-mails are identified as communications between a prosecutor, his paralegal, and a victim advocate, discussing the victim's participation in criminal litigation involving McKee. Twenty e-mails are identified as communications between prosecutors, a paralegal, and persons from various police agencies, showing attempts by the attorneys and paralegal to gather factual information for trial.

McKee claims none of these materials are exempt from disclosure.

The privilege log states that the four e-mails discussing the victim's participation in McKee's criminal case were withheld under RCW 5.60.060(8). The County agrees that RCW 5.60.060(8) was not applicable. That statute

exempts communications between a victim and a victim advocate, not communications between a victim advocate and an attorney or paralegal. Those communications, the County claims, are nevertheless exempt as attorney work product under RCW 42.56.090, along with the memorandum and all the other e-mails.

The Public Records Act exempts from public disclosure records "that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.56.290. "Work product under the public disclosure act is the same as work product under the civil rules." Soter v. Cowles Pub. Co., 131 Wn. App. 882, 893, 130 P.3d 840 (2006), aff'd, 162 Wn.2d 716, 174 P.3d 60 (2007).

The attorney work product doctrine protects materials prepared or collected in anticipation of litigation. Included within the definition of work product is factual information which is gathered by an attorney, as well as the attorney's legal research, theories, communications, opinions, and conclusions. Limstrom v. Ladenburg, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998); Koenig v. Pierce County, 151 Wn. App. 221, 230-31, 211 P.3d 423 (2009), review denied, 168 Wn.2d 1023 (2010).

The memorandum and the 29 e-mails McKee sought are encompassed by the attorney work product doctrine. As the attorney's declaration demonstrates, they memorialize an attorney's communications prepared in anticipation of litigation. Because these communications would be protected from civil

discovery, they are exempt from disclosure under the Public Records Act. RCW 42.56.290.

McKee contends the prosecutor should have redacted the memorandum and the 29 e-mails and produced them with only the header and footer showing, rather than withholding them altogether. Because McKee raises this argument for the first time on appeal, we decline to consider it. RAP 2.5(a).

Finally, McKee contends the trial court abused its discretion in declining to examine the documents in camera. Determining whether in camera inspection is required is left to the discretion of the trial court. Overlake Fund v. City of Bellevue, 60 Wn. App. 787, 796-97, 810 P.2d 507, review denied, 117 Wn.2d 1022 (1991). Without examining the documents themselves, the trial court could determine from the privilege log and the prosecutor's declaration that the documents were exempt as attorney work product. We find no abuse of discretion. Harris v. Pierce County, 84 Wn. App. 222, 235-36, 928 P.2d 1111 (1996).

Affirmed.

Becker, J.

WE CONCUR:

Cox, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY R. McKEE, Appellant, vs. KING COUNTY, Respondent.	No.: 70901-1-I DIVISION ONE MOTION FOR RECONSIDERATION

I. MOTION

Jeffrey R. McKee, appellant, by and through his attorney of record, Christopher Taylor of FT Law, P.S., moves pursuant to RAP 12.4 for an order reconsidering its opinion that affirmed Snohomish County Superior Court's order granting respondent-defendant King County's motion for summary judgment and dismissing with prejudice Mr. McKee's Public Records Act case in *McKee v. King County*, Case No. 12-2-08128-8. Specifically, for the reasons set out below, Mr. McKee requests the Court reverse the trial court's order of dismissal, and remand for further proceedings.

II. ISSUE

Absence of Bad Faith Not Grounds to Dismiss Judicial Review under Public Records Act; and Further Proceedings Necessary to Award Costs.

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III. MEMORANDUM OF LAW AND ARGUMENT

"Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it refused to allow inspection or copying of a specific public record or class of records." RCW 42.56.550(1). "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." *Id.*

"Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). "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." *Id.* However, "[a] court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1).

"A showing of bad faith is not required nor does good faith reliance on an exemption exonerate an agency that mistakenly relies upon that exemption." *Spokane Research & Def. Fund*, 155 Wn.2d 89, 101 (2005). "[A]gencies may not resist disclosure of public records until a suit is filed and then avoid paying [costs] by disclosing them voluntarily thereafter. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 118 (2010). "If a court determines that the records do not fall within an exemption to the PRA, the prevailing party

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is entitled to costs...from the agency. *Id.* at 118-19. "Subsequent events do not affect the wrongfulness of the agency's initial withholding of records if the records were wrongfully withheld at the time. *Id.* at 119.

In other words, although the absence of bad faith on the part of the agency is grounds for denying an award of penalties to an inmate requester, the absence of bad faith has no bearing on whether a requester is properly designated as a prevailing party. Whether a requester is a prevailing party is a "legal question of whether the records should have been disclosed [and produced] on request." *Spokane Research & Def. Fund*, 155 Wn.2d at 103. The presence or absence of bad faith is simply irrelevant to the threshold question of whether the records were wrongfully withheld. Moreover, the presence or absence of bad faith is irrelevant to whether a prevailing party is entitled to costs.

Here, Mr. McKee requested "the complete case file in *State v. McKee*, King County Superior Court Cause No. 03-1-01734-1 KNT" of King County. CP 96. King County identified one two-page record responsive to that request—the KCDAD Booking Sheets, dated June 30, 2003—that was responsive to Mr. McKee's request. CP 59. King County also withheld that record in its entirety, claiming the record exempt under RCW 70.48.100.

Jail records "shall be made available...(f) Upon the written permission of the person" that is the subject of the records. RCW 70.48.100(2). And "when the subject of [jail] records seeks their disclosure" under the Public Records Act, the request "amounts to a [written] grant of permission." *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 20 (2011). A claim of exemption under RCW 70.48.100 for jail records where the requester is the subject of the records is "improper." *Id.*

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Therefore, King County's claim of exemption regarding the Booking Sheets was improper. And therefore, at least with respect to the Booking Sheets, King County was not entitled to judgment as a matter of law, and thus summary judgment was inappropriate. To the contrary, because King County wrongfully withheld the Booking Sheets, Mr. McKee was and is entitled to judgment as a matter of law, and should be properly designated the prevailing party.

Furthermore, Mr. McKee requests this Court remand for further proceedings. Specifically, the Mr. McKee is entitled to be awarded costs pursuant to RCW 42.56.550(4).

RESPECTFULLY SUBMITTED this 4th day of June, 2015.

Christopher Taylor
Attorney for Appellant
WSBA # 38413

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION FOR RECONSIDERATION was delivered this 4th day of June, 2015 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JEFFREY R. McKEE, Appellant, v. KING COUNTY, Respondent.	)	No. 70901-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jeffrey R. McKee, has filed a motion for reconsideration of the opinion filed on May 18, 2015. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 22ND day of June, 2015.

FOR THE COURT:

Becker, J.
Judge