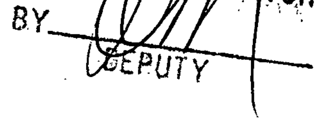
FILED
COURT OF APPEALS
DIVISION II

2014 DEC 17 PM 1:19

STATE OF WASHINGTON

BY ____ DEPUTY



No. 47359-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

NORBERT SCHLECHT

Appellant,

v.

CLARK COUNTY WASHINGTON,

Respondent.

APPELLANT'S BRIEF

Norbert Schlecht, Pro Se
Appellant
7704 NW Anderson Ave.
Vancouver, WA 98665
(360) 356-5657

TABLE OF CONTENTS

I. Assignment of Error 6

II. Issues pertaining to Assignment of Error 6

III. Statement of the Case 6

IV. Argument 9

A. Standard of review for the motion for summary judgment 9

B. Principles applicable to Public Records Act requests 10

C. The trial court erred in finding that the investigative search for public records requested by Norbert Schlecht under Washington's Public Records Act was a reasonable search as a matter of law 12

D. Appellant is entitled to attorney fees (if applicable) and cost 15

V. Conclusion 16

TABLE OF AUTHORITIES
Table of Cases

State Cases:

Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996)................... 10

Bonamy v. City of Seattle, 92 Wn. App. 403, 410, 960, P. 2d 447 (1998).... 12

Folsom v. Burger King, 135 Wn. 2d 658,958 P.2d 301 (1998).................. 9

Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004)....12,13

Hearst Corp. v. Hoppe, 90 Wn.2d 120, 123, 127, 580 P.2d 246 (1978)........10

Homeowners Association v. Tydings, 72 Wn.App. 139, 864 P.2d 392 (1993).9,10

Hooper v. Yakima County, 79 Wn.App. 770, 904 P.2d 1183 (1995)..............10

Mechling v. City of Monroe, 152 Wn. App.830, 814, 222 P.3d 808 (2009)......11

Morris v. McNichol, 83 Wn.2d 491,519 P.2d 7 (1974)...............................9

Neighborhood Alliance of Spokane County v. County of Spokane, 153 Wn.App. 241, 224 P.3d 775 (2009); review granted 168 Wn. 2d 1036-43, 233 P.3d 889 (2010).. 13,14,15

Nicholson v. Deal, 52 Wn.App 814, 764 P.2d 1007 (1988)......................... 10

Progressive Animal Welfare Society v. University of Washington, 125 Wn. 2d 243, 25, 884 P.2d 594, 92 (1994)..11

Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992)..................10

Spokane Research and Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d

1117 (2005).. 9

Tabak v. State, 73 Wn.App. 691, 870 P.2d 1014 (1994)..........................9

Wood v. Lowe, 102 Wn.App. 872, 878, 10 P.3d 494 (2000)....................13

Yuan v. Chow, 92 Wn.App. 137, 960 P.2d 1003 (1998)..........................10

Federal Cases:

Citizens Comm'n on Human Rights v. Food and Drug Amin., 25 F.3d 1325, 1328 (9th Cir. 1995).. 15

Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)............15

Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350-1351 (D.C. Cir. 1983)..15

Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)........15

Regulations, Rules and Statutes

FOIA 5 U.S.C. ¶ 552 (1970)..15

RAP 18.1 (a)..16

RCW 42.56...6,7

RCW 42.56.010 (3)..11

RCW 42.56.010 (4)..11

RCW 42.56.550 (3)...9

RCW 42.56.070 (1)..11

RCW 42.56.080...12

RCW 42.56.520 12

ASSIGNMENT OF ERROR

A. The trial court erred in its order dated October 10, 2014 finding at summary judgment that the County (Clark) does not possess records responsive to the Petitioner's (Norbert Schlecht) public records request under Washington's Public Records Act and that the search the County conducted for such records was reasonable and in good faith.

B. The Appellant is entitled to reasonable attorney fees (if applicable) and costs as prevailing party in his Public Records lawsuit.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Did the trial court err in its order dated October 10, 2014 finding at summary judgment that the County (Clark) does not possess records responsive to the Petitioner's (Norbert Schlecht) public records request under Washington's Public Records Act and that the search the County conducted for such records was reasonable and in good faith?

B. Is the Appellant entitled to reasonable attorney fees (if applicable) and costs as prevailing party in his Public Records lawsuit?

STATEMENT OF THE CASE

The case is a Public Records Act (PRA) case, governed by Chapter 42.56 RCW. It was commenced by Mr. Schlecht, pro se, as a resident of Clark County,

Washington. The primary issue on appeal addresses the question of whether the respondent Clark County established at summary judgment that it had conducted a reasonable and in good faith search of requested public records. There was no issue of the vagueness of the request. Clark County simply claimed that it had not discovered any records responsive to the public records request.

On October 10, 2014, the Honorable Suzan L. Clark, Judge of the Clark County Superior Court, granted Clark County's motion for summary judgment. CP 88-89.

On November 8, 2013, Mr. Schlecht made a public records request to the Clark County Sheriff's Office (CCSO), pursuant to Chapter 42.56 RCW, in efforts to learn the identities of certain individuals engaged in activity referred to as "casing the neighborhood". CP 14. The basis of the public records request is a CRESA 9-1-1 document. CP 15-17. With a letter dated 11/22/2013, the CCSO responded that such entity does not have documents that are responsive to Mr. Schlecht's request. CP 18-19.

On November 27, 2013, Mr. Schlecht appealed the initial determination encouraging the entity to expand its search vis-à-vis format of records and jurisdiction. CP 20. With a letter dated 12/18/2013, the CCSO responded that such entity had not discovered any records responsive to Mr. Schlecht's request.

CP 21.

As Mr. Schlecht at this point had exhausted his administrative remedies, he filed a lawsuit for disclosure of public records. CP 3-26. The focus of Mr. Schlecht's complaint of non-compliance with the Act's requirements is primarily two-fold: inadequate search by the agency (CP 6, lines 17-20); and bad faith exhibited by the agency (CP 10, lines 5-7). Mr. Schlecht limited his lawsuit to items 2)A) and 2)B) of subject public records request. CP 4, lines 18-19.

Offered in respondent Clark County's motion for summary judgment is the declaration of Mary Ann Gentry. CP 37-39. In such she describes her records search as yielding no responsive records to include confirmation that the names of the relevant individuals were never obtained by responding CCSO deputies O'Dell and Smyth. CP 38, lines 4-5. This statement however is contradicted by an email authored by CCSO Deputy Eric O'Dell more than one hundred days after subject 5/9/2013 event confirming that at least one of the relevant individuals had been "id'd" (identified). CP 62.

Subject declaration of Ms. Gentry also insists that Mr. Schlecht's 11/8/2013 public records request was not received by the CCSO until 11/20/2013. CP 37, lines 26-27. In his response to Clark County's motion for summary judgment, Mr. Schlecht in great detail (CP 53, line 11 - CP 54, line 6), supported by relevant

documentation (CP 68-74), disproves such assertion. The fact that Mr. Schlecht's public records request was not responded to in a timely manner does not necessarily indicate bad faith on the part of the agency. It is the deliberate backdating of documents (plural) that casts a shadow of bad faith over the entire process.

ARGUMENT

A. Standard of review for the motion for summary judgment.

The standard of review of a summary judgment is de novo review. Morris v. McNichol, 83 Wn.2d 491, 519 P.2d 7 (1974). RCW 42.56.550 (3); Spokane Research and Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005).

In the summary judgment context, the movant bears the burden of establishing the absence of a genuine dispute regarding any material fact. Folsom v. Burger King, 135 Wn. 2d 658, 958 P.2d 301 (1998).

In assessing a motion for summary judgment the Court must view the facts in a light most favorable to the non-moving party, in this instance, Mr. Schlecht. Homeowners Association v. Tydings, 72 Wn.App. 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Tabak v. State, 73 Wn.App. 691, 870 P.2d 1014 (1994). A

summary judgment of dismissal of this lawsuit is sustainable only if there are no genuine issues of material fact. Homeowners, supra at 154. The party resisting summary judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn.App. 137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996).

The burden lies with the moving party to show the absence of material facts as to the various claims. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn.App 814, 764 P.2d 1007 (1988). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v. Yakima County, 79 Wn.App. 770, 904 P.2d 1183 (1995).

The generalized structure for viewing summary judgments seems clear. Clark County, as movant, had the burden, with regard to the facts and the law, to establish the absence of a genuine issue of material fact.

B. Principles applicable to Public Records Act requests.

Washington's Public Records Disclosure Act provisions, as amended from time to time, constitute a "strongly worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 120, 123, 127, 580 P.2d 246 (1978).

The public records statues place the onus on the governmental agency which is responding to a public records request to provide those records "unless those records fall within the specific exemptions of ... this chapter or other statues which prevents or prohibits disclosure of specific information or records." RCW 42.56.070 (1); Mechling v. City of Monroe, 152 Wn. App.830, 814, 222 P.3d 808 (2009). Washington courts are instructed to construe liberally the disclosure provisions of the Act and to construe narrowly its exemptions. Progressive Animal Welfare Society v. University of Washington, 125 Wn. 2d 243, 25, 884 P.2d 594, 92 (1994).

A public record is statutorily defined as:

> "Any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, retained by State or local agency regardless of physical form or characteristics."

RCW 42.56.010 (3)

The Act defines a "writing" as:

> "handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing date compilations from which information may be obtained or translated."

RCW 42.56.010 (4).

When a request for public records is made, the recipient agency has few options: provide the records, acknowledge receipt of the request and provide a reasonable estimate of the time it would take to provide the records, or deny the request. RCW 42.56.520.

C. The trial court erred in finding that the investigative search for public records requested by Norbert Schlecht under Washington's Public Records Act was a reasonable search as a matter of law.

On November 8, 2013, Mr. Schlecht made a public records request for documents in possession of the CCSO. He requested the following: "Identity records to include not limited to last name, first name, date of birth. Any/all records identifying subjects initially described as "WM 30S CARRYING GAS CAN, SIGNALING A WF CURLY RED HR M20S BRO SHIRT BJS" as follows: A) PER search completed at 05/09/13 07:37:07 B) PER search completed at 05/09/13 07:50:30." CP 14. There was no request for clarification of the request. Mr. Schlecht therefore had met the burden of requesting "identifiable public records". RCW 42.56.080. Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). This has been described as "a reasonable description enabling the governmental employee to locate the requested records". Bonamy v. City of Seattle, 92 Wn. App. 403, 410, 960, P. 2d 447 (1998);

Hangartner, supra at 448; Wood v. Lowe, 102 Wn. App. 872, 878, 10 P.3d 494 (2000). The public entity has the burden of conducting a reasonable investigation for identifiable public records. If a request is too vague, the agency can request clarification. Hangartner, supra at 447, 448. In this case however, there was no argument of confusion or vagueness over the description of records requested. What was at issue in the case was whether or not the agency conducted a reasonably sufficient search for identified public records.

The bone of contention is reduced to the question of whether for purposes of summary judgment, the movant Clark County sustained its burden of establishing that its search for its own records was "reasonable beyond a material doubt". Neighborhood Alliance of Spokane County v. County of Spokane, 153 Wn.App. 241, 224 P.3d 775 (2009); review granted 168 Wn. 2d 1036-43, 233 P.3d 889 (2010).

Since the trial court in its (amended) order granting summary judgment (CP 88-89) does not present any independent conclusions we must look at the underlying motion for summary judgment (CP 27-48). In such, the movant agency states "they (Sheriff's Office) also confirmed that the names of "WM carrying gas can" or "WF curly (red) HR" were never obtained by either deputy" CP 28, lines 15-17. Also, "Clark County never obtained any information

regarding the identity of "WM carrying gas can" or "WF curly (red) HR"". CP 29, lines 23-24. Additionally, "the County doesn't have the underlying data ... the County made an extensive search and found no information regarding the identity of (subjects)". CP 34, lines 15-19. Finally, "the investigating officers never obtained the actual names of (subjects)". CP 34, lines 21-22. All of the above is contradicted by an email authored by one of the investigating officers (CP 62), quote: "She was id'd (identified)". This email was provided to Clark County prior to subject June 13, 2014 motion for summary judgment.

In his July 3, 2014 response to Clark County's motion for summary judgment, Mr. Schlecht challenged Clark County to "produce a declaration authored by Deputy O'Dell stating whether or not he is able to retrieve the identity of the redhead". CP 56, lines 2-3. Clark County in its July 11, 2014 reply falsely interprets such challenge as a request to create a new (public) record. CP 81, line 11. The challenge however does not refer to the initial public records request but to the declaration in support of summary judgment.

As to adequate search, in this case, the movant party used as its compass the case of <u>Neighborhood Alliance of Spokane County v. County of Spokane</u>, 153 Wn. App.241, 224 P.3d 775 (2009); review granted 168 Wn. 2d 1036-43, 233 P.3d 889 (2010). Relying for assistance upon federal case law interpreting

analogous federal legislation, the Freedom of Information Act (FOIA), 5 U.S.C. ¶ 552 (1970), the Washington court held that a PRA search must be "judged by a standard of reasonableness in construing the facts in the light most favorable to the requestor." Ibid., at 257, citing Citizens Comm'n on Human Rights v. Food and Drug Amin., 25 F.3d 1325, 1328 (9th Cir. 1995).

The standard at summary judgment was stated by the court: "An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" Neighborhood Alliance, supra., at 257 citing Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984), quoting Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350-1351 (D.C. Cir. 1983). The Neighborhood Alliance court noted also that the methods used in conducting a search must be "reasonably expected to produce the information requested". Ibid at 257, citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

The methodology employed in this case, as well as the contours of the search protocol are challenged by Mr. Schlecht. Mr. Schlecht considers Clark County's decision not to pursue the lead vis-à-vis Deputy O'Dell to amount to an inadequate search. Hence there exists a genuine issue of material fact.

D. Appellant is entitled to attorney fees (if applicable) and costs.

Attorney fees and costs are awarded on appeal pursuant to RAP 18.1 (a). Those fees (if applicable) and costs are requested by Mr. Schlecht.

CONCLUSION

The Public Records Act and case law interpreting that Act provide clear direction that cognizable public records shall be made available to a requestor who makes a request for identifiable records. The Act does not require that the requestor take the lead in locating the records requested. In the present case, Mr. Schlecht provided what information was necessary to effect a reasonable and comprehensive search of the records of Clark County. What emerged in this case was evidence that the respondent failed to conduct an adequate search overshadowed by acts of bad faith.

For the reasons set forth above, Mr. Schlecht respectfully urges that summary judgment was improperly granted in this case and that this matter should be remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 15TH day of December 2014.

Norbert Schlecht, Pro Se
Appellant

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 17 PM 1:19

STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

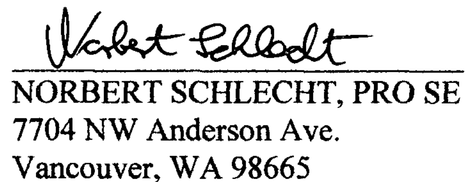
NORBERT SCHLECHT, Appellant,	))	
	)	No. 47359-3-II
v.	)	
	)	CERTIFICATE OF SERVICE
CLARK COUNTY, Respondent,	))	

I, the appellant Norbert Schlecht, hereby certify that on December 15th, 2014, I deposited following documents in the mails of the U.S. Postal Service, postage prepaid, directed to the below named individuals as shown below:

Original (for filing) and one copy of Appellant's Brief sent to:
David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Copy of Appellant's Brief sent to:
Jane Vetto
Clark County Prosecuting Attorney, Civil Division
1300 Franklin ST., Suite 380
PO Box 5000, Vancouver, WA 98666-5000

Dated this 15th day of December 2014.



NORBERT SCHLECHT, PRO SE
7704 NW Anderson Ave.
Vancouver, WA 98665