No. 922209

SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE BLOCK,

Appellant,

vs.

THE CITY OF GOLD BAR

Respondent.

RESPONDENT CITY OF GOLD BAR'S ANSWER TO BRIEF OF AMICI WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, ALLIED DAILY NEWSPAPERS OF WASHINGTON AND THE MCCLATCHY COMPANY

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I. IDENTITY OF RESPONDING PARTY

Respondent City of Gold Bar files this answer pursuant to RAP 13.4(h) and the Court's November 19, 2015 letter granting Amici's Motion for Leave to File an Amicus Curiae Memorandum.

II. STATEMENT OF THE CASE

Respondent City of Gold Bar relies on the facts set forth in the Respondent's Answer to Petition for Review.

III. ARGUMENT

A. Block Failed to Satisfy RAP 13.4(b)'s Criteria for Accepting Supreme Court Review.

As a preliminary matter, Petitioner Anne K. Block ("Block") wholly failed to satisfy RAP 13.4(b)'s criteria for accepting Supreme Court review. As outlined in detail in the City's Answer to Petition for Review, Block has not cited to a single case that would justify review by the Supreme Court. Amici's memorandum is similarly flawed.

RAP 10.6(a) states in part, "The appellate court may, on motion, grant permission to file an amicus curiae brief only if all parties consent *or if the filing of the brief would assist the appellate court.*" (emphasis added). Here, Amici do not provide any additional information that would actually assist the court, but instead simply re-state the same arguments that have already been rejected by both the trial court and the Court of

Appeals (and that were insufficiently briefed in Block's Petition for Review). Amici do not explain how their recitation of the same arguments "assist[s] the appellate court" here. Amici's Brief should not be used as a means to remedy Block's inadequate Petition.

B. This Matter is Not "Of Substantial Public Interest" Simply Because it Is a Public Records Act Case.

Amici's memorandum begins with general policy statements regarding the Public Records Act ("PRA"). The City has no quarrel over the purposes for which the PRA was adopted. The City agrees – the public does have the right to remain informed and the PRA should "assure that the public interest will be fully protected." RCW 42.56.030. But Amici fail to explain how the public interest is protected by allowing public records crusaders like Block to upend decades of well-established case law regarding summary judgment motions and Petitions for Review.

Just because the PRA itself is of great public interest does not mean that *this PRA case* is "of substantial public interest" meriting review by this Court. Not all cases brought under the PRA indicate matters of public importance simply because of the PRA's underlying public purposes. If that were the case, all PRA actions would necessitate review by this Court. When reduced to basics, however, this matter is a run-of-the-mill summary judgment case in which Block failed to meet her burden

as plaintiff. No "substantial public interest" exists.

C. Amici's Misunderstanding of the Relevant Facts in this Matter Do Not Create a "Substantial Public Interest."

Amici's argument rests on its disagreement with two issues in particular: 1) the adequacy of the City's search; and 2) the "extent to which the City can claim attorney-client and work product privileges to records pertaining to its compliance with the [PRA] itself." Amici's Brief at 6. Not only does Amici's Brief not explain how "substantial public interest" is triggered by these two issues, but Amici's arguments regarding these issues demonstrate their unfamiliarity with the underlying facts in this matter.

1. The City's search was adequate and is supported by this Court's recent decision in *Nissen v. Pierce County*.

First, Amici argue that the City did not meet its burden of proving the adequacy of its search "for records on the former Mayor's cell phone" when the City submitted a *non-expert* declaration from the former Mayor. Amici's Brief at 7. To remedy this manufactured "issue", Amici suggest this Court clarify its recent decision in Nissen v. Pierce County, 183Wn. 2d 863, 357 P.3d 45 (2015), and require public employees to submit affidavits that do not contain "purported expert testimony" regarding searches for records. Amici's Brief at 7.

Consistent with their brief submitted to the Court of Appeals below, Amici's arguments again focus on only *one* aspect of the City's search, that is, the search of the former Mayor's records.[1] To the contrary, however, the City presented ample, totally unrefuted evidence in support of its search. The City's claims are fully supported by the declarations of former Mayor Joe Beavers and former City Clerk Laura Kelly (CP 243-312, 197-231), the deposition testimony of City Clerk Laura Kelly (CP 69-83, 160-165, 584-584), Anne Block's own testimony (CP 310-312), as well as the declaration of former Mayor Crystal Hill (CP 184-196). To the extent that Amici argue that the City's motion relies exclusively on former Mayor Hill's declaration, Amici are mistaken.

Nonetheless, no clarification of Nissen is necessary. Again, highlighting Amici's misunderstanding of the facts, the former Mayor's declaration *was not* offered as expert testimony.[2] In fact, Amici already offered this *exact same argument* at the Court of Appeals. See Brief of

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[1] Amici focus on the search of the former Mayor's "cell phone," but former Mayor Hill-Pennington's declaration clearly identifies that in addition to instructing staff to search for records, she also searched for responsive records in numerous places, "including, but not limited to, [her] AOL account, [her] Blackberry device and [her] professional work e-mail." CP 168.

[2] Block assigned no error regarding the admissibility of former Mayor Hill's declaration, nor -- importantly -- did Block object or move below to strike any portion of the declaration. Block accordingly waived any defect. Bonneville v. Pierce County, 148 Wn. App. 500, 509, 202 P.3d 309 (2008) (internal cites omitted). The City addresses this matter solely to address Amici's mischaracterization of the declaration.

Amici Washington Coalition for Open Government, Washington Newspaper Publishers Association, and Allied Daily Newspapers of Washington, filed October 9, 2014 in COA No. 71425-2, at 10-11. Rather, the City offered the Hill declaration, pursuant to CR 56(e), as that of a lay witness testifying on the basis of her *own personal knowledge* regarding the manner in which she personally searched for responsive public records.

The Court of Appeals' decision correctly determining that the evidence established that the "City's searches were 'reasonably calculated to uncover all relevant documents,'"[3] is further supported by Nissen's holding that "an employee's good-faith search for public records on his or her personal device can satisfy an agency's obligations under the PRA." Nissen, 183Wn. 2d at 57.

> To satisfy the agency's burden to show it conducted an adequate search for records, we permit employees in good faith to submit "reasonably detailed, nonconclusory affidavits" attesting to the nature and extent of their search. The PRA allows a trial court to resolve disputes about the nature of a record "based solely on affidavits," without an in camera review, without searching for records itself, and without infringing on an individual's constitutional privacy interest in private information he or she keeps at work.

Id. at 57 (citations omitted).

[3] *See* Block v. City of Gold Bar, 189 Wn. App. 262, 274, 355 P.3d 266 (Div. I, 2015).

Using the same standard as applied in Nissen, the City of Gold Bar did just that.[4] The City's declarations – including that of former Mayor Hill – were "both 'reasonably detailed' and 'nonconclusory,' as the law requires." Block, 189 Wn. App. at 274. The declarations detailed who searched for and gathered responsive documents, which places were searched, which search terms were used, and described technology difficulties experienced by the former mayor. Most damaging to Block's case, and as the Court of Appeals directly acknowledged:

> Notably, Block fails to point to any evidence in this record that refutes any of this evidence of technical difficulties that Hill Pennington testified that she experienced. We must assume that there is no such evidence.

Id. at 275. The Court of Appeals was correct. Block offered absolutely *no* evidence to rebut the Hill declaration. None.

Amici fear that a PRA plaintiff would have "an impossible standard to meet" if the plaintiff moves for summary judgment. Brief of Amici at 7. Amici fail to explain, however, why a moving-party plaintiff challenging an agency's response under the PRA should be entitled to a lesser standard than a plaintiff in a non-PRA action. A PRA plaintiff can also choose to file a show cause motion under RCW 42.56.550(1), in

[4] Block was decided just two months prior to Nissen.

which case the burden falls squarely and indisputably on the public agency. Block and her counsel below chose instead to file a motion for summary judgment – the law of summary judgment applies with full force in a PRA case.

2. Discovery was permitted in this case.

Finally, Amici argue that "it is in the public interest for this Court to reiterate that its holding in Neighborhood Alliance [172 Wn.2d 702, 261 P.3d 119 (2011)] must not be ignored," suggesting that case requires agencies to respond to discovery even if the attorney-client privilege is invoked. Amici's Brief at 9. Otherwise, Amici argue, "the requester will never be able to withstand a summary judgment motion by the agency." Id. Amici's position again demonstrates its complete lack of knowledge of the relevant facts below.

The City cited heavily to Neighborhood Alliance as that case fully supports the City's position here. While the City redacted[5] specific records (CP 380-389, 433-438) between its former City Attorney and City staff created in response to Block's PRRs and Block's threatened lawsuit against the City, or in response to other litigation, Amici and Block fail to explain how all of the other non-privileged evidence regarding the City's

[5] While Amici mischaracterize these records as being "withheld," the record clearly indicates that the records exempt as attorney-client privilege and work product here were "redacted." CP 226-231.

search – including declarations from former Mayor Beavers, former Mayor Hill, and former City Clerk, and deposition testimony of the City's former Clerk – is insufficient to show proof of PRA compliance.

Further, and while the City permissibly objected to deposition questions expressly seeking legal advice (*See* CP 587-89),[6] the City did not prevent Block from otherwise engaging in seeking discovery on the City's search efforts. In fact, Block asked, and the City Clerk answered, *specific* questions regarding the search efforts. *See* CP 71, ll. 6-13; 72, ll. 20-22; 73, ll. 3-9; 79, ll. 11-17; 80, ll. 9-16.

Amici recognize that "a public agency may certainly turn to its attorney for legal advice about the [PRA]," but without any authority, and contrary to the *in camera review* of both the trial court and Court of Appeal's determinations, Amici claim the records at issue merely show PRA compliance and do not constitute legal advice. Amici – like Block – fail to cite to a single case to support their position that advice from a public agency's legal counsel regarding PRA compliance, specifically after being threatened with litigation by the requestor, somehow does not constitute *legal* advice.

Block had ample opportunity to pursue discovery regarding the City's search, and she engaged in such discovery. But no substantial

[6] Notably, Block *did not* move to compel answers to the questions objected to under the attorney-client privilege.

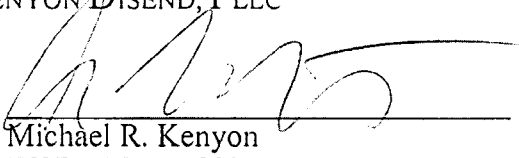
public interest exists in allowing public records requestors to delve into specific communications regarding PRA legal advice protected by the attorney-client privilege. No further review is warranted.

V. CONCLUSION

Amici filed its brief under the guise of protecting the public interest. But in doing so, Amici completely ignore Block's failure to meet her burden as plaintiff and on summary judgment, and her failure to satisfy the criteria of RAP 13.4(b) necessary for this Court to accept review. This case should be treated no differently than any other case decided on summary judgment. Allowing PRA plaintiffs to bring motions for summary judgment without sufficient evidence does nothing to further the policy behind the PRA nor the public interest. Review should be denied.

RESPECTFULLY SUBMITTED this 18th day of December, 2015.

KENYON DISEND, PLLC

By 

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DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 18 day of December, 2015, I sent for service a true copy of the foregoing *Respondent City of Gold Bar's Answer to Brief of Amici Washington Coalition for Open Government, Washington Newspaper Publishers Association, Allied Daily Newspapers of Washington and The McClatchy Company* on the following counsel of record using the method of service indicated below:

Attorney for Appellant: Michele Lynn Earl-Hubbard Allied Law Group LLC P.O. Box 33744 Seattle, WA 98133-0744	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: Michele@alliedlawgroup.com
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18 day of December, 2015, at Issaquah, Washington.

Kathy Swoyer

OFFICE RECEPTIONIST, CLERK

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Subject: Filing in Case No. 922209

Dear Sir/Madam,

Please accept for filing the attached *Respondent City of Gold Bar's* ***Answer to Brief of Amici*** *Washington Coalition for Open Government, Washington Newspaper Publishers Association, Allied Daily Newspapers of Washington and The McClatchy Company*, in Supreme Court Case No. 922209, Anne Block v. City of Gold Bar. It includes the Declaration of Service.

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