71425-2

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No: 71425-2

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

ANNE BLOCK,

Appellant,

v.

CITY OF GOLD BAR,

Respondent.

BRIEF OF AMICI
WASHINGTON COALITION FOR OPEN GOVERNMENT,
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION,
AND ALLIED DAILY NEWSPAPERS OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS

Amici curiae are Allied Daily Newspapers of Washington, the Washington Newspaper Publishers Association, and the Washington Coalition for Open Government ("WCOG"), collectively "Amici". The identities of Amici are further described in the accompanying Motion to File Amici Curiae Brief. This case deals with an agency's burden of proof when a requester sues under the Public Records Act, Chapter 42.56 RCW ("PRA"), and also implicates the disparate treatment of requesters based on past contact with the agency. This Court's decision will directly impact the Amici, who are frequent users of the PRA to inform their readers and constituents. Amici are sometimes compelled to pursue litigation to achieve access to public records. Amici have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on all record requestors, not only the parties.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the Brief of Appellant, Brief of Respondent, and Reply Brief of Appellant.

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III. ARGUMENT

A. The Identity of a Requester May Not Be Considered by the Agency or the Trial Court

Access to public records is a right belonging to "any person" who requests such access. RCW 42.56.080. Further, agencies may not distinguish between requestors, treating some differently than others. *Id., see also DeLong v. Parmelee*, 157 Wash. App. 119, 146, 236 P.3d 936 (2010). In the present case, the City of Gold Bar ("City") devotes a great deal of space and effort in its summary judgment pleadings, and in its appellate response brief, attempting to tarnish the character of the appellant, Ms. Block. The City's focus on Ms. Block's previous public records requests and lawsuits is entirely irrelevant to this appeal, and was likewise irrelevant to the issues presented to the trial court below. It appears that in defending its actions in response to the records request made by Ms. Block, the City is attempting to deflect attention away from its response and onto the actions of the requester. This deflection is improper, and it is vital that this Court so acknowledge.

Not only is it inappropriate for an agency to condition its proper response to a records request based on who made the request, but it is also inappropriate for a court to consider a requester's history of requests and PRA lawsuits in determining whether the law was violated. The record in

this case demonstrates that there is a contentious history between the parties. However, such history is immaterial to the issue of whether the request at issue was satisfied, under the terms of the PRA.

The smoke and mirrors in the City's pleadings and brief, replete with judgment-laden terms such as "antics," "misguided crusade," and "relentless attacks," (CP 314), imply that Ms. Block is somehow less entitled to public records than another requester, who has not previously clashed with the City. Not only is this a distortion of the purpose behind the PRA, but it is also a dangerous precedent to set. Government agencies are "instruments" of the people who created them, RCW 42.56.030, and although it may make public work less onerous to ignore citizens who make themselves a thorn in the side of the agency, the agency must accept that it may not always have a pliable constituency. Even individuals who engage in "blatantly abusing the PRA" are still entitled to access to public records to the same extent as any other person. *Delong*, 157 Wash. App. At 131.

Rather than focus on the precise legal issues at hand, the City attempts to color the Court's opinion of Ms. Block by characterizing her use of the PRA as "attacks" on the City, and blaming the City's worsened financial circumstances on her. *Brief of Respondent,* ("Resp. Br.") at 2. Whether these allegations are true is completely beside the point, as "the

scholar and the scoundrel [have] equal rights of access to agency records." *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), *judgment vacated on other grounds,* 486 U.S. 1029 (1988).[1]

It is unclear from the record the extent to which the City's introduction of irrelevant information affected the trial court's decision. In any event, agencies must be reminded that past actions of the requester which may be seen as annoying or inconvenient to the agency are never an excuse for failure to strictly adhere to the requirements of the PRA. This Court should take this opportunity to so remind them.

B. The Agency Has the Burden to Prove Compliance with the Act at All Stages of a Proceeding.

Before the trial court, and in its appellate briefing, the City argues that because Ms. Block brought a summary judgment motion, she bears the burden of proving that the City did *not* properly comply with the PRA. While the City is correct that summary judgment standards typically apply to public records cases, the novel theory that the use of a summary judgment motion, as opposed to a show cause hearing, could alter the fundamental obligations of an agency is both unsupported by the case law and would cause serious practical complications. To place the burden of

[1] Although the *Durns* decision dealt with the application of the federal Freedom of Information Act ("FOIA"), Washington courts have consistently held that federal cases interpreting FOIA are instructive in interpreting the PRA. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978).

proof on the requester is to impose a nearly insurmountable hurdle, which is contrary to the purpose of the PRA. The burden of proving that the agency complied with the terms of the PRA is, and has always been, squarely on the agency. RCW 42.56.550; see also *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014) ("The agency refusing to release records bears the burden of showing secrecy is lawful.").

In *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011), the Washington Supreme Court adopted the FOIA approach for determining the adequacy of a search for records, and then stated, "many FOIA cases are resolved on motions for summary judgment concerned with the adequacy of the search. In such situations, the agency bears the burden, beyond material doubt, of showing its search was adequate." Only after the agency makes such a showing does the burden shift to the requester to rebut. *Id.*, at 736, Madsen, J. concurrence.

Simply because it was Ms. Block who moved for summary judgment does not change the basic tenet of the PRA that the agency must meet this burden. After all, it is the agency that has all of the information necessary to meet such a burden. By definition, if a requester sues for failure to comply with the PRA, it means the requester has been denied

access to information--information which may be crucial to meeting the burden of proof.

Further, it makes little sense to say that the burden is on the agency at a show cause hearing, but on the requester at the summary judgment phase. In public records cases, the show cause hearing serves as a pseudo-summary judgment hearing in any event. The order of the judge is a final order appealable as of right. RAP 2.2(a)(3). There is little practical difference between the two processes as they apply to the PRA, and to treat them differently is unreasonable.

To support its suggestion that a motion for summary judgment can alter the burden of proof scheme clearly established in RCW 42.56.550, the City relies extensively on language in dicta in *Building Industry Association of Washington v. McCarthy,* 152 Wn. App. 720, 218 P.3d 196 (2009) ("*BIAW*"). In *BIAW*, it was the agency--not the requester--that moved for summary judgment regarding the public records issues. *Id.* at 729. The court did say that the moving party bears the initial burden of showing the absence of an issue of material fact--however in that case, the moving party was the agency. *Id.* at 735. The reason the Court stated that there was "no improper burden shifting" in *BIAW* was not because the moving party always bears the burden on summary judgment, but rather because in that case the moving party *was* the agency, which already had

the burden. *Id.* at 735-36.

The City's improper effort to shift the burden of proof to the requester is a tacit admission that the City cannot carry its burden of proof. As the Ms. Block has explained, the City has no admissible evidence to support its self-serving claim that AOL lost all of Mayor Hill's responsive emails. CP 106-112. In prior cases where agencies have asserted that requested electronic records were lost, those agencies proved such facts with the non-conclusory declarations of qualified computer experts. *See BIAW,* 152 Wn. App. At 729-730 (declaration from county computer expert established that no requested documents had been withheld); *West v. Wash. State Dept. of Natural Resources (DNR)*, 163 Wn. App. 235, 240, 244, 258 P.3d 78 (2011) (agency information technology personnel determined that requested email records had been destroyed as a result of computer upgrades almost a year before PRA request was made); *see Neighborhood Alliance,* 172 Wn.2d at 722-723 (agency failed to conduct adequate search where agency failed to examine computer that had been recently replaced when request was made).

In this case, the City's claim is entirely based on the a declaration of former Mayor Hill, drafted almost five (5) years after the request had been made, that AOL lost her emails at some unspecified time and for some "unexplained" reason. *Resp. Br.* At 19 (citing CP 171-183). Mayor

Hill's alleged attempt to search for responsive emails occurred several months before the City's computer consultant was retained in May of 2009, and by that time any emails lost or destroyed by Mayor Hill were apparently irretrievable. CP 60, 149, 155, 157-158. As Ms. Block explained in detail, (i) Mayor Hill does not claim to have any computer training or expertise, (ii) Mayor Hill admits that she does not know anything specific about how or when the emails were lost "other than [her] vague recollection," (iii) Mayor Hill's assertion that the emails were lost "through no fault of [her] own" is unsupported speculation, and (iv) the blogs cited by Mayor Hill are inadmissible hearsay and lack foundation. CP 106-109. Mayor Hill's declaration was so obviously conclusory and inadmissible that the City did not even attempt to argue otherwise in its reply.[2] *See* CP 38-59.

Having no admissible evidence to carry its burden of proof, the City now seeks to rewrite the PRA and numerous PRA cases in order to shift the burden of proof to the requester. But the burden of proof is on the City, and the City failed to carry that burden. The requester had no

[2] The City argued only that agency affidavits are presumed to be offered in good faith and that Mayor Hill was testifying from "personal knowledge," CP 45, and both arguments are irrelevant to the question of whether Mayor Hill's declaration was either admissible or sufficiently detailed under *BIAW*, *West* and *Neighborhood Alliance*. The City also argued that the City Council would decide whether to spend City funds on a computer expert, CP 47-49, as if the City's budgetary decisions somehow relieved the City of its burden of proof.

burden to disprove the City's conclusory and inadmissible claim that AOL somehow lost Mayor Hill's emails before Ms. Block requested them.

Agencies and public officials should ***not*** use private email accounts for public business. The use of such email accounts creates unnecessary problems and expense for both agencies and requesters, and often results in litigation. *See Mechling v. Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissin v. Pierce County*, __ Wn. App. __, 333 P.3d 577 (2014). The ramifications of upholding the trial court's decision in this matter will extend far beyond the City of Gold Bar. The Court must not shift the burden of proof or ignore the rules of evidence in order to relieve an agency of the consequences of its own foolish decision to use personal email accounts for the public's business.

IV. CONCLUSION

Washington Coalition for Open Government, Allied Daily Newspapers of Washington, and Washington Newspaper Publishers Association urge the Court not to allow an agency to discriminate among requesters based upon past contact with the agency. The Amici further urge the Court to unequivocally hold that the agency carries the burden of proof not just in show cause hearings under the PRA, but in summary judgment situations as well. What is at stake is the very public access and

government transparency that is the heart of the PRA.

Respectfully submitted this 9th day of October, 2014.

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CERTIFICATE OF SERVICE

I, Emily K. Arneson, certify under penalty of perjury that on the 9th day of October, 2014, I caused a copy of the foregoing BRIEF OF AMICI WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, AND ALLIED DAILY NEWSPAPERS OF WASHINGTON to be served on the following by the method indicated:

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