No. 71425-2-I

IN THE COURT OF APPEALS, DIVISION ONE

ANNE BLOCK,

Appellant,

v.

CITY OF GOLD BAR,

Respondent

APPELLANT BLOCK'S ANSWER TO AMICUS BRIEF BY NON-ENTITY "CITIZENS OF GOLD BAR AND THE UPPER SKY VALLEY"

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I. STATEMENT RELEVANT FACTS

The parties filed their appellate briefs on 7/11/14 (Br. App.), 8/25/14 (Br. Resp.) and 9/25/14 (Reply Br.). On 10/14/14 this Court accepted a timely-filed joint amicus brief of the Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government ("WCOG") (hereinafter "media/WCOG").[1] On 11/7/14 Jeffrey Myers, former trial court counsel for the Respondent in this case (see CP 622), filed by U.S. Mail[2] a Motion to file amicus brief, proposed amicus brief, and proposed witness declaration on behalf of the Respondent's former mayor Joe Beavers. The proposed amicus was a non-entity–a group of citizens Beavers admits he "formed" solely by having them sign a petition saying they had read an earlier version of his declaration (but not the amicus brief itself) and "formed" solely to file the amicus brief in this case. (See App. Block's 11/10/14 Opp. to Mot. to File Am. Br.). The amicus admits that the brief solely responds to the media/WCOG amicus brief, not the parties' briefs. See 11/7/14 Mot. to File Am. Br. The "Citizens'" brief references Beavers' appellate Declaration and his created documents as evidence.

In a notation ruling dated 11/21/14 the "Citizens" Amicus brief was

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[1] The media/WCOG amicus was timely filed on 10/9/14, 45 days after the Brief of Respondent pursuant to RAP 10.2(f)(2).
[2] See Certificate of Service.

accepted (with no mention of the Beavers Declaration or its attached materials) but stating "The panel that considers the appeal will determine what weight, if any, to give arguments made by 'citizens'." 11/21/14 notation ruling (quotations in original).

II. LEGAL AUTHORITY AND ARGUMENT

A. The Beavers Declaration and Attachments are Not Part of the Record, are Inadmissible, and Should be Disregarded.

Beavers filed a Declaration in support of the motion to file the amicus brief stating purported facts and attaching new documents not in the appellate record. Beavers has not established the propriety of consideration of his offered testimony or the attachments, nor can he. **See, e.g.** RAP 9.11; **see also** ER 401-404, 602, 701, 901.

Beavers filed two declarations in this case below and was deposed. CP 243-312, 60-89. Beavers as the witness and agent of the party and Myers as the lawyer for the party had the opportunity to develop a factual record below. They did so. They should not be allowed under the guise of "amicus" to flood the record now with material they and Respondent did not introduce below, did not argue on appeal, and cannot now introduce, and to which Appellant, with its 10 page answer, cannot adequately respond. The declaration and its attachments seek to further attack Appellant Block and introduce false, misleading, and irrelevant new material. It is not helpful to the Court. Its consideration would be unfair to

Appellant. It serves no legitimate or lawful purpose, particularly at this stage, is not properly part of the record, should be disregarded, and should be given no weight.

B. The "Citizens" Amicus and Improper Beavers Declaration Should be Given No Weight.

Amicus briefs are not designed for agents of a party and its former trial court counsel to have a second bite at the apple or to try to pad a record with purported "evidence" the party did not introduce when it had the chance. Amicus briefs are further not designed to respond to another amici. Respondent Gold Bar answered the media/WCOG amicus. It did not need Myers and Beavers or an alleged "citizens" group to do so for it.

The so-called "Citizens" amicus brief does not involve an actual entity or group. Instead, Beavers admits that when he read the media and WCOG joint amicus on 10/10/14 that he wrote a declaration and went to selected residents and had them sign a paper showing support for its filing. The document he attaches merely states the people have read his appellate declaration and "give their support to this effort." Beavers Decl., Ex. A. The Beavers Declaration is dated 11/7/14. Those signing his form dated their signatures as 10/4/14, 11/4/14, or 11/5/14, making it impossible they could have reviewed the 11/7/14 declaration, but also making clear the people did not review or approve the amicus brief itself or the motion to

file it or agree to be part of any entity or an amicus in this case. The group has not been incorporated. It does not have officers. It is not "real" in any sense of the word. It is a group of people Beavers claims to have pulled together between 10/10/14 and 11/7/14 solely for the purpose of filing the amicus brief, and the only evidence he presents of the existence of a "group" is the signatures on his form to having reviewed his declaration that had not even been written as of the date of the signatures and the signer's "support for this effort". There has been no showing any of the people who signed Beavers' form saying they read his declaration intended to be amici.

C. The Sliding Scale of Compliance "Citizens" Propose Violates the PRA.

The amicus brief asks the Court to consider the history between agency and requestor when "deciding the reasonableness of the agency's search" and "reasonableness of the [ ] response" (Amicus Br. at 5). It then also uses this as a platform to allege incorrect, misleading, and irrelevant statements about Block. But the relief the brief proposes—a sliding scale for compliance and search efforts with reduced levels of obligation for requestors a City considers a burden—conflicts with the PRA and previous interpretations of it. **See, e.g., Zink v. City of Mesa**, 140 Wn. App. 328, 340, 166 P.3d 738 (2007) (substantial compliance for repeat

requestor not sufficient; strict compliance required); **see also** RCW 42.56.030. Similarly, the pared-down duties the brief proposes to prove a reasonableness of a search—bypassing the need for admissible evidence by those with adequate foundation and knowledge as to what specifically was done—similarly conflicts with the PRA and previous cases interpreting it. **See, e.g., Neighborhood Alliance v. County of Spokane**, 172 Wn.2d 702, 261 P.3d 119 (2011). The PRA imposes strict obligations on agencies, whether or not the agency or its officials like the requestor.

D. Allegations re: Block are Incorrect, Misleading, and Irrelevant.

The primary focus of the amicus brief is Beavers' unsupported allegations about Block and his claim she is financially harming the City. Amicus attacks Block rather than focusing on the issues in this case where the focus belongs. The record shows that, while Block has attempted to efficiently address only the actual issues in this case, the City's attorneys (including Myers), at the behest of Beavers as the controlling agent for Respondent below, increased costs to the City and its citizens with their actions in this case, just a few of which are discussed below.

At the time of Block's request at issue in this appeal the City was represented by Weed, Graafstra and Benson, Inc., P.S. CP 521-523. That firm failed to create or retain any contemporaneous documentation of Mayor Hill's alleged efforts to search her AOL account for responsive

records (or if it preserved such records, they have been silently withheld from Appellant). The City then attempted to carry its burden of proof on reasonableness of the search with the conclusory, self-serving, and inadmissible declaration of former mayor Hill, and improperly attempted to shift the burden of proof to the requester. If Weed Graafstra had properly responded to Block's PRA request, this case would never have been filed. As soon as Block made her PRA request it should have been obvious to the City's attorneys that Mayor Hill's use of her personal AOL email account was a problem, but the Weed Graafstra firm did **not** instruct Hill to stop using her AOL account. Instead, the firm kept using that AOL account to communicate with Mayor Hill even after Hill allegedly experienced "numerous incidents" in which AOL had lost emails and data. CP 171, CP 491, 498.

The Weed Graafstra firm withheld or redacted virtually all of the contemporaneous documentation of the City's efforts to respond to Block's request based on sweeping and unexplained assertions that these records were either work product or attorney-client privileged or both. CP 534-544. Then-Mayor Beavers and all of the City's subsequent attorneys ratified this action. When Block deposed the City Clerk regarding the redacted emails, attorney Myers asserted an extremely broad claim of attorney-client privilege that prevented Block from obtaining any

information about the emails or the exact nature of the City's exemption claims. The City's decision to withhold these key documents and to assert an overly broad and inadequately explained claim of privilege is a root cause of the current litigation. And these actions did not benefit the City of Gold Bar in any way. They merely increased the City's legal bills and its corresponding potential liability to Block.

Indeed, the citizens of Gold Bar would probably like to know what is in the emails that have been the cause of this lengthy dispute. Unfortunately, Beavers and the City's attorneys have decided to spend a great deal of the City's money to try and prevent anyone from ever finding out their contents.

Block's complaint in the 2009 case, referenced by Beavers in his list, was filed before the City had responded to Block's request.[3] CP 146. After the City filed its answer in March 2009 there was no further litigation in that case, **id,** and the timeliness of the City's response to that request had become moot. The parties specifically discussed the need to amend the complaint but this was never done because there was no action in the case. Nonetheless, in January 2010, the City through its attorney Myers suddenly filed a motion to dismiss the 2009 case, supported by numerous

[3] The 2009 complaint also involved a disputed document referred to as the "Schilling letter." In January 2010, the City finally explained why it did not have a document that was explicitly mentioned in another record and that claim was dropped from the 2010 case. CP 95.

declarations that addressed the irrelevant issue of the timeliness of the City's response. CP 184-242. Indeed, attorney Myers candidly acknowledged in his cover letter that the parties had already discussed amending the 2009 complaint, and that the motion, filed on the instructions of then-Mayor Beavers was probably unnecessary. CP 145. This action—taken when Beavers was the Mayor of Gold Bar and Myers was the City's attorney—served no useful purpose other than to increase the City's own legal bills. Rather than respond to the City's unnecessary motion Block simply dismissed the 2009 case and filed the current 2010 complaint. When the City finally moved for summary judgment in the 2010 case, the City's new attorneys (Kenyon Disend) argued at length about the irrelevant issue of the timeliness of the City's response to Block's request, and re-filed all of the irrelevant declarations from the 2009 case into this case. CP 316-319, 184-242. The City made no attempt to explain why any of this material would be relevant to the pending motions. Instead, Beavers and the City's current attorneys mischaracterized the voluntary dismissal of the 2009 case as an "example of [Block's] erratic behavior," an allegation that would be irrelevant even if it were true (which it is not). CP 319. And the City's current attorneys have wasted even more time and money by presenting the same irrelevant material in their brief in this Court. Br. of Resp. at 3-8.

In March of 2012 the City (Beavers and Myers) used this case as an excuse to depose Block at length about her alleged relationship to a website called the Gold Bar Reporter. CP 310-312. That deposition had nothing to do with the issues in this case, as shown by the fact that the City cited the deposition only once in the trial court, in a footnote containing yet another irrelevant attack on Block. CP 336.

Even though in camera review is permitted by RCW 42.56.550(3) and commonly granted, Beavers and the City's current attorneys refused to consent to *in camera* review of the handful of redacted emails that are at the heart of this case. This forced Block to file a motion for in camera review. The City resisted *in camera* review, falsely claiming that there was no dispute as to the content of the emails. CP 345-348. In camera review was granted anyway, CP 35-37, and the City's opposition served only to delay the proceedings and increase the City's legal bills.

As Block has repeatedly explained, the burden of proof in a PRA case is always on the agency. Furthermore, the record clearly shows that the City cannot carry its burden of proof. Consequently, the City (and former Mayor Beavers) have significantly increased the cost of this litigation with the absurd argument that the burden of proof shifts to the requester on summary judgment. The City's meritless attack on the most basic

principles of the PRA has also forced Block to incur significant additional legal fees, thereby increasing the City's liability to Block if she wins.

Finally, the constant, irrelevant attacks on Block by Beavers and the City's attorneys serve only to waste this Court's valuable time, to increase the City's own legal bills, and to increase the City's potential liability for Block's attorney fees if she wins. There is no benefit to the City or citizens of Gold Bar in these irrelevant attacks. Yet Beavers and Myers, who claim to be concerned about the financial health of the City, have deliberately increased the City's potential liability by forcing Block to respond to yet another irrelevant, ad hominem attack on Block.

III. CONCLUSION

For the reasons set forth above, Block respectfully requests that this Court grant no weight to the amicus brief of non-entity "Citizens of Gold Bar and the Upper Sky Valley" and the improper Beavers' declaration it filed therewith.

RESPECTFULLY SUBMITTED this 29th day of December, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 29, 2014, I delivered a copy of the foregoing Appellant Block's Answer to Amicus Brief By Non-Entity "Citizens of Gold Bar and the Upper Sky Valley" by U.S. Mail to the following:

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Dated this 29th day of December, 2014, at Shoreline, Washington.

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