

No. 94092-4

WASHINGTON STATE SUPREME COURT

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Washington State
Supreme Court

KEVIN ANDERSON, Petitioner,

v.

DEPARTMENT OF SOCIAL & HEALTH SERVICES,
DIVISION OF CHILD SUPPORT, Respondent.

PETITIONER'S REPLY BRIEF

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I. ARGUMENT

A. DCS' ANSWER CONTAINS NUMEROUS FALSE ASSERTIONS.

1. CITIZENS DO NOT "BYPASS THE LAW" BY REQUESTING PUBLIC RECORDS FROM AN ADMITTED AGENCY.

In its Answer, DCS falsely asserts: "[Anderson]... attempted to bypass the law.... and use the [Public Records Act (PRA)] to access confidential DCS records." Answer @ 1.

However, DCS records cannot be assumed to be "confidential." For instance, in this case, DCS withheld garnishment information from the debtor of the action, admitted that RCW 26.23.120 does not exempt the withheld information, and failed to identify any authority that does exempt the information --Anderson has argued that garnishment information is subject to compulsory disclosure under RCW 74.20A.080(13), and the information has already been released by DCS' having served the orders to withhold and deliver on Anderson's employers, bankers, and others. Petition for Review @ 12.

Furthermore, DCS' argument that its records are "confidential" is incompatible with the fact that DCS operates a website and uploads supposedly "confidential DCS records" onto the internet --DCS has refused to address its website or distinguish the records withheld here from those it uploads onto the internet. Appellant's Opening Brief @ 23.

Finally, DCS' assertion fails to explain how Anderson "attempted to bypass the law" by following DCS' own rules regarding the requesting and disclosure of his own support records: Anderson has shown that he made his request pursuant to WAC 388-14A-2110, which, again, DCS has completely refused to address or even cite in any of its briefs; Anderson's requested records are subject to public disclosure pursuant to RCW 26.23.120(3)(b), WAC 388-14A-2105(3)(a), and DSHS Policy 5.02, here too, DCS has refused to address or cite this authority; and Anderson filed a PRA lawsuit for the withholding of his requested records pursuant to WAC 388-01-130, which, again, DCS has utterly refused to address or cite.

This is not a case about Anderson requesting special access to "confidential DCS records." Anderson simply requests equal access to his own information.

2. DCS HAD NOTICE THAT REDACTIONS WERE AT ISSUE.

In its Answer, DCS falsely asserts: "[Anderson] first expressed concern about case comment redactions during discovery." Answer @ 6.

This oft repeated, erroneous assertion was debunked after Division Two endorsed it. Appellant's Motion for Reconsideration @ 3-5.

3. DCS CANNOT CONTINUE TO ARGUE CONTRARY TO ITS OWN ADMISSIONS.

In its Answer, DCS falsely asserts: "DCS withheld child support case records where RCW 26.23.120 precluded disclosure." Answer @ 8.

DCS' assertion, however, is patently false, and counsel should face sanctions for continuing to argue a position that has zero basis in fact: DCS has openly admitted, with regard to the garnishment information that was withheld from Anderson's requested case-comment printout, "...THERE IS NO EXEMPTION UNDER RCW 26.23.120 WHICH ALLOWS DCS TO WITHHOLD FROM MR. ANDERSON NAMES OF INDIVIDUALS ON WHOM DCS SERVED AN ORDER TO WITHHOLD AND DELIVER..." (emphasis added). Petition for Review @ 12. Obviously, RCW 26.23.120 cannot simultaneously preclude disclosure of garnishment information while admittedly not applying to the withheld information.

4. DCS PRODUCED THE REQUESTED, NON-EXEMPT EMAIL ON MARCH 6, 2015, NINE MONTHS INTO A PRA LAWSUIT.

In its Answer, DCS falsely asserts: "On March 6, 2015, DCS made a last attempt to explain the application of RCW 26.23.120 to Mr. Anderson's records request." Answer @ 7.

On this date, however, nine months into a PRA lawsuit, which admittedly focused on DCS' withholding of the email Anderson had requested, DCS totally reversed course and decided to produce the requested and repeatedly challenged metadata; in fact, by DCS' account, "[i]n a March 6, 2015, [sic] letter... 'in response to [Anderson's] expressed concern about the identity of the author and recipient of the requested e-mail,' [DCS] provided a redacted copy of the e-mail chain, which showed the author and recipient of each e-mail." Respondent's Amended Brief @ 11-12.

The requested email and its metadata was withheld under the attorney-client privilege, not RCW 26.23.120, and neither court below found the email to be exempt under RCW 26.23.120. It appears as if DCs is now trying to rewrite the well-documented facts of the case.

5. DCS MISREPRESENTS DIVISION TWO'S HOLDING.

In its Answer, DCS falsely asserts: "In concluding that RCW 26.23.120 is an 'other statute' that wholly exempts child support case records from disclosure... the Court of Appeals properly recognized that the plain language of RCW 26.23.120 exempts all DCS records and information related to individuals who are subject to DCS child support enforcement services..." Answer @ 11.

Division Two, however, absolutely did not find what DCS represents: "We note that we are not holding that RCW 26.23.120 is a categorical exemption..." Petition for Review @ 4.

B. DCS' ARGUMENT REGARDING THE REQUESTED EMAIL'S METADATA NOT BEING AN ISSUE BELOW IS DISPROVEN BY DCS' OWN WORDS.

In an effort to avoid the untenability of its position, DCS now argues: "Mr. Anderson did not raise metadata as an issue before the trial court or on appeal.... Accordingly, this issue is not properly before this Court for review." Answer @ 16-17. DCS' new position, however, is disproven by DCS' own legal pleadings.

According to DCS, "Mr. Anderson requested 'a copy of the e-mail sent from Judy R[oppo] to [the] King County Prosecutor's Office on 3/10/10...." Respondent's Amended Brief @ 6. Since Anderson made his request, it is the "sent from" and "to" or the "author" and "recipient" --the metadata-- that has been at issue.

Again according to DCS, "... the only copy found was imbedded within an e-mail chain... [DCS] determined that all of the e-mails contained in the chain were privileged... Accordingly, [DCS] withheld the record..." Respondent's Amended Brief @ 8-9. As evidenced by DCS' later production of "the only copy found" of Anderson's requested public record, this entire chain was not privileged, and DCS violated the PRA by withholding it until after Anderson sued. Appellant's Opening Brief @ 18-21.

Instead of simply producing the non-exempt portions of the requested email, DCS notified Anderson that the email was being withheld in its entirety as a protected attorney-client communication. Anderson immediately appealed DCS' withholding; in fact, DCS characterizes the basis for Anderson's appeal as "... [Anderson] believed [DCS] inverted the 'to' and 'from' categories..." Respondent's Amended Brief @ 9-10.

After DCS had flat-out denied Anderson's administrative appeal, Anderson filed suit pursuant to WAC 388-01-130, explicitly alleging that DCS had violated the PRA by unlawfully withholding the requested email; in fact, DCS characterizes Anderson's complaint as "... a complaint in superior court... [that] includes factual allegations regarding his request for the March 10, 2010 e-mail..." Respondent's Amended Brief @ 10.

During litigation, Anderson made another (failed) attempt to gain access to the requested email --None of the following has been challenged or even addressed in any DCS brief:

"[Anderson] contacted DCS' Counsel, the Attorney General's Office, and requested Counsel review DCS' withholding. On January 23, 2015, Counsel notified Anderson that DCS' entire[] withholding [of] the requested e-mail was correct, so, on March 1, 2015, Anderson submitted a discovery request related to the e-mail... By this time, Anderson had repeatedly notified DCS that its identification of 'Washington prosecutor' as the purported author of the e-mail must be incorrect as no such person or office exists, so, at a minimum, DCS should properly identify the author of the e-mail..." Appellant's Opening Brief @ 4.

Days after having received Anderson's discovery, DCS completely reversed course and produced the email; according to DCS, "... [i]n a March 6, 2015 letter... in response to [Anderson's] expressed concern about the identity of the author and recipient of the requested e-mail, [DCS] provided a redacted copy of the e-mail chain, which showed the author and recipient of each e-mail." Respondent's Amended Brief @ 11-12.

Shortly after producing the email, DCS motioned for and was granted summary judgment based on the trial court's erroneous determination that the email was entirely exempt. Appellant's Reply Brief @ 7-8

On appeal, the email, its withholding, and DCS' post-lawsuit production were again at issue; in fact, Anderson presented the following question for the Court's review: "Does DCS' entire withholding of Anderson's requested e-mail, until after he [had] filed suit, violated the PRA?" Appellant's Opening Brief @ 7.

Of course, Division Two found the "as redacted" email to be protected attorney-client communication. Published Opinion @ 11.

DCS' new position is factually inaccurate and absolutely contradicted by the record. According to this Court's precedent, the identity of an attorney's client is never subject to protection under attorney-client privilege, Dietz v. Doe, 131 Wn.2d 835, and DCS' withholding of this requested information clearly violates the PRA according to this Court's holding in Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89. If, as DCS itself contends, the "only copy" of Anderson's requested email was "imbedded" within an email chain, DCS had an obligation to produce the requested, non-exempt metadata, O'Neill v. City of Shoreline, 170 Wn.2d 138.

DCS must be found to have violated the PRA by withholding the requested, non-exempt "sent from" and "to" portions of Anderson's requested email, and this case must be remanded for further proceedings.

C. THIS COURT CAN DISREGARD ANY JUDICIAL FINDING OF HOW RCW 26.23.120 APPLIES TO DCS RECORDS AND, INSTEAD, REVERSE DIVISION TWO AND REMAND BASED SOLELY ON DCS' OWN ADMISSIONS.

Any discussion of whether or not RCW 26.23.120 should be read as exempting garnishment information from the debtor of the action is purely academic: DCS, by its own admission, admits the this authority does not apply to the withheld material.

At issue in this matter is DCS' withholding of garnishment information --For the purpose of making this argument, DCS' withholding of the requested email, withheld under the attorney-client privilege is not relevant; therefore, it is not referenced. VRP 1-16. And with regard to DCS' withholding of garnishment information, DCS has openly admitted that RCW 26.23.120 does not apply to the withheld material: "... THERE IS NO EXEMPTION UNDER RCW 26.23.120 WHICH ALLOWS DCS TO WITHHOLD FROM MR. ANDERSON NAMES OF INDIVIDUALS ON WHOM DCS SERVED AN ORDER TO WITHHOLD AND DELIVER..." (emphasis added). Petition for Review @ 12. Thus, when DCS was asked, in open court, to explain its redactions, its answer: "Your Honor, I can't say.... I think that some of these redactions were improper..." Appellant's Motion for Reconsideration @ 10.

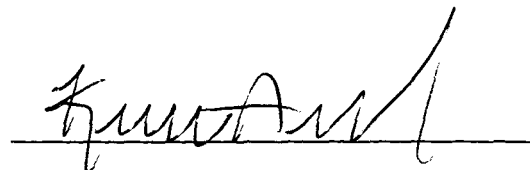
Obviously, the withholding of information from a public record under a non-applicable claim of exemption violates the PRA: PAWS, 125 Wn.2d 243. Accordingly, this court should find DCS to have violated the PRA and remand the case for further proceedings.

II. CONCLUSION

In theory, DCS' argument sounds terrific, but in practice, there is just no way to get behind the reality that DCS is withholding garnishment information, which it uploads onto the internet, from the debtor of the action; this information was unquestionably released by DCS' serving the garnishment order(s), and the subject of the order should have equal access to the information.

If DCS' argument for the confidentiality of all records it maintains on individuals is not rejected, over a million individuals will lose their ability to access their own records, and an entirely new class of information --garnishment information found in DCS records-- will have been created in which the information is simultaneously exempt from disclosure while also being subject to compulsory disclosure.

DATED this 30th day of March, 2017.

A handwritten signature in black ink, appearing to read "Kevin Anderson", is written over a horizontal line.

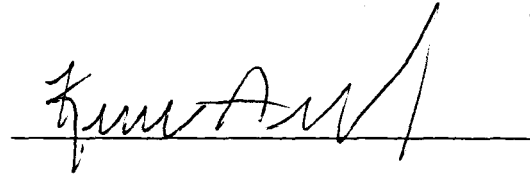
Kevin Anderson
Petitioner, pro se

CERTIFICATE OF MAILING

I, Kevin Anderson, hereby swear under the penalty of perjury of the laws of the State of Washington that on this date I did mail via U.S. mail, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

AAG Anne Miller
Attorney General of Washington
PO Box 40124
Olympia, WA 98504

DATED this 31st day of March, 2017.

A handwritten signature in black ink, appearing to read "Kevin Anderson", is written over a horizontal line.

Kevin Anderson
Petitioner, pro se