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Supreme Court No. 97005-0

Court of Appeals No. 77433-6

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ERIC HOOD

Appellant

v.

CITY OF LANGLEY,

Respondent.

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REPLY TO CITY OF LANGLEY'S RESPONSE TO PETITION FOR  
REVIEW

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## **A. ARGUMENT IN REPLY**

### **1. Introduction**

Evidence, City admissions, case law, and a construal of the Public Records Act in its entirety lead to one logically possible conclusion regarding the only relevant issue before this Court: the City withholds requested electronic calendars. The City's improper Response to [Hood's] Petition for Review ("Answer") does not alter that logic or conclusion.

### **2. The City's Answer, Including Its "Statement of the Case", is Improper**

The City untimely filed its Answer on May 9, 2019. RAP 13.4(d).<sup>1</sup> An Answer should "comply with the requirements as to form" pursuant to RAP 10.3. RAP 13.4(e). A respondent may present a Statement of the Case if it is not "satisfied with the statement in the brief of appellant or petitioner." RAP 10.3(b). A Statement of the Case should be "a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." RAP 10.3(a)(5). The City's "Statement of the Case" flouts these rules, as shown.

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<sup>1</sup> See Appendix A for the full text of RAPs in the order as first cited herein.

In the Court of Appeals, the City admitted that “the only remaining issue is whether the trial court erred as to granting summary judgment as it pertains to the request for calendars”. Brief of Respondent, p. 9.

Calendars are also the sole focus of Hood’s Petition for Review (“Petition”). The City’s “Statement of the Case” nonetheless distractingly discusses, at length, Hood’s request for personal journals, issues Hood conceded, and other irrelevancies. Answer, p. 1-4.

The relevant facts and procedures, accurately and briefly restated:

1. On January 15, 2016, after the City had closed its response to Hood’s January 5 request for “all” McCarthy’s “calendars”, Hood viewed paper records at the City, was denied access to the laptop where the electronic calendars were kept, and requested electronic records about himself. Court of Appeals Opinion (“Op.”) p.2-3.

2. The Court of Appeals remanded to determine: a) whether the City adequately searched for calendars the City admits were kept in electronic form, and b) whether Hood’s January 15 request was either a new or a modified request, in order to ultimately determine c) whether the City failed to produce the calendars. Op., p. 8-11.

Regarding these facts and findings, Hood’s Petition properly “raises new issues”. RAP 13.4(a). These include examining Court of Appeals speculation that the City “set aside” the calendars, which in turn

speculatively “suggests” they had been printed. Petition, p. 4-7, referencing Op., p. 8. The City’s Answer improperly ignores this issue.<sup>2</sup>

Regarding the dispute over Hood’s January 15 request, the City’s Answer claims without reference (in violation of RAP 10.3(a)(5)) that the City Clerk, Mahler, testified that it was modified. Answer, p. 2. But then it falsely states, also without reference:

Hood disagreed, filing a contrary declaration that did *not* discuss his conversation with Mahler that the City believed modified his records request. Instead, he contended that he never *intended* to modify his request and disputing the City’s treatment of his request for electronic records, including the electronic calendars maintained by the City.

*Id.* (emphasis added).

This statement “raises a new issue” to which this Reply responds.<sup>3</sup>

In fact, Hood’s Declaration discusses his conversation with Mahler. CP 496 at 14-16. More importantly, Hood unambiguously declared “I never altered my January 5, 2016 or January 15, 2016 requests either orally or in writing.” CP 497 at 18. The City’s insertion of the word “intended” into Hood’s testimony improperly argues, indeed insinuates, that he corrected a previous statement or memory, and thus invites undue

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<sup>2</sup> “brief of respondent [should] answer brief of petitioner.” RAP 10.3(b).

<sup>3</sup> “A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review.” RAP 13.4(d).

skepticism. This Court should consider why the City misrepresents facts and violates rules in what ought to be a straightforward Statement.

Regardless of what transpired *during* Hood and Mahler’s conversation, the City admits Hood made his January 15 request “subsequent” to the conversation. Petition, p. 2 and p. 13, n.8. An agency’s verification of a request after it is made ensures clarity and understanding for both agency and requester, consonant with “the intent of this chapter to provide full public access to public records.” RCW 42.56.100.<sup>4</sup> In short, agencies must respond “within” not *before* five days of making a request in order to prevent the very situation the City attempts to exploit. RCW 42.56.520.<sup>5</sup>

Even if Hood had modified his request on January 15, the City was nonetheless required to “disclose” the calendars to him by alerting Hood to their existence and permitting him to view them when he visited the City. Petition, p. 6-7, quoting *Sanders v. State*, 169 Wash.2d 827, 836, 240 P.3d 120 (2010). And even if, as the Court of Appeals speculated, the City had “set aside” the paper printouts of the electronic calendars, the City still would not have disclosed them in their electronic form, as they were kept. Petition, p. 10-12.

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<sup>4</sup> See Appendix B for full text of RCW 42.56.100

<sup>5</sup> See Appendix B for full text of RCW 42.56.520

The City's Answer ignores these key issues, as well as its tacit admission that it did not produce the "only remaining records on the laptop" at the time it provided "all the paper records" to Hood. Court of Appeals Brief of Respondent, p. 13. It instead proffers two diversionary issues, addressed below.

### **3. The Court of Appeals Decision Conflicts with Higher Courts**

The City failed to disclose the calendars; there is thus no disputed issue of material fact to remand. Remanding an *undisputed* material fact conflicts with multiple higher Court opinions, including those cited by Hood. Whether those opinions involve the PRA, are correctly cited, or whether Hood cross filed in the lower court are irrelevant City arguments that serve only to divert.<sup>6</sup> Answer, p. 4-6.

### **4. Substantial Issues Presented by this Case Have Public Importance**

Ought a Court of Appeals remand a case though a key finding results from a speculative conclusion? Does an agency meet its disclosure obligations by *possibly* "setting aside" paper copies of electronic calendars amongst tens of thousands of other documents without alerting the

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<sup>6</sup> Contrary to the City's claim, Hood accurately cites *Cerrillo v. Esparza*, 158 Wash.2d 194, 200, 142 P.3d 155 (2006); accord CR 56(c). Answer, p. 5, n.1.

requester of the calendars' existence? Ought an agency be permitted to produce only paper copies of electronic calendars though the calendars are kept only in electronic form? Ought an agency be permitted to defend its violation of law by failing to statutorily respond to a records request? Ought an agency avoid its disclosure obligations by systematically failing to provide "fullest assistance" to a requester? RCW 42.56.100. What does "fullest assistance" mean and how should it be applied? Ought a Court of Appeals examine the PRA in its entirety in order to enforce its overall purpose? Only by ignoring substantial issues can the City dismiss the public importance of this case. This Court should address them.

## **B. CONCLUSION**

The City misrepresented facts, violated court rules, and ignored key issues in order to conclude, "Given the unclear state of the record concerning the request and search for electronic records and calendars, these arguments are better directed to the trial court on remand." Answer, p. 7. But the record before this Court is clear: a) the City's defense in this case capitalized on its failure to provide fullest assistance and respond within five days to a requester; b) the City did not disclose requested calendars to Hood; c) the Court of Appeals based a key finding on



speculation and, in conflict with higher court rulings, remanded undisputed issues.

In short, the City's Answer asks this Court to substitute City admissions, case law, evidence and a construal of the Public Records Act in its entirety with an "unclear state" both created and exploited by the City. *Id.* Hood's Petition should be granted.

DATED this 13<sup>th</sup> day of May, by

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## **Appendix A**

### **RAP 13.4 (d) Answer and Reply.**

A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

### **RAP 13.4 (e) Form of Petition, Answer, and Reply.**

The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

### **RAP 10.3 (b) Brief of Respondent.**

The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

### **RAP 10.3 (a) Brief of Appellant or Petitioner.**

The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

**(5) Statement of the Case.** A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

**RAP 13.4 (a) How to Seek Review.**

A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

**RAP 10.3 (b) Brief of Respondent.**

The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

**Appendix B**

**RCW [42.56.100](#) Protection of public records—Public access.**

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or

disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records. If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

**RCW [42.56.520](#)**

**Prompt responses required.**

(1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond in one of the ways provided in this subsection (1):

- (a) Providing the record;
- (b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;
- (c) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request;
- (d) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request if it is not clarified; or
- (e) Denying the public record request.

(2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

(3)(a) In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking.

(b) If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Otherwise, the agency must respond, pursuant to this section, to those portions of the request that are clear.

(4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

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#### **CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on May 13, 2019 in Langley, WA Washington, I emailed the foregoing documents to:

Jeffrey S. Myers, WSBA No. 16390 Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. P.O. Box 11880 Olympia, WA 98508-1880  
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By: /s/ Eric Hood     Date: May 13, 2019  
Eric Hood



**ERIC HOOD**

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