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NO. 64217-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CHAD A. PIERCE,

Appellant,

v.

THE CITY OF DES MOINES,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

THE HONORABLE BRAIN D. GAIN
King County Cause No. 09-2-22973-2KNT

APPELLANTS OPENING BRIEF

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I. INTRODUCTION.

The case involves Washington's Public Records Act ("PRA"), which exists to "preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'" O'Connor v. Washington State Dep't of Social & Health Services, 143 Wn.2d 895, 905, 25 P.3d 592 (1994)(quoting Progressive Animal Welfare Soc'y v. University of Washington, 125 Wn.2d 243, 251 (1994)).("PAWS").

The PRA empowers and encourages citizens to motion the Superior Court, in the county which the records are maintained, to obtain mandatory sanctions and penalties against any agency of this State who fails to disclose records, enters into what has been coined as "silent withholding" of records, or just fails to disclose the records "within a reasonable amount of time" as required in the Act.

If an agency has violated any of the provisions of the Act, the Superior Court has a mandatory duty to impose penalties as a sanction to deter future misconduct.

An agency cannot shroud its refusal to produce records, its going into "silent withholding" of the records, and its failure to disclose the public records within a reasonable amount of time as required under the PRA and then expect to be absolved of their liability and accountability to the public because the agency produced the records, ten months after the request was made and then only due to being forced through a lawful tort claim commenced by a citizen to gain the requested records. Such actions, by any agency, is violative of the PRA and would completely undermine the

justification of open government.

In this case, Mr. Chad Pierce ("MR. Pierce"), was detained at the Regional Justice center (RJC) in Kent, Washington and Mr. Pierce made a request from the City of Des Moines Police Dep't ("City") seeking the documents which were caused to be created on April 20, 2004 by Mr. Pierce involving an incident with Mr. Michael Chapman. (request was made June 1, 2007 CP 8-15).

The City responded to the request and produced the records only redacting any Social Security Number and Dates of Birth. Id.

Mr. Pierce reviewed the records provided by the City and noticed that the records were connected, and part of two other sets of case records, namely, case #04-1305 and #04-1307. CP 11.

Mr. Pierce made a request to the City for the records to which were connected to the first request. The City responded without producing the records granting itself two-weeks to find the requested records. Two weeks came and went with no response so Mr. Pierce sent a letter inquiring of the records and made in the same letter, a second request for records the City had under Case #05-492 and #05-0492. The City again responded and did not produce the records of either request granting itself two weeks to gather the records. Two weeks came and went with no production of records. Mr. Pierce did as the City's letters directed Mr. Pierce to do and attempted to contact the City via letters, even sending a Private Investigator to the City to obtain the records-but, the City instead went into silent mode. CP 16-19.

Almost ten-months later, Mr. Pierce drafted a tort claim against the City due to its silent withholding of the records sought in the two requests made previously. CP 94-97.

The City shortly after being faced with the tort claim decided to produce the requested records in a partial fashion, and grouped all the documents together as one. The City produced an exemption log sheet where the City failed to state what its exemptions were for nine of the twenty-three records found which were withheld. CP 20-24.

Mr. Pierce motioned the King County Superior Court ("Trial") to obtain sanctions and penalties for the City's failure to produce the records within a reasonable amount of time and for the City's silent withholding until being forced through a tort claim to release the requested records. The trial court allowed the City to bypass mandatory sanctions for its silent withholding and failure to produce the records within a reasonable amount of time by incorrectly stating that Mr. Pierce could not prevail due to the City's production of partial records before the said motion was commenced. The trial court failed to acknowledge that the City only produced almost ten-months later due to the tort claim commenced by Mr. Pierce otherwise the records would never have been provided to Mr. Pierce. Such a ruling incorrectly shifts the burden of proof from agencies of this State to the citizens, encourages needless litigation and completely defeats the purpose of the PRA which is to facilitate public access to information retained by agencies in Washington.

Therefore, this Court should reverse the trial court's order of dismissal because the trial court honored and condoned

that an agency can endlessly delay meeting its mandatory duty to produce requested records under the PRA without having any sanctions and penalties imposed so long as the agency releases the records after a citizen forces release through litigation of a tort claim process against the agency.

This reasoning completely absolves the government of its responsibility to explain and justify its secrecy from the beginning and, in reality, rewards a "hide the ball" strategy.

The Court's ruling promotes needless and expensive costs in litigation by forcing a citizen to pay the cost of an appeal to gain the results which the trial court should have ruled upon in the first place.

Nothing in the PRA establishes that our Legislature had intended for its citizens to incur expenses of appealing an erroneous trial court ruling before obtaining the mandatory sanctions and penalties against an agency. On the contrary, the Legislature through enacting the PRA, intended in the plain language to promote citizens access to government information upon request-not through force.

Any interpretation to the contrary would facilitate a grave miscarriage of justice to State citizens by allowing an agency to engage in deceitful "hide the ball" strategies until being forced to produce through legal litigation procedures.

Such would defeat the purpose of the PRA and holds the government unaccountable for its actions.

Because the trial court's ruling fails to comport with the PRA mandatory requirements, this Court should reverse the order of dismissal, remand the case back to the trial court

with instructions to impose penalties against the City for its silent withholding of the records and failure to produce the records within a reasonable amount or time as required under the PRA. Further, this Court should instruct the trial court to determine the City's negligent or bad faith in delaying the release of the records with imposing a minimum range of \$52.50 per record-per day for each of the two requests made by Mr. Pierce calculated until a judgment is rendered in favor of Mr. Pierce.

II. ASSIGNMENT OF ERROR.

A. DECISION IN ERROR.

Mr. Pierce assigns error to the trial court's order of dismissal entered on August 17, 2009, and by misconstruing RCW 42.56.550(2)(4) which state that "upon motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request" and that "any person who prevails against an agency in any action in the courts seeking the right to...receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees...it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record." See also PAWSII, 125 Wn.2d 243, 270-71 (1994) which holds that silent withholding is also disfavored under the PRA.

B. ISSUES PERTAINING TO ERROR.

1. Did the trial court err by interpreting the PRA to mean that Mr. Pierce could not be considered a "prevailing party" for the purpose of obtaining penalties against the City due to the City's production of the records after Mr. Pierce filed a tort claim, but prior to the motion for sanctions?

2. Did the trial court err by failing to recognize that if Mr. Pierce had not commenced a tort claim against the City to obtain the two different requests for records, the City would not have produced as promised nine months earlier which violates the PRA?

3. Did the trial court err by concluding that Mr. Pierce "cannot be a 'previling party' nor his motion be one that could 'reasonably be regarded as necessary' to obtain the records," where Mr.Pierce's motion sough sanctions for the City's failure to produce the records within a reasonable amount of time and due to the City's "silent withholding" of the records until forced to produce through a tort claim which violated the PRA?

4. Did the trial court err by allowing the City to file a motion to dismiss where the City had no procedural authority due to its failure to follow CR 6(d) and respond to the motion filed by Mr.Pierce within one day of the hearing, But instead waited until after the hearing commenced to file a belated reply?

5. Did the trial court err by dismissing the motion for sanctions based upon its misconception that the City had produced

all of the requested records, where the City never provided any response regarding several requested records?

6. Did the trial court err by dismissing the motion for sanctions without first addressing the City's withholding of certain records without first stating what exemptions the City was relying upon to exempt those records as required under the PRA?

7. Did the trial court err by failing to recognize or take into consideration the City's refusal to produce the records until forced to through a legal tort claim having been commenced against the City by Mr. Pierce?

III. STATEMENT OF THE CASE.

On an unknown date, Mr. Pierce sent the City a request to obtain records consisting of a report Mr. Pierce filed on April 20, 2004 against Mr. Michael Chapman.¹ CP 9

On June 1, 2007, the City of Des Moines Police Department Office manager, Terryann Dell responded to the request and in fact produced the requested records only redacting the social security numbers and dates of birth. CP 8-15. In the City's letter, Ms. Dell made sure to state with particularity the RCW exempting the disclosure of the SS# and D.O.B. Id.²

Mr. Pierce examined the records and noticed that they were connected to two other sets of records located under the City's case numbers 04-1305 and 04-1307.³

1. The records requested in this case were requested due to Mr. Pierce's being detained under a cause commenced by the City's Police Dep't in 2005 which was initiated by Mr. Chapman who was retaliating for Mr. Pierce's 4-20-2004 complaint and arrest of Mr. Chapman.

2. The City provided the records connected with the 4-20-2004 complaint against Mr. Chapman **free of charge**.

3. The record requests made by Mr. Pierce were material to his criminal case.

Mr. Pierce made a request to the City's Office Manager, Terryann Dell seeking the City's records under cases numbered 04-1305 and 04-1307. CP 16-17.

On April 16, 2008, the City's office manager received Mr. Pierce's request and on April 17, 2008 responded to the said request stating:

The City of Des Moines Police Department is in receipt of your request for records received on 4/16/08. We anticipate our review to identify responsive documents will take some time however, we will provide an appropriate response as soon as possible. If you do not receive a complete response within two weeks, please do not hesitate to contact my office at 206 870-7634."

CP 16-17, (emphasis added).

However, a complete response did not come within two weeks as promised prompting Mr. Pierce to draft the City a letter inquiring as to the status of the records. In the letter, Mr. Pierce made a second records request seeking the City's case records under case numbers #05-492 and #05-0492.⁴ CP 18-19.

On May 10, 2008, the City's Office manager responded, and five days longer than the PRA requires causing a violation of the PRA, stating:

The City of Des Moines Police Department is in receipt of your second request for records received on 4/29/08. I had been working on other public disclosure requests that had come in previous to yours, but want to assure you I have requested the 2004 records from archives and once they are received, I will identify responsive documents and provide an appropriate response as soon as possible. If you do not receive a complete response within two weeks, please do not hesitate to contact my office at 206 870-7634."

CP 18-19 (emphasis added).

However, a complete response to both requests for records did not come within the two weeks as promised which prompted Mr. Pierce to do as the City directed and draft several letters

4. These records are the records that were secreted from the court in Mr. Pierce's current criminal conviction and are exculpatory.

inquiring of the City as to the records locations. The City decided to enter into a silent mode not responding to such requests. CP 4, 36-37, 44, 87, 95-97, 115-16, 141.

Frustrated by the City's silence, Mr. Pierce had his Private Investigator proceed to directly go down to the City's Police Department and attempt to pick up the sought after two records requests made by Mr. Pierce. The City refused to talk and remained in a silent mode. Id. (The Private Investigator also made numerous calls which all went unanswered as well).

Ms. Landis, a citizen within this State, also made several attempts at contacting the City and had no response as to the records locations. Id.

Frustrated further by the City's silence, Mr. Pierce on or about February 10, 2009, almost ten-months after the record requestes were made, caused the City to be placed upon notice of intent to legally litigate by commencing a tort claim on the City served upon both the City's Police Department, as well as the City Hall. (The mayor was served). CP 95-97.⁵

It was on February 24, 2009, and shortly after the City received its tort claim that the City responded through its attorney, Susan Mahoney, and produced a partial set of the two records requests made by Mr. Pierce. In a letter drafted by Ms. Mahoney she stated:

Enclosed please find copies of the records you requested from the City of Des Moines. Given the unanticipated delay in being able to complete your request, we are providing the records to you free of charge. I have also inclosed

5. The tort claim Risk management and the City never addressed the damages sought or paid any damages and assumed its was not liable due to its partial disclosure.

an exemption log detailing the records that have been withheld because they are exempt from disclosure under the Public Records Act."⁶

CP 21 (emphasis added).

A subsequent set of records was sent on February 25, 09 by the City's attorney. In the letter the attorney for the City stated:

Enclosed please find copies of additional records you requested from the City of Des Moines. This packet of records was inadvertently left out of the packet of records placed in the U.S. Mail yesterday. Again, these records are being provided to you free of charge. The only redactions from this group of records are social security numbers."⁷

CP 22 (emphasis added).

Upon Mr. Pierce's perusal of the received records and exemption log sheet, Mr. Pierce noticed that the exemption log sheet listed that there were twenty-three responsive documents connected to the requests. The City only produced fifteen of those documents. Out of the nine withheld sets of documents, the City failed to state in the exemption log what exemptions it was relying upon to withhold the nine sets of documents. CP 23-24.

On May 20, 2009, and based upon the City's silent withholding and failure to produce the records within a reasonable amount of time, Mr. Pierce sent the trial court a "motion" requesting penalties be imposed against the City as a sanction for the PRA violations.⁸ CP 1-25, 35-41.

The trial court set a show cause hearing for June 26, 2009

6. The City's statement that the delay was the reason the records were being provided to Mr. Pierce "free of charge" is specious as the City provided, free of charge, Mr. Pierce's request for records connected to the 4-20-04 incident with Mr. Chapman which the next two requestes were based upon.

7. The City grouped the records as one in the exemption log.

8. The Act only requires a motion commenced "ex parte" but in good faith Mr. Pierce sent the City a copy to put the City on notice.

@ 2:30 pm.

June 26, 2009 arrived and the City failed to appear for the show cause hearing as ordered by the Court. The trial court inquired of Mr. Pierce as to whether or not the City was served a copy of the motion, declaration and proposed order.⁹

The trial court re-set the show cause hearing for July 24, 2009 ordering the City to appear and "show cause why a judgment should not be entered against it for failure to produce the reasonably sought records." CP 40-41

On July 08, 2009, Mr. Pierce, after the City failed to appear, caused an addendum motion to the show cause motion to be filed in the trial court which outlines the damages sought by Mr. Pierce. CP 43-54

On July 08, 2009, the City, acting through its attorney, Ms. Susan Mahoney, caused a limited notice of appearance to be filed with the trial court asserting that the City was only appearing for the purpose of objecting claiming: (1). That the trial court lacked jurisdiction over the subject matter; (2). the trial court lacked jurisdiction over the persons; (3). insufficiency of process; (4). insufficiency of service of process; and (5). failure to state a claim upon which relief may be granted. CP 67-68

Nowhere in the case history does the City dispute that it delayed producing the records for almost ten months by silently withholding the records which resulted in a failure to produce

8. (cont'd)...The Motion was sent to the Clerks office in King Co., there the clerk sent the motion back claiming that it did not have a cause number and could not be filed. Mr. Pierce sent it back and cited the rules for filing new PRA ex parte motions, the clerk, at Mr. Pierce's request sent the "motion" back but after altering the "motion" to read that it was a "complaint."

9. Mr. Pierce sent a motion accompanied by an affidavit proving that the City was served with the motion, declaration, and order. CP 43-59

the public records within a reasonable amount of time as required under the PRA triggering penalties to be imposed as a sanction for the PRA violations. CP 69-79 . The City also nowhere in the litigation disputes that the public records were only produced once Mr. Pierce caused a tort claim to be filed seeking damages. Id. Therefore, the City has waived that affirmative defense and its only challenge to the litigation was that since Mr. Pierce never served the City with a "summons and Complaint" which the City speciously asserted was required under the PRA, that Mr. Pierce could not obtain penalties due to the objections raised in the City's limited notice of appearance based upon the same. Id.

On July 22, 2009, Mr. Pierce, in response to the City's limited notice of appearance, caused a motion to clarify to be filed in the trial court asserting that the City, under the rules governing motions practice, was properly served even though the Act only requires "ex parte" motions. CP 63-66

On July 24, 2009 @ 1:30 pm, the show cause hearing was heard. The City appeared through Susan Mahoney whom was present in the courtroom, and Mr. pierce appeared as the plaintiff via a telephonic hearing.

During this hearing, the trial court allowed the City, after the City already waived its procedural right to respond, to be allowed to cause a motion to dismiss accompanied by the memorandum to be filed after the hearing was concluded. (The VRP is not provided). The trial court took the case under advisement

of CR 6(d). The motion also provided the trial court guidance as to the service and jurisdiction being properly before the trial court which mandated imposition of penalties against the City for violating the PRA. (CP 80-111).

On August 10, 2009, Mr. Pierce sent to the trial court and City a motion opposing the City's motion to dismiss. In the motion Mr. Pierce claimed that the trial court was in fact without the required jurisdiction to file the City's motion due to its being untimely and moot. (CP 112-138).¹²

On August 17, 2009, the trial court entered a dismissal order asserting that Mr. Pierce could not be considered, under the PRA, a prevailing party because the City produced the two sets of records prior to the motion being filed requesting to have penalties imposed against the City for violating the PRA. (CP 111).

The trial court never took into account, as far as the entire record shows, the City's silent withholding, and failure to produce the records until Mr. Pierce caused a legal tort claim to be commenced-which points a reasonable judge into a direction establishing that the City was acting in a bad-faith manner. Id.

On September 1, 2009, Mr. Pierce motioned the trial court to reconsider its order of dismissal based upon its mistaken understanding of the PRA. (CP 139-143).

On September 3, 2009, the trial court denied Mr. Pierce's motion to reconsider. (CP 143). This appeal timely follows. CP 144-146 .

12. The motion was caused to be filed by the clerk on 8-18-09.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Because the trial court decided this case on the basis of affidavits and documents without testimony, review is de novo, and the appellate court can decide issues of both fact and law. RCW 42.56.550; Cowles Publishing Co. V. Pierce County Pros. Office, 111 Wn.App. 502, 505, 45 P.3d 620(2002); O'Connor, 143 Wn.2d 895, 904 & n.28(quoting PAWS, 125 Wn.2d at 252; Ames v. Fircrest, 71 Wn.App. 284, 292-93, 857 P.2d 1083(1993).

The appellate court is not bound by the trial court's findings on disputed factual issues. PAWS, 125 Wn.2d at 252-53.

Although reviewed de novo, a decision based on affidavits is a decision on the merits and is not treated as a summary judgment motion on appeal. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 794 (1990); Ames, 71 Wn.App. at 292-93.⁽¹³⁾

Statutory construction is a question of law reviewed de novo. State v. Smith, 80 Wn.App. 535, 539 (Division I, 1996).

Courts must take into account the policy underlying the PRA "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). A government agency that redacts or withholds a document bears the burden of proof to show that its action complies with a statutory provision exempting disclosure, in whole or in part, of records. RCW 42.56.550(1); Cowles Publ'g. v. Prosecutor's Office, 111 Wn.App. 502, 505, 45 P.3d 620(2002).

⁽¹³⁾. This case involves a "motion" for sanctions filed in the superior court, not a civil lawsuit. The City moved to dismiss claiming, incorrectly, that since Mr. Pierce did not serve the city with a "summons and complaint" that dismissal under rule 12 was appropriate.

B. THE PUBLIC RECORDS ACT DOES NOT REQUIRE THAT MR. PIERCE COMMENCE A CIVIL ACTION AGAINST THE CITY WHERE A SUMMONS AND COMPLAINT NEEDED TO BE SERVED UPON THE CITY TO OBTAIN SANCTIONS, ONLY AN EX PARTE MOTION FOR SANCTION WAS REQUIRED.

The PRA establishes that "[u]pon the **motion of any person** having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained" RCW 42.56.550(1)(**emphasis added**).

Furthermore, the Laws of 1973 Chapter 1 § 34(Initiative Measure No. 276, approved November 7, 1972) holds in pertinent part:

Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained..."

Laws of 1973, c. 1 § 34.

The language since the inception of the Public Records Act has always maintained that "any person" may motion the superior court, in the county where the records are located, to obtain penalties against an agency for violations of the PRA. One of those violations is failing to produce the records "within a reasonable amount of time." See RCW 42.56.550(4).

In this case, the City, argued to the court, adnauseam, that the City was not required to make an appearance at the initial show cause hearing due to Mr. Pierce not serving upon the City a "summons" and "complaint" and initiating a costly civil law suit against the City. Such a position, which was the City's only position, was meritless and without support from the PRA. In fact, the PRA holds to the contrary. The trial

court in its order entering a dismissal on August 17, 2009 did rule in opposition to the City's position holding that the PRA only requires a "motion" not a tort claim or "summons" and a "complaint" to be filed to obtain the penalties against the agency for PRA violations. (CP 69-79, 111).

This court should make a ruling, in a published opinion, clarifying this issue of the Act requiring a "motion" ex parte to obtain penalties against an agency for PRA violations, not any "summons and complaint" process which is a long drawn out ordeal incurring vast amounts of financial funds, where the PRA only requires a simple ex parte motion, which amounts to very little financial burden upon a citizen, to gain the just penalties against any agency of this state which violates the PRA. Therefore, because this case is a case of first impression which the public has a substantial interest in, and due to the real possibility of this specious interpretation of the Act is to recur, guidance is needed for the public's interest.

Mr. Pierce heavily argued this issue, which was the sole issue disputed in the cause of action. (CP 1-25, 35-37, 40).

C. THE CITY'S REFUSAL TO PRODUCE THE RECORDS UNTIL ALMOST TEN MONTHS LATER AFTER A TORT CLAIM WAS CAUSED TO BE FILED FOR DAMAGES VIOLATED THE PRA PROVISION THAT HOLDS THE RECORDS MUST BE TURNED OVER "WITHIN A REASONABLE AMOUNT OF TIME."

1. THE TRIAL COURT IMPROPERLY ALLOWED THE CITY TO DISREGARD THE PUBLIC RECORDS ACT'S STRICT REQUIREMENTS IN TIMELY RESPONDING TO MR. PIERCE'S REQUESTS FOR PUBLIC RECORDS.

The PRA requires several actions by agencies that receive

requests for Public records. First, RCW 42.56.100 requires agencies to "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." Second, RCW 42.56.520 requires agencies to make prompt responses within five business days of receiving the records request and, when access is denied, to specify the reasons therefore. The agency must supply an explanation for each denial of access that details which exemption applies and how that exemption applies to the records requested. RCW 42.56.210(3). Third, RCW 42.56.080 requires agencies to make the public records themselves "promptly available to any person" upon request.

An agency may not withhold a record in its entirety if only some information is exempt. In those cases, RCW 42.56.210(1) requires agencies to segregate the exempt information and to produce the record in redacted form.

Finally, the PRA prohibits agencies from denying access unless an exemption applies and from discriminating based on the identity of the requestor or the purpose of the request. See RCW 42.56.080.

The City violated each of these requirements on two PRA requests, and the trial court improperly permitted it to do so with impunity.

The City promptly responded to the first request in a letter acknowledging the request, but never produced the records.

The City failed to promptly respond to the second request and failed to produce the requested documents, instead, the City

responded by way of letter acknowledging the second request for records granting itself two-weeks to obtain the records. (CP 42-59, 62-66 _____)(This is in relation to both responses provided by the City to Mr. Pierce).

While an agency may, under limited circumstances, require more than five days to identify and disclose responsive documents, such a delay must be "reasonable." RCW 42.56.520.

Courts have found that a "reasonable" time for an agency to respond to a request such as Mr. Pierce's is approximately three weeks. For example, in Okerman v. King County Dep't of Dev. & Env'tl. Services, 102 Wn.App. 212, 6 P.3d 1214(2000), the agency needed three weeks to review the files, voice mail and e-mail of 285 employees in order to compile the responsive documents. Because the responsive documents were not located in a single file and had to be collected from several sources in several locations, Division One held "the [agency's] estimate of time to provide the requested records was reasonable." Id. at 218. In contrast, the City in this case took more than 9 months to complete a far less daunting task. The records Mr. Pierce requested were (1). located in the same location at the Des Moines Police Department which the request was made to; (2). the records were located in three files within the agency's Department; and (3). the records were involving one detective George Jacobowitz, one officer William Shephard, and one officer Casey Emly's generated files-all officers working with the City's Police Department. Therefore, such a delay is certainly not reasonable.

The following chart summarizes the City's impermissible delay in responding to the two Public records requests of Mr. Pierce. (14)

DATE	REQUEST ONE
Unknown	Mr. Pierce makes his first PRA request.
June 1, 2007	City responds by letter. Produces the requested records. City states what the exemption was for redacting the SS# and D.O.B.. City provided records free . CP 8-9.
Unknown date	Mr. Pierce previews the records. The records were connected to the City's case(s) 04-1305 & 04-1307. CP 11
	REQUEST TWO
April 16, 2008	Mr. Pierce makes second PRA request to City requesting the City's files under case(s) 04-1305 and 04-1307. CP 16-17
April 17, 2008	City responds by letter. No records disclosed. City grants itself two weeks to locate records. City directed Mr. Pierce to call the City in 2 weeks if no response was received. CP 17
April 29, 2009	Mr. Pierce does not receive a response. Mr. Pierce drafts a letter to the City inquiring as to the location of the records. CP 18-19.
May 10, 2008	City responds by letter. No records disclosed. City grants itself 2 week extension to receive records. City directs Mr. Pierce to call the City in 2 weeks if no response was received. CP 19.
May 24, 2008 through February 23, 2009	Mr. Pierce receives no response from the City. City enters into silent withholding. City fails to produce the records within a reasonable amount of time. CP 35-37,45,87,114-117.
February 10, 2009	Mr. Pierce sends the City a tort claim seeking damages for the City's failure to produce the second requested sets of records. CP 94-97.
February 24, 2009	City responds by letter through attorney Susan Mahoney. City provides partial set of records. CP 20-21.

(14) The first request for records is not an issue. It is the later two requests (Two and Three) that are in issue.

(cont'd...)

February 25, 2009	City produces a partial set of records with an exemption log. The City witholds nine of the records where nine of the nine withheld were never provided with exemptions to base the City's withholding upon. (CP 22-24. ___).
	REQUEST THREE
April 29, 2008	Mr. Pierce makes a PRA request to the City seeking records in case 05-492 and 05-0492. CP 19
May 10, 2008	City responds by letter. No records disclosed. City grants itself 2 week extension to locate records. City directs Mr. Pierce to call the City in 2 weeks if no response was received. CP 19
May 24, 2008 through February 23, 2009	Mr. Pierce receives no response from the City. City enters into silent withholding of the records. City fails to produce the records within a reasonable amount of time CP 35-37,45,87,114-17.
February 10, 2009	Mr. Pierce send the City a tort claim seeking damages for the City's failure to produce the third set of requested records. CP 94-97
February 24, 2009	City responds by letter through Susan Mahoney, its attorney. City produces a partial set of records. City provides an exemption log. CP 21
February 25, 2009	City produces a partial set of records with an exemption log. The City witholds nine of the requested records. Nine of the records withheld have no exemption claimed on the exemption log sheet to justify there exemptions. CP 21

When the City did respond, it failed to produce and cite what exemptions its was standing upon to withhold nine sets of records in their entirety. The City's grouping the two requests into one, failing to separate the two requests in the exemption log sheet, failing to produce the two records requests until ten months later after Mr. Pierce filed a tort claim constitutes

a violation of the PRA. The City also, in response to the third request, failed to timely respond within the five days as required under the Act.

D. THE CITY'S EXEMPTION LOG SHEET PROVIDED WHICH FAILED TO CITE WHICH EXEMPTION WAS USED TO EXEMPT NINE SETS OF RECORDS DOES NOT CONSTITUTE A "CLAIM OF EXEMPTION" AS REQUIRED UNDER THE PUBLIC RECORDS ACT.

The question here is: Does an agency violate the PRA by failing to disclose requested records and further by not asserting what exemption was used to withhold the requested records?

1. A claim must address each record specifically.

When interpreting the PRA, the court's primary objective is to ascertain and give meaning to Legislative intent. Koenig v. City of Des Moines, 158 Wn.2d 173, 181, 142 P.3d 162 (2006).

"[W]e begin with the statute's plain language and ordinary meaning." Id. Thus, in determining what constitutes a "claim of exemption" under the PRA, this court must look first to the plain language of the statute.

In general, the PRA mandates that:

agencies shall, upon request for identifiable public records, make them promptly available to any person.

RCW 42.56.080. While there are limited exemptions from this requirement (see, e.g., RCW 42.56.240 & 270), an agency cannot simply declare a record to be exempt without providing a very specific explanation.

The PRA says:

agency responses refusing, in whole or in part, inspection of any public record shall include a

statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

RCW 42.56.210(3)(emphasis added).⁽¹⁵⁾

Thus, the plain language of the PRA shows the State Legislature's intent for agencies to make a claim of exemption in a very specific way (stating a specific exemption and **(also)** explaining how it applies to a specific records). Id. (bold emphasis the authors own addition).

As the Supreme Court said in PAWS:

[W]ithout a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorially required de novo review is vitated. The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requestor must include specific means of identifying any individual records which are being withheld in their entirety.

PAWS, 125 Wn.2d at 270-71. (emphasis added).

The identifying information for each record should include "the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient." Id. at 271. In other words, an agency can't play "hide the ball" by describing only general categories of withheld records, or by alleging generally that unidentified records fall under either one exemption or another.

When the City refused to allow Mr. Pierce to inspect the whole records without explaining how a specific exemption

(15).see also RCW 42.56.070(1), which says that when it is necessary to delete personal information, the "justification for the deletion shall be explained fully in writing." (emphasis added).

applied to each record, it did not comply with the plain terms of the PRA, specifically, RCW 42.56.210(3). Therefore, the City's letters dated February 24 & 25, 2009 and exemption log provided did not constitute a "claim of exemption," to the six withheld records consisting of:

1. Law Enforcement Criminal History Investigation-Pages=1(4-8-05).
2. Harbor View Medical center Fax w/Attached SAC Report-Pages=9(4-15-05)
3. Fax from CPS to Det. G.Jacobowitz w/attach report-pages=16 (2-24-05)
4. Dept of Social & Health Serv. from E Applebee to det Jacobowitz-p.=7(3-1-05)
5. Fax from Des Moines to King County Prosecutor Office-pages=2 (3-08-07).
6. Sexual Assl't Eval from harborview Med. Ctr-pages=9 (4-7-2005)
7. Fax cover sheet from deputy Thalhofer to DMPD-pages=1 (4-2-05).
8. Fax transmission from DMPD to deputy Thalhofer-pages=6 (5-20-2005).
9. DOC Monthly report screen -pages=1 (2-11-2005).

CP 23-24.

Therefore, the trial court erred by failing to address this matter once raised by Mr. Pierce. (CP 111).

E. THE TRIAL COURT'S ORDER DISMISSING MR. PIERCE'S MOTION FOR SANCTIONS AGAINST THE CITY IS A VIOLATION OF THE PUBLIC RECORDS ACT AND NEEDS REVERSED.

The proper standard of appellate review of a trial court's denial of a per record per day penalty which is mandatory under the PRA, specifically, RCW 42.56.550(4) is whether the trial court abused its discretion. This was clearly established in Yousoufian:

[T]he PDA's (recodified and named PRA in 2005) penalty provision clearly grants the trial court "discretion" to determine the appropriate per day penalty, and this grant of discretion is only meaningful if appellate courts review the trial courts imposition [or lack thereof] of that penalty under an abuse of discretion standard of review.

Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2005)(emphasis added). The Supreme Court went on to analyze King County v. Sheehan with approval:

[I]n Sheehan...the Court of Appeals held that under RCW

42.17.340(4) [now codified as RCW 42.56.550(4)] an appellate courts "function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, not to exercise such discretion ourselves." There the court reasoned that the PDA [now PRA] "grants discretion to the trial court, not to this appellate court, to set the amount of penalty within the minimum and maximum ranges."

....
We agree with the analysis the Court of Appeals set forth in Sheehan and conclude, therefore, that the trial court's determination of daily penalties is properly reviewed for an abuse of discretion.

Yousoufian, 152 Wn.2d 421 at 430-31(emphasis added)(citing King County v. Sheehan, 114 Wn.App. 325, 350-51, 57 P.3d 307 (2002))[brackets are authors own].

The test for abuse of discretion is not whether the appellate court might or even would have ruled the other way. Coggle v. Snow, 56 Wn.App. 499, 506-07, 784 P.2d 554(1990). In numerous contexts the courts have defined the abuse of discretion standard as follows: An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. See, e.g., Coggle v. Snow, 56 Wn.App. at 506-07 (custody hearing), Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)(contempt rulings); Shumacher v. Watson, 100 Wn.App. 208, 211, 997 P.2d 399(2000)(child support); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615(1995)(prior misconduct evidence); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775(1971).

One commentator has had the following to say about the general topic of judicial discretion:

If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of choice. To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another....

....[Discretion] can usefully be referred to as primary and secondary.

When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process....

The other type of discretion, the secondary form, has to do with hierarchical relations among judges... Specifically, it comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal.

Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 636-37 (1971)(emphasis added).⁽¹⁶⁾

The trial court in this case abused its discretion by not imposing penalties against the City for its silent withholding and failure to produce the two requests for public records in a reasonable amount of time, and only then, after Mr. Pierce filed a legal tort claim for damages against the City which prompted the City to produce the records almost ten months after the promise to produce was received by Mr. Pierce.

Therefore, this Court should reverse the trial court's order of dismissal and remand with instructions to impose the penalties as a sanction against the City for violating the PRA.

⁽¹⁶⁾ This article has been quoted with approval in a number of Washington cases. See, e.g., In re Jannot, 110 Wn.App. 16, 19, 37 P.3d 1265(2002), which contains an excellent overview of the function and purpose of judicial discretion.

1. THE TRIAL COURT ERRED WHEN IT DISMISSED MR. PIERCE'S MOTION FOR SANCTIONS BY INCORRECTLY RULING THAT UNDER THE PUBLIC RECORDS ACT MR. PIERCE COULD NOT BECOME A PREVAILING PARTY BECAUSE THE CITY PRODUCED THE RECORDS PRIOR TO THE MOTION FOR SANCTION COMMENCEMENT.

a. Judicial oversight is essential to ensuring disclosure.

The PRA authorizes "any person having been denied an opportunity to inspect or copy a public record"... "within a reasonable amount of time" to file a motion in the Superior Court in the county which the records are located in to obtain penalties against any agency for failure to comply with the requirements of the PRA. RCW 42.56.550(1).

If a citizen prevails in a PRA action, the court is in fact required to award all costs and attorney fees as well as a penalty of \$5 to \$100 per record per day that a citizen was denied access to public records. RCW 42.56.550(4).

The Supreme Court has recognized, in fact, that "judicial oversight is essential" to ensuring that government agencies comply with the PRA's disclosure mandate. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 100, 117 P.3d 1117(2005).

An agency cannot avoid penalties by releasing records belatedly, if the records should have been public at the time the citizen requested them, as in this case where the City of Des Moines improperly withheld numerous public records until Mr. Pierce initiated a tort claim for damages against the City.

The City then produced almost all of the records which were requested which were publicly disclosable. See also CP 19-24.

Thus, judicial oversight-including imposition of stiff penalties for improper concealment or silent withholding of requested public records-is at the very heart of the PRA scheme. Only through litigation, or the threat of it, can a citizen hold accountable those agencies that would rather operate without scrutiny. Accordingly, if the PRA is to be liberally construed in favor of disclosure, the penalties mandated by the PRA for an agencies silent withholding and failure to produce within a reasonable amount of time until being forced to by a citizen's tort claim for damages being commenced must be interpreted to protect the citizen's right to judicial review of an agency's actions or secrecy.

Mr. Pierce anticipates that the City will argue that due to its belated release of records after Mr. Pierce caused a tort claim to commence, but before the motion for penalties requesting sanctions was commenced, that there is nothing important or at stake in the appeal. Such argument should be rejected by this court due to its contradiction to the strong statement in Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d. at 102-03 where Supreme Court held that a PRA suit is not mooted by disclosure of documents after litigation commences, and that penalties must be assessed for any period of improper withholding in order to facilitate purposes of the PRA. Further, any act committed by an agency in violation of the PRA is, "intolerable, thoroughly unacceptable behavior."

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b. The trial court's interpretation of the Public Records Act is not supported by any policy considerations and should be reversed.

Here, the trial court's interpretation of the Public Disclosure Act was unjust and unsupported by any policy.

The PRA in our State was modeled after the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Washington Supreme Court often looks to judicial construction of the FOIA in construing this State's PRA. Limstrom v. Ladenburg, 136 Wn.2d 595, 608, 963 P.2d 869(1998); Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)(because the PRA closely parallels the FOIA, judicial interpretations of the Federal Act are "particularly helpful").

In the case before this court, the trial court's interpretation of the PRA, against Mr. Pierce, was not at all supported by the PRA. The order of dismissal allowed the City to continue to play "hide the ball" and not be held to any amount of accountability for its actions.

Therefore, this court should reverse the trial court's order of dismissal entered on August 17, 2009 and remand with appropriate instruction to impose sanctions against the City starting at \$52.50 per record per day the City violated the act until the judgment in favor of Mr. Pierce.

F. THIS COURT SHOULD RECOGNIZE MR. PIERCE AS THE PREVAILING PARTY FOR PURPOSES OF THE STATUTORY PENALTY AND AWARD OF ATTORNEY'S FEES.

Pursuant to RAP 18.1, Mr. Pierce requests reasonable

attorneys' fees and expenses. RAP 18.1(a). Furthermore, Mr. Pierce, pursuant to RAP 7.2(d) requests that this court, if it reverses the trial court's order of dismissal in favor of imposing penalties, instruct the trial court to award Mr. Pierce attorneys' fees and costs associated with the litigation of this appeal.

The Public Records Act provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney's fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

RCW 42.56.550(4).

This provision mandates fees and costs to a prevailing party at both the trial court and on appeal. PAWS I, 114 Wn.2d 677, 690 (1990); Lindstrom v. Ladenburg, 85 Wn.App. 524, 534, 933 P.2d 1055(1997).

A prevailing party is "one who has an affirmative judgment rendered in his favor at the conclusion of the entire case." Tacoma News, Inc. v. Tacoma Pierce County Health Dep't, 55 Wn.App. 515, 525, 778 P.2d 1066(1989). A party prevails even though portions of the requested documents are found to be exempt. Id.; see also PAWS I, 114 Wn.2d at 684. A party also prevails where "'the existence of the lawsuit has a causative effect on the release of information.'" DOE I v. Washington State Patrol, 80 Wn.App. 296, 303, 908 P.2d 914(1996)(granting

fees to PRA requestor)(quoting Coalition on Gov't Spying v. King Co. Dep't of Public Safety, 59 Wn.App. 856, 864, 801 P.2d 1009(1990)(quoting Miller v. U.S. Department of State, 779 F.2d 1378, 1389(8th Cir. 1985))).

The attorney's fees provision of the PRA "is intended to encourage broad disclosure and to deter agencies from improperly denying access to public records." Lindberg v. County of Kitsap, 133 Wn.2d 729, 746, 948 P.2d 805(1997); see also Hoppe, 90 Wn.2d at 140. Requestors who challenge violations of the PRA are acting as private attorneys general protecting the rights of all citizens to access to information and to government responsiveness and accountability. As with other civil rights laws, challengers must be awarded full attorney's fees and costs to encourage others to assume this burden and to ensure that government abuses do not go unquestioned and unchallenged.¹⁷ Conversely, reduced fee awards discourage the public from exerting its rights and embolden agencies like the City to improperly block or delay access. In light of these potential consequences, courts must liberally construe the attorneys' fees provision. PAWS I, 114 Wn.2d at 682; see also Hoppe, 90 Wn.2d at 130. the goal is to encourage disclosure, and the agency's motives are irrelevant. See DOE I, 80 Wn.App. at 301-02. Only "strict enforcement" of fees "will discourage improper denial or delay of access to public records." PAWS I, 114 Wn.2d at 686. Mr. Pierce is entitled to such an award even if he does not obtain disclosure of additional information

17. See Seattle Sch. Dist. No. 1 v. Washington, 633 F.2d 1338, 1348(9th Cir. 1980), aff'd, Washington v. Seattle Sch. Dist. No. 1, 458 US 457 (1982)(The purpose in providing attorney's fees in (cont'd...)

through this appeal.

Further, Mr. Pierce is entitled to fees and the statutory penalty because of the City's numerous violations of the PRA found in other individual's requests. For example see Kleven v. City of Des Moines, 111 Wn.App. 284, 44 P.3d 887(2002); Koenig v. City of Des Moines, 123 Wn.App. 285, 95 P.3d 777(2004); Koenig v. City of Des Moines, 158 Wn.2d 173, 142 P.3d 162(2006); Rental Hous.Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393(2009).

Delay and lack of "fullest assistance to inquireres" alone justify an award of fees and statutory penalties. DOE I, 80 Wn.App. at 303-04(superior court abused its discretion in failing to award statutory penalties where agency failed to give requestor the "fullest assistance" required by the PRA).

Finally, the PRA's fees and cost provision also mandates an award of statutory penalties for each day that the agency denied the requestor the right to inspect or copy a public record. RCW 42.56.550(4); ACLU of Washington v. Blaine Sch. Dist. No. 503, 95 Wn.App. 106, 111, 975 P.2d 536(1999); see also Limstrom v. Ladenburg, 136 Wn.2d 595, 617, 963 P.2d 869 (1998); Amren v. City of Kalama, 131 Wn.2d 25, 29, 36-37, 929 P.2d 389(1997).

The decision is not discretionary under the PRA, it is mandatory, so the prevailing party does not need to prove damages. Amren, 131 Wn.2d at 36; Yacobellis v. City of Bellingham, 64 Wn.App. 295, 303, 825 P.2d 324(1992). The Court (cont'd...) in civil rights cases is "to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law."; State v. Lundgren, 96 Wn.App. 773, 784, 982 P.2d 619(1999)(attorneys' fees legislation reflects recognition that fee awards are necessary "to ensure(cont'd)

must award some penalty; the only discretion is in setting the amount that must be between \$5 per record per day and \$100 per record per day. ACLU, 95 Wn.App. at 111; RCW 42.56.550(4)(the statutory language says penalty is per record per day).

Just as with mandatory attorney's fees, a mandatory penalty is essential to the underlying policy of the PRA to promote full disclosure in a timely manner. Amren, 131 Wn.2d at 36-37; Yacobellis, 64 Wn.App. at 103.

"Strict enforcement" will prevent agencies from improperly denying access. Amren, 131 Wn.2d at 36-37.

Because the penalty must encourage agencies to allow access, neither the agency's motives nor the interest of the outside parties are relevant. The agency's good or bad faith only becomes relevant in determining the size of the penalty. Id. at 111-112; Lindstrom, 136 Wn.2d at 617.

For example, the ACLU panel reversed a lower court's decision to award a penalty of only \$5 per day. ACLU, 95 Wn.App. at 111. The panel held that the lower court should have awarded additional penalties because the school district that was involved in the case had acted in bad faith. Id.

The District had claimed that the records were too voluminous to mail, when the Superintendent knew the request involved only thirteen pages of documents. Id. at 113.

Here, the City's bad faith is clearly apparent in the record before this court where the record establishes that the City promised to produce the records but then went into what (cont'd)...sufficiently vigorous enforcement of civil rights").

has been coined by the court's as "silent withholding" of the two sets of requested public records. The City received those requests, as detailed in the chart, supra, and failed to, in fact, produce those records within a reasonable amount of time, and only produced the "partial" sets of records, almost ten-months later, once Mr. Pierce caused a tort claim for damages to be commenced against the City. Almost all of the records requested were disclosable, and not subject to any public exemptions. When the City did finally disclose the requested documents, albeit redacted and with some of the records withheld in their entirety where no exemptions were stated which would support the City's withholding of the records.

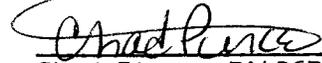
Such actions, by a City who has had several PRA cases commenced against it, establishes bad faith and further shows that penalties are not preventing the City from continuing its violative practices of the PRA.

Therefore, this court should require a penalty of \$100 per record per day against the City to deter future bad faith by the City of Des Moines and its Police Department.

V. CONCLUSION.

Based upon the foregoing reasons and facts briefed, this Court should reverse the trial court's order of dismissal, order Mr. Pierce as the prevailing party, order the trial court to impose sanctions against the City of Des Moines at the \$100.00 per records per day penalty for each day that Mr. Pierce was denied his right to inspect or copy the records until the date of judgment favorable to the appellant, Mr. Pierce.

RESPECTFULLY SUBMITTED THIS 17th day of May, 2010.


Chad Pierce-714567-KB-22
AIRWAY HEIGHTS CORR. CTR
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

CERTIFICATE OF SERVICE

I, Chad Pierce, the appellant hereby decalre under penalty of perjury under teh laws of the State of Washington that I causeda true and correct copy of this appeallant opening brief and the clerks papers to be deposited into the US Federal Mail System via a prepaid first class envelope. The said documents were caused to be delivered to the interested party below at the address listed below.

- 1. Susan Mahoney
21630-11Th Ave. South, Suite C
Des Moines, Wa 98198

I decalre under penalty of perjury that the foregoing is true and correct.

Dated this 18 day of May, 2010.


Chad A. Pierce

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