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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 40866-0-II

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

DAVID K. CHESTER,

Appellant,

v.

THE DEPARTMENT OF CORRECTIONS

Respondents.

REPLY AND RESPONSE BRIEF OF DAVID K. CHESTER

David K. Chester, Pro se
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Airway Heights, WA 99001-2049

I. SUMMARY OF REPLY

In response to Appellant's Opening Brief, the respondents Department of Corrections (hereafter "DOC") argue (1) that Mr. Chester's action involves claims that were or could have been litigated in his previous action, (2) Mr. Chester's entry into a release and settlement agreement released all current and futures claims which bars this action.

As argued below, Mr. Chester's rights under the PRA to challenge unlawful withholding of the more than 700 unidentified pages of public records, is not barred from review. The DOC's arguments do not satisfy the legal requirements to support, rather than impede disclosure and production under the PRA.

A. FACTS

On April 10, 2007, Mr. Chester mailed a letter to the DOC. In this letter, Mr. Chester requested disclosure of 24 different groups of identifiable public records in regards to specific instances of misconduct by a DOC medical care provider named John Loranger. CP 5, ¶4.1. By letter dated May 18, 2007, DOC informed Mr. Chester that 691 unidentified pages of public records were being withheld in their entirety. The DOC claimed that each of the 691 unidentified pages of public records were exempt from

disclosure in their entirety based upon attorney-client privilege and work product pursuant to RCW 42.56.290.(CP 8,¶4.13.)

On November 15, 2007, Mr. Chester filed a complaint against the DOC in Spokane County Superior Court No. 07-2-05187-7; (CHESTER I)(CP 85, CP 91 ¶4.1, 4.2, and 4.3). The basis for his complaint alleged specfically that DOC failed to promptly respond to Mr. Chester's PRA request within the five (5) business day prompt response requirement of RCW 42.56.520. (CP 91, ¶4.1, 4.2, and 4.3.)

On February 16, 2010, prior to Mr. Chester signing a release and settlement agreement with the DOC, he filed his complaint in Thurston County Superior Court No. 10-2-00288-7 (CHESTER II), challenging the DOC's unlawful withholding of the more than 700 unidentified pages of public records the DOC is withholding in their entirety based on the attorney-client and work product privileges. (CP 4, CP 8, ¶4.13, 4.14, and 4.15). The two cases were pending simultaneously for more than twenty-five (25) days, does this waive the DOC's defense of res judicata?

On March 16, 2010, twenty-five (25) days after his complaint was filed in Thurston County Superior Court (CHESTER II) (CP 4), Mr. Chester served the DOC with his Thurston County Superior

Court (CHESTER II) complaint challenging the DOC's unlawful withholding of more than 700 unidentified pages of public records DOC claimed to be exempt from disclosure in their entirety based on attorney-client and work product privileges.

The DOC now claims that Mr. Chester is barred from challenging the DOC's unlawful withholding of more than 700 unidentified pages of public records the DOC claims to be exempt from disclosure in their entirety because Mr. Chester went to judgment in CHESTER I (CP 36-44) on the issue of DOC failing to promptly respond to his initial records request dated April 10, 2007, within five (5) business days.

II. ARGUMENT

The DOC cannot evade its PRA obligation by claiming Mr. Chester is barred from challenging DOC's claim of exemption the agency believes authorizes the silent withholding of more than 700 unidentified pages of public records.

The trial court in CHESTER I did not consider the claims of attorney-client and work product privileges, thus those claims are not barred from review even though everything else about the two cases is identical, being between the same parties for the same request.

In the PRA context, the balance tips even more in favor of identifying, disclosing and producing these public records. The PRA "is a strongly worded mandate for broad disclosure [and production] of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). To serve the broad goal of transparent government, agencies are required to adopt rules and regulations that "provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. Agencies bear the burden to prove a particular statutory exemption applies. RCW 42.56.550(1), and they may not define the parameters of the exemptions. See Hoppe, 90 Wn.2d at 131, 580 P.2d 246 ("[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization."). Thus, judicial oversight is essential to ensure governmental agencies comply with the PRA.

With these principles in mind, the DOC had a duty to facilitate, rather than impede, public disclosure and production, any doubts regarding Mr. Chester's request must be resolved against the DOC and in favor of public disclosure.

The DOC argues that Mr. Chester cannot challenge any of the DOC's claimed exemptions in a separate action because he should

have or could have in the first action, CHESTER I (CP 36-44). Res judicata does not bar review.

Res judicata, or claim preclusion, is intended to prevent piecemeal litigation and ensures finality of judgments. Landry v. Luscher, 95 Wn.App. 779, 783, 976 P.2d 1274 (1999). Thus, a subsequent action should be dismissed if it is identical with the first action in the following respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against when the claim is made. Id. (citing Hayes v. City of Seattle, 131 Wn.2d 706, 711-12, 934 P.2d 1179, 943 P.2d 265 (1997)). The DOC cites these four elements and minimally applies them, but it does not analyze them in any depth against the tests discussed in case law. See id. at 783-85.

Factors three and four are met because Mr. Chester and the DOC are the only parties to the actions. The focus, therefore, is on whether the causes of action are the same. The two lawsuits (CHESTER I & II) do not involve the same subject matter simply because they both arise out of the same public records request and responsive records.

First, there is a dispute that the subject matter in Mr. Chester's Spokane County and Thurston County cases are the same.

Both cases arise out of Mr. Chester's April 10, 2007, public records request, but both cases do not challenge the DOC's response to that request. In the Spokane County case (CHESTER I) Mr. Chester challenged the DOC's failure to promptly respond to his original request dated April 10, 2007, within the five business day prompt response requirement of RCW 42.56.520. (CP 42, ¶4.1, 4.2 and 4.3). In the Thurston County case (CHESTER II), Mr. Chester alleged that (1) the agency failed to provide a detailed privilege/withholding log identifying individually each of the more than 700 unidentified page of public records being withheld in their entirety. (CP 21, ¶4.66, 4.67, 4.69, 4.70 and 4.71); (2) the agency failed to provide the fullest assistance to the records requester, Mr. Chester. (CP 22,¶5.3); (3) failure to timely provide responses;(4) failure to timely provide the records after the time estimate for completion of request;(5) failure to claim a valid exemption to deny requester disclosure of public records (CP 21,¶4.72).

The trial court in CHESTER I did not consider that the agency refused to identify each of the 691 unidentified pages of public records the DOC claim to be exempt from disclosure. The trial court did not require the agency to produce and index that

identified each of the 691 unidentified pages of public records the DOC claim exempt from disclosure based on attorney-client and work product privileges.

In fact, the trial court in CHESTER I stated in his Memorandum Decision dated March 20, 2009, that "Again, as previously referenced, but the various pages of withheld pursuant to attorney-client privilege and/or work product, virtually every request made by Mr. Chester was responded to by DOC" (CP 96-97). The trial court also mentions that Mr. Chester's request for the withholding index "appears later and is not in fact a part of Mr. Chester initial complaint." See, Memorandum Decision dated March 20, 2009. (CP 96, para. 2.)

Second, the causes of action are not identical for the purposes of res judicata, even though both cases arise out of Mr. Chester's April 10, 2007 public records request.

Mr. Chester did not have an opportunity to bring all his claims related to the unlawful withholding of more than 700 unidentified pages of public records that DOC claims to be exempt from disclosure in their entirety based on the attorney-client and work product exemptions. The Spokane County trial courts Memorandum decision dated March 20, 2009, clearly states "Mr.

Chester has, in addition to sending voluminous correspondence, filed a number of Motions to compel and requests for an index for excluded documents. The request for the index appears later and is not in fact a part of Mr. Chester's initial complaint." (CP 96).

The Spokane County Trial court did not order the DOC to produce a withholding/privilege log to identify individually each of the public records the agency claimed exempt from disclosure in their entirety. Without a detailed privilege/withholding index an agency cannot simply declare a record to be exempt without providing a specific explanation of how the exemption applies to the individual public record. As of the date of this reply, the DOC still has not provided Mr. Chester an index that indentifies individually each of the records it claims to be exempt from disclosure.

Without the information a privilege/withholding index provides, Mr. Chester was never able to prepare an adequate record for a reviewing court so that he could sufficiently challenge the agency's silent withholding of the more than 700 pages of public record the DOC continues to claim as exempt from disclosure. Mr. Chester has not been able to lawfully challenge

the agency's claim of exemption the agency believes authorizes the silent withholding of the more than 700 unidentified pages of public records since May 2007.

Mr. Chester's Thurston County case (CHESTER II) alleged specifically the agency failed to provide him a detailed privilege/withholding log that identifies individually each of the withheld public records. (CP 20, ¶4.65, 4.66, 4.67), thus the Thurston County complaint is not the same matter as resolved in the Spokane County case. (CHESTER I).

Examining the two actions that were brought by Mr. Chester, this court may observe that the two cases do not deal with the same subject matter which can be reached because the nature of the claim is entirely disparate. The action brought by Mr. Chester in Spokane County focused exclusively on the five (5) business day prompt response requirement of RCW 42.56.520 and the Thurston County case seeks to challenge the agency's unlawful withholding of more than 700 unidentified pages of public records that DOC still refuses to disclose. Therefore, Mr. Chester may proceed with his underlying action and has not failed to state a claim entitling him to relief.

It should also be noted by this Honorable Court that Mr.

Chester's entry into judgment by signing a release and settlement agreement only released his claims, damages and causes of action of any nature arising out of public records act as "DESCRIBED" in his complaint and appeal in Spokane County Court No. 07-2-05187-7 (CHESTER I), did not bar him from the subsequent action in Thurston County. (CP 60) Mr. Chester did not sign a release and settlement agreement that specifically released all claims, damages, and causes of action arising out of his April 10, 2007, records request. If that is what the DOC believed, it should have so stated in the settlement agreement itself.

The release and settlement agreement speak for itself (CP 106-108), and did not state in the language of the four corners of the agreement that Mr. Chester would release all his claims arising out of his April 10, 2007 public records request. Mr. Chester would have not entered into any agreement with the agency releasing the claims arising out of the April 10, 2007 records request because DOC has, and continues to silently withhold more than 700 unidentified pages of public records. Again, Mr. Chester only agreed to sign a release and settlement agreement regarding the causes of action arising out of PRA as "DESCRIBED" in his

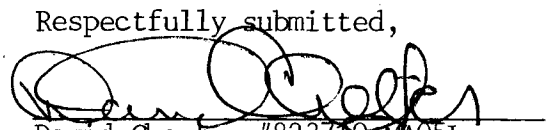
Spokane County case (CHESTER I), as it pertained to DOC's failure to provide a prompt response within five business days to Mr. Chester original April 10, 2007 records request as required by RCW 42.56.520.

III. CONCLUSION

The Department of Corrections violated the PRA by wrongfully withholding more than 700 unidentified pages of public records. It has failed to identify and explain it claim of exemptions as applied to each of the individual record. The trial Court erred in dismissing Mr. Chester's case without conducting a de novo review of the agency actions. This honorable Court should reverse, order the DOC to produce all non-exempt records and award Mr. Chester all his fess and costs associated with this action. Again, a strong penalty in this case will hopefully deter further DOC actions that undermine the PRA's broad mandate of disclosure and require the DOC to be better stewards of taxpayers money.

DATED THIS 10th day of February, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE BY MAIL

I David Chester, declare that, on February 6, 2011, I deposited the foregoing documents, or a copy thereof, in the internal legal mail system of Airway Heights Corrections Center and made arrangements for proper postage, to all parties listed below.

I further declare under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

Documents

1. Cover Letters
2. Reply Brief of Appellant
3. Declaration of Service by Mail

Parties Served By First Class Mail

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Dated this 6th day of February, 2011.

Signature