

COURT OF APPEALS
DIVISION II

NO. 41293-4-II

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

STATE OF WASHINGTON
DEPUTY
Cm

RICHARD GERMEAU,

Appellant,

v.

MASON COUNTY, et. al.,

Respondents.

REPLY BRIEF OF APPELLANT

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I. LEGAL AUTHORITY AND ARGUMENT

A. The County's Public Records Policy Does Not Require Requests to be Sent to the Public Records Officer nor Does it Require Use of the Term "Public Records Request"

1. The County's Policy States that a Requestor Merely "Should" Send the Request to the Public Records Officer and Label it as a "Public Records Request"

The County¹ asserts that its public records policy "*required* that members of the public direct their requests 'to the designated public records officer' and indicate that it was a public records request." Resp. Brief at 15 (emphasis added) (citing CP 187).² However, the County's public records policy states:

Requests for public records *should* be in writing and directed to the designated public records officer and *should* include the following ... [a] clear indication the document is a "Public Records Request."

CP at 187 (emphasis added). A request merely "should" be directed to the public records officer and merely "should" be labeled as a "Public Records Request."³

¹ In Respondents' Brief, the Mason County Civil Service Commission is listed as a party in the case and a respondent in this appeal. See Resp. Brief at 1. The Mason County Civil Service Commission is no longer a party to this case and is not a respondent. The Mason County Civil Service Commission was named in the original complaint but removed from the Amended Complaint. See CP at 4 (Amended Compl. at 1).

² Deputy Germeau notes again how odd it is that the County is claiming that a person must comply with the PRA policy when the County claims the request was not made for identifiable records or under the PRA. See Opening Brief at 18-19.

³ See also CP 200 (Sheriff's web site provides that requests can be made "in person"; no requirement to make them to public records officer); CP 197 (Sheriff's web site: "Please"

“Should” does not mean “required.” In fact, they are quite different, “[t]he term ‘should’ is directional and is not mandatory[.]” State v. Reier, 127 Wn. App. 753, 757, 112 P.3d 566 (2005) (citation omitted). Therefore, when the County’s public records policy says that a requestor “should” send the request to the public records officer, this is directional rather than mandatory. Sending the request to the County’s sole public records officer is not required.⁴ Therefore, Deputy Germeau did not violate the County’s public records policy. He did not fail to do anything that was required.

Similarly, when the County’s public records policy says a requestor “should” label it as a “Public Records Request,” this too is directional and not mandatory. See Reier, 127 Wn. App. at 757. Again, Deputy Germeau did not fail to do anything that was required by the County policy.⁵ Therefore, the County’s argument that Deputy Germeau

fill out form and send to “agency” listed; “contact” person listed for each department; no requirement to send request to public records officer).

⁴ The County does not argue that it did not receive the request (just that it “must” be sent only to one person, the public records officer). The County did not refute that it received the request. See Opening Brief at 22 (citing CP at 31, 204-205).

⁵ In the trial court, the County argued that Deputy Germeau was required to use the County’s public records request form (for a request that, they claim, was not a public records request). See CP 155. The County appears to have abandoned that argument because it did not address it in its Respondents’ Brief. If the County is still arguing that Deputy Germeau must use a form, that issue is fully addressed in Deputy Germeau’s Opening Brief at 18-19.

failed to follow the “requirements” of the policy is flawed as there were no “requirements.”

The use of the term “should” in the County policy is significant. The policy says that a request “should” do many things that are, in fact, directional and not mandatory. For example, the policy says that a request “should” be in writing. CP 187. The word “should” is used because, as the County is aware, a request can be oral. See *Beal v. City of Seattle*, 150 Wn. App. 865, 874, 209 P.3d 872 (2009) (oral requests, while “problematic,” are allowed). The County was careful to craft its policy by using the word “should” because it knew that it could not require a requestor to submit requests in a manner not required by the PRA.⁶

Further, following the County’s logic that a requestor “must” follow a policy describing what a requestor “should” do would lead to disastrous results for agencies. For example, the Attorney General’s non-binding Model Rules for Public Records, ch. 44-14 WAC, provide that an agency “should” do dozens of things, all of which would be requirements under the County’s interpretation. One of those (WAC 44-14-01001) is that an agency “should” coordinate requests across departments of the

⁶ RCW 42.56.040(1)(d) allows the County to adopt PRA policies—as long as they are “authorized by law.” The County knew that it could not “require” a requestor to send a request to only the public records officer or to label it as a “public records request” so the policy noted that a requestor merely “should” do these.

agency—something that this Court has specifically held is not a requirement. See Koenig v. Pierce County, 151 Wn. App. 221, 233-34, 211 P.3d 423 (2009) (holding prosecutor had no duty to inquire with other county departments concerning record request it received).

2. A Public Records Request Is Not Required to Be Sent Exclusively to the Public Records Officer

Even if the word “should” were not in the policy, the County argues that PRA itself requires a requestor to send a public records request only to the public records officer. Resp. Brief at 17. There is no such requirement in the PRA. The statute governing public records officers, RCW 42.56.580, merely provides:

(1) Each state and local agency shall appoint and publicly identify a public records officer whose responsibility is to serve as *a* point of contact for members of the public in requesting disclosure of public records and to oversee the agency’s compliance with the [PRA].

...

(3) For local agencies, the name and contact information of the agency’s public records officer to whom members of the public *may* direct requests for disclosure of public records ...[shall be published].

(Emphasis added).

The public records officer is “a” point of contact—not “the” point of contact. Obviously, “a” point of contact would refer to one of several, whereas “the” point of contact would refer to just one. Moreover, the public records officer is the person to whom a requestor “may” direct a

request. RCW 42.56.580(3). “The term ‘may’ in a statute generally confers discretion.” **Freeman v. Freeman**, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). A statute providing that the public records officer is “a” point of contact to whom a request “may” be made is not a requirement to send requests only to the public records officer.

The County relies on **Parmelee v. Clarke**, 148 Wn. App. 748, 201 P.3d 1022 (2008), **rev. denied**, 166 Wn.2d 1017, 210 P.3d 1019 (2009) in arguing that a policy that requests “should” be directed to the public records officer means that they are “required” to be so directed. **See** Resp. Brief at 14-18. However, the County must stretch the holding of **Parmelee** to make this argument. **Parmelee** does not apply here.

Allan Parmelee is an inmate convicted on two counts of first degree arson for fire-bombing the cars of attorneys. **See DeLong v. Parmelee**, 157 Wn. App. 119, 132, 236 P.3d 936 (2010). Parmelee makes extremely large numbers of requests and has shown a pattern of using these public records to harass and intimidate corrections officials and others. **Id.** at 132-136. One of his many requests, the subject of the **Parmelee v. Clarke** action, was made to a Department of Corrections (“DOC”) staff person who was not the public records officer. **Parmelee**,

148 Wn. App. at 751. Parmelee was subsequently told by letter to send the request to the public records officer.⁷ **Id.** He refused.

A DOC regulation, WAC 137-08-060(1)(1986), provided that a public records request “may be initiated in any office of the department during normal business hours.” **Id.** at 754. Parmelee argued that any “office” meant any staff person. **Id.** The Court disagreed, holding:

[I]t would be absurd to construe the term “office” to mean every employee of the Department. The Department has numerous offices and institutions located throughout the state. It is more reasonable to read the regulation as requiring that requests be submitted to the person designated at each of the Department’s locations responsible for responding to requests initiated at that location.

Id. at 755.

The County takes this quote—which was addressing the argument that an “office” is every employee—and argues that a policy that a person “may” make a request to the public records officer is, instead, a requirement to do so in order to make a valid request for public records. Specifically, the County argues the following:

In **Parmelee** the published WAC provision cited by the Court used the word “may” in reference to the manner in

⁷ Of course, another difference between **Parmelee** and the case at bar is that Parmelee was an inmate and his ability to make public records requests was therefore restricted. See **Livingston v. Cedeno**, 164 Wn.2d 46, 53-54, 186 P.3d 1055 (2008) (inmates’ public records rights curtailed); **Sappenfield v. Dep’t of Corrections**, 127 Wn. App. 83, 89, 110 P.3d 808 (2005) (same). Deputy Germeau is not an inmate.

which a request “may be initiated.” The Court had no trouble holding that this regulation, in conjunction with others that described the duties of public records officers, mandated submission to the public records officer. **Parmelee**, 148 Wn. App. at 754-55.

Resp. Brief at 16-17. Hence, the County claims “may” means “must.”

The problem with the County’s argument is that the **Parmelee** court’s conclusion about the “may” policy regarding the public records officer was in the context of Parmelee’s argument about an “office” being every employee. **Id.** at 754-55. **Parmelee** never held that a public records policy using the word “may” is instead uniformly a “must.”

Quite to the contrary, **Parmelee** also noted: “The law permits an agency to designate a person to whom a request *should* be directed.” **Id.** at 751 (emphasis added).⁸ “Should”—not “must.” “Should,” of course, is directional, not mandatory. **Reier**, 127 Wn. App. at 757. Hence, all **Parmelee** tells this Court is that a request “should” be directed to the public records officer. This is very different than the County’s claim that **Parmelee** holds that a request to the public records officer is mandatory. **See** Resp. Brief at 17. This Court should decline the County’s invitation to turn the word “should” in public records policies into a “must.”

⁸ Of course, Deputy Germeau accepts the **Parmelee** holding and the County’s policy that a request “should” be directed to the public records officer. Normally, Deputy Germeau did so, but in this case he could not. **See** CP at 30-31.

3. A Public Records Request Is Not Required to Be Labeled “Public Records Request”

The County further argues that Deputy Germeau’s request did not comply with the County’s policy that “require[s]” it to be labeled as a “Public Records Request.” Resp. Brief at 14. First, the County’s policy uses the word “should” which, again, is not a “requirement.” Second, as previously briefed, the PRA does not require use of any “magic words” such as “Public Records Request.” See Opening Brief at 19-20. Instead, the standard is whether the request asks for an “identifiable public record.” See Opening Brief at 12-15. Deputy Germeau’s request asked for “identifiable public records” when he sought “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35; Opening Brief at 12-15 (applying “identifiable public record” standard to Deputy Germeau’s request). Deputy Germeau’s request was a public records request because it asked for “identifiable public records”; it was not required to be labeled as a “public records request” to be valid.

B. The County Had Fair Notice that the Request Was For a Public Record

The County argues that Deputy Germeau did not give the County fair notice that he was making a *public records request*. See Resp. Brief at 2. However, that is not the proper test to determine whether the request

was a valid PRA request. Rather, the test is whether Deputy Germeau requested an *identifiable public record* and gave the agency “fair notice that it has received a request for a *public record*.” **Wood v. Lowe**, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (“**Lowe**”) (emphasis added); **Beal v. City of Seattle**, 150 Wn. App. 865, 873-74, 209 P.3d 872 (2009). This is a significant difference. The **Lowe** and **Beal** standard centers on whether the records sought are “public records”—not whether the request bears the words “public records request.”

1. The Requested Records Were “Public Records”

The question is whether Deputy Germeau’s request was for a “public record.” **See Lowe**, 102 Wn. App. at 878 (requestor must give agency “fair notice that it has received a request for a *public record*.”) (emphasis added). Deputy Germeau requested “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35. A “public record” is broadly defined to include any writing “containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2). Documents related to an investigation of a police officer clearly “relat[e] to the conduct of government.” **See Amren v. City of**

Kalama, 131 Wn.2d 25, 31-32, 929 P.2d 389 (1997) (complaints against officer); **Cowles Pub. Co. v. State Patrol**, 109 Wn.2d 712, 719-20, 748 P.2d 597 (1988) (internal affairs complaints); **Spokane Police Guild v. Washington State Liquor Control Bd.**, 112 Wn.2d 30, 37, 769 P.2d 283 (1989) (investigation of police officers). The County denies this, arguing that the records involving the investigation of Det. Sgt. Borcharding “may or may not” be “public records.” Resp. Brief at 24.

The County relies on a case deciding whether investigative records are *exempt from production* under the PRA to argue that the records may not be “public records.” **Id.** (discussing **Newman v. King County**, 133 Wn.2d 565, 575, 947 P.2d 712 (1997)). There is a difference between whether something qualifies as a “public record” and whether it is exempt from production. Any record meeting the definition of a “public record” is a “public record” subject to production if not exempt. If a statute exempts the public record from production, then it does not need to be produced, but it must be identified and the agency must justify the withholding. **See Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120, 125 (2010) (“A [public record] is never exempt from disclosure; it can be exempt only from production. An agency withholding a document must claim a ‘specific exemption,’ i.e., which exemption covers the document.”) So, whether or not some of the requested records are exempt

from production under the PRA does not mean they are not “public records.”⁹

Next, the County states the following:

Deputy Germeau essentially argues that any time a citizen communicates with a government employee and, in the course of that communication, expresses an interest in a document, regardless of the context, it is a public records request and the failure of the government employee to recognize it as such subjects the government to daily penalties, attorneys fees and costs.

Resp. Brief at 20.

Deputy Germeau is not making any such argument. First, Deputy Germeau did not casually mention an interest in a document to a government employee; he sent a written request for very specific records to a high-ranking County official, Chief Byrd. CP 35. Second, the PRA already addresses this situation by requiring a requestor to seek an “identifiable public record.” See Beal, 150 Wn. App. at 872 (valid PRA request is for an identifiable public record, which is one “for which the requestor has given a reasonable description enabling the government employee to locate the requested record”). When a requestor vaguely inquires about information—as opposed to requesting an “identifiable

⁹ Once again, Deputy Germeau notes the oddity of the County claiming that the request was not made under the PRA but then arguing that the records are exempt from production under the PRA. See Opening Brief at 21. If Deputy Germeau’s request was not made pursuant to the PRA, the County would have no reason to cite to a PRA exemption.

public record”—the requestor has not made a valid public records request. See id. at 875. This is why Deputy Germeau made a written request to a high-ranking official for “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35. The requested records are “identifiable public records,” thus Germeau submitted a valid PRA request. See Opening Brief at 12-15.

2. No Other Statute Provides Access to the Records

The County argues that it did not know that the request was a public records request—which again is not the test; “identifiable public records” is—because Deputy Germeau sought records that were available under a law other than the PRA. See Resp. Brief at 24. The Court in Lowe explained that when another statute provides better access to documents responsive to a request, then it may be reasonable for the agency to believe that the request was made pursuant to the other statute. Lowe, 102 Wn. App. at 879-80 (non-PRA statute provided unfettered access to personnel file, whereas PRA would have authorized redactions).

The County is incorrect in its assertion that RCW 41.56.030(4) would have provided access to the records in question, and the County does not quote that statute for good reason. RCW 41.56.030(4) does not

provide a mechanism of access to agency records, and in fact merely provides, in the “definitions” section of ch. 41.56 RCW:

"Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

This is not a statutory basis to obtain records. This statute says nothing about obtaining records. This is in direct contrast to RCW 49.17.250(1), the non-PRA statute in Lowe, which provides “Each employer shall make [employee personnel] file(s) available locally within a reasonable period of time after the employee requests the file(s).” The statute in Lowe sets forth a clear requirement to provide records; the definition of “collective bargaining” in RCW 41.56.030(4) does not.

The County then cites City of Bellevue v. Int’l Ass’n of Firefighters, Local 1604, 119 Wn.2d 373, 831 P.2d 738 (1992) as the authority that RCW 41.56.030(4) allows Deputy Germeau to obtain the records. Resp. Brief at 24. However, City of Bellevue involved an entirely different situation than Deputy Germeau faced here: an ongoing labor arbitration.

In City of Bellevue, “[w]hile the arbitration hearing was pending, the Union requested the City to provide comparable wage and salary data that the City intended to present at the arbitration. The City refused to provide this information.” City of Bellevue, 119 Wn.2d at 740. This was essentially a discovery violation in the context of arbitration. There was no arbitration in Deputy Germeau’s case. Because in City of Bellevue an arbitration was pending and a party was not providing required information, then—and only then—did that Court hold, “[C]ollective bargaining includes the duty to provide relevant information the other party needs to carry out its collective bargaining responsibilities.” Id. at 383. The County does not describe how the materials surrounding the investigation of Det. Sgt. Borcharding were needed to carry out “collective bargaining responsibilities” such as the wage and salary dispute being arbitrated in City of Bellevue.

Next the County points to a decision of the Public Employee Relations Commission, Bremerton Patrolmen’s Ass’n v. City of Bremerton, 3843-A, 4739, 4739 (PECB, 1994) (attached as Appendix A to Respondents’ Brief). First, any statement in that PECB decision about providing records has no precedential value. Further, any quotation about obtaining records is dicta as neither the findings of fact, conclusions of law, nor the order in the PERC decision even mention the issue of

obtaining records from an employer. Id. at 15-20 (unnumbered pages). It is important to note that before this suit neither Deputy Germeau nor Det. Sgt. Borcharding had ever heard of a “guild request” as a means of obtaining records. CP 32, 38. The collective bargaining agreement does not contain a provision regarding the production of records. CP 30.

The County is asking this Court to hold that any time someone from a collective bargaining unit asks for information relating to a represented employee that RCW 41.56.030(4)—which is merely the definition of “collective bargaining”—requires an employer to provide the documents. While providing information during arbitration might be required based on City of Bellevue, the County is asking this Court to expand that right to everyday (non-arbitration) requests for records. Under the County’s theory, any person from a collective bargaining unit can demand any type of records from the employer at any time, even when the collective bargaining agreement does not provide for this. This would subsume the PRA, and would also be a significant expansion of labor law in the state of Washington. Such an expansion of labor law is not warranted here.

C. Responsive Records Existed at the Time of the Request

The County argues that, even if the request was a public records request, the County did not violate the PRA because there were no

responsive records to provide. Resp. Brief at 29-34. The County claims that it is “undisputed” that no responsive records existed. **Id.** at 27.

However, the claim that no responsive records existed on the date of the request is simply incorrect. **See** Opening Brief at 34-35; CP at 66-90. At least six responsive records existed. **See** CP at 66-82, 84, 86, 88-90. One record in particular, CP 88-90, is an August 12, 2009 memorandum discussing the Borcharding internal affairs investigation.¹⁰ This was clearly responsive and existed when Germeau made the August 13, 2009 request.

The County argues that, if the request is found to be a public records request, it properly responded because the PRA “does not require a response to be *in writing*. RCW 42.56.520.” Resp. Brief at 30 (emphasis in original). The County is correct that not *all* responses must be in writing. RCW 42.56.520 provides: “Responses to request for public records shall be made promptly”; there is no requirement for the response to be writing.

However, “Denials of requests must be accompanied by a written statement of the reasons therefor.” RCW 42.56.520. **See Rental Housing Ass'n of Puget Sound v. City of Des Moines**, 165 Wn.2d 525,

¹⁰ CP 88 is the metadata for memo, showing the “created” date of the memo was August 12, 2009. The date on the memo (CP 89) is February 22, 2010 but it was created on August 12, 2009. The County has not refuted the metadata.

537-39, 199 P.3d 393 (2009) (describing requirements for written explanation of denial). The County denied the request when it withheld existing responsive records—the six contained at CP 66-82, 84, 86, 88-90. This is silent withholding and a “denial” of the request. See id. at 537 (describing how “silent withholding” of records violates the PRA). So, by silently withholding at least six records, the County “denied” the request and was thereby required to provide a written response. It did not provide any written response. CP 32. This violated the PRA. Smith v. Okanogan County, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) (“When an agency fails to respond as provided in [RCW 42.56.520], it violates the act[.]”).

In addition to failing to provide a written response, the County violated the PRA when it failed to provide the existing responsive records and to provide a withholding index.¹¹ CP 32-34. This violated the PRA for reasons previously briefed. See Opening Brief at 33-39.

D. Deputy Germeau Has Standing

The County argues that Deputy Germeau lacks standing because he was not denied access to the records. Resp. Brief at 35. The County brushes off the fact that RCW 42.56.550(1) affords standing to “any

¹¹ As previously noted, the County did provide some records after the suit, claiming it was not providing them under the PRA. CP at 34.

person having been denied an opportunity to inspect or copy a public record by an agency” by claiming that Deputy Germeau “did not request” the records.¹² Resp. Brief at 35.

“Requesting the records” (a term the County does not define) is not the standard to determine standing. Under RCW 42.56.550(1), “[a]ny person having been denied an opportunity to inspect or copy” records has standing. The Legislature could have easily provided that standing is limited to “one who requested the records”; it did not. A court interpreting the standing provision of RCW 42.56.550(1) “will not read” into it “language that is not there.” **Kleven v. City of Des Moines**, 111 Wn. App. 284, 291, 44 P.3d 887 (2002). There is no “one who requested the records” standard and the Court should not read one into the PRA. **See id.** at 289-90 (PRA liberally construed in favor of access to public records).

Returning to the actual language of the statute, Deputy Germeau most certainly is “any person” who has been “denied an opportunity to inspect or copy” the records. He submitted the request and signed it. CP at 35. He was denied the opportunity to inspect or copy the records (until after filing this PRA suit).

¹² As a factual matter, Deputy Germeau did “request” the records. He submitted the request and signed it. This is addressed **infra**.

Like the newspaper reporter making the request on behalf of the newspaper in Moser v. Kanekoa, 49 Wn. App. 529, 530, 744 P.2d 364 (1987), Deputy Germeau was the person making the request and has standing.¹³ In contrast, a complete stranger to the request—for example, a random resident of Mason County—could not claim to have been denied an opportunity to inspect or copy the records because he or she had nothing to do with it. Deputy Germeau did. The County provides no authority for the proposition that someone who submits a request and signs it, and who is not given the requested records, is not “any person having been denied an opportunity to inspect or copy” them.

The County argues that the FOIA case cited by Deputy Germeau, Doherty v. U.S. Dep’t of Justice, 596 F. Supp. 423 (D.C. N.Y. 1984), should not be followed because Kleven declined to follow a FOIA case addressing standing. Resp. Brief at 37. Kleven does, indeed, hold that a FOIA standing case should not be followed by Washington courts—but because standing under FOIA is *stricter* than under the PRA. Kleven, 111 Wn. App. at 292-93. A closer examination of the Kleven ruling on the FOIA standing case actually provides an additional reason why Deputy Germeau has standing.

¹³ Moser did not rule on standing. However, given that standing could be raised at any time, even *sua sponte* by the Court of Appeals, one can conclude that the reporter had standing in Moser even though the request was presumably made on behalf of another.

Kleven held that a FOIA standing case, McDonnell v. United States, 4 F.3d 1227 (3d Cir. 1993), should not be followed by Washington courts because FOIA had *narrower* standing requirements than the PRA. Kleven, 111 Wn. App. at 292. Because the PRA has less stringent standing requirements, the Kleven court declined to follow McDonnell. Id. 111 Wn. App. at 292.

It is instructive to look at the McDonnell standard that Kleven declined to follow. McDonnell held that a person lacked standing who did not sign a request or whose name does not appear on it. Kleven, 111 Wn. App. at 291-92 (quoting McDonnell, 4 F.3d at 1236-7). If Kleven rejected the requirement that a person's signature or name must appear on the request to have standing, it follows that if a person's signature or name *does* appear on the request he or she has standing. Deputy Germeau's signature and name appear on the request. See CP at 35. Following the Court's logic in Kleven, and the language of the PRA, Germeau has standing.

E. Deputy Germeau's Appeal Is Not Frivolous

The County argues that Deputy Germeau's appeal is frivolous under RAP 18.9. However, the trial court said the following:

I want to get to the standing issue because *I think the Court of Appeals should rule on it*. I think this [case] is the other side of Kleven, and how am I going to do this? *In the hopes that*

maybe [Deputy Germeau's counsel] will take this up the street and see what they think, I'm going to grant the summary judgment on both standing [and the lack of a public records request], saying he doesn't have standing because he wasn't making it in his personal capacity, but I'll say as a footnote that I think that's a weak reed for me to rely on because if you liberally construe the act, even though he held himself out as a representative of somebody else, and even though he's not an attorney licensed to represent somebody else, that if you give the act a very liberal construction, he could have standing based on the zone of interest argument that [Deputy Germeau's counsel] mentioned, but because of my recognition of where [counsel] was going, he deferred and didn't put it on the record, but it's in his documents, I think standing might be extended, but I'm going to rule he doesn't have standing so that if this goes up, that will be addressed by the Court of Appeals.

RP at 17-18 (emphasis added). An appeal is not frivolous when a trial court urges an appeal to be brought for the Court of Appeals to decide a questionable issue and states that its ruling against the appellant is a “weak read” to rely upon.

II. CONCLUSION

Deputy Germeau made a public records request. There are two requirements for a public records request: (1) a request for “identifiable public records” which (2) gives the agency “fair notice that it has received a request for a public record.” **Beal**, 150 Wn. App. at 872 (“identifiable public records”); **Lowe**, 102 Wn. App. at 878. A valid request need not be labeled as a “public records request.” The question is what was asked for, not how it was labeled.

An “identifiable public record” is one “for which the requestor has given a reasonable description enabling the government employee to locate the requested record.” **Beal**, 150 Wn. App. at 872. Deputy Germeau requested “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35. These could be located by County staff; indeed, they later were. CP at 33, ¶27; 150. This demonstrates they could be located and were thus “identifiable public records.”

“Fair notice” does not require the requestor to cite the PRA. **Beal**, 150 Wn. App. at 873-74. The requestor must give notice of a request for a “public record.” **Id.** A public record is, *inter alia*, a writing that “relating to the conduct of government ...” RCW 42.56.010(3). Notes, memos, and emails relating to an investigation of a police officer are “public records.”

The County argues that it did not receive “fair notice” that Deputy Germeau’s request was a request for a public record because he did not send it to the public records officer or label it as a “public records request.” (The County claims the request was not under the PRA but insists that the request comply with its PRA policy.) However, the County’s PRA policy notes that a requestor merely “should” send it to the public records officer and “should” label it as a “public records request.”

CP at 187. “Should” is directional, not mandatory. State v. Reier, 127 Wn. App. at 757 (citation omitted). Moreover, the PRA itself does not require that a request be sent to the public records officer. RCW 42.56.580 (public records officer “a” point of contact (not “the” point of contact) and the person to whom a requestor “may” direct a request).

There was no other statute outside the PRA that allowed Deputy Germeau to obtain the records. The definition of “collective bargaining” in RCW 41.56.030(4) does not provide access to the records. The case cited by the County, City of Bellevue, involved access to documents during an arbitration, which is not present in Deputy Germeau’s case. The definition of “collective bargaining” is nowhere near a statute requiring disclosure of records like the personnel file statute at issue in Lowe.

Deputy Germeau was not required to use the County’s form to give the County “fair notice” that he was making a public records request. There are no “magic words” required to make a public records request. See Lowe, 102 Wn. App. at 878 (“we will not require a requester to specifically cite the act. We fear such a requirement may raise a hyper technical barrier behind which agencies can justify denial of otherwise legitimate requests for public records.”) (citation omitted).

Because Deputy Germeau's request was for "identifiable public records" and gave the County "fair notice" that it was a request for "public records," it was a public records request.

The County violated the PRA by not providing (at a minimum) the six existing responsive records. CP at 66-82, 84, 86, 88-90 (six records); CP at 33 (no records provided until after suit). The County violated the PRA by not providing a written response to Deputy Germeau explaining why it was denying these records. The County violated the PRA by not providing a withholding index.

Finally, Deputy Germeau has standing. The trial court noted that its conclusion that Deputy Germeau did not have standing was a "weak reed" and urged the Court of Appeals to consider the issue. RP at 17. Deputy Germeau submitted and signed the request. CP at 35. RCW 42.56.550(1) grants standing to "any person having been denied an opportunity to inspect or copy a public record by an agency[.]" Deputy Germeau is not a stranger to the request; he made it and signed it. **Kleven** declined to follow a FOIA case holding that a person must sign a request to have standing; it follows that a person signing the request has standing. The standing provisions of the PRA must be liberally construed. **Kleven**, 111 Wn. App. at 289-90 & 291 (citing RCW 42.56.030).

The County did not address, let alone refute, Deputy Germeau's argument that he is the "real party in interest." The "real party in interest" is "the person who, if successful, will be entitled to the fruits of the action." **Northwest Independent Mfrs. v. Dep't of Labor and Industries**, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). Deputy Germeau obtained at least a portion of the fruits of action because the County provided him some (but not all) of the requested records after the suit was filed. CP at 33, ¶27.

The County also did not address, let alone refute, Deputy Germeau's argument that he is within the "zone of interests" of the PRA and has suffered "injury in fact." Deputy Germeau has standing to bring this case. He submitted a request, signed it, and was denied access to the requested records.

Based on the forgoing, this Court should find that Mason County violated the PRA and Deputy Germeau is the prevailing party.

Respectfully submitted this 24th day of February, 2011.

By: 

Greg Overstreet, WSBA #26642
Chris Roslaniec, WSBA #40568

ALLIED
LAW GROUP

COURT REPORTERS
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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY CR
DEPUTY

I certify under penalty of perjury under the laws of the State of

Washington that on February 24, 2011, I caused the delivery by email
pursuant to agreement of a copy of the foregoing Reply Brief of Appellant
to:

John E. Justice at jjjustice@lldkb.com

Dated this 24th day of February, 2011 at Seattle, Washington.



Chris Roslaniec