

No. 43859-3-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff/Appellant

v.

MARGARITA MENDOZA DE SUGIYAMA

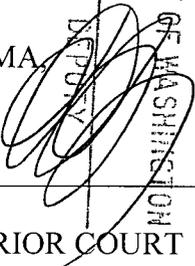
Defendant/Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Thomas McPhee)

Case No. 12-2-01320-6

BRIEF OF RESPONDENT

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I. INTRODUCTION

In this Public Records Act case, the State asks this Court to read the Public Records Act to create a related-litigation exemption that would prevent Respondent Margarita Mendoza de Sugiyama from obtaining state-created emails that are not otherwise exempt from production under the PRA, simply because the trial court granted a protective order as to those same emails in separate civil litigation against the State on the ground that the discovery request was overbroad. Yet those emails would be produced to any other person upon request. In the alternative, it appears the State is asking this Court to read the PRA to prevent all persons from obtaining those same emails just because Ms. Mendoza de Sugiyama was denied them in civil litigation because the Court read her particular discovery request as overbroad. In either formulation, the State's position makes no sense, is contrary to binding Supreme Court precedent, and cannot be sustained on appeal.

II. STATEMENT OF THE ISSUES

1. RCW 42.56.290 exempts state agencies from PRA disclosure requirements only where the records "would not be available to another party under the rules of pretrial discovery." All records in this case would generally be available under pretrial discovery rules provided the documents were relevant to the action. Did the Superior Court

correctly construe this litigation exemption narrowly to allow liberal access to public records?

2. The Washington Supreme Court has held that “public records from a public agency available to litigants against the agency by discovery under the Civil Rules are not exempt from the public records act.” All records at issue in this case would be generally available to “litigants against the agency.” Did the Superior Court correctly follow binding precedent when it held the records subject to disclosure?

3. In 2005, in response to a Supreme Court decision, the legislature amended the PRA, RCW 42.56.080, to provide that “agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.” The only reason the Superior Court denied Respondent’s discovery in the underlying litigation was overbreadth. Did the Superior Court correctly determine that the same overbreadth objection did not apply to PRA requests?

III. STATEMENT OF THE CASE

A. In the Whistleblower/Discrimination Litigation, Plaintiff Sought Emails Exchanged Between the Main Participants in the Case During the Relevant Time Frame, But Judge McPhee Denied The Request As Overbroad

Until she was terminated by the State, Ms. Mendoza de Sugiyama was the Diversity Programs Administrator for the Internal Civil Rights

Branch of WSDOT's Office of Equal Opportunity. CP 89. Her job responsibilities included overseeing investigations into WSDOT employee complaints of discrimination, harassment and retaliation. CP 89. The State terminated this 25-year employee on September 24, 2010. CP 100.

Respondent filed her original complaint against the State on June 22, 2011 (the "whistleblower litigation"). CP 100. On July 26, 2011, she filed an amended complaint alleging whistleblower retaliation pursuant RCW 42.40, *et seq.*, and discrimination, retaliation, and harassment owing to her gender and national origin. CP 100.

In individual discovery requests, Respondent asked for all documents, including emails, correspondence, and notes, between or among specific key individuals and "defendant relating to the issues identified in plaintiff's Complaint." CP 54-80. The relevant time frame was always January 1, 2007 through the date of trial. CP 40. After the State objected, plaintiff agreed to narrow the scope of her requests to emails exchanged between the twelve key individuals in the case. CP 112.

The State continued to object that the requests were overbroad, burdensome, and costly, and continued to insist that plaintiff provide key word search terms to limit the number of emails produced. CP 165.

On February 14, 2012, plaintiff conducted the deposition of WSDOT's CR 30(b)(6) designee, Joanna K. Jones. CP 215. Ms. Jones is

employed by WSDOT in the Information Technology Field. CP 218 (Jones Dep. at 4:23-24). Ms. Jones testified that she was asked to find emails exchanged between the individuals identified in plaintiff's discovery dating back to January 1, 2007 to the date of the request. CP 220 (Jones Dep. at 6:20-23). Ms. Jones stated that she had already completed the email searches for ten of individuals identified. CP 224-226, 228 (Jones Dep. at 10-12; 14:11-18). Ms. Jones further testified that the emails are ready to be produced on an external hard drive. CP 234 (Jones Dep. at 20:7-11). The emails, however, have not been reviewed for privilege by defendant's counsel. CP 243 (Jones Dep. at 29:4-10). The process of copying the emails to an external hard drive would take up to one hour. CP 242 (Jones Dep. at 28:20-22).

Following the CR 30(b)(6) deposition, on February 16, 2012, plaintiff's counsel proposed providing defendant with an external hard drive for copying the emails and offered to convert the documents at plaintiff's expense so that it would not cost defendant any money in providing these documents. CP 111. In response, defendant's counsel persisted that it was unduly burdensome for the State to review 174,000 emails for privilege. CP 111. The parties filed corresponding motions to compel and for a protective order on March 9, 2012. CP 165.

Judge McPhee heard oral argument on the motions on April 27, 2012, and denied plaintiff's motion to compel regarding the emails stating:

Now as regards the ESI, it is clear that there are a number of e-mails here, but that number is significantly less than 174,000. It can be no greater, by my estimation, than half of that amount. But under any circumstances, that is a huge volume of e-mails. Mr. Sheridan describes this request as being run of the mill, commonly made. I disagree. And in disagreeing, I acknowledge the challenges the courts are now facing concerning discovery of what has been now characterized as ESI. It is creating considerable challenges for the courts.

One way of addressing those challenges are the principles identified by Ms. Battuello as "the Sedona principles" for collaborative discovery of information relevant to a case that resides within a vast volume of ESI. The party seeking discovery is not bound by any law here in this state to abide by those principles. The plaintiff can simply say no. But if the plaintiff does that, then the torch essentially passes to the court to determine what discovery sought must be produced under the rules of discovery. And within that, I have both the charge and the discretion to limit discovery where that discovery is unduly burdensome or overbroad.

Here I see the problem as, the plaintiff has asked for production of e-mails that, "are relating to the issues identified in plaintiff's complaint." Within that very broad standard is an extremely overbroad request, one that by its overbreadth creates a significant and undue burden on the defendant. So where it is an up or down call for me, either that the Department must produce what has been requested or the request for production must be denied because it is overbroad and unduly burdensome, I come down on the latter. I am going to deny your motion to compel production of these documents.

Now, what that does, Mr. Sheridan, is leave open the door for you to craft a request for production of e-mails that are identified using language much less broad than the request here. It must be crafted so that, in the absence of a

collaborative effort, the responding party can construct a set of filters that it is confident is responsive to your request but at the same time permits it to undertake a search of its records that is not unduly burdensome.

Underlying my determination here is a consideration that you alluded to in your argument, Mr. Sheridan. You said "if this was a small company." Well, it's not a small company. And the issues here are very different. This is a public agency. And the public has a particular interest in making certain that its business is carried on in the best interest of the public it serves. That encompasses any range of matters that include federal funds, that include contracts, that include other information that is not at all relevant to this case but is important for the public and the business of the public and is important in some instances to keep that information out of the hands of others. And clearly, slipping over to the Public Records Act cases, the Public Records Act acknowledges that.

So, in my view, the act of simply turning over all of these e-mails and letting the party seeking discovery do the filtering is not something that a public agency can or should agree to, and it is not something that a court should countenance. In this type of situation, there needs to be an opportunity for the responding party, the public agency, to filter the very broad request, all e-mails, to identify any e-mail that would be relevant to the case and then produce it.

Now, there are two ways to do that, either a collaborative approach or by much more narrowly defined requests for production. The ball is in your court in that regard, and you can approach it as you choose. But at this time, your motion to compel is denied.

CP 147-150.

After the ruling, the State deposed Ms. Mendoza de Sugiyama, and based on the high Bates stamp numbers assigned to emails used as exhibits at the deposition, one may reasonably conclude that some of the very same documents the State was withholding were used as deposition exhibits.

CP 213-214.

B. In The PRA Litigation, Which Was Filed By The State, Judge McPhee Initially Found For The State, But On Reconsideration, Found That Under *O'Connor*, He Could Not Prohibit The Plaintiff's Requests For The Same Documents As Plaintiff Had Sought In The Whistleblower Litigation

On April 28, 2012, Respondent Margarita Mendoza de Sugiyama filed a public records request for the emails that were denied her in the civil litigation. CP 4, 195. The public records request sought "... all documents assembled by Joanna Jones, Senior Information Technology Specialist, that resulted from the e-discovery request for assistance from Assistant Attorney General Kate Battuello in connection to my lawsuit. Specifically I am requesting the approximately 174,754 emails Joanna Jones testified she has stored from searches conducted from email files...." CP 4, 195.

In response to the State's motion for an injunction to prevent the release, Judge McPhee, who was the same judge in the whistleblower litigation, initially granted the State's motion. CP 329.

In response to plaintiff's CR 59 motion, in an oral ruling from the bench, Judge McPhee reconsidered and reversed his earlier decision recognizing that:

In 2005, the legislature amended the PRA, RCW 42.56.080, to provide that "agencies shall not deny a

request for identifiable public records solely on the basis that the request is overbroad.” So that concept [of overbreadth] has been removed from the Public Records Act. Thus, the protection under CR 26 from undue burden and expense is, in my opinion, not available under the Public Records Act.

CP 349-50. In a written order dated August 3, 2012, Judge McPhee denied the State’s motion for an injunction. CP 336. This appeal followed.

IV. ARGUMENT

A. The PRA Shall Be Liberally Construed And Its Exemptions Narrowly Construed To Promote This Public Policy And To Assure That The Public Interest Will Be Fully Protected

The PRA ““is a strongly worded mandate for broad disclosure of public records.”” *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). “The PRA’s purpose is to increase access to government records.” *Sanders v. State of Washington*, 169 Wn.2d 827, 849, 240 P.3d 120 (2010). To that end, the legislature has declared:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict

between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

Under the PRA, each agency must make their records available for public inspection unless “the record falls within the specific exemptions...of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.040. The statute permits the state to redact certain information “to prevent an unreasonable invasion of personal privacy interests protected by this chapter,” but “the justification for the deletion shall be explained fully in writing.” *Id.*

B. The PRA Does Not Permit The State Or The Court To Weigh The Motives Of The Person Requesting The Documents

The PRA does not contain a provision that allows the State or the courts to ask why a person wants a particular record. The State can only withhold a document from production if it is exempt. Here, the State is adding an element to the analysis that is not in the statute—enforcement of discovery orders in separate litigation—thus, the argument goes, preventing the plaintiff in another case from circumvent[ing] a superior court discovery order. This is not a valid exemption under the PRA.

C. The State Reads The Exemption Contained In RCW 42.56.290 Too Broadly And The PRA Too Narrowly

RCW 42.56.290 provides:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

Contrary to RCW 42.56.030's broad declaration promoting public access, the State has broadly read the language stating that "records would not be available to another party under the rules of pretrial discovery."

Under the State's view, "another party" means opposing party. The State has further broadly read, "causes pending in the superior courts" to mean a cause pending in one court. Under the broad reading, RCW 42.56.290 would apply to the particular person in a particular case. But that is not what the statute says. The statute applies to "another party," which can mean all other parties—not just one—and applies to all causes pending in superior courts, not a particular court.

Construing the exemption narrowly (as required), any person in Washington may obtain those documents unless *no* person in Washington could obtain those documents under the Civil Rules, such as in situations of statutory or litigation privileges. This explains why the cases cited by the parties in this case pertain to documents that are attorney work product or attorney client privileged.

Here, the State's argument leads to the extraordinary and absurd result that the PRA permits everyone in Washington, or perhaps the world, to obtain the documents requested by Ms. Mendoza de Sugiyama under the PRA, except for Ms. Mendoza de Sugiyama, because she decided to vindicate her whistleblower rights, but received an adverse discovery ruling in a completely different case. Or, the State apparently argues in the alternative that the trial court's discovery ruling in the whistleblower litigation must read to apply to everyone, in which case, every other citizen would be denied production of those documents because of one superior court ruling that is applicable to one plaintiff. Indeed, followed to its logical extension, the State's argument means that citizens would be barred from obtaining public records if any superior court anywhere *might* deem the documents undiscoverable under the particular context of that case. What would happen if a Superior Court denied discovery of documents based on relevance to the particular matter? Would that bar that same person, or indeed *all* persons from obtaining those same documents? Given that the PRA does not take into account the requestor's motive, relevance is not an issue, yet the State's reading would import that requirement into this exemption. And, that exemption would quickly swallow the rule.

None of these results make any sense.

D. The State Is Seeking To Do Precisely What The Trial Court Sought To Do In *O'Connor*, Which Is Improper

The Supreme Court addressed this very issue in *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001). There, the plaintiff sued the State for damages associated with the molestation of a 15-year-old child while in the custody of the state. *Id.* at 898. After filing the complaint, the plaintiff sought related documents under the PRA. *Id.* The State denied the request, stating that, "as this matter is in litigation, the Superior Court Civil Rules apply, not the public records act." *Id.* at 899. The assistant attorney general said, "the public records act was not intended to be used as a discovery tool for pretrial discovery." *Id.*

The trial court entered orders quashing the plaintiff's public disclosure requests, barring further public disclosure requests relating to the litigation, and requiring the plaintiff to employ the Superior Court Civil Rules for discovery to obtain the materials sought. *Id.* at 903. The State is asking this Court to do essentially the same thing by preventing Ms. Mendoza de Sugiyama from "attempting to circumvent" a superior court discovery order. App. Brief at 5.

The Supreme Court in *O'Connor* held that the public records sought by the plaintiff were subject to statutory disclosure requirements to the extent they were discoverable under CR 26. The Court *reversed* the

trial court orders and *granted* attorney fees and costs to the plaintiff. The Court concluded that: “the Civil Rules are incorporated into the ‘other statute’ provision of RCW 42.17.260(1) [now RCW 42.56.070(1)], but that does not dictate the conclusion urged by Respondent. We nevertheless conclude that public records from a public agency available to litigants against the agency by discovery under the Civil Rules are not exempt from the public records act under RCW 42.17.310(1)(j) [RCW 42.56.290].” *O’Connor*, 143 Wn.2d at 910.

The Court went on to hold that “public records from a public agency available to litigants against the agency by discovery under the Civil Rules are not exempt from the public records act under RCW 42.17.310(1)(j) [RCW 42.56.290].” *Id.* at 910.

The Supreme Court specifically held that:

The Civil Rules do not conflict with the public records act. The rules provide that records that are not relevant and privileged are exempt from discovery. The trial court nevertheless was in error in concluding that Respondent DSHS may deny the direct public records request by Petitioner and that Petitioner, as a litigant against DSHS, must seek access to the records under the Civil Rules for discovery.

Id. The court cannot look to the motives of the plaintiff in another case and impose its will on the defendant in a completely different case unless

it is authorized by statute. The PRA does not permit the court to treat a PRA request as linked to another case.

E. *Hangartner* Does Not Apply Here, and In Any Case, Would Be Distinguished On Its Facts

Finally, the State, while admitting that the 2005 amendment to RCW 42.56.080¹ was a legislative response to the holding in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) (App. Brief at 17), the State argues that *Hangartner* should apply here, because the “*Hangartner* court did not apply its holding regarding overly broad requests to the ‘litigation exemption. . . .’” *Id.* at 18. This argument is irrelevant, because *O’Connor* did address this issue, was not overturned by legislative action, and firmly held that the trial court there was wrong to use a discovery order as a basis for denying a PRA request. It is also a nonsensical argument in the negative: in essence, the State argues that a case that did not apply to the statute at issue in this case, but which was abrogated by the legislature, should apply by extension to the statute that is at issue in this case. If anything, the legislature’s intent to modify .080 should be read the other way, and in harmony with a narrow reading of .290. Overbreadth objections have no place in Public Records Act

¹ Clarifying that agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.

jurisprudence. In addition, in *Hangartner*, the Court was concerned with the difficulties the State would have in responding to an overbroad request. *Hangartner*, 151 Wn.2d at 447-448. Here, the requested emails have already been assembled by the State and could be produced in under an hour.

V. CONCLUSION

The State's appeal should be denied, and the Superior Court's judgment should be affirmed. Respondent requests costs as the prevailing party, and attorney fees pursuant to RCW 42.56.550(4).

Respectfully submitted this 13th day of February, 2013.

MacDONALD HOAGUE & BAYLESS

By: Betz T. _____ WSBA # 41062
for
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Attorney for Respondent

DECLARATION OF SERVICE

Windy Walker states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.

2. On February 13, 2013, I caused to be delivered via email addressed to:

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a copy of the BRIEF OF RESPONDENT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 13, 2013 at Seattle, King County, Washington.


Windy Walker

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