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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 49884-7-II

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

**ARTHUR WEST,
appellant,**

Vs.

**THE CITY OF TACOMA,
respondent**

Review of a decision entered by
the Honorable Judge Cuthbertson

**APPELLANT'S
OPENING BRIEF**

Arthur West
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II. TABLE OF AUTHORITIES

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III. SUMMARY OF ARGUMENT

This case involves the question of whether a municipal entity, in this case the City of Tacoma, may deliberately and silently withhold records responsive to a request for "threat assessments" and then escape liability by disclosing the records after a suit has been filed for disclosure.

The record in this case demonstrates that the City of Tacoma first deliberately and silently withheld records it knew to be in existence and knew to be responsive to West's records request and then subsequently, (4 months later) attempted to evade liability for withholding the records from West by suing a third party for an injunction (without joining or notifying West) and then finally (6 Months later) belatedly disclosing the responsive records to the requester just 2 days before the hearing set on West's Motion for an Order to Show Cause regarding the silent withholding of the very same records.

There simply can be no credible argument that the "Fire Protection Evaluation" (See CP at 32-61) and the Siting Report, (See CP at 15-31) to which the PHAST Modeling was attached as one of a dozen similar threat assessment appendices were "threat

assessments" every bit as much as the PHAST Modeling record (AKA Exhibit K to the silently withheld siting report) that was provided to West in response to his request.

Nor can there be any credible denial, in light of the City's representations at CP 64-65 that the City deliberately narrowed the scope of West's request ("...the City's understanding that West sought (only) the identical records to those (sic) requested by Carlton") (CP 65 line 1-2) to just include the PHAST Modeling, without any rational or colorable basis, without indicating that other records were in existence.

Only after the City had responded to a request by the TNT did plaintiff West discover that records had been silently withheld from him that were responsive to his April request.

Although the City later belatedly disclosed the responsive records, the Superior Court refused to acknowledge that a violation of the PRA had occurred. As the Supreme Court ruled in *Spokane Research*,

In light of the clear precedent denouncing the type of silent withholding practiced by the City in this case, and the undeniable circumstance that the disputed and silently withheld records were

responsive to West's April 13, 2016 request, this case should be remanded back to the Trial Court with instructions to find that the City violated the Public Records Act and for an award of costs and any appropriate per diem penalties under RCW 42.56.550.

IV. ASSIGNMENTS OF ERROR

1. The Court erred in failing to find a violation of the PRA when the city deliberately concealed and silently withheld records that were undeniably responsive to West's Public Records Request for "Threat assessments"
2. The Court erred in allowing the City to escape liability by means of post-litigation production of silently withheld responsive records when the City had failed to meet its burden to demonstrate the records were non-responsive and lawfully withheld and no adequate search had been conducted.....
3. The court erred in finding that the plaintiff failed to respond to a request for clarification when no such request had been made.....
4. The Court erred in finding that the records the city silently withheld from West on May 3, 2016 were lawfully withheld under the authority of an injunction issued against the TNT on August 26, 2016, nearly 4 months later in an ex parte proceeding that did not include West.....
5. The Court erred in failing to find a violation of the Public Records Act and award penalties and fees when the City failed to respond as required by RCW 42.56.550 in regard to responsive public records of "Threat assessments" it knew to be in existence.....

**ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

1. Did the Court err in failing to find a violation of the PRA when the City deliberately concealed and silently withheld records that were undeniably responsive to West's Public Records Request for "Threat assessments"? Yes.....

2. Did the Court err in allowing the City to escape liability by means of post-litigation production of silently withheld responsive records when the City had failed to meet its burden to demonstrate the records were non-responsive and lawfully withheld and no adequate search had been conducted? Yes.....

3. Did the court err in finding that the plaintiff failed to respond to a request for clarification when no such request had been made? Yes

4. Did the Court err in finding that the records the city silently withheld from West on May 3, 2016 were lawfully withheld under the authority of an injunction issued against the TNT on August 26, 2016, nearly 4 months later in an ex parte proceeding that did not include West? Yes.....

5. Did the Court err in failing to find a violation of the Public Records Act and award penalties and fees when the City failed to respond as required by RCW 42.56.550 in regard to responsive public records of "Threat assessments" it knew to be in existence? Yes.....

V. STATEMENT OF THE CASE

On April 13, 2016, plaintiff submitted a request under the Public Records Act to the City of Tacoma. (CP at 4, lines 6-7)

The request sought the following records

1. Records of threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal on property leased from the Port of Tacoma.

2 . Any internal safety or threat assessments related to this project. (CP at 4, lines 8-11)

On May 3, the City responded to West's request by citing to one Vapor modeling report, but silently withheld two other responsive records as follows:

Dear Mr. West:

We interpret your request 16-10527 for "records of threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal on property leased from the Port of Tacoma" to include the "2-D and 3-D PHAST quantitative modeling" completed for the Tacoma LNG project in accordance with federal regulation that has been requested by John Carlton under PDR 16-10346. As you know, those records are subject to the temporary restraining order issued in Pierce County Superior Court Cause No. 16-2-06889, and cannot be disclosed at this time. (CP at 4, lines 12-19)

Unbeknown to West due to the City's deliberate and silent

withholding, further responsive records existed that were not disclosed to him: "threat assessments" in the form of a (1) a Fire Protection Study and (2) a Siting report to which the PHAST Modelling was one appendix (Appendix K) among nearly a dozen others, virtually all of which were "threat assessments". (CP 16-61)

On Friday, August 26, in response to a PRA request from Derrick Nunnally, a reporter for the TNT, the City and PSE appeared in court to seek a restraining order against the Tacoma News Tribune for these same records, the siting report (with appendices A-J and L-M) and the separate "Fire Protection Study", responsive records which had not been identified by the city as responsive to West's request and were silently withheld from West. West was not notified of or named as a party in that case. (CP at 5-7)

In the Complaint filed in that subsequent (The PSE v. TNT-Nunnally) case, the additional records were described as "Reports" of a character that would have been responsive to West's request. (See PSE's (Second) Complaint for Injunctive Relief at page 2-3, sections 8-12, describing a "Siting Report" and a "Fire Protection Evaluation Report, (FPE Report)") (CP at 6-8)

On 09/02/2016 Plaintiff filed a complaint for violation of the

PRA, claiming that the Fire Protection Report and the Siting Records were silently withheld (CP at 3-10)

On 10/19/2016 Plaintiff filed a motion for a show cause Order. (CP 11-61)

Appended to the Order were the silently withheld records, which West had obtained from a third party. These were the silently withheld LNG Siting Study Report, (CP 15-31), and the Silently withheld Fire Protection Evaluation. (CP 32-61)

On 10/26/2016 the City filed an objection (CP 62-69) and a declaration of Martha Lantz (CP 70-111)

On 11/03/2016 the plaintiff filed a response including the fact that the City had disclosed the disputed records to him the previous day. (CP 112-121)

On 11/04/2016 The Court heard argument and ruled that because the records had been disclosed after the filing of the suit, and due to the fact that an injunction was subsequently and temporarily entered in a proceeding West was not a party to, 4 months after the Fire Protection study and siting report were silently withheld from West by the City, the PRA had not been violated (See Transcript of November 4, 2016)

On 12/16/2016 The Court entered an Order of Dismissal. (CP 122-123)

On 01/17/2017 Appellant filed a timely Notice of Appeal.(CP 124-127)

STANDARD OF REVIEW

This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all issues de novo.

ORDER ON APPEAL

Appellant seeks review of the Order Denying the Motion for an Order to show Cause and Dismissing the Complaint of December 16, 2016. (CP 122-127)

VI. ARGUMENT

This case concerns a Fire Protection Evaluation Report and a Siting Report, “threat assessments” submitted to the City of Tacoma and the Tacoma Fire Department in relation to the permitting process for a proposed LNG terminal on property leased from the Port of Tacoma.

The City implicitly acknowledged the records were responsive to West's request, and, significantly, had (as of November 2nd, 2016) belatedly produced these same records in response to West's request, (See CP 120-121), in an Email from Tacoma Deputy City Attorney Martha Lantz “reopening” the April 13 request and providing the disputed documents.

Further, the City, rather than advancing any meritorious arguments in reply to the Plaintiff's Motion to Show Cause, filed a reply that was completely devoid of any actual argument or citation of authority concerning the appropriate duties of an agency in responding to a request for public records.

Instead, counsel attempted to make some form of far-fetched, contrived and wholly specious argument that, because West intervened in the Carlton case, his request was somehow

transubstantiated by some form of divine intercession into an identical copy of Mr. Carlton's request.

This Court should see through and reject these baseless arguments that the City is now estopped from asserting *having now disclosed the disputed records in response to plaintiff's April 13, 2016 request.* (See CP at 120-121)

1. The Court erred in failing to find a violation of the PRA when the city deliberately concealed and silently withheld records that were undeniably responsive to West's Public Records Request for "Threat assessments"..

The Court erred in in issuing the Order of December 16, 2016, when it failed to find a violation of the PRA in the face of clear, readily apparent and palpable silent withholding of responsive records by the City of Taccoma.

Even if the city had not disclosed (on November 2nd, 2016, well after West had filed a lawsuit) the 2 previously disputed records (and associated accessory documents) in response the plaintiff's April 13 request, there is no credible argument that the terms "threat" and/or "safety assessment" fail to encompass the records silently withheld by the City in this case.

As common sense and the City's belated (November 2) disclosure in response to West's April 13 PRA request underscores, the "Siting Report" and "Fire Protection Evaluation Report, (FPE Report) were known responsive records that should have been produced, or at the very least identified, in response to West's broad request for threat and/or safety assessments and reports.

"Threat" is a broad term commonly understood to include a...person or thing likely to cause damage or danger, or the possibility of trouble, danger, or ruin.

Similarly, "Assessment" is a broad term encompassing ... a judgment about something, the act of assessing something, or an idea or opinion about something.

It is beyond reasonable dispute that the "Fire Protection Evaluation Report" and the "Siting Report" were known responsive records that fell within the broad scope of the term "Threat Assessments" and/or "Internal Threat and Safety Assessments"

The City completely fails to make any reasonable search argument to justify their refusal to identify or produce these records, and it is evident that they were concealed in a classic case of silent withholding.

When an agency withholds or redacts records, its response "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); see PAWS II, 125 Wn.2d at 270. The purpose of the requirement is to inform the requester why the documents are being withheld and provide for meaningful judicial review of agency action. See PAWS 11, 125 Wn.2d at 270; Sanders v. State, 169 Wn.2d 827,846,240 P.3d 120 (2010).

An agency may not "silently withhold" a public record "because it gives requestors the misleading impression that all documents relevant to the request have been disclosed." See Zink: II, 162 Wn. App. at 71 L. "The agency's failure to properly respond is treated as a denial of records." Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 750, 174 P.2d 60 (2007).

Here, the City never argued that the 2 withheld reports were located elsewhere and could not have been located by an adequate search. Instead the City appears to argue the Plaintiff West did not employ some form of (unspecified) mandatory magical words in his request to identify the records, and that he was required to inform the City, after it closed his request, of missing documents that he was unaware of because the City silently withheld them in the first place!

This silent withholding violated the Public Records Act for, as the Court explained in PAWS...

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. *See PAWS v. UW*, 125 Wn.2d 243 at 270, (1994), citing *Fisons*, 122 Wn.2d at 350-55.

Just as the Supreme Court noted in PAWS, the silent withholding of the threat and safety assessments by the City of Tacoma in this case created the misleading impression that all documents relevant to plaintiff West's request had been disclosed. The city cannot fairly be permitted to evade the provisions of clearly established law by committing a textbook example of silent withholding of records.

The Superior Court's failure to address the City's manifest silent withholding in this case justifies an order of remand from this Court

2. The Court erred in allowing the city to escape liability by means of post-litigation production of silently withheld responsive records when the city had failed to meet its burden to demonstrate the records were non-responsive and lawfully withheld and no adequate search had been conducted.....

"The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." *Livingston v. Cedeno*. 164 Wn.2d 46,52, 186 P.3d 1055 (2008). The intent section of the PRA clearly states that the people:

"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."
LAWS OF 1992, ch. 139, § 2 (codified at RCW 42.56.030).

In judicial review of agency action under the PRA, the burden is on the agency to show a withheld record falls within an exemption, to identify the document withheld and to explain how the specific exemption applies. See *Sanders v. State*, 169 Wn.2d 827, 845- 46, 240 P.3d 120 (2010).

The City did not meet this burden as it failed to identify known responsive records. In addition, the City violated the PRA by failing to conduct a reasonable search to discover the records it admits it was aware of the existence of to begin with.

The Court erred in issuing the Order of December 16, 2016, in ruling that the post-litigation disclosure of the records by the City cured its violation (See Transcript at Page 15) in that

Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit. "[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act." *COGS*, 59 Wn. App. At 862 .
Spokane Research & Defense Fund v. City of Spokane,. 155 Wn.2d 89, 117 P.3d 1117 (2005)

There is no colorable claim by the city that it conducted a reasonable search in order to fulfill the April 13 request, or for that matter that any search whatsoever was performed for the records actually requested, as it is undisputed that the City deliberately restricted the scope of West's request in order to conceal documents it wished to have suppressed. This violated the established duty of an agency in responding to a PRA request in that, as the Attorney General's Model Rules provide...

An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out"

records on his or her own. WAC 44-14-04003 (9), Citing to *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

In addition to the established requirement of a reasonable search, the manifest and clearly expressed intent of the Public Records Act clearly establishes that agencies must rely *solely on statutory exemptions* for withholding records *and cannot rely upon individual distinctions* such as those claimed by the City of Tacoma as the basis for withholding known responsive records in this case...

The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, *agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records* based upon the identity of the person or agency which requested the records, and (2) *agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records*. Laws of 1987, ch. 403, § 1, at 1546; (emphasis added)

The City violated the PRA in failing to conduct a reasonable search, instead deliberately making invidious distinctions and relying upon an extra-statutory basis for withholding known responsive records. In addition, the city appears to have

purposefully restricted the scope of its response in order to conceal responsive records not covered under the Carlton injunction, and then sought to employ the injunction entered against a third party (Derrick Nunnally) as a smokescreen to conceal the existence of records it should have identified and produced in response to plaintiff West's request SFour (4) months earlier.

3. The court erred in finding that the plaintiff failed to respond to a request for clarification when no such request had been made.....

The Court erred in in issuing the Order of December 16, 2016, based upon a flawed “clarification” argument when the City's “clarification” argument lacked any statutory basis and was somewhat less than clearly persuasive

Significantly, the City has failed to identify a single statute or any relevant case law that requires a requestor to inform an agency after it has closed out a PRA request of missing documents it has itself concealed the existence of, because there is no such authority.

Contrary to the City's fanciful claims, there is simply no requirement to advise the agency of missing documents which it has itself silently withheld, especially after a request has been terminated. To establish

such a standard the Court would have to add an additional requirement of administrative necromancy to the combination of clairvoyance and diligent research requirements already expressly rejected by the Court in *Daines*.

The clarification procedure in statute does not provide any basis for the actions of the City in this case, because the request was not "unclear" to begin with and the agency never actually asked for clarification, even after it closed the request. In any event the clarification process is simply not available to deny a response to a clear request after an agency closes a request. As the Model Rules explain..

... An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor. WAC 44-14-04003 (7)

The City failed to comply with the Model Rules or the

required statutory procedure for requesting clarification *before* closing the request. Apparently, not only does the city maintain that West was required to use magic words of unspecified content, to identify the records he sought, they also seek to assert that he was required to perform a mind reading act rival that of The Great Carnac to divine, by some occult means, the existence of records that the city was actively concealing, and then travel back through time to provide clarification prior to the city's closure of his PRA request.

Needless to say, these were not realistic expectations, and this case should be remanded for the Trial Court to find a violation of the PRA and for any appropriate further proceedings.

4. The Court erred in finding that the records the city silently withheld from West on May 3, 2016 were lawfully withheld under the authority of an injunction issued against the TNT on August 26, 2016, nearly 4 months later in an ex parte proceeding that did not include West.....

The Court in issuing the Order of December 16, 2016, erred in finding that the circumstance that an injunction was entered against third parties 4 months after the City silently withheld responsive records from West justified withholding retroactively in

that:

Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. *Spokane Research & Defense Fund v. City of Spokane*, . 155 Wn.2d 89, 117 P.3d 1117 (2005)

The entry of an injunction in an action where West was not joined 4 months after the City silently withheld responsive records can in no way act retroactively to justify silent withholding.

The Trial court's failure to recognize the fundamental reality stemming from both legal precedent and the unidirectional nature of the space-time continuum justifies an order of remand from this Court.

5. The Court erred in failing to find a violation of the Public Records Act and award penalties and fees when the City failed to respond as required by RCW 42.56.550 in regard to responsive public records of "Threat assessments" it knew to be in existence.....

The Court, in issuing the Order of December 16, 2016, erred in failing to find a violation of the Public Records Act when it was undisputed that the City had failed to respond as required by RCW 42.56.520 in regard to responsive public records it knew to be in

existence or which a reasonable search would have revealed.

RCW 42.56.520 imposes clear responsibilities on agencies...

Within five business days of receiving a public record request, an agency...must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested...(3) acknowledging that the agency...has received the request and providing a reasonable estimate of the time the agency...will require to respond to the request; or (4) denying the public record request. RCW 42.56.520

The City has nowhere credibly disputed that it failed to comply with RCW 42.56.520 in regard to the public records of threat assessments that it knew to be in existence, and has not asserted any form of reasonable search defense, so to the extent that the Siting Report and Fire Study were responsive public records, the City violated the PRA by not identifying and disclosing them. See *West v. Washington State Department of Natural Resources*, 163 Wn. App. 235, 244, 258. P.3d 78 (2011). This, too, was reversible error justifying an Order of Remand.

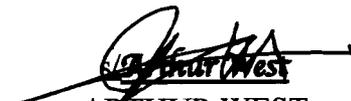
VII CONCLUSION AND RELIEF SOUGHT

By its acts and omissions, as described above, the city failed to conduct a reasonable search, silently and unreasonably withheld

records, and failed to produce records in a timely manner until after the hearing on plaintiff's Motion for an Order to Show Cause was confirmed on the 2nd of November, 2016, nearly seven months from when the request for disclosure of public records was originally submitted.

This conduct clearly violated the Public Records Act, and this case should be remanded for further proceedings with instructions for the Court to find a violation of the PRA and award costs and any appropriate penalties.

For the foregoing reasons, appellant respectfully requests that this Court reverse the Trial Court's ruling in every respect and remand this matter back to the Superior Court with instructions to find that the City committed a violation of the PRA, and to issue such further relief in the form of costs and penalties as may be appropriate. Respectfully submitted this 27th day of September, 2017.


ARTHUR WEST

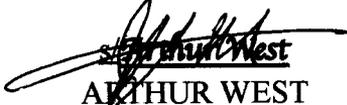
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I hereby certify that on September 27, 2017, I caused to be served
a true and correct copy of the preceding document on the party listed
below at their addresses of record via Email:

Martha Lantz, Attorney for Respondent City of Tacoma, at

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ARTHUR WEST