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NO. 49884-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ARTHUR WEST,

Appellant,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Arthur West made a public records request to the City of Tacoma. The City responded with every record he asked for and more. The City did not violate the Public Records Act, and West is not entitled to penalties, fees or costs. The trial court order denying West's motion for the City to show cause under RCW 42.56.550 and dismissing his public records lawsuit against the City should be upheld.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The City produced all records responsive to Appellant's public records request.**
- 2. The City's production of records to West and others, subsequent to the resolution of related injunction cases, did not violate the Public Records Act.**
- 3. The City's communication to Mr. West advising him of the interpretation of his request and invitation to respond, including by providing clarification or disagreement, did not violate the Public Records Act.**
- 4. The trial court appropriately considered the outcome of an injunction in a separate public records act matter in its determination that the City did not violate the Public Records Act.**
- 5. The City did not violate the Public Records Act and the trial court appropriately denied Appellant's Motion to Show Cause under RCW 42.56.550, and correctly dismissed Appellant's public records lawsuit.**

III. STATEMENT OF THE CASE

Arthur West sent the City an e-mail dated April 13, 2016 requesting records related to Puget Sound Energy's (PSE) proposed Liquid Natural Gas (LNG) plant (City of Tacoma Public Disclosure Request No. 16-10527). The request was for:

“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. 3. Any similar records for the Port's proposed methanol plant.”

Clerk's Papers (CP) at 74-75.

Mr. West's request followed a separate request received March 1, 2016 from John Carlton, also seeking records related to the proposed PSE LNG plant (City of Tacoma Public Disclosure Request No. 16-10346). The Carlton request was for “2-D and 3-D PHAST quantitative modeling” (“Modeling Records”) related to the LNG plant. CP at 77-79. The Modeling Records are located in Appendix J to a document entitled “Siting Study Report” (“Siting Report”) and are also contained on a separate DVD.

CP at 82.¹ PSE moved to enjoin the City from production of the Modeling Records to Mr. Carlton, in Pierce County Superior Court Cause No. 16-2-06889-3 (Carlton case). Pierce County Superior Court Judge Cuthbertson entered a temporary restraining order against the City's production of the Modeling Records on April 14, 2016. CP at 81-84.

Also on April 14, 2016, West moved to intervene in the Carlton case. In support of intervention West stated that the Carlton case "involves a records [sic] related to a hazard assessment of a proposed Liquid Natural Gas facility. As a citizen who has requested the records at issue, West is entitled to intervene...." (Emphasis added.) CP at 86.

On April 29, 2016 Judge Cuthbertson held a hearing in the Carlton case on PSE's request for a permanent injunction and also considered West's intervention motion. West argued in that hearing he should be allowed "to intervene in this case of the purpose of determining the issues involving the records that the City holds...." (Emphasis added.) CP at 92. Mr. West's motion to intervene was granted, following Deputy City Attorney Lantz's statement that the City had no objection with the "caveat that the intervention would be limited to the precise records at issue" in the

¹ The Siting Report itself (but not Appendix J (or any other appendices) nor the separate DVD) is officially titled "Tacoma LNG Siting Study Report" and is contained in the Clerk's Papers at CP 15-31 as an Exhibit to Appellant's Motion for an Order to Show Cause.

Carlton case, i.e. the Modeling Records. CP at 93 and 96. West confirmed his intervention be limited to the “records held by the City at this time.” CP at 92.

In that West’s intervention into the Carlton case was predicated on his representations that he was seeking the same records as requested by Carlton, the City determined item No. 1 of Mr. West’s records request 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 be for the Modeling Records requested by Mr. Carlton. CP at 98. The City did not, however, produce the Modeling Records, telling West “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 98.

Item No. 2 of Mr. West’s request was for “any internal safety or threat assessments” related to the LNG plant (emphasis added). The City determined that there were no safety studies or assessments related to the LNG plant conducted internally by any City staff or department. The Siting Report itself was not created by the City, but was only submitted to it and the City did not consider it responsive to West’s request for internal assessments. Accordingly, the trial court found “there is no internal safety

and threat assessment.” VRP at 29. Mr. West was informed that “there are no responsive records to item #2 of your request.” CP at 98.²

The City e-mailed West that his “request is considered closed.” He was also advised to contact the City at his earliest convenience if he believed “there are other records responsive, or this does not meet the scope of your request . . .”. CP at 98.

No exemptions under the Public Disclosure Act were listed in the City’s response, as no records were withheld as exempt. The Modeling Records responsive to item No. 1 of West’s request were withheld, not as exempt under the Public Records Act, but as subject to the injunction entered in the Carlton case, to which Mr. West was a party.³ No items were withheld in response to item No. 2 for “internal” safety and threat assessments as the City possessed no such records. See VRP at 29.

On May 13, 2016 Judge Cuthbertson issued an order in the Carlton case denying permanent injunctive relief regarding the Modeling Records

² West was provided records in response to item No. 3 of his request for “any similar records for the Port’s proposed methanol plant” and those records are not at issue in this appeal.

³ The City has never asserted any of the records requested by any of the three requesters, Carlton, West or the News Tribune were exempt from production under the Public Records Act. Rather, the City followed the statutory process for giving PSE, an interested third party, notice of the City’s intent to produce the requested records. PSE then initiated the injunction proceedings which, while the temporary injunction was in place, precluded the City from producing the records.

and staying the ruling. The City remained precluded from disclosing the Modeling Records while PSE sought an appeal. CP at 101.⁴

On May 17, 2016 the City received a different request for records related to the proposed PSE LNG plant, from Derrick Nunnally, a reporter for the Tacoma News Tribune (News Tribune Request). CP at 103. The News Tribune request was for “all documents and correspondence submitted to or sent by the City of Tacoma to PSE, including the Tacoma Fire Department, related to safety and security plans for Puget Sound Energy's Liquefied Natural Gas facility (emphasis added)” (City of Tacoma Public Disclosure Request No. 16-10672). CP at 103.

The News Tribune request for “safety and security plans” for the LNG plant was interpreted by the City as requesting different records than the Carlton and West request for Modeling Records. The News Tribune request was also interpreted differently than the West request for the non-existent “internal” threat or safety assessments. *See* VRP at 20-21, 26-27. The News Tribune request was determined by the City as including the entirety of the Siting Report to which the previously requested Modeling

⁴ This Court may take judicial notice that PSE’s appeal of the Order Denying Injunctive Relief in the Carlton case was assigned Court of Appeals No. 49045-5-II.

Records were appended at Appendix J,⁵ as well as another document in the possession of the City (but not created internally) which is entitled Fire Protection Evaluation Report.⁶ *See* VRP at 20-21.

The City determined the records responsive to the News Tribune request were not exempt and subject to production. PSE moved for injunction in Pierce County Superior Court Cause No. 16-2-10575-6 (News Tribune case). Judge Cuthbertson denied the injunction in an Order dated August 26, 2016. CP at 105.⁷ PSE appealed both injunction cases (Carlton and News Tribune) where they were consolidated and production was stayed, meaning the City was enjoined from producing the Modeling Records, the Siting Report and the Fire Protection Evaluation.

The News Tribune case was dismissed by the Court of Appeals on October 10, 2016 after the News Tribune published the Siting Report (including the Modeling Records) and the Fire Protection Evaluation, which the newspaper had obtained independently of the public records

⁵ The Siting Study (absent Appendix J or any of its other appendices and absent the separate DVD) is contained at CP 15-31.

⁶ The Fire Protection Evaluation, created by PSE's Contractor, Chicago Bridge and Iron is contained at CP 32-61.

⁷ This Court may again take judicial notice that the News Tribune case was appealed by PSE and assigned Court of Appeals No. 49517-1-II, then consolidated with the Carlton Court of Appeals Case and a stay was issued over all records requested by Carlton and the News Tribune (the Modeling Records, the larger Siting Study and the Fire Protection Evaluation Report).

request. CP at 110. On October 25, 2016 the Court of Appeals dismissed the Carlton appeal. CP at 107-108.

Mr. West did not intervene in the News Tribune injunction, but attended the hearings, and was fully aware of the City's interpretation of the News Tribune request as seeking records different than the Modeling Records he and Carlton had requested, and different than the non-existent "internal" safety and threat assessments.

Mr. West's first indication of disagreement with the City's handling of his Records Request No. 16-10527 was in his complaint filed on September 2, 2016 alleging the City violated the Public Records Act. CP at 3-10. West claimed the City should have viewed items responsive to the News Tribune's request (the entirety of Siting Study and the Fire Protection Evaluation) as also responsive to No. 1 of his April 13, 2016 request for the Modeling Records, and to item No. 2 of his request for "internal" safety or threat assessment records. According to West, the City's determination that no "internal" safety and threat assessments existed was an improper and "silent" withholding of the Siting Study and the Fire Protection Evaluation Report. CP at 5.

West demanded all the records he argued he had requested must be produced and penalties be assessed against the City for the days that he was not in possession of the Siting Study and the Fire Protection

Evaluation, for failing to perform a valid search or produce a valid exemption log, and that attorneys' fees and costs be awarded against the City. CP at 7.

On October 19, 2016 West filed a Motion for Order to Show Cause in which he requested the trial court enter an order pursuant to RCW 42.56.550 compelling the City to appear and show cause why it should not be found in violation of the Public Records Act. West's motion was accompanied by a declaration attaching the Siting Study and the Fire Protection Evaluation. CP 12-61. The City responded, requesting the Motion to Show Cause be denied and that the underlying lawsuit be dismissed. The City's response is supported by a declaration containing true and correct copies of the evidence establishing the chronology of the West request, the Carlton request and the News Tribune request. CP at 62-111. Oral argument was held on West's Motion on November 4, 2016 and is contained in the VRP.

On November 2, 2016 after publication of the Siting Report (including the Modeling Records) and of the Fire Protection Evaluation the City communicated with Mr. West as is shown in the (undated) copy of an e-mail he has placed in the record at CP 120-121. The communication confirmed that item No. 1 of his April 13, 2016 request was for the Modeling Records, which had been enjoined from production

in the Carlton case, and that those records were now produced. The communication also provided West with access to the entirety of the Siting Report and the Fire Protection Evaluation Report, but does not suggest that West had previously requested the entirety of the Siting Study and the Fire Protection Evaluation Report, only that the City was aware of his interest in the records requested by the News Tribune. CP 121.

During the November 4, 2016 oral argument of West's motion for the City to show cause why it did not violation the Public Records Act, the trial court found the City had produced all of the records of "threat assessments" Mr. West had originally requested. The court specifically found that there were no records that would be responsive to the requested "internal" "safety or threat assessments;" that the City did not withhold the requested records; that everything else was provided; that West had the opportunity for clarification and that any delay in producing the records West requested was due to the injunctions. VRP at 29-30. The Superior Court orally denied Mr. West's request for an order to show cause and orally granted the City's request to dismiss the underlying public records lawsuit. TR at 30, 31. The December 16, 2016 Order on appeal denied the motion for an order to show cause under RCW 42.56 and dismissed Mr. West's underlying public records act lawsuit against the City.

IV. ARGUMENT

A. Standard of Review

Appellant incorrectly asserts the standard of review is de novo. Br. of Appellant at 11. The more appropriate analysis is for this Court to defer to the trial court's findings of fact including that no records of "internal" threat assessments existed, that the City provided an opportunity for clarification and that the City timely produced the requested documents. VRP at 29-30.

The Superior Court considered this matter on West's motion to "show cause," a procedure under the Public Records Act for judicial review of a public agency action: "[u]pon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1).

Division III of the Court of Appeals recently held in the unpublished but still informative case of *McKee v. the Department of Corrections*, 195

Wn. App. 1046, 2016 Wash. App. LEXIS (1935) (unpublished) that the appropriate standard of review of a show cause order in a public records case is deference to the trial court's findings of fact. The opinion in *McKee* notes a court may completely resolve public records act claims in a show cause hearing, including whether there is a public records act violation and, in the context of a show cause hearing, may dismiss a records act claim based solely on affidavits. *See also* RCW 42.56.550(3), “[t]he court may conduct a hearing based solely on affidavits.”

Earlier case law has held when no live testimony is presented and no witness credibility is weighed, an appellate court reviews both the facts and the law in a public disclosure case de novo. *See, e.g., Zink v. City of Mesa*, 140 Wn. App. 328, 336 (2007). However, *McKee* departs from prior “proclamations that an appeals court reviews de novo orders on show cause based solely on affidavits.” Instead, *McKee* concluded the appellate court should defer to the trial court's findings of fact. Because RCW 42.56.550(3) expressly authorizes a hearing solely based on affidavits, *McKee* reasoned that following the normal summary judgment rule of denying a motion if a question of fact exists renders RCW 42.56.550(3) a nullity, because a court could not resolve a case only on affidavits if a question of fact exists. For RCW 42.56.550(3) to be meaningful, the court concluded that it would “defer to the trial court's findings of fact despite

the lack of an evidentiary hearing and even if a question of fact exists” and would “affirm the trial court because substantial evidence supported the trial court’s finding of facts.”

The logic articulated in *McKee* applies here. The trial court in this case did not consider any live testimony, and had before it only a written record consisting of pleadings and the declarations of Mr. West and the City Attorney. The findings contained in the trial court’s oral rulings are supported by substantial evidence in the written record, which, in turn, support the trial court’s legal conclusion that the City met its burden of proof to establish that no violation of the Public Records Act occurred and that West’s complaint should be dismissed. It is not required for this Court to re-weigh that documentary evidence; instead, this Court need only determine whether the trial court correctly applied the law to the facts to deny Mr. West’s request for an order to show cause and to dismiss the public records lawsuit.

B. The trial Court correctly concluded the City did not violate the Public Records Act.

1. The City did not “silently withhold” records from Mr. West.

Silent withholding occurs when a specifically requested record is not provided by the agency and the requester is not notified of the agency’s position that the record exists but the record is withheld subject to a

recognized exemption to the Public Records Act. In such a situation, the requester is legitimately disadvantaged by a misleading impression that all of the responsive records have been identified and either produced or withheld. *E.g., Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn. 2d 243, 270, 271 (1994) (PAWS II).

As the trial court correctly determined, this case is not “silent withholding.” None of the records Mr. West requested were withheld without citation to an exemption, silently or otherwise. Mr. West asked 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.” By all logical inferences, including Mr. West’s in court statements that he was requesting the same records as Carlton, that request was for the Modeling Records. Those records were not withheld as exempt, they were subject to injunction and could not be produced.

Mr. West also asked for ““internal” safety or threat assessments” related to the LNG project. No such records exist. The City did not “silently withhold” those records; rather, it told Mr. West that no responsive records existed. Mr. West incorrectly asserts that the Siting Report and the Fire Protection Evaluation responsive to the News Tribune request are also records responsive to his request for “internal” safety or threat assessments. The Siting Report and the Fire Protection Evaluation

are not internal records of the City, and West never requested them. Records cannot be withheld, silently or otherwise, when they are not requested.

No exemptions under the Public Disclosure Act were listed in the City's response as no records were withheld as exempt. The concept of silent withholding is simply not applicable here. Mr. West was informed of the City's interpretation of the records subject to his request, and of the reasons records were not produced – either they were subject to a court ordered injunction or, in the instance of safety or threat assessments “internal” to the City, because records did not exist. No exemptions were asserted and no records were withheld.

Moreover, the City informed Mr. West of its understanding that he sought the identical records to those requested by Mr. Carlton, and specifically informed Mr. West it interpreted his request as for the Modeling Records requested by Carlton. Mr. West did not indicate any disagreement with the City's understanding that his April 13, 2016 request for “threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal” was for precise records that were requested by Carlton.

2. The City conducted an adequate search for responsive records.

West's argument that the News Tribune requested the same records as he did is not persuasive. The News Tribune requested different records than West. The Siting Study and the Fire Protection Evaluation were responsive to the News Tribune request but not to the West request for the Modeling Records and for "internal" safety and threat assessments. No evidence supports West's argument that the City's intended production to the News Tribune of different records than requested by West shows the City failed to adequately search for the records West did request.

The adequacy of the agency's search under the Public Records Act is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor. An agency fulfills its obligations under the Act if it can demonstrate beyond a material doubt that its search was reasonably calculated to uncover all relevant documents. The agency must show that it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested". *Neighborhood Alliance of Spokane County v. Spokane County*, 153 Wn. App. 241, 257 (2009). The question of whether the requested documents are found is not determinative of the adequacy of an agency's search. The issue to be resolved is not whether there might

exist any other documents possibly responsive to the request, but rather whether the search for the requested records was adequate. *Id.*

This case is not about the adequacy of the City's search for the records requested by West. The City communicated extensively with Mr. West about what he was asking for, including in the context of the Carlton case to which Mr. West was a party, and the City reasonably concluded (and Mr. West did not disagree) that the request for "threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal" was for the Modeling Records sought by Mr. Carlton and which were subject to injunction. The City also told Mr. West that there were no responsive records to the second part of his request for "internal" safety or threat assessments related to the LNG project.

As the trial court correctly concluded, the City's search for the records of "internal" safety or threat assessments Mr. West actually asked for was adequate, but did not reveal anything that met that description. The trial court specifically found, "there is no internal safety and threat assessment." VRP at 29. When the City searched for the News Tribune's request for "all documents and correspondence submitted to or sent by the city of Tacoma to PSE, including the Tacoma Fire Department, related to safety and security plans for Puget Sound Energy's Liquefied Natural Gas

facility” the City determined the entirety of the Siting Report (inclusive of the Modeling Records) as well as another document entitled Fire Protection Evaluation to be responsive. Neither the Siting Report nor the Fire Protection Evaluation are documents created internally by the City and would not be responsive to West’s request for internal threat assessments, no matter how comprehensively or extensively the City may have searched. They were, however, responsive to the News Tribune’s request for documents or correspondence submitted to or sent by the City to PSE.

The fact that a search for a different set of documents for a different requester revealed records that Mr. West feels should have been identified and provided in response to his request for “internal threat assessments” (a term which had no meaning to the City’s fire department) does not establish that the City’s search in his case was in any way inadequate or deficient.

The trial court specifically and correctly found the City’s search for the records West actually requested to be reasonable and adequate when Judge Cuthbertson stated, “. . . there is no internal safety and threat assessment” . . . “everything else that was requested has been provided.” VRP at 30. West’s argument to the contrary should be rejected.

Moreover, the City's search in response to Mr. West's request was completely reasonable in light of the extensive interaction with Mr. West surrounding his request. He was well aware of how the City interpreted his request, he participated as a party in one of the injunction proceedings and attended hearings of the other, and he did nothing to clarify or inform the City that he disagreed with its stated approach to his request or that he ever wanted to amend his initial request or make a new request to add the records responsive to the News Tribune's request. While the Public Records Act does impose upon the City the duty to adequately search for records in response to a request, it does not impose upon the City a duty to search for, identify or produce records that were not asked for.

The trial court specifically found the City's interaction with West included opportunities for West to clarify, when Judge Cuthbertson stated, "the City has responded appropriately and included an opportunity for clarification. . . ." VRP at 30. The City closed West's request and informed him again that it interpreted his request as for the Modeling Records that were enjoined, and that there were no responsive records meeting the description of "internal" threat assessments. The City's communication specifically invited West to inform the City of any disagreement or issue with the records provided or the responses given.

West said nothing. If West wanted the records the News Tribune asked for he had a very simple remedy – contact the City and make a new request.

Division I of the Court of Appeals considered an identical situation in *Canha v. Department of Corrections*, 193 Wn. App. 1036; 2016 Wash. App. LEXIS 836 (unpublished). The Department of Corrections gave Canha its interpretation of his request and asked him to respond if its interpretation was inaccurate. Canha did not indicate the Department’s summary of his request was inadequate but later argued the Department’s response was deficient. The Court found Canha failed to establish that the Department did not identify and produce all of the records he sought in his request. The same is true here. The City identified all of the records it interpreted West as asking for and informed him the Modeling Records were enjoined and that there were no records of “internal” threat assessments. If West thought otherwise, either when the request was closed or when he learned of the News Tribune’s request, he should have informed the City. He cannot now argue that the City’s response to his request was inadequate.

3. The City did not violate the Public Records Act when it produced records to West beyond those he requested.

Once the Carlton and News Tribune injunction cases were resolved the City published the entire universe of records requested by Carlton and West and the News Tribune on its website for anyone to view

without the necessity of making a public records request. At the same time the City specifically emailed Mr. West with a link to all of those records.

West now argues that the City's recognition of the broad interest in the records related to the LNG plant and efforts to disseminate those records to the public and to West shows the City "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 produce in response to plaintiff West's request." (Brief of Appellant at 20).

In other words, he is arguing that the City's action when the injunctions were lifted to make all the records available, even records West did not specifically request, means that the City failed to adequately look for and silently withheld the records he actually did request. This logic is circular and was appropriately rejected by the trial court as not supported by the facts and should be similarly rejected by this Court. The trial court found that the entire universe of records actually requested by West were provided and that any other records he may have been interested in but did not request are "otherwise contained in" the records

requested by the News Tribune. VRP at 30. This conclusion is supported by substantial evidence and should be upheld. West did not request the same records the News Tribune requested. The City's courtesy and diligence in providing West with records beyond his request is not a violation of the Public Records Act. To the contrary it is, as the trial court concluded, "a good result that helps the citizens and the City." VRP at 30.

V. CONCLUSION

The trial court's findings that the City did not violate the Public Records Act are supported by substantial evidence, are consistent with applicable law and should be upheld by this Court. Appellant's lawsuit against the City was properly dismissed and he is not entitled to penalties, fees or costs or any kind.

Respectfully submitted this 27th day of December, 2017.

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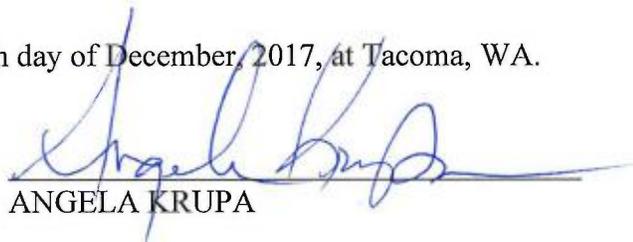
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EXECUTED this 27th day of December, 2017, at Tacoma, WA.


ANGELA KRUPA

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