

FILED
Court of Appeals
Division II
State of Washington
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No. 51498-2-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

FREEDOM FOUNDATION,
Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent.

**APPELLANT FREEDOM FOUNDATION'S
REPLY BRIEF**

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I ARGUMENT

A. A General Statement That An Agency Was Busy Does Not Meet the PRA's Requirement That Agencies Provide Reasonable Estimates of the Time Needed to Gather and Disclose Public Records.

Respondent, Department of Social and Health Services (“Respondent”) defends their violation of the Public Records Act’s (“PRA”) requirement that agencies provide a reasonable time estimate by constructing a straw man. The Foundation never asserted that agencies must always provide records within 5 days. The Foundation never asserted that the agency was wrong about its need to assemble records. The Foundation never asserted that notifying third parties was a mistake. However, the Appellant does assert that their estimate for production was unreasonable because a) it was not based on any evaluation of the individual request and b) the superior treatment of the similarly situated requester proves that the Foundation’s treatment was not reasonable.

Respondent has repeatedly emphasized how busy its public records officers were at the time of the Appellant’s request. However, Respondent has not shown that the Foundation’s request was particularly onerous. The Attorney General’s Office has created a model rule that is informative here:

To provide a “reasonable” estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates for every requestor, regardless of the nature of the request, are rarely “reasonable” because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

Wash. Admin. Code 44-14-04003. Here, Respondent has given a general response related to workload, not a response tailored to the request.

Respondent is correct that there has never been a case in which an agency’s estimate was found to be unreasonable. However, it is also true that there has never been a case in which identical requests were being processed at the same time. This factual scenario provides the court with a standard by which to judge the agency’s response to each request. This factual distinction makes the cases cited by Respondent irrelevant. The agency showed this court what reasonable, transparency-focused behavior looked like in the way it responded to the SEIU Training Partnership’s request, *See* Appellant’s Opening Brief Generally. The Court need not try to investigate the innerworkings of an agency and formulate from whole cloth a gold standard to which the agency should adhere. Respondent showed this court what it could do for requesters if it chose.

As to penalties, the Foundation was denied access to records to which it was entitled in violation of the PRA. The unreasonable estimate provided by Respondent resulted in a 32-day delay in disclosure. On June 9, 2017 there was no litigation-related excuse for withholding the records responsive to the Foundation’s request.

However, Respondent refused to disclose the records, citing their previous time estimate. It is clear from the fact that there was no change to the records produced to SEIU Training Partnership and Appellant, CP. 299, that no further work needed to be done to disclose the records. It was a simple matter of hiding behind their original, unreasonable estimate. This behavior was sanctioned by the Supreme Court in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor and Indus.*, 185 Wn.2d 270, 289 (2016) and should be sanctioned here. Additionally, the Court in *Wade's* awarded per-day penalties for each delay, as this court should here. *Id.*

B. The Agency Does Not Understand Its Duty to Requesters.

There's no reason to reiterate all the ways in which Respondent did not meet its duty to provide full and timely assistance to requesters. Clearly, the Respondent still does not understand that the PRA is a clear mandate that the servants of the public prioritize disclosure and err in favor of disclosure at all turns. As Appellant stated in its Opening Brief, The TP is not an affected party and even if they were, there is no right to advance disclosure to affected parties.

Finally, it is shocking to see Respondent say that an opponent of disclosure can stop a pending disclosure just by shooting respondent an email saying that the opponent intends to ask a court to intervene. Respondent's Opening Brief at 20. Only a court has the power to prevent an agency from disclosing records. Notice of intent

to file an appeal does not supersede the PRA's mandate to disclose records in the timeliest manner possible.

C. This Case Was Properly Filed

Judge Skinder found that all questions were properly before him, CP 492, and Respondent did not challenge this finding. Therefore, it is not before the Court of Appeals. Additionally, the final agency action requirement is only necessary when challenging an agency's final action. RCW 42.56.520. Here, the foundation initially challenged the way in which the agency responded to its request, as the PRA allows. RCW 42.56.550. The further violations alleged under RCW 42.56.520 occurred while litigation under §550 was already pending and, as Judge Skinder noted, were properly integrated into the case.

Additionally, the rule advocated by the agency would lead to absurd results. Respondent's analysis holds that whenever an agency ekes out a few records at a time and more records may be forthcoming, its actions are not reviewable by a court. An agency's failure to provide requested records in a timely manner would, under the logic of Respondent's argument, protect that agency from judicial review of their timeliness. It creates perverse incentives to delay disclosure. Additionally, a delay in disclosure that eventually ends in disclosure is still actionable. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor and Indus.*, 185 Wn.2d 270, 289 (2016).

II CONCLUSION

For the foregoing reasons, the Court should reverse the lower court and find that DSHS violated multiple provisions of the PRA. DSHS gave an unreasonable estimate by making an estimate that was not based on available facts and proved to be drastically longer than necessary. DSHS unlawfully distinguished between requesters, because the Training Partnership was a requester and not an affected party. Even if the Training Partnership was an affected party, the PRA makes clear that DSHS bore a duty only to the requester, not an affected party. DSHS did not provide the fullest and timeliest assistance to the Foundation, contrary to RCW 42.56.100. Finally, DSHS's many violations of the PRA resulted in a delayed production of records in violation of RCW 42.56.520 and RCW 42.56.550(4).

RESPECTFULLY SUBMITTED on August 31, 2018.



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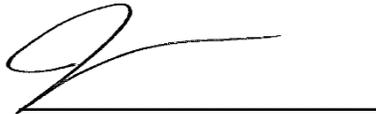
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I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State of Washington that on August 31, 2018, I caused the foregoing document to be filed with the clerk, and caused a true and correct copy of the same to be delivered via e-mail pursuant to an e-service agreement to the following:

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FREEDOM FOUNDATION

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