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STATE OF WASHINGTON
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No. 87417-4

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE DEPARTMENT,

Respondent.

**PETITIONER SARGENT'S MOTION TO MODIFY THE NOTATION
RULING ON RESPONDENT'S MOTION TO STRIKE PORTIONS
OF PETITIONER'S SUPPLEMENTAL BRIEF**

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I. IDENTITY OF MOVING PARTY

Petitioner Evan Sargent moves for the relief below under RAP 17.7.

II. STATEMENT OF RELIEF SOUGHT

Sargent seeks modification of the Deputy Clerk's December 18, 2012 notation ruling, which summarily granted Respondent Seattle Police Department's (SPD) motion to strike portions of Sargent's supplemental brief. The Court should modify the notation ruling to deny the relief sought by SPD, because the ruling conflicts with the scope of the Court's September 5, 2012 Order. The Order granted Sargent's Petition for Discretionary Review of three designated orders of the Court of Appeals. The notation ruling also conflicts with the de novo standard of review for Public Records Act (PRA) actions under RCW 42.56.550(3), which requires consideration of the entire record before the trial court to determine whether an agency has satisfied its burden to prove the applicability of the exemption it asserted under RCW 42.56.240(1) to withhold presumptively disclosable public records.

In the alternative, the Court should modify the notation ruling to articulate the stricken portions of the grounds previously

accepted for discretionary review in order to define the scope of review for the January 15, 2013 oral argument.

III. FACTS RELEVANT TO MOTION

In his Petition for Discretionary Review, Sargent expressly requested the Supreme Court review three separate Court of Appeals orders and attached those orders as appendices: (1) "The September 19, 2011 published opinion in *Sargent v. Seattle Police Department*"; (2) "the April 17, 2012 order denying Sargent's RAP 12.4 motion for reconsideration"; and (3) "the April 17, 2012 order denying Sargent's two RAP 9.11 motions supporting to the motion for reconsideration." See Petition for Review at 1, Appendices A-C. Sargent assigned error to these orders based upon multiple issues presented in this PRA enforcement action. *Id.* Sargent's issue statements cited controlling Supreme Court PRA decisions by name and statutory provisions. *Id.*

SPD's June 15, 2012 answer to Sargent's Petition for Discretionary Review neither objected to the Court's consideration of the RAP 9.11 issues contained in Sargent's petition nor argued that Sargent had referenced improper matters outside the record. SPD's answer also did not claim Sargent "failed to preserve" issues that now should be stricken. Instead, SPD's answer complained

that Sargent's arguments for reconsideration had "shifted" regarding the existing trial court record. See Answer to Petition at 6. This argument, however, ignored the fact that after the conclusion of the trial court proceedings, the Supreme Court issued the controlling decisions in *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) (decided after the Court of Appeals terminated review, but before Sargent filed his motion for reconsideration), and *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), which fortified Sargent's existing arguments that SPD violated the PRA by "willfully and variously refusing to provide, delaying in providing, redacting, and ignoring Mr. Sargent's requests, without lawful justification." CP 2; 9-11 (Complaint).

On September 5, 2012, the Supreme Court granted discretionary review of Sargent's Petition. See Order of Supreme Court of Washington, Department I. The Court's Order did not exclude any of the three designated Court of Appeals orders from review or narrow the scope of issues presented by Sargent's Petition for Discretionary Review.

On November 5, 2012, the parties filed supplemental briefs addressing these issues. Both parties referenced Sargent's RAP

9.11 motions and the related materials Sargent presented to supplement the record. SPD also attached two of Sargent's pleadings before the Court of Appeals that referenced the RAP 9.11 motions and materials: Sargent's RAP 12.4 motion for reconsideration, and a declaration by Sargent's counsel in support of his second RAP 9.11 motion. See SPD's Supplemental Brief, App. A-B.

On November 21, 2012, despite this Court having accepted review, SPD filed a Motion to Strike Portions of Petitioner's Supplemental Brief, which argued for the first time that the Court should not consider RAP 9.11 issues arising from the order by the Court of Appeals denying Sargent's two RAP 9.11 motions. SPD also argued for the first time that Sargent's supplemental brief contained issues that were not raised in the petition, including SPD's failure to produce a log of withheld records, Sargent's unanswered April 21, 2010 records request letter, Sargent's unanswered May 14, 2010 records request voicemail, and the fact that SPD's delayed production of incomplete records violated the PRA's promptness requirement.

Sargent's answer to SPD's motion to strike demonstrated that each SPD argument was inconsistent with prior briefing and

the record. See Sargent's Answer at 3-8, 11-13. Regarding preservation of the RAP 9.11 issues, Sargent demonstrated that, in addition to expressly designating for review the order of the Court of Appeals denying his two RAP 9.11 motions, two of the issues for review in his supplemental brief were directly related to that challenged order. *Id.* at 3 (citing Issues 3 and 6). Sargent also noted that SPD relied on its belated records productions, which it made after the trial court proceedings ended and again after appellate review terminated, multiple times in its own supplemental brief. *Id.* at 5-7.

Nevertheless, on December 18, 2012, the Deputy Clerk issued a notation ruling granting without comment SPD's Motion to Strike Portions of Petitioner's Supplemental Brief. SPD did not submit a proposed order with its motion, and no order by the Supreme Court accompanied the ruling. While SPD's motion specified four references in Sargent's supplemental brief citing issues raised by his two RAP 9.11 motions (see Motion at 3), SPD made imprecise secondary arguments to strike issues it incorrectly claimed Sargent did not preserve for appeal (*Id.* at 5-8).

IV. GROUNDS FOR RELIEF AND ARGUMENT

Under RAP 17.7, a party aggrieved by a clerk's ruling may move to modify that ruling within 30 days. RAP 17.7. "A motion to the Justices in the Supreme Court will be decided by a panel of five Justices unless the court directs a hearing by the court en banc." *Id.*; see *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983) (reviewing order by Chief Justice under RAP 17.7).

As shown by Sargent's Petition for Review, the Order granting review (which accepted all issues presented by Sargent's Petition), and Sargent's Answer to the motion to strike, the Court should modify the notation ruling to deny the relief sought by SPD's motion, because it conflicts with the scope of the Court's September 5, 2012 Order granting discretionary review of the three Court of Appeals orders. See Petition for Review at 1-3 (and citations to the record and briefing contained therein), App. A- C; Order of Supreme Court of Washington, Sept. 5, 2012 ("It Is Ordered: That the Petition for review is granted"); Sargent's Answer to SPD's Motion to Strike at 3-5, 12-13. Sargent properly designated and attached the three orders of the Court of Appeals for which he sought review, including the order denying his two

RAP 9.11 motions. See Petition for Review at 1, Appendices A-C.

The issues in his petition arise directly from the three orders.

Sargent's supplemental brief addressed those issues squarely, as did SPD's brief, which attached Sargent's RAP 9.11 declaration of counsel and motion for reconsideration.¹ The notation ruling should be modified both to accept review of these issues consistent with the Order granting discretionary review and to avoid prolonged PRA litigation exemplified by cases such as *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010).

The ruling further should be modified because it conflicts with the de novo standard of review for PRA actions under RCW 42.56.550(3), which requires consideration of the entire record, including the briefing before the trial court. The appellate court "stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (citing *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989)).

¹ The notation ruling poses a further problem because it is unclear whether SPD's appendices and references to Sargent's RAP 9.11 materials are now stricken as well.

Contrary to the assertions in SPD's motion to strike, Sargent raised and preserved the issues related to SPD's PRA violations. The issues were supported by the following factual explanations: SPD ignored both Sargent's April 21, 2010 letter request and May 14, 2010 voice message request for records; SPD delayed production of incomplete records, which violated the PRA's promptness requirement; and SPD failed to produce a log of withheld records. Sargent plainly argued these issues before the Court of Appeals in his amended opening brief, his reply, and his motion for reconsideration after the order terminating review.

These are not "new issues," as mischaracterized by SPD's motion to strike. Sargent's Complaint cited SPD's failure to answer his April 21, 2010 letter and May 14, 2010 voice message and incorporated those allegations by reference as a basis for his PRA cause of action. CP 9. Likewise, Sargent's simultaneously filed show cause motion asserted: "Abandoning its obligations under the PRA, SPD has not responded to Sargent's last two communiques. The underlying information request has been outstanding for nearly one year and the SPD has withheld and redacted information without sufficient explanation." CP 55. These allegations, which formed the basis of Sargent's arguments on

appeal in support of the trial court's findings that SPD violated the PRA, were demonstrably preserved.

Likewise, Sargent preserved his arguments that SPD's delayed production of incomplete and redacted records violated the PRA. The Complaint was explicit: "SPD violated the PRA by delaying without lawful justification, and failing to produce 'within a reasonable amount of time' within the meaning of RCW 42.56.550(4)" the records he sought. CP 10. His show cause motion also alleged SPD's violation of the PRA for failure to promptly produce records: "The PRA requires an agency to promptly produce requested public records. SPD refused to do so." CP 54. These allegations preserved Sargent's promptness arguments under RCW 42.56.080, 42.56.100 and 42.56.520, as referenced in his supplemental brief. SPD cannot draw a meaningful distinction because the PRA repeatedly mandates prompt agency action in responding to a records request, whether that means prompt confirmation of the request, or prompt production of the records.

Lastly, SPD was on notice that Sargent alleged a PRA violation for failure to provide a production/exemption log when Sargent alleged in the trial court that SPD refused to respond to

inquiries about hundreds of unidentified records SPD was withholding before Sargent was compelled to file a PRA lawsuit.

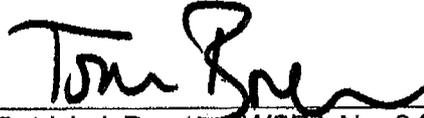
Under these circumstances, the statutory standard of de novo review under RCW 42.56.550(3) requires modification of the notation ruling under RAP 17.7 to deny SPD's motion to strike regarding these properly preserved issues which are supported by the record.

In the alternative, Sargent seeks clarification of the notation ruling to articulate the stricken portions of the grounds previously accepted for discretionary review in order to define the scope of review for the January 15, 2013 oral argument.

V. CONCLUSION

The December 18, 2012 notation ruling granting SPD's motion to strike conflicts with the Court's order granting Sargent's Petition for Discretionary Review and the statutory de novo standard of review under RCW 42.56.550(3). For these reasons, Sargent respectfully requests a modification of the notation ruling under RAP 17.7 in order to deny the relief sought by SPD's motion.

DATED this 27th day of December, 2012.

A handwritten signature in black ink, appearing to read "Tom Brennan". The signature is written in a cursive style with a horizontal line underneath it.

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Subject: 87417-4 - Evan Sargent v. Seattle Police Department

Evan Sargent v. Seattle Police Department
Case number 87417-4

Please see attached Petitioner Sargent's Motion to Modify the Notation Ruling on Respondent's Motion to Strike Portions of Petitioner's Supplemental Brief.

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