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No. 66522-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PERCY LEVY,
Appellant,

Vs.

SNOHOMISH COUNTY,
Respondent.

2011 MAR 17 10:10:17
COURT OF APPEALS
STATE OF WASHINGTON

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Snohomish County violated the Public Disclosure Act by failing to timely provide requested records.
2. The trial court abused its discretion by not penalizing Snohomish County under the Public Disclosure Act.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The request for clarification from Snohomish County was unnecessary because the requested records were clearly identifiable. (Error 1)
2. The County, whether intentional or not, violated the Public Records Act (PRA) by failing to timely provide the records – which had been located and purchased. (Error 1)
3. The trial court determined that the County had acted in good faith. This is in error because good faith does not shield an agency from a penalty under the PRA. (Error 2)

III. STATEMENT OF THE CASE

The material facts are not in dispute. On April 19, 2010, Levy submitted to Snohomish County (“County”) a request for records. CP 66. The request was submitted under the Public Records Act (“PRA”), chapter 42.56 RCW.

The request sought the following records:

While pending trial back in 2002 (#02-1-02453-4) my attorney provided me with a statement made by my

co-defendant Breena Johnson (Martin). The statement was made to Everett detectives.

I want a copy of that statement.

CP 66.

The Public Records Specialist, Dave Wold ("Wold"), responded by letter on April 20, 2010, acknowledging receipt of the request. CP 66. Moreover, Wold implied that he knew the exact records Levy was requesting, but was not sending them at that time because he recalled previously providing them a year before. CP 66-67.

On May 6, 2010, Levy sent a letter voicing his frustration with the delay and stating emphatically that he had never been provided the records in question. Also, because Wold had implied that *other* statements may exist, Levy added in his letter that he would like *any* statements made by Ms. Johnson (Martin). CP 67.

On May 14, 2010, Wold sent Levy a letter stating that Levy would be provided the records after paying \$8.07 (for 34 pages). Wold stated that not only had he found the 22 page original statement of Ms. Johnson (Martin), but he had also located a 2 page statement made by her after taking a polygraph. CP 68.

Levy immediately provided Wold with a money order for \$8.07 to cover the cost of the 24 pages of records. CP 68.

On May 7, 2010, Wold mailed 22 pages of documents to Levy. CP 69.

On June 16, 2010, Levy's wife sent Wold an e-mail asking why the 24 pages had been paid for, yet only 22 pages had been sent. CP 69. After several e-mails between Wold and Levy's wife, Wold eventually conceded that he made an error and would send the two (2) pages he failed to send previously. CP 69.

Levy filed the present action in Snohomish County Superior Court and the County ultimately filed a motion for summary judgment. CP 46-64. The Honorable Judge Ronald Castleberry decided that the County's response to Levy's PRA request had been reasonable. CP 10-11.

IV. ARGUMENT

A. Standard of Review

Court of Appeal review decisions under the Public Records Act (PRA) de novo. RCW 42.56.550(3); *Cowles Publ'g Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 505, 45 P.3d 620 (2002). Courts of Appeal are in the same position as trial courts when, as here, the record is based on affidavits and documentary evidence. An appellate court in such a position can decide both issues of fact and law. *Ames v. City of Fircrest*, 71 Wn. App. 284, 292-93, 857 P.2d 1083 (1993).

B. SNOHOMISH COUNTY VIOLATED THE PUBLIC RECORDS ACT BY FAILING TO TIMELY PROVIDE REQUESTED RECORDS

Under the prompt response provision of the PRA, an agency must respond to a request for public records within 5 business days of receipt by either (1) providing the records; (2) acknowledging that the agency has received the request and providing a reasonable amount of the time the agency will require to respond to the request; or (3) denying the request. RCW 42.56.520.

An agency may seek clarification of an “unclear” request. RCW 42.56.520; WAC 44-14-04003. However, an agency can only seek a clarification when the request is objectively “unclear.” Seeking clarification of an objectively clear request delays access to public records. WAC 44-14-04003.

1. Clarifying the original request was unnecessary.

On April 20, 2010, Wold implied that he knew the exact record being requested. CP 66-67. In fact, he stated that he believed the records “were provided to [Levy] a year ago.” CP 66-67. Wold’s only question was to ask if Levy wanted “another copy.” *Id.*

Under the PRA, at the five day mark the agency is required to either provide the records or give a reason why they are not able to do so. RCW 42.56.520. With this fact in mind, the County is bound by the reasons they gave in the April 20 letter (the five day mark), and it is undisputed that Wold’s only issue at that time was the

question of whether Levy wanted a second copy of what was believed to have already been provided. Even under a severely strained interpretation of Wold's original letter would a reasonable person believe that Wold did not understand the scope of the request.

Moreover, Wold goes so far (in the April 20 letter) as to say that if Levy is "seeking another interview by Everett Police...our file does not contain that record." Such language implies that a search has been done and no further records exist.

Therefore, the threshold issue seems to be the question of if the PRA intended for agencies to go beyond the five day mark in order to clarify if the same documents had been provided in the past?

The answer is no. An agency can only seek clarification of a request that is *objectively unclear*. WAC 44-14-04003. In this case, a finding that Levy's original request was objectively unclear would involve *assuming* Levy made a *mistake* by requesting the same record for a second time.

Another argument in the trial court was that it was a second letter from Levy that brought about the need for clarification (Levy's follow up letter). CP 67. The problem with such argument is that it stretches the PRA and the facts of this case. It appears to be a diversion away from the real issue of if Wold had the right to delay sending the records under the mistaken belief that he had previously provided them.

The County would like this Court to believe clarification was needed because two pages were eventually found and provided to Levy. However, the record does not show (at the five day mark) the County knew or relied on anything other than the question of if the records had been previously provided.

Wold's April 20 letter should have simply stated the number of pages responsive and the cost to obtain copies, **along with a disclaimer telling Levy that he might possibly receive duplicative records from a previous request.** If such a process had been followed, Levy would have received his requested records much earlier, which would follow the "prompt response" language contained in the PRA.

To add insult to injury, prior to the summary judgment hearing Levy provided a copy of the request from a year prior, which shows that Wold was mistaken as to Levy receiving the records in the past.¹ CP 25, 31.

2. The County, whether intentional or not, violated the PRA when they failed to timely mail all of the responsive documents.

The substance of this argument can be summed up from the County's argument during the summary judgment motion in the trial court. The County stated they "concede[]" the Public Records

¹ If 16 pages were provided in the request from a year prior, the instant request which provided 24 pages could not have been the same.

Specialist made a mistake, [but] it was incidental and caused little delay.” CP 59.

On its face, the County’s argument is without merit. The term “mistake” is synonymous with “violation.” The County argued that the violation be ignored because it was “reasonable under the circumstances.” *Id.* However, the County assumes that penalties are discretionary instead of mandatory, which is not the case. Once a mistake has been made by an agency, the penalty is mandatory. *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002); Public Records Act Deskbook at 17.5(2)(a).

An alternative argument from the County was that Levy did not request the two pages in question. This argument is without merit. On May 14, 2010, the County described the content of 24 pages of records and the cost to obtain them. CP 68. Levy paid the cost for these records. CP 68. It would lead to an absurd result to find that the County was not required by the PRA to provide them.

If the County would like, the additional two pages could be deemed a second request – thereby creating a second violation. After all, the five day letter explicitly stated that no further records existed, yet it was later that Wold claimed he discovered an additional two pages.

3. The trial court erred by not penalizing the County.

As stated earlier, penalties under the PRA are not discretionary but are mandatory. It is an undisputed fact in this case that the

County erred by not providing the records to Levy in the most timely fashion possible.²

It would be easy for most courts to find that two (2) months is relatively short and innocuous. However, such findings create superfluous sections of the PRA and are not consistent with the rule of law.

It should also be noted that the County's withholding of the records denied Levy the use of the records to support his position in a separate matter filed against the County. CP 27-28. Thereby, eliminating any argument as to the fifty-eight (58) days being an innocuous period of time.

V. REQUEST FOR COST/ ATTORNEY FEES

Levy moves this court to grant him all costs incurred as a result of this appeal, in accordance with RAP 14.3(a) and RAP 18.1. This falls within the PRA's allowance of "all cost" to the prevailing party. RCW 42.56.550(4).

Further, Levy seeks a statutory attorney fee pursuant to RCW 4.84.080(2).

² The request was sent on April 19, 2010, and the records were provided to Levy on June 17, 2010. From the date of Levy's request until the date he received them represents 58 days.

VI. CONCLUSION

Levy respectfully requests that this court reverse the decision of the trial court and remand back for determination of penalties using the factors set forth in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

Dated this 10 day of March, 2011.



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PROOF OF SERVICE FORM

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PART 1: **Delivery by U.S. Mail:** Proof of Service by Mail.

I, DIANE LEVY, declare that I am over the age of eighteen years and not a party to the action. My address is 4935 CLINTON AVENUE, RICHMOND, CA. 94805.

On, MARCH 15, 2010, I served the APPELLANT'S OPENING BRIEF by placing a true copy in the United States mail enclosed in a sealed envelope with postage fully prepaid, addressed as follows:

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PART 2: I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on MARCH 15, 2010, at RICHMOND, California.


Signature

DIANE LEVY
Print Name