

71052-4

71052-4

COURT OF APPEALS
STATE OF WASHINGTON
JAN 19 11 3: 58

NO. 71052-4

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

CITY OF MARYSVILLE,

Appellant,

v.

CEDAR GROVE COMPOSTING, INC.,

Respondent.

BRIEF OF AMICUS

WASHINGTON COALITION FOR OPEN GOVERNMENTS

Judith A. Endejan, WSBA #11016
GARVEY SCHUBERT BARER

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

Table of Contents

	Page
I. IDENTITY AND INTEREST OF AMICUS.....	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT	2
A. Cedar Grove Had Standing to Sue for a PRA Violation Even if the Requests at Issue Were Submitted by an Agent.....	2
B. The City Violated the PRA by Creating a Scheme to Circumvent the Creation of City Records that Would Have to be Produced	5
1. Wrongful Invocation of Attorney-Client Privilege	5
2. The City’s Retention of an Expert to Do its Work for the Purpose of Avoiding its Public Records Act Obligations Violates the Spirit and the Law Behind the PRA.....	7

Table of Authorities

Page

Cases

Burt v. Dep't of Corrections, 168 Wn.2d 828, 231
P.3d 191 (2010)..... 3, 4

*Concerned Ratepayers Ass'n v. Public Utility
District No. 1 of Clark County, Wash.*, 138
Wn.2d 950, 983 P.2d 635 (1999)..... 9

Hangartner v. City of Seattle, 151 Wn.2d 439, 90
P.3d 26 (2004)..... 6

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d
246 (1978)..... 4

Kleven v. City of Des Moines, 11 Wn. App. 284, 44
P. 3d 887 (2002)..... 2, 3

Statutes

RCW 42.56 passim

RCW 5.60.060(2)(a) 6

I. IDENTITY AND INTEREST OF AMICUS

WCOG is an independent, nonpartisan organization dedicated to promoting the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to foster open government processes, supervised by an informed citizenry, which is the cornerstone of democracy. WCOG's interest in this case stems from the public's strong interest in timely access to accurate information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. WCOG and its members believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent manner. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA"), is an essential tool of transparency that should be protected and encouraged. WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court. WCOG has a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the Order on Cross Motions for Summary Judgment of July 2, 2013 and Order Granting Plaintiff's Motion for Summary Judgment Regarding Penalties, of September 9, 2013 as revised on October 18, 2013.

III. ARGUMENT

A. Cedar Grove Had Standing to Sue for a PRA Violation Even if the Requests at Issue Were Submitted by an Agent.

The City of Marysville ("City") contends that Cedar Grove Composting, Inc. ("Cedar Grove") has no standing to sue under RCW 42.56.550 because its agent submitted the underlying requests without disclosing the identity of Cedar Grove. This position is wrong for several reasons. First, this procedural requirement is not present in RCW 42.56.550, which allows "any person having been denied an opportunity to inspect or copy a public record" to sue in superior court. It does not state that only the named requestor can sue.

This court specifically rejected the City's position in *Kleven v. City of Des Moines*, 11 Wn. App. 284, 291, 44 P. 3d 887 (2002). There an attorney submitted several PRA requests on behalf of his client Mr. Kleven. Contrary to the City's reading of this case none of the requests disclosed the identity of the client. It was disclosed when Mr. Kleven sued for PRA violations. This court said "The doctrine of

standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit. The record amply supports Klevens personal stake here.” *Id.* at 290.

This Court then refused to read the PRA litigation statute narrowly and ruled

We will not read into a statute language that is not there. Accordingly, we will not read into the act a requirement that precludes a client from obtaining public records through counsel. Likewise, we will not read into the act a requirement that counsel must identify the fact of representation or the name of the client when making a request for public records on behalf of a client.

Id. at 291.

The City presents no reason to reverse this holding. Even though Chris Cappel was not an attorney, she was an agent of Cedar Grove, just like an attorney, who can act on his client’s behalf.

The City twists *Burt v. Dep’t of Corrections*, 168 Wn.2d 828, 835, 231 P.3d 191 (2010) to support its view. However, *Burt* cannot be read as the City suggests. In *Burt* the court said that the requester was a necessary party in an action to enjoin release of the records requested, because the requester has a stake in the outcome of the case that cannot be protected without the requester’s participation. *Burt* does not stand for the proposition that a RCW 42.56.550 suit must be dismissed if the named requester is not the plaintiff. To so hold would contradict the Court’s

reasoning that “The stated purpose of the PRA is to protect the public’s interest in being able to obtain public records. Without an advocate for release of the requested records, this purpose can be frustrated.” *Burt v. Dep’t of Corrections*, 168 Wn.2d 828, 835, 231 P.3d 191 (2010).

Burt means that there must be an advocate, with a stake in the outcome, involved in PRA litigation that deals with the release of records to the public. That advocate here is Cedar Grove which is in a truly adversarial relationship with the agency and with a stake in the outcome in obtaining records relating to the City’s efforts to de-rail Cedar Grove’s operations. Cedar Grove clearly can, and has, vindicated the public’s right to obtain records that disclose the conduct of government.

Like in *Kleven*, this Court should interpret RCW 42.56.550 liberally, in light of the PRA’s “strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The trial court rejected the City’s hyper-technical argument and found properly that Cedar Grove had standing to sue.

Second, the City’s position means that a requester would have to disclose the identity of everyone interested in the records requested or no recourse would be possible under RCW 42.56.550 for interested, but unnamed requesters. The City cannot do that under RCW 42.56.080 (“Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose

of the request”). Many times PRA requests are submitted by attorneys, as in *Kleven*, or others with undisclosed clients for sound reasons (i.e., to obtain collateral information about an agency to prepare a bid response). In this case, given their adversarial relationship, disclosure of Cedar Grove’s identity could certainly impact the response from the City so it had a sound reason to not disclose its identity in the actual PRA requests.

Third, and most important, the City clearly knew that the records it would be producing to Ms. Cappel were intended for Cedar Grove. Finding of Fact 11 in the Order Granting Plaintiff’s Motion for Summary Judgment Regarding Penalties found that the City was aware of Cedar Grove’s requests. The City’s briefs do not discuss this fact or point to any reason why the PRA’s policy would be furthered by adoption of its restrictive view on standing. As a matter of policy WCOG favors a broad PRA interpretation that promotes disclosure and enhances government transparency. The City’s position is not well taken, given this policy, and the facts as found by the trial court.

B. The City Violated the PRA by Creating a Scheme to Circumvent the Creation of City Records that Would Have to be Produced.

1. Wrongful Invocation of Attorney-Client Privilege.

In the Order of Cross Motions for Summary Judgment the trial court found that the City improperly withheld records under the attorney-

client exemption,¹ finding that those records were not prepared or used for the purpose of seeking or receiving legal advice. They were routed through the City's attorney as part of the larger scheme to shield the City's action with Strategies 360.

In recognizing the attorney-client exemption in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 454, 90 P.3d 26 (2004) the Supreme Court warned:

[s]hould an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith. A finding of bad faith could cost the agency dearly since a requesting party is "entitled" to an award of between \$5 and \$100 for each day that it was wrongfully denied the 'right to inspect or copy [the requested] public record.'

WCOG views the City's actions as validation of its concerns that the "new" attorney-client exemption from *Hangartner* would be misapplied to the public's detriment to shield public records from disclosure. Agencies must apply the attorney-client privilege narrowly. *Id.* Instead, the City asserted the privilege as part of its larger plan to insulate its conduct from public view. The penalties assessed due to this conduct are

¹ This exemption arises from the attorney-client privilege in RCW 5.60.060(2)(a) incorporated into the PRA through the "other statutes" provision of RCW 42.56.070(1).

fully warranted and agencies should be warned that improperly claiming the privilege will lead to stiff consequences.

2. *The City's Retention of an Expert to Do its Work for the Purpose of Avoiding its Public Records Act Obligations Violates the Spirit and the Law Behind the PRA.*

According to the Trial Court's Findings of Fact the City carefully orchestrated a scheme to hide its true conduct by hiring an agent to act in its stead. The City, no doubt, congratulated itself on its brilliant plan, which it thought would insulate its agent's records from public disclosure. The trial court fully reviewed the pleadings and record and properly concluded to the contrary.

This case again highlights the significant concern of WCOG that public agencies will manipulate the language of the PRA, and the cases that construe it, to find a "technical" way to avoid public disclosure of records that might embarrass or inconvenience them. This contradicts the PRA's recognition that the "free and open examination is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3)

In this case the City claims that the records of Strategies 360 are not disclosable public records because they never came into the City's physical possession. This argument is not well taken because the trial court found that the City directed Strategies 360 to not send the City records for the very purpose of insulating them from the reach of Cedar

Grove's PRA requests, which would give the City "plausible deniability."
FOF 10-13.

The City's briefs argue that the sky will fall if the trial court's rulings are upheld because virtually all records of government contractors will become public records even if the records were never sent to, or used by, the government (App. Brief, p. 45). Such a sweeping result is unlikely if the court rules based upon the specific facts in this case. Where the evidence shows that a public agency hired a third party to perform specific tasks as its "employee"², and those tasks are directed by the City to further the City's goals, records relating to the performance of those tasks are disclosable under the PRA. This has to be the case in this situation where the public agency set up this arrangement for the purpose of avoiding PRA obligations.³ The City directed Strategies through phone calls and told it to not send emails to avoid creating public records. Thus, the City could duck any PRA responsibility claiming "the documents don't belong to us" – even though the City paid for them and they were used for an alleged City purpose. No doubt the City could have asked to see the documents which Strategies would have had to provide as part of its specific assignment but the City chose not to ask – to avoid creating unquestionable public records.

² Finding of Fact Nos. 4-6 noted that Marysville hired Strategies to work with a third party – Mike Davis and his group – on a plan of action (i.e., mailers, letters to the editor) to oppose Cedar Grove.

³ ???

WCOG urges this Court to not let the City get away with this ploy. To do so would mock the spirit of open government and encourage the delegation of politically sensitive tasks to private entities to avoid public scrutiny.

The only pertinent case to address whether a document held by a third party is a public record is *Concerned Ratepayers Ass'n v. Public Utility District No. 1 of Clark County, Wash.*, 138 Wn.2d 950, 983 P.2d 635 (1999). There the court found that a technical document regarding a turbine generator produced by a private third party was a public record, even though the agency had not retained a copy, because it was used in the agency's decision-making process.

The City reads *Concerned Ratepayers* (like *Burt*) too narrowly, claiming that the Strategies documents are not public records because they were not used in the "government's decision-making process." (Br. of App., p. 37) This ignores the definition of "public record" that includes: any writing containing information relating to the conduct of government." RCW 42.56.010(1) (emphasis supplied). The City's "conduct" here was to hire an outside public relations firm to help a third party (Mr. Davis) produce messaging to further the City's goals. Records relating to that conduct were "used" by the City, as a practical matter, to achieve its goals, even though they were not physically in the City's possession.

If the City's view were to prevail hired "consultants" would be beyond scrutiny. For instance, Seattle City Light hired an online defamation management firm to polish Jorge Carrasco's image.⁴ The public should be able to see what that firm did to accomplish this purpose even if records documenting it were kept only in the consultant's files. This "work" did not involve "decision-making" but certainly relates to the conduct of Seattle City Light and was paid for by Seattle City Light and used for its benefit. Certainly the public has the right to see the private consultant's work for Mr. Carrasco just as much as it has the right to the documents from Strategies 360.

As required by RCW 42.56.030 this Court should liberally construe the definition of a "public record" to cover the 173 records at issue. The unique circumstances of this case need not yield a broad ruling with sweeping application, as the City claims. Rather, the court can send a message to agencies that they must not circumvent public accountability by hiring a private entity to perform politically sensitive, even questionable tasks. Otherwise, government will simply hire "private entities" to do their business without public scrutiny.

In sum, WCOG urges the court to look under the hood when an agency hires a private entity to do specific work to see if this decision was motivated by a desire to circumvent the PRA. While every record of that

⁴ See http://seattletimes.com/html/localnews/2023849447_citylightrandxml.html.

private entity may not be a public record those created at the direction of,
and for the benefit of the agency should be disclosable. What is at stake is
the very public transparency that is the heart of WCOG's mission.

DATED this 16th day of September, 2014.

GARVEY SCHUBERT BARER

By 
Judith A. Endejan, WSBA #11016

CERTIFICATE OF SERVICE

I, Darlyne De Mars, certify under penalty of perjury under the laws of the State of Washington and the United States of America that, on September 18, 2014, I caused to be filed with the Court of Appeals, Division I Clerk's Office, 600 University Street, Seattle, WA 98101 the **Brief of Amicus Washington Coalition for Open Government** with said document being served on the persons listed below in the manner shown:

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98188-4630
T 206.574.6661

- United States Mail, First Class
- By Legal Messenger
- By Facsimile
- By E-Mail
phil@tal-fitzlaw.com

Attorneys for Appellant/Cross-Respondent City of Marysville

Jeffrey S. Myers
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 1880
Olympia, WA 98508-1880

- United States Mail, First Class
- By Legal Messenger
- By Facsimile
- By E-Mail
jmyers@lldkb.com

Attorneys for Appellant/Cross-Respondent City of Marysville

Michael A. Moore, WSBA #27047
Sarah E. Tilstra, WSBA #35706
Corr Cronin Michelson Baumgardner & Preece
LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
T 206.625.8600
F 206.625.0900

United States Mail, First Class
 By Legal Messenger
 By Facsimile
 By E-Mail
mmore@corrchronin.com
stilstra@corrchronin.com

*Attorneys for Respondent/Cross-Appellant
Cedar Grove Composting, Incorporated*

Howard M. Goodfriend, WSBA #14355
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
T 206.624.0974
F 206.624.0809

United States Mail, First Class
 By Legal Messenger
 By Facsimile
 By E-Mail
howard@washingtonappeals.com

*Attorneys for Respondent/Cross-Appellant
Cedar Grove Composting, Incorporated*

Dated at Seattle, Washington, this 18th day of September, 2014.


Darlyne De Mars

SEA_DOCS:1161269.