NO. 89396-9

SUPREME COURT OF THE STATE OF WASHINGTON

AMBER WRIGHT,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The trial court awarded penalties and fees of some $650,000 after erroneously concluding the agency had violated the Public Records Act (PRA) by failing to timely produce four records: one record that is exempt under the PRA but that was timely produced as provided in RCW 13.50.100; one record that did not exist at the time of either of the two public records requests; and two records that were not identified in either request. In correcting the trial court's use of incorrect standards and disregard of applicable law, the Court of Appeals engaged solely in an error-correcting function. Its decision rests squarely on case law and statute and contains no novel holdings.

In particular, the Court of Appeals did not mention or address preemption, as claimed by Petitioner. Consistent with precedent, the Court of Appeals simply held that records whose public availability is governed specifically by RCW 13.50.100 fall within the PRA's "other statute" exemption under RCW 42.56.070. There is no conflict with the PRA and no "preemption" of the PRA.

The Court of Appeals corrected the trial court's errors, and nothing more. Further review is not necessary.

II. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, Department of Social and Health Services (DSHS).

III. COUNTERSTATEMENT OF THE ISSUES

1. Is review unwarranted when the Court of Appeals properly determined the four records in question did not involve a PRA violation?

2. Is review unwarranted when the Court of Appeals correctly determined that the four records in question were not improperly withheld under the PRA, which makes the issue of whether those four records should have been listed on an exemption log moot?

3. Is review unwarranted when the Court of Appeals correctly applied a de novo standard of review to the legal questions on appeal?

DSHS raised a number of issues before the Court of Appeals that the Court of Appeals found unnecessary to address. Although the Petition for Review of the Court of Appeals decision should be rejected, in the event that this Court accepts review, DSHS raises the following issues only to preserve them in compliance with RAP 13.4(d):

4. Did the trial court err by refusing to dismiss Ms. Wright's public records action, which was time-barred?

5. Did the trial court err in its penalty determination?

6. Did the trial court err by awarding excessive costs and attorney fees?

IV. STANDARD FOR ACCEPTANCE OF REVIEW OF A COURT OF APPEALS DECISION

This Court applies the criteria set forth in RAP 13.4(b) in determining whether to accept review. Ms. Wright has not established a basis for review under RAP 13.4(b), and her Petition for Review should be denied.

V. STATEMENT OF THE CASE

A. Ms. Wright's Attorneys Requested CPS Records

1. The March 2007 Request

On March 26, 2007, attorney Carter Hick requested a copy of Amber Wright's "entire DSHS file." RP at 88 (Aug. 31, 2011); Ex. 1, at 1. DSHS notified Mr. Hick that he would "receive the requested information under RCW 13.50" upon providing a signed authorization required in the statute. RP at 89-91 (Aug. 31, 2011); Ex. 202. On June 1, 2007, after receiving the necessary authorization, DSHS provided Mr. Hick with a copy of Ms. Wright's Child Protective Services (CPS) file (approximately 2,200 pages), after which it received no further communication. RP at 94-95, 97 (Aug. 31, 2011); Ex. 205.

2. The May 2008 Request

On May 20, 2008, DSHS received a seven-page public records request from attorney David Moody "[p]ursuant to RCW 42.56 *et seq.* and RCW 13.50 *et seq.*" RP at 106 (Aug. 31, 2011); Ex. 206. Like Mr. Hick, Mr. Moody sought Ms. Wright's CPS files. Ex. 206.

DSHS timely responded, stating:

> Amber's Children's Administration records are confidential child welfare records and are exempt from public disclosure per RCW 42.56.230(1), RCW 74.04.050 and 13.50.100(2). Her authorization permits them to be disclosed to you under RCW 13.50.100(7), and they will be provided to you under that statute.

RP at 107-08 (Aug. 31, 2011); Ex. 207. DSHS produced approximately 3,400 pages of CPS records to Mr. Moody in installments, concluding on November 14, 2008. Exs. 211-214.

B. The Four Disputed Records

Only four records are at issue in this case. They are described here.

1. The Recorded Interview

In November 2009, DSHS discovered that a CD in the back of Ms. Wright's CPS file had not been provided to Mr. Moody in response to his 2008 request. RP at 155-56 (Aug. 31, 2011); Ex. 215. The CD contained an audio recording of an interview of Ms. Wright from an abuse

investigation in 2005. *See* Ex. 215. On December 11, 2009, DSHS apologized for the delay and sent Mr. Moody a copy of the recording, along with an explanation that it was being provided under RCW 13.50.100. Ex. 215.

2. The Transcript of the Recorded Interview

After discovering the CD containing Ms. Wright's 2005 interview, DSHS transcribed the recording and provided the transcription to Mr. Moody as a courtesy, along with the recording, under RCW 13.50.100. Ex. 215. The transcription was created in December 2009 and did not exist at the time of the 2007 and 2008 record requests. RP at 135, 156 (Aug. 31, 2011); Ex. 215.

3. The PRIDE Manual

In 2009, Ms. Wright filed a tort lawsuit against DSHS in federal court and made discovery requests for DSHS manuals, policies, and protocols. Ex. 230, at 2. On March 4, 2010, in response to Ms. Wright's discovery requests, DSHS's attorneys produced a "DSHS Foster/Adoption PRIDE Manual," a training manual for potential foster and adoptive parents. RP at 60 (Aug. 31, 2011); Ex. 6; CP at 709-10. The PRIDE Manual was not produced in response to the 2007 or 2008 record requests because it was not part of Ms. Wright's CPS files and therefore was not responsive to the requests. Ex. 6; CP at 709.

4. The Pierce County Investigative Protocols

On March 16, 2010, in further response to Ms. Wright's tort discovery requests, DSHS's attorneys produced a copy of its Pierce County Child Abuse Investigative Protocols, which described protocols for jointly investigating sexual and physical child abuse with Pierce County law enforcement. Ex. 5, at 1-59; CP at 709. It was not produced in response to the 2007 or 2008 record requests because it was not part of Ms. Wright's CPS files and therefore was not responsive to the requests. Ex. 5, at 1; CP at 709.

C. The Trial Court Proceedings

On April 6, 2010, Ms. Wright filed a complaint against DSHS under the PRA. CP at 1-6. The complaint alleged that, in responding to Mr. Hick's and Mr. Moody's requests, DSHS improperly withheld the four records described above. Ms. Wright also alleged that DSHS should have provided a privilege log describing those four records. *Id.* She asked the court to award daily penalties and costs, including attorney's fees, under the PRA. *Id.*

The trial court rejected DSHS's argument that Ms. Wright's 2005 CPS interview recording and the 2009 transcript were confidential and subject to release only under RCW 13.50.100. RP at 28-31 (Sept. 1, 2011). The trial court engaged in no legal analysis, instead commenting

only that "I don't think it's fair", RP at 21 (Apr. 29, 2011), and "you can't hide behind some esoteric definition under Title 13 or Title 42.56, I don't think so." RP at 36 (Aug. 31, 2011). In addition, although there was no dispute that the transcript was created in December 2009, well after the 2007 and 2008 records requests, the trial court concluded that the transcript was responsive to both requests. CP at 566. The trial court ruled that DSHS unlawfully withheld the 2005 CPS interview recording and the 2009 transcript under the PRA. CP at 566.

The trial court also refused DSHS's request to apply the "identifiable public records" standard under RCW 42.56.080 to determine whether the PRIDE Manual or Investigative Protocols had in fact been requested in the 2007 or 2008 request. RP at 140-41 (Sept. 1, 2011). Instead, the trial court consistently treated the matter as a discovery dispute governed by discovery standards.[1] Instead of applying the

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[1] During DSHS's opening statement, for example, the trial court engaged in the following exchange:

> THE COURT: What else is it then? What do you intend to show that it is then if it isn't a request for discovery?
>
> MR. CLARK: I intend to show it's a public records request for very specific information.
>
> THE COURT: Trying to cut corners and to be extra cautious and you're not calling it a discovery request, you're calling it something else?
>
> Mr. CLARK: Yes, absolutely, we're calling it a public records request.
>
> THE COURT: I would suggest to you that's a problem.

RP at 35-36 (Aug. 31, 2011). A similar exchange occurred during witness examinations:

statutory "identifiable records" standard, it appears the trial court concluded the PRIDE Manual and Investigation Protocols had been unlawfully withheld under the PRA because they were relevant to Ms. Wright's tort case. CP at 566; RP at 34 (Sept. 1, 2011).

The trial court awarded daily penalties of $100 and entered judgment in the amount of $287,800. CP at 786. It did not engage in a *Yousoufian* analysis, instead applying an "obstruction of justice" liability standard.[2] RP at 46 (Nov. 18, 2011); CP at 786. The trial court also awarded $346,000 in attorney fees, billed at up to $500 per hour, applying a loadstar multiplier of 2.0. RP at 19-20 (Nov. 18, 2011); CP at 740, CP at 787.

DSHS appealed.

> MR. CLARK: I think that's a good question you pose, your honor. I would add again this is not a discovery case, it is a public records case.
>
> THE COURT: You know, it is a discovery case. You're alleged to have not disclosed the discovery that's necessary in a tort claim. And in order to determine that you have to know what it is about.

RP at 65 (Aug. 31, 2011). During closing argument the trial court continued to insist it was addressing a discovery dispute:

> MR. CLARK: We would argue it's not a discovery request, it is a request for public records.
>
> THE COURT: See, that's where you're starting off, in my opinion, representing your client on the wrong foot. What was the basis for this request? It is a trial and what do you do in trials? You send out interrogatories, you take depositions, what is all that categorized as? Discovery.

RP at 17 (Sept. 1, 2011).

[2] *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

D. The Court of Appeals Decision

The Court of Appeals reversed. It held that both the 2005 CPS interview recording and the 2009 transcript are controlled by RCW 13.50.100(2), which states, "Records covered by this section shall be confidential and *shall be released **only** pursuant to this section and RCW 13.50.010.*" *Wright v. State*, ___ Wn. App. ___, 309 P.3d 662, 667 (Sept. 10, 2013) (emphasis added by the Court). The court noted that, under RCW 42.56.070(1), a requested record may be exempt from production under the PRA if it "is controlled by any 'other statute which exempts or prohibits disclosure of specific information or records.'" *Id.* at 667 (emphasis omitted). The Court of Appeals concluded:

> Because the legislature has prescribed chapter 13.50 RCW as the sole method for obtaining juvenile records maintained under that chapter, we hold that (1) the PRA did not apply to DSHS's production of her interview recording and transcription; (2) DSHS did not violate the PRA in failing to disclose these requested items until it later found them; and (3) Wright was not entitled to any PRA awards for DSHS's nonexistent noncompliance.

Id. at 668. The court also held that the 2009 transcription was not a "public record" for PRA purposes because it was not in existence at the time of Ms. Wright's 2007 and 2008 requests. *Id.* at 667 n.12.

Regarding the PRIDE Manual and Pierce County Investigation Protocols, the Court of Appeals concluded that Mr. Hick's and Mr. Moody's requests did not mention or identify with "reasonable clarity" that the manual or protocol was sought; instead, the language of the requests was limited to materials "specifically related" to the 2005 CPS investigation regarding Ms. Wright. *Wright*, 309 P.3d at 665-66. The court rejected the trial court's "discovery" standard, instead applying the PRA's requirement that a request must, at a minimum, "identify the documents with reasonable clarity to allow the agency to locate them." *Id.* at 665 (quoting *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26, 30 (2004)). Applying this standard, the court concluded that the PRIDE manual and Investigation Protocols were not responsive to either request because they provide general DSHS guidance and procedures for numerous clients and the public and they are not specific to Ms. Wright's individual CPS referral history and records. *Id.* at 665-66.

Having reversed the trial court's findings that DSHS violated the PRA, the Court of Appeals reversed the award of penalties and attorney's fees.

VI. ARGUMENT

A. The Court of Appeals Decision Does Not Conflict With Decisions of the Supreme Court or the Court of Appeals

1. The Court Correctly Concluded That RCW 13.50 Is an "Other Statute" That Exempts Juvenile Care Agency Records From Disclosure Under the PRA and Provides the Exclusive Process for Obtaining Access to Such Records

Ms. Wright asserts that the Court of Appeals held that RCW 13.50 conflicts with and "preempts" the PRA. The Court of Appeals made no such holding; its opinion makes no reference to federal preemption or to any recognized type of preemption, and it makes no reference to any conflict between RCW 13.50 and the PRA. Instead, consistent with existing legal authority, the Court of Appeals held that RCW 13.50.100 is as an "other statute" under RCW 42.56.070(1) that exempts juvenile care agency records from production under the PRA. *Wright*, 309 P.3d at 667-68 (citing *In re Dependency of KB*, 150 Wn. App. 912, 210 P.3d 330 (2009); *Deer v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004)). The court specifically stated:

> The PRA provides that a requested record may be exempt from disclosure if the record is controlled by *any "other statute which exempts or prohibits disclosure of* specific information or records." RCW 42.56.070(1) (emphasis added). RCW 13.50.100(2) expressly provides: "Records covered by this section shall be confidential and *shall be released* ***only*** *pursuant to this section and RCW 13.50.010.*" (Emphasis added) (second emphasis added).

Wright, 309 P.3d at 667. Applying these statutes, the Court concluded that the 2005 CPS interview recording and the 2009 transcript were exempt from production under the PRA, and that their release was governed by chapter 13.50 RCW. *Id.* at 668.

Ms. Wright suggests that this conclusion conflicts with decisions like *Ameriquest Mortgage Company v. Washington State Office of the Attorney General*, 170 Wn.2d 418, 241 P.3d 1245 (2010), and *Freedom Foundation v. Washington State Department of Transportation, Division of Washington State Ferries*, 168 Wn. App. 278, 276 P.3d 341 (2012). But those cases concluded that federal preemption analysis is not necessary for federal privacy regulations because there is no conflict—the regulations qualify as "other statute[s]" under the PRA. *See Ameriquest*, 170 Wn.2d at 439-440; *Freedom Found.*, 168 Wn. App. at 297. Here, federal preemption is not at issue because there is no federal statute or regulation at play.

Ms. Wright also claims that the Court's conclusion conflicts with *Deer v. Department of Social & Health Services*, 122 Wn. App. 84, 93 P.3d 195 (2004). But, just like in this case, the court in *Deer* concluded that "chapter 13.50 RCW is an 'other statute' that 'exempts or prohibits' disclosure of particular documents to particular people[.]" *Deer,* 122 Wn.

App. at 92. The *Deer* court held that "[a]ssuming such other statutes do not conflict with the [PRA], we treat them as supplementing the [PRA]." *Id.* at 91 (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994)). The *Deer* court concluded:

> Thus, chapter 13.50 RCW furthers the [PRA's] policy of allowing access to records held by government agencies but simultaneously protects the privacy of dependent juveniles and their families. As the [PRA] and chapter 13.50 RCW do not conflict, chapter 13.50 RCW supplements the [PRA] and provides the exclusive process for obtaining juvenile justice and care records.

Deer, 122 Wn. App. at 93. Ms. Wright's claim of a conflict with *Deer* does not exist.

Ms. Wright also asserts a conflict with *In re Dependency of KB*, 150 Wn. App. 912, 210 P.3d 330 (2009). But, again just like the present case, the court in *KB* held that RCW 13.50 "specifically addresses the process, *including sanctions*, for obtaining juvenile justice and care agency records," and noted that RCW 13.50 was enacted after the PRA. *KB*, 150 Wn. App. at 923 (emphasis added). This Court made a similar holding regarding the JRA's strict control over the privacy and release of juvenile care agency records in *North American Council on Adoptable Children v. Department of Social & Health Services*, 108 Wn.2d 433, 441, 739 P.2d 677 (1987) ("Juvenile records are confidential, and may be revealed only under circumstances not satisfied here," referencing

RCW 13.50.010 and .100). Ms. Wright's claim of a conflict with *KB* does not exist.

Ms. Wright continues to claim she did not have access to the process or remedies provided in RCW 13.50. A juvenile or parent denied access to juvenile records can file a motion in juvenile court to gain access, and may be awarded a daily penalty if the records were wrongfully denied. *See* RCW 13.50.100(7), (10). The Court of Appeals, relying on *Deer*, correctly held that the recorded interview and transcript were dependency records under RCW 13.50, and that Ms. Wright could have filed a motion in juvenile court under RCW 13.50.100(8) if she believed DSHS had denied her access to records. *Wright*, 309 P.3d at 669.

2. No Supreme Court or Court of Appeals Decision Has Held That Unknown Records or Records Not Found Must Be Listed on an Exemption Log

When an agency finds records responsive to a PRA request and determines that they are exempt from production, the agency must specify the exemption and give a brief explanation of how the exemption applies to the document, which can be done by providing an exemption log or withholding index describing the records. *See* RCW 42.56.210(3); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540, 199 P.3d 393 (2009). No Washington appellate decision has ever held that the PRA requires an agency to list on an exemption log a record that was

not found despite an adequate search (such as the 2005 CPS interview recording, if it were subject to the PRA rather than RCW 13.50), a record that did not exist at the time of the request (such as the 2009 interview transcription), or records that were not requested (such as the PRIDE Manual and Investigation Protocols). It is axiomatic that an agency has to find and know about a record to be able to list it on an exemption log.

Ms. Wright mistakenly tells this Court that "the Court of Appeals and trial court found, and DSHS conceded, that DSHS improperly and *silently withheld* public records . . ." Pet. for Review at 9 (emphasis added). This is incorrect. No records were "silently withheld," and DSHS has never conceded that they were. RP at 56 (Sept. 1, 2011). In fact, the 2005 interview recording was provided under RCW 13.50.100 as soon as it was found. Ex. 215. And the 2009 transcript did not exist at the time of the requests and was created and provided to Ms. Wright under RCW 13.50.100 solely as a courtesy. Ex. 215. Moreover, the PRIDE Manual and Investigative Protocols are not exempt from production, but are available to the public upon request; in this case, however, they were not requested by either the 2007 or 2008 request. CP at 709-10.

The trial court gave no explanation on its exemption log ruling, and its order did not characterize any record as having been "silently withheld." CP at 565-67. And the Court of Appeals decision made no

determination that records were silently withheld. To the contrary, the Court of Appeal's determination that none of the four records were improperly withheld under the PRA made it entirely unnecessary for the Court to decide if those records needed to be listed on an exemption log. Accordingly, there is no conflict with other cases on this issue.

3. The Decision Does Not Conflict With Supreme Court or Court of Appeals Authority on the Standard of Review

Ms. Wright contends the Court of Appeals erred by not deferring to the trial court's factual determination as to whether the PRIDE Manual and Investigation Protocols had been requested. As explained above, the trial court committed an error of law in making that determination, repeatedly insisting the issue was governed by principles of "discovery" instead of the PRA, and failing to examine the language of the requests.

On appeal, DSHS challenged that legal ruling and asked the Court of Appeals to first determine whether the PRA's "identifiable public records" standard under RCW 42.56.080 and *Hangartner* is the correct legal standard for evaluating whether the requests asked for the manual and protocols. Br. of Appellant at 36. The Court of Appeals appropriately applied de novo review and determined that, under *Hangartner*, a PRA request "must identify with reasonable clarity those documents that are desired." *Wright*, 309 P.3d at 665 (quoting *Hangartner,* 151 Wn.2d at

447-48 (citing the "identifiable public record" language in RCW 42.56.080). *See also Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447, 451 (1998) (appellate court reviewed request language and held PRA does not "require public agencies to be mind readers" and if requester "truly wanted the City to provide him with certain policies, he could easily have said so"), *review denied*, 137 Wn.2d 1012 (1999).

After determining that the "identifiable public records" standard under RCW 42.56.080 applied, the court examined whether Ms. Wright had requested manuals and protocols. Questions of law, including an agency's obligations under the PRA, are reviewed de novo. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010). Here, the question of what records Ms. Wright requested was fitting for de novo review because the only evidence required for the Court's determination was the text of Ms. Wright's request; the live opinion testimony proffered by Ms. Wright could not change the language of her request. *See* Ex. 206. Thus, the Court of Appeals was as equally well positioned as the trial court to determine whether the request sought the PRIDE manual and Investigation Protocols. Applying the correct legal standard under RCW 42.56.080, the Court of Appeals concluded in the negative. Accordingly, its decision is in no conflict with any authority.

B. The Decision Does Not Raise an Issue of Substantial Public Importance

Children who are entitled to their DSHS records under RCW 13.50.100 do not lack an enforcement remedy. Ms. Wright received her recorded interview under RCW 13.50.100 well before she filed this PRA lawsuit. *See* Ex. 215; CP at 1. If she had not received it, she could have filed a motion in juvenile court under RCW 13.50.100(8). Although Ms. Wright claims the decision will prevent someone like her from filing a motion in juvenile court under RCW 13.50.100(8), the decision actually holds that she can file such a motion as a remedy if she believes records were improperly denied. *Wright,* 309 P.3d at 669 (citing *Deer,* 122 Wn. App. at 94).

The trial court's award of penalties under the PRA for records subject to RCW 13.50 ignores the express mandates of RCW 13.50.100, which require that such records are "confidential and shall be released only pursuant to this section" and provides an enforcement procedure and daily penalty scheme for wrongful withholding. *See* RCW 13.50.100(2), (8), (10). *See also In re Dependency of KB*, 150 Wn. App. at 923 (applying PRA sanctions to RCW 13.50 records would render RCW 13.50.100(10) superfluous). Giving effect to RCW 13.50 does not conflict with the PRA: "chapter 13.50 RCW furthers the [PRA's] policy

of allowing access to records held by government agencies but simultaneously protects the privacy of dependent juveniles and their families." *Deer,* 122 Wn. App. at 93. Contrary to Ms. Wright's claims, using the PRA to resolve issues with juvenile records "would interfere with the orderly juvenile court review of access requests to those very sensitive documents." *Id.* at 94.

The Court of Appeals decision gives effect both to the PRA and to the protections and enforcement scheme in RCW 13.50.100. It creates no new exemption, produces no gap in enforcement for a failure to provide properly requested records, and denies no person a remedy for unauthorized withholding. There is no substantial issue of public importance to review.

VII. CONCLUSION

Petitioner has failed to meet the criteria in RAP 13.4(b) for granting a petition for review. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 18th day of November, 2013.

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SUPREME COURT OF THE STATE OF WASHINGTON

AMBER WRIGHT, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	CERTIFICATE OF SERVICE

I certify that on November 18, 2013, I served a true and correct copy of Respondent's Answer to Petition for Review on all parties or their counsel of record by U.S. mail, with first-class postage prepaid, addressed as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 18th day of November, 2013, at Tumwater, WA.

Cheryl Chafin

Cheryl Chafin, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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