

No. 89396-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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AMBER WRIGHT,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Amber Wright, (“Amber”) an abused juvenile seeking access to public records related to the handling of her case by the Department of Social and Health Services (“DSHS”) sought review of the Court of Appeals decision (“Decision”) denying the application of the Public Records Act (“PRA”) to her document request. Amber asked this Court to grant review because the Decision conflicts with Supreme Court and Court of Appeals authority and raises issues of substantial public importance. Specifically, the Decision improperly holds that Amber has no relief under the PRA, despite the acknowledgement that (1) the documents she requested were public records under the PRA, (2) DSHS withheld public records from her, and (3) DSHS failed to provide an exemption log documenting its withholding of documents. Moreover, the Decision creates a new out for the government to avoid key obligations under the PRA, such as providing an exemption log, based on the broad claim that the “other statutes” exception applies.

In its Answer, DSHS raises three new issues for this Court to consider if review is granted. Specifically, DSHS asks the Court to consider whether this case is barred by the statute of limitations, even though DSHS never provided an exemption log to trigger the running of the statute. DSHS also claims that the trial court’s award of statutory

penalties and fees was excessive. None of the issues raised by DSHS were addressed in the Decision, however, and DSHS offers no argument on these issues in its Answer. If this Court grants Amber's Petition, the issues raised by DSHS should not be considered on review.

II. IDENTITY OF PETITIONER

The Petitioner is Amber Wright, plaintiff in the trial court and respondent in the Court of Appeals. In its Answer to the Petition, DSHS cross-petitioned with respect to three new issues.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued its published opinion in *Wright v. DSHS*, No. 42647-1-II, on September 10, 2013 ("Decision"). A copy of the Decision is attached as Appendix A to the Petition for Review filed on October 10, 2013 ("Petition").

IV. ISSUES RAISED IN ANSWER TO PETITION

In its Answer to the Petition, DSHS raised the following issues, which are re-stated below:

1. Did the trial court properly hear Amber's case, where DSHS admittedly never provided an exemption log and thus the statute of limitations never started running?
2. Did the trial court properly exercise its broad discretion in awarding penalties?

3. Did the trial court properly exercise its broad discretion in awarding attorney fees?

V. STATEMENT OF THE CASE

The facts of this case are fully set forth in Amber's Petition for Review, which is incorporated by reference here. DSHS misstates a crucial fact in its Answer which is relevant to the new issues raised in its cross-petition and requires clarification. Specifically, DSHS now asks the Court to consider whether Amber's case should have been dismissed as barred by the statute of limitations. In its Answer, DSHS repeatedly claims that DSHS did not provide an exemption log for the "four disputed records" discussed by the Court of Appeals because they had not been located or were allegedly not subject to Amber's requests. Answer at 14.

DSHS misstates Amber's argument by attempting to limit DSHS's failure to provide an exemption log to only these four records. It is undisputed, however, that DSHS never provided an exemption log at all, for any of the numerous records it withheld, not solely the four records discussed by the Court of Appeals. Amber made this argument in both the trial court and the Court of Appeals. The trial court properly ruled that Amber's case was not barred by the statute of limitations, and that DSHS's failure to provide an exemption log violated the PRA. The Court of Appeals did not address this issue in the Decision.

At deposition and at trial, DSHS's witnesses admitted that no log had been provided. Diane Fuller was the DSHS employee who responded to Amber's March 2007 request. RP 88-89 (8/31/2011). Ms. Fuller's June 1, 2007 letter to Amber's attorney makes clear that information was "removed or redacted." CP 156-157. At trial, Ms. Fuller reiterated that DSHS withheld and redacted information from the March 2007 request:

Q: And what was the purpose of sending [Mr. Hick] this letter?

A: It was to explain what had been withdrawn from the file, if there had been any redactions, to clarify what it was that was forwarded to him.

Q: Were there any pages you did not give to Mr. Hick out of the file?

A: Yes. RP 94-95 (8/31/2011).

Despite withholding and redacting information, DSHS did not provide Amber with the legal authority justifying its claimed exemptions:

Q: Now, in your letter where you are describing records withheld from Amber's request, you would agree with me that you don't provide any sort of legal authority as to why you're withholding each individual record?

A: That's correct.

Q: You didn't provide Amber's attorney or Amber with what's called a privilege log in response to her request, correct?

A: Correct.

RP 101 (8/31/2011).

Kristal Wiitala and Barbara McPherson were the DSHS employees responsible for responding to Amber's May 2008 request. RP 105-106; 148-149 (8/31/2011). In their depositions, they both admitted that information had been withheld from Amber's 2008 request, but that an exemption log had not been provided.

Kristal Wiitala

Q: And no privilege log was ever provided to my client explaining each record that was not provided in response to 42.56, correct?

A: Not by me, no.

Q: And you're not aware of one, right?

A: No.

Q: I'm correct?

A: Yes, correct. Sorry.

CP 330.

Barbara McPherson

Q: And you agreed with me earlier that information was redacted in response to my client's public records request, right?

A: Yes.

Q: And you agree that no privilege log was ever provided to my client, correct?

A: That's right.

CP 313.

At trial, Ms. Wiitala again admitted that information had been withheld. RP 116 (8/31/2011). But, no exemption log for any withheld records was ever provided. Because DSHS never provided an exemption log for any of the records it withheld, the trial court properly denied DSHS's motion for summary judgment on the statute of limitations. CP 376-378.

Though DSHS asks the Court to review this issue, it has not presented argument or evidence in support of its claim that review is warranted on this ground. The same is true with respect to its request for review of the trial court's penalty and fee determinations, which are both well within in the broad discretion of the trial court.

VI. ARGUMENT

A. Amber's Case Was Timely Filed.

If this Court grants the Petition, DSHS asks the Court to consider also whether Amber's case was timely filed. The trial court rejected DSHS's statute of limitations argument, denying DSHS's motion for summary judgment and the Court of Appeals did not address this issue. This Court should likewise decline to consider DSHS's statute of limitations argument, as it was properly rejected twice and DSHS has presented no argument on why it meets the standard for review under RAP 13.4.

Moreover, Amber's case was unquestionably timely filed. The statute of limitations for suits brought under the PRA is governed by RCW 42.56.550(6), which provides, "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." As Amber demonstrated in the Petition and by the testimony excerpted above, DSHS never provided an exemption log for any record it withheld. Accordingly, the statute of limitations has never commenced, let alone expired.

Instead of acknowledging this, DSHS attempts to limit Amber's entitlement to an exemption log to only the four disputed records discussed in its Answer. Answer at 14-15. But this Court has repeatedly held that an exemption log is required for all withholding. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 541 (2009).

Specifically, the log must:

(1) adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient or (2) explain which individual exemption applied to which individual record rather than generally asserting....exemptions as to all withheld documents.

Id. at 539-540. This requirement applies when an agency withholds or redacts information from a PRA request. *See Sanders v. State of Washington*, 169 Wn.2d 827, 846 (2010) (agency withholding or redacting any record must specify the exemption and give a brief explanation of how

the exemption applies to the document). As the trial court properly ruled, failure to provide a privilege log is, by itself, a violation of the PRA. *See id.* at 842.

Here, there is no dispute that DSHS withheld and redacted information from Amber's March 2007 and May 2008 Public Records Act requests. DSHS's trial witnesses conceded that information was removed or redacted from both of Amber's requests and that no exemption log setting forth individual explanations for the withholdings or redactions was ever provided as required by the PRA. *See Rental Hous. Ass'n*, 165 Wn.2d at 538 ("Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record.") (emphasis added).

Amber argued in the trial court and the Court of Appeals that this failure tolled the running of the statute of limitations, and has never limited this argument to the four disputed documents that were improperly withheld. Consequently, as recognized in *Rental Housing*, the statute of limitations has not even commenced. The Court of Appeals did not address DSHS's claim to the contrary and this Court should likewise reject it. Indeed, one of the key problems with the Decision is that it lets government agencies off the hook from providing an exemption log for documents claimed exempt under the "other statutes" exemption to the

PRA. That has never been the law under the PRA. As argued previously, that is a key reason review should be granted.

B. The Trial Court's Determination of Fees and Penalties Was Within Its Discretion and Does Not Warrant Review.

Again, without presenting argument or authority, DSHS claims that if this Court accepts review, it should also review the trial court's ruling awarding penalties and fees. The Court of Appeals did not address the trial court's penalty and fee ruling, however, and DSHS fails to demonstrate why this Court should.

Moreover, the trial court's determination regarding the proper penalty to assess is reviewed under the abuse of discretion standard and will not be disturbed unless it is manifestly unreasonable. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735, 743 (2010). A trial court's decision is manifestly unreasonable only if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654 (2003) (internal quotations omitted)). While DSHS may disagree with the court's penalty assessment, it has failed to demonstrate (or even argue) that the court's ruling meets the criteria under RAP 13.4. The trial court carefully considered the parties' arguments and correctly applied the law in determining the penalty. CP 798-801. If this Court

grants the Petition, review of the trial court's fee and penalty determination is not warranted.

VII. CONCLUSION

This Court should accept review of the issues set forth in the Petition. The additional issues raised by DSHS in its Answer should not be considered.

RESPECTFULLY SUBMITTED this 3rd day of December, 2013.

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Subject: Wright v. State; Cause No.: 89396-9: Reply in Support of Petition for Review

Good afternoon.

On behalf of Paul J. Lawrence and Kymberly Evanson, attached for filing in the above-referenced matter are the Reply in Support of Petition for Review and a Certificate of Service.

Should you have any difficulty with the attachments, please do not hesitate to contact me.

Thank you.

Dawn M. Taylor
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