Supreme Court No. 90296-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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HOWARD GALE,

Appellant,

vs.

CITY OF SEATTLE,

Respondents,

ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The City of Seattle ("the City") was the respondent in the Court of Appeals. The City files this answer in opposition to the Petition for Review filed by Appellant Howard Gale ("Gale").

II. INTRODUCTION

Gale seeks review under RAP 13.4(b)(1) and RAP 13.4(b)(4) of the Court of Appeal's unpublished decision in *Gale v. City of Seattle*, No. 70212-2-I, 2014 WL 545844 (Feb. 20, 2014). Neither applies here. There is no reason to accept review of the Court of Appeal's well-reasoned decision.

Gale argues that the Court of Appeals decision conflicts with *Neighborhood Alliance of Spokane County v. County of Spokane,* 172 Wn.2d 702, 720, 261 P.3d 119 (2011). The Court of Appeals decision is wholly consistent with *Neighborhood Alliance.* It is Gale who attempts to turn *Neighborhood Alliance* on its head. He claims that the Court of Appeals should have focused on the results of the City's search rather than whether the search itself was adequate and argues that an agency should remain liable if it does not find and produce every responsive document even if it has conducted an adequate search. In essence, Gale contends that a search must be perfect. Gale's arguments directly conflict with *Neighborhood Alliance*. There, this Court said that in determining the

adequacy of a search, the "focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate." *Id.*, 172 Wn.2d at 719-20. "When examining the circumstances of a case, then the issue of whether the search was... adequate is separate from whether additional responsive documents exist but are not found ('a search need not be perfect only adequate')." *Id.*, 172 Wn.2d at 720 (citations omitted). Review is not merited under RAP 13.4(b)(1).

Gale's asserted public interest is also based on his faulty interpretation of *Neighborhood Alliance.* Gale, thus, fails to establish the criteria of either RAP 13.4(b)(1) or RAP 13.4(b)(4) justifying review.

Gale makes additional arguments without relating them to any particular section of RAP 13.4(b). He recycles unsupported arguments rejected by the trial court and Court of Appeals regarding the scope of his request, and the City's request for clarification. He also argues that the unrebutted Declaration of Seattle Center Public Records Officer ("PRO") Denise Wells is conclusory and unsupported. Gale not only raised this argument for the first time in his motion to reconsider the Court of Appeals decision; he presented no evidence when he had the opportunity at the trial court to rebut Wells' declaration. In addition, he argues that the Court of Appeals should not have referred to FOIA precedent regarding

the standard for determining search adequacy even though this Court adopted that FOIA standard in *Neighborhood Alliance.*

None of these arguments warrant review either. Because the decision of the Court of Appeals is wholly consistent with established case law and does not present any matter of substantial public interest justifying review, Gale's petition for review should be denied.

III. COUNTERSTATEMENT OF ISSUES

The City acknowledges the issues that Gale presents, but believes they are more appropriately formulated as follows:

1. Should the Court revisit and overturn *Neighborhood Alliance*, which held that in determining the adequacy of a search the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate.

2. Should an agency be penalized for conducting a good faith, adequate search based on the information it had where the requestor informed the agency that records were missing from a production, the agency repeatedly asked the requestor for additional information to aid in locating the allegedly missing records, but the requestor refused to provide any additional information.

3. Should an agency be held liable for conducting an expanded search for records using additional search terms not suggested by the requestor until show cause reply briefing where the agency repeatedly asked the requestor for additional information to assist in searching for records and the requestor refused to provide that information because he did not want to "tip his hand."

IV. RESPONSE TO GALE'S STATEMENT OF THE CASE

The Court of Appeals decision provides an accurate overview of the facts, which the City incorporates by reference. The City provides the following facts to counter Gale's inaccurate factual contentions. Gale has created a moving target since making his request and throughout this litigation. He made a request that plainly sought records on one topic, and then asserts that the City should have recognized that he was seeking records on a different topic. He claims that documents are missing, offers to help, and then refuses on three separate occasions to do so. CP 52, 186, 189, 201-03, 284. Gale waited until oral argument at the show cause hearing to suggest that the City should have used the search terms "homeless" and "transient," and argued that the City should have known to use them. Op. at 8. At oral argument before the Court of Appeals, Gale attempted to expand his request even further, stating:

"If I had said I'm interested in records on homeless, we'd

> be in court here today arguing about why didn't they look for transient, why didn't they look for outlet user community, why didn't they look for people who use the Center as a day shelter?" (January 15, 2014, 702122, from minutes 22:48 to 22:54)

In his petition, Gale claims he "could never have known what terms the city might use prior to the release of records." Pet. at 12. Gale expects the City to read his mind and seems to believe that communicating openly and clearly with the City is "tipping his hand." CP 202. At the same time, he claims the City should be subject to penalties for conducting anything less than a perfect search.

Gale continues to claim that documents are missing, but has provided no evidence to support such an argument. He claimed to possess unproduced responsive documents in November 2012, but throughout this litigation he has neither identified nor produced the alleged missing documents. Gale offered no evidence below to support his allegations, and provides no legal support for the proposition that the Court of Appeals erred here. The Court of Appeals correctly recognized that based on his "unsupported suspicions regarding the City's motives" for restricting AC outlet access at the Armory, "Gale presumes more records must exist that explain the City's decision and interprets the absence of such records as proof that the City is withholding them." Op. at 15. Gale's unsupported speculation does not warrant review by this court.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals decision is consistent with *Neighborhood Alliance.*

In *Neighborhood Alliance*, this Court held that the PRA requires an agency to perform an adequate search for responsive records and adopted the FOIA standard of reasonableness regarding what constitutes an adequate search. *Id.,* 172 Wn.2d at 719-720 ("The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.").

In determining the adequacy of a search, the "focus is not on whether responsive documents do in fact exist, but whether the search itself was adequate." *Id.,* 172 Wn.2d at 720. "The agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Id.,* 172 Wn.2d at 721. The standard of reasonableness "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir., 1986). An agency's search is not inadequate because it "did not do all that it could." *Id.* at 1385. Here the City did all that it could.

Gale failed to present evidence at the trial court or in the Court of Appeals to rebut the Declarations of Seattle Center Public Records Officer ("PRO") Denise Wells. For the first time in his motion to reconsider the Court of Appeals decision, Gale contended that Wells' declarations were conclusory and unsupported by the evidence. It is well-settled that new issues cannot be raised for the first time on appeal. RAP 2.5(a); *Heg v. Alldredge,* 157 Wn.2d 154, 162, 137 P.3d 9 (2006), *see also, State v. Mc Donald,* 138 Wn.2d 680, 691, 981 P.2d 443 (1999). Because Gale did not raise this issue in a timely fashion in the trial court or in the Court of Appeals, it is too late for him to do so now. The Court should decline to address this issue.

In any event, at no point in this litigation has Gale provided any authority to demonstrate that Wells' good faith declaration describing the step-by-step process for responding to PRA requests both generally and specifically to Gale's request was insufficient to demonstrate an adequate search. The Court of Appeals found that Ms. Wells' "declarations describing these searches identify the probable search terms used, the places searched (hard and electronic files and archived emails), and establish that the City searched in locations likely to contain responsive records." (Op. at 18). It ultimately concluded: "Seattle Center followed standards procedures in responding to Gale's request", and the "trial court

properly determined the City met its PRA requirements with the December 6, 2012 disclosure." (Op. at 16, 18, respectively) "[W]here an agency has proper procedures in place, it may avoid penalties under the PRA by simply following them in a reasonable manner." *Francis v. WA Dept. of Corrections,* 178 Wn. App. 42, 313 P.3d 457, 467 (2013).

The PRA Model Rules, WAC Chapter 44-14, provide guidance on reasonable agency searches. WAC 44-14-04003(9) states in pertinent part:

> *A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are.* One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records... It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. *An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records.* Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer. [emphasis added]

Wells' unrebutted declaration fulfilled all criteria established by *Neighborhood Alliance* to demonstrate an adequate search: it was submitted in good faith, is reasonably detailed, includes search terms,

types of searches conducted, and establishes that all places likely to contain responsive materials were searched. *Neighborhood Alliance,* 172 Wn.2d at 721. Gale offers only unsupported speculation while the record demonstrates the adequacy of the City's second search.

The City conceded the first search was inadequate. For the second search, Wells provided the 28 selected records custodians with Gale's request, the results from the first production, asked if others might have responsive documents, required everyone to confirm whether they had responsive documents, provided clear instructions on where to look for responsive documents, and offered to help those who needed assistance. (CP 200, 277) Per standard practice, Wells relied upon individual records custodians to search for responsive records. This not only makes sense as records custodians are most familiar with their emails, files and record-keeping systems, this practice is specifically recognized by the Model Rules as reasonable, as noted above. See WAC 44-14-04003(9). Further, this Court recognized that an "agency does not necessarily have to produce a declaration or affidavit from the individual employee who actually conducted the search; an affidavit or declaration of the agency employee who is responsible for supervising a FOIA search may be sufficient." *Neighborhood Alliance,* 172 Wn.2d at 734 *(Madsen, C.J., concurring,)* citing *Carney v. Dept. of Justice,* 19 F.3d 807, 814 (2nd Cir.,

1994)(citations omitted). *Carney* provides guidance because our Supreme Court held that "adequacy of a search of records under the PRA is the same as exists under FOIA." *Neighborhood Alliance,* 172 Wn.2d at 719.

The Court of Appeals below correctly applied the reasonableness standard established in *Neighborhood Alliance* and found that the City's second search for records was adequate and that the City's December 6, 2012 production brought it into compliance with the PRA.

Gale nonsensically argues that by making a reasonable search the "a priori factor in determining PRA violations," an agency could escape liability if it conducted an adequate search but did not disclose and/or release all of the documents located through the search. Pet. at 10. Nothing in *Neighborhood Alliance* or the Court of Appeals decision leads to the conclusion that an agency need not disclose or release the records found as the result of its search. In fact, *Neighborhood Alliance* specifically linked an agency's search and production obligations: "[A]n adequate search is required in order to properly disclose responsive records." 172 Wn.2d at 721 (citation omitted). Gale's argument to the contrary is baseless.

B. The Court of Appeals Correctly Found that the City Should Not Be Penalized for Gale's Lack of Cooperation

The Court of Appeals properly found that based on the unique facts of this case, "Gale created the need for clarification when he e-mailed the City after its initial production of documents, expressed concern that documents were missing, and offered to 'facilitate the search.'" (Op. at 18). Gale argues that the Court of Appeals ignored the fact that he "was within his right to take court action without providing this notice to the City, and he should not be disadvantaged by having done so." Pet. at 19.

Gale fundamentally misunderstands the concept of clarification applied by the Court of Appeals. The Court of Appeals recognized that where a requester says that records are missing and the agency asks in good faith for additional information that would help it locate those records, the agency should not be penalized for conducting an adequate search based on the information it has.

The Court of Appeals relied on *Bartz v. Dep't of Corrections,* 173 Wn.App. 522, 297 P.3d 737 (2013). Bartz informed DOC that its response to his request was incomplete because he possessed emails between two DOC employees that should have been included in the responsive documents, but failed to identify the allegedly missing records to DOC or

to provide them to the trial court. The court held that DOC had not violated the PRA where "the record shows that (1) "DOC made multiple attempts to produce the requested records, even asking Bartz to provide specific names and dates for the emails he was seeking and performing another futile search when he refused to supply this information," and (2) DOC responded promptly to every letter Bartz sent involving this PRA request. *Id.*, 173 Wn.App at 539. The Court of Appeals noted that the facts in this case were strikingly similar to the facts in *Bartz* and held that Gale's lack of cooperation in responding to the City's request for clarification "support its conclusion" that the City came into compliance with the PRA on December 6, 2012. (Op.at 20)

Gale attempts to distinguish *Bartz* because that requestor sought the production of two particular emails, while he sought broad categories of documents. However, the number of alleged missing documents is not the controlling issue, rather the fact that both Bartz and Gale claimed to have responsive documents in their possession and refused to provide any additional information to the agencies to assist them in producing those documents. An agency should not be penalized, nor should a requester be rewarded for the requester's lack of cooperation.

C. The Trial Court Properly Applied FOIA Precedent

Citing to *Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 114 Wn.2d 677, 790 P.2d 604 (1990) ("*PAWS*"), Gale argues that Washington courts should not consider FOIA cases here because FOIA does not have a provision for penalties when responsive records are not produced. This is simply a variation on his argument that a less than perfect search cannot be adequate. He also appears to be asking this Court to overturn *Neighborhood Alliance.*

For almost forty years, this Court has noted that where the PRA closely parallels FOIA, "judicial interpretations of FOIA are helpful in construing [the PRA]." *Hearst Corp.v. Hoppe,* 90 Wn.2d 123, 128, 580 P.2d 246 (1978); *Dawson v. Daly,* 120 Wn.2d 782, 791-92, 845 P.2d 995 (1993); *Limstrom v. Ladenburg,* 136 Wn.2d 595, 608-09, 963 P.2d 869 (1998); *O'Connor v. Wash. State Dep't of Soc. & Health Serv.,* 143 Wash.2d 895, 25 P.3d 426 (2001). In *Neighborhood Alliance,* this Court considered the similarity between FOIA and the PRA provisions regarding production of records and application of exemptions and, because those provisions of the two statutes mirrored each other, held that "the adequacy of the search for records under the PRA is the same as exists under FOIA." 172 Wn.2d at 719. Just as this Court did in *Neighborhood*

Alliance, the Court of Appeals properly looked to FOIA precedent in construing the reasonableness standard.

D. The Court Should Ignore Gale's Arguments Regarding the Third Search

In his petition, Gale quotes language contained in the City's response to his motion for reconsideration of the Court of Appeals decision referring to the expanded forensic search conducted by the Law Department:

> His search was conducted using a forensic, complex e-discovery litigation tool that requires extensive training... This forensic tool allows a person to search multiple records custodians simultaneously and catches terms embedded within attachments and long e-mail threads. It is not readily available to Seattle Center.

Gale asserts that this is a "stunning admission" that documents "for the first time" the reasons that the February 8, 2013 document production yielded additional documents.

Contrary to Gale's hyperbole, this so-called "stunning admission" has been in the record throughout this litigation as it reflects the Declaration of Matt Jaeger submitted in the trial court (CP 368-69). It was discussed in the City's briefing in the trial court and Court of Appeals and

acknowledged by both courts. (CP 142),[1] (CP 589)[2] (CP 191)[3] Resp. Brief at 9, Op. at 6, 9.

Gale argues for the first time in his petition for review that the Seattle Center's second search was not adequate because it used "inferior search tools" rather than the e-discovery tool used by the Law Department. Pet. at 16. The Court should refuse to address this issue because Gale raises it for the first time in his petition for review. RAP 2.5(a); *Heg v. Alldredge,* 157 Wn.2d at 162; *State v. Mc Donald,* 138 Wn.2d at 691.

Had Gale raised this argument earlier, it would still fail because he omits salient facts. The Law Department's search used terms to include those suggested by Gale in his reply to show cause briefing and expanded the scope of the search beyond records related to the Armory. Even using the Law Department's more sophisticated system, the results of the third search produced essentially similar results as the second search including records unresponsive to Gale's specific request or records substantially similar to documents previously disclosed. The records were provided to the trial court to review and to compare to the records produced as a result of the City's second search, and the trial court concluded that the City exceeded its obligation under the PRA when it conducted the third search.

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[1] February 8, 2013 City Response to Plaintiff's Motion to Show Cause
[2] March 4, 2013 Defendant's Motion for Reconsideration
[3] March 15, 2013 Order on Defendant's Motion for Reconsideration

The Court of Appeals, in turn, found that "the trial court did not err in concluding that the city's February 2013 production exceeded PRA requirements." Op. at 20, n. 14.

The reasonableness of a search turns on "the likelihood that it will yield sought-after information, the existence of readily available alternatives, and the *burden of employing those alternatives*." *Forbes v. City of Gold Bar,* 171 Wn.App. 857, 866, 288 P.3d 384, 388 (2012), citing *Trentadue v. Federal Bureau of Investigation,* 572 F.3d, 794,797-98 (2009). [emphasis added]. The standard of reasonableness "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir., 1986). An agency's search is not inadequate because it "did not do all that it could." *Id.* at 1385.

In affirming the trial court's ruling, the Court of Appeals acknowledged that an agency should not be punished for going beyond its obligations under the PRA. Similarly, in *Neighborhood Alliance,* this Court adopted a reasonableness standard in determining the adequacy of a search. The trial court and Court of Appeals correctly found it was not reasonable to expect agencies to conduct the type of search conducted by the Law Department in this case.

VI. CONCLUSION

Gale has failed to cite any fact or point of law that warrants review by this Court. The Court of Appeals decision correctly applied the standard adopted by this Court in *Neighborhood Alliance.* Nothing in Gale's petition supports revisiting that standard. Review is not merited under RAP 13.4(b).

DATED this 11th day of June, 2014.

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DECLARATION OF SERVICE

Susan Williams states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Paralegal in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge and belief.

2. On June 11, 2014, I caused to be delivered by ABC Legal Messengers, addressed to:

Howard J. Gale
702 2nd Avenue W., Apt. 304
Seattle, WA 98119

a copy of Answer to Appellant's Petition for Review.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of June, 2014, at Seattle, King County, Washington.

Susan Williams

OFFICE RECEPTIONIST, CLERK

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Case Name: Howard Gale v. City of Seattle
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