

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 06, 2015, 10:46 am
BY RONALD R. CARPENTER
CLERK

NO. 91255-6
COURT OF APPEALS NO. 70757-4-1

E CRF
RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

KAMAL MAHMOUD,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

By: Sara J. Di Vittorio
Lyndsey M. Downs
Deputy Prosecuting Attorneys
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201
(425) 388-6343

Attorneys for Respondent
Snohomish County

 ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUE.....	1
III.	RESTATEMENT OF THE CASE.....	2
	1. Request 09-05374.....	2
	2. Request 09-05375.....	3
	3. Request 10-01666.....	3
	4. Request 10-05383.....	4
	5. Request 10-08592.....	4
	6. Request 10-08593.....	5
	7. Mr. Mahmoud Amends His Employment Lawsuit To Add PRA Claims.....	5
IV.	REASONS WHY REVIEW SHOULD BE DENIED.....	7
V.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<u>Bartz v. Dep’t of Corr. Public Disclosure Unit</u> , 173 Wn.App. 522, 297 P.3d 737 <u>review denied</u> , 177 Wn.2d 1024 (2013)	10
<u>Johnson v. Dep’t of Corr.</u> , 164 Wn.App. 769, 265 P.3d 216 (2011)	10
<u>Mahmoud v. Snohomish County</u> , __ P.3d __ 2014 WL 5465404 at *4 (Wn.App. Div. 1, October 27, 2014)	8, 9, 11
<u>Newman v. King County</u> , 133 Wn.2d 565, 947 P.2d 712 (1997).....	8
<u>Rental Housing Association of Puget Sound v. City of Des Moines</u> , 165 Wn.2d 525, 539-40, 199 P.3d 393 (2009)	10

Statutes

Chapter 42.56 RCW	1
Public Records Act (PRA), Chapter 42.56 RCW	5
RCW 42.56.250(5).....	2, 7, 9
RCW 42.56.550(6).....	1, 6, 9, 10
RCW Chapter 49.60.....	7

Rules

Rules of Appellate Procedure 13.4(b).....	1, 7, 11
---	----------

I. INTRODUCTION

Snohomish County (“the County”) made public records available to Kamal Mahmoud in compliance with the Public Records Act, chapter 42.56 RCW (“PRA”). Mr. Mahmoud sued the County for PRA violations more than one year after the County’s last claim of exemption or production of a record on an installment basis. The Court of Appeals unpublished decision in this case correctly applied the statute of limitations provided in RCW 42.56.550(6) and concluded his lawsuit should be dismissed as a matter of law. The Court of Appeals’ decision is consistent with Washington law. Therefore, review by this Court is not warranted under RAP 13.4(b), and Mr. Mahmoud’s Petition should be denied.

II. RESTATEMENT OF THE ISSUE

For the reasons outlined below, this matter does not warrant the Court’s discretionary review¹. However, if the Court were to grant review, the sole issue presented would be:

Does RCW 42.56.550(6) bar litigation where the Plaintiff sues alleging PRA violations more than one year after an agency’s last claim of exemption or production of a record on a partial or installment basis?

¹ The Petition for Review identifies 7 issues for review. Only 3 of those issues are argued in the body of the Petition for Review.

III. RESTATEMENT OF THE CASE

Between August of 2009 and December of 2010, Mr. Mahmoud submitted six PRA requests to Snohomish County. Each request was received and assigned a tracking number. Those tracking numbers are 09-05374, 09-05375, 10-01666, 10-05383, 10-08592, and 10-08593.

1. Request 09-05374

The County received request 09-05374 on August 3, 2009. CP 125. On August 7, 2009, four business days later, the County responded, notifying Mr. Mahmoud that responsive records were exempt from production pursuant to RCW 42.56.250(5). Id. The letter notified Mr. Mahmoud of the type of records (investigative records), what exemption applied (RCW 42.56.250(5) which exempts investigative records in an on-going EEO investigation), and why that exemption applied (the investigation was on-going). Id. Mr. Mahmoud, through counsel, wrote two letters to the County dated October 20, 2009, and February 11, 2010. CP 2515-16; 2518-19. In those letters, he inquired as to the status of request 09-05375, to which the County was in the process of responding². Id. The County did not respond to either of those letters.

² The Petition for Review states that the letters from counsel “re-issued” requests 09-05374. The letters from counsel only refer to 09-05375. There is no reference to request 09-05374.

2. Request 09-05375

The County received request 09-05373 on August 3, 2009. CP 44. On August 5, 2009, two business days later, the County acknowledged Mr. Mahmoud's request and provided a first installment of records. CP 45. A second installment of records responsive to 09-05375, was provided on October 21, 2009. Id. On April 2, 2010, the County produced a third and final installment of records. Id.

3. Request 10-01666

The County received request 10-01666 on March 15, 2010. CP 63. On March 22, 2010, five business days later, the County responded acknowledging Mr. Mahmoud's request and providing an estimate of time needed to respond to his request. Id. On May 20, 2010, the County produced a first installment of responsive records. CP 64. On June 11, 2010, the County produced a second installment of responsive records. Id. On June 29, 2010, the County produced a third installment of responsive records. Id. On July 12, 2010, the County produced a fourth installment of responsive records and an exemption log. Id.

Mr. Mahmoud apparently did not review these records until four months later. In an email dated November 21, 2010, to Planning and Development Services Mr. Mahmoud stating he did not receive the fourth installment. The next day, November 22, 2010, the County provided him

with an additional courtesy copy of the records that had been provided on June 29, 2010. CP 89. Although these records had been provided almost five months previously, the County considered this installment the fifth and final installment of responsive records. CP 64.

4. Request 10-05383

The County received request 10-05383 on July 23, 2010. CP 45. On July 28, 2010, three business days later, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to respond to his request. Id. On August 16, 2010, the County produced the responsive records and claimed an exemption for one document. Id. The letter informed Mr. Mahmoud of the type of record (a memo from Max Phan to his attorney, Steve Bladek, concerning Mr. Mahmoud), what exemption applied (RCW 5.60.060(2)(a) which exempts attorney-client privileged communications), and why that exemption applied (the memo contained attorney-client privileged communications). Id. Mr. Mahmoud was informed there were no further responsive records and the request was closed. CP 56.

5. Request 10-08592

The County received request 10-08592 on December 6, 2010. CP 45. On December 8, 2010, two business days later, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to

respond to his request. Id. On December 9, 2010, the County produced an installment of responsive records. CP 120. After an appropriate search, it was determined no more responsive records existed. CP 2551. On January 19, 2011, Mr. Mahmoud was informed there were no further responsive records and the request was closed. Id.

6. Request 10-08593

The County received request 10-08593 on December 6, 2010. CP 64. On December 6, 2010, the same business day, the County responded to Mr. Mahmoud's request and provided an estimate of time needed to respond to his request. Id. On January 14, 2011, the County produced a first installment of responsive records. CP 65. On February 25, 2011, the County produced a second installment of responsive records. Id. On February 28, 2011, the County produced the third and final installment of responsive records and an exemption log. Id.

7. Mr. Mahmoud Amends His Employment Lawsuit To Add PRA Claims

On August 30, 2012, Mr. Mahmoud filed an Amended Complaint in the employment lawsuit he had previously filed against the County. CP 18-23. Mr. Mahmoud's Amended Complaint added a third claim to his lawsuit: violation of the PRA, , based on newly alleged facts. CP 21-22.

The County moved for summary judgment alleging Mr. Mahmoud's claims were time-barred. CP 31-133. The superior court denied the County's motion on December 19, 2012. CP 991-93. The County then moved for reconsideration and the superior court concluded Mr. Mahmoud's claims regarding request 09-05374 were time-barred. CP 1055-57. In response to a show cause order, the superior court ruled the County's responses to requests 09-05375, 10-01666, 10-08592, and 10-08593 complied with the PRA. CP 1829-31. The superior court ruled the County violated the PRA in responding to request 10-05383 and awarded \$18,000.00 in penalties. CP 2445-53. After motions practice, the superior court awarded \$18,055.00 in attorney fees and costs. CP 2115-19. Mr. Mahmoud appealed and the County cross-appealed.

In its opinion, the Court of Appeals concluded that all of Mr. Mahmoud's claims were barred by the statute of limitations codified in RCW 42.56.550(6). Respondent, Snohomish County, filed a motion to publish this case. The Court of Appeals denied the motion finding that the opinion was not of precedential value. As a result, this case may not be cited to as authority in any future Washington case. See GR 14.1. Mr. Mahmoud now petitions for discretionary review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should not grant discretionary review in this case because the Court of Appeals' decision is consistent with Washington law. *See* RAP 13.4(b).

1. The Court of Appeals Properly Found That The PRA's Statute of Limitations Was Triggered By A Categorical Claim Of Exemption For Records Involved In An On-going and Active Employment Investigation.

The Court of Appeals properly affirmed the trial court's decision that the statute of limitations was triggered by the County's claim of exemption in response to request number 09-05374. The County refused to provide Mr. Mahmoud of records of an on-going, active investigation into Mr. Mahmoud's claims of employment discrimination. This refusal to provide records rested on their exempt status under RCW 42.56.550(5). RCW 42.56.250(5) exempts "[i]nvestigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment." The investigative records sought related a complaint of discrimination that was open and on-going at the time of the request. CP 129-30; CP 986-87. The records were exempt and the County notified Mr.

Mahmoud of the claim of exemption and how the exemption applied to the records.

The Court of Appeals concluded that records in an on-going, active employment discrimination investigation are categorically exempt from public disclosure, just as law enforcement investigative records are categorically exempt from public disclosure when that investigation is active and on-going. Mahmoud v. Snohomish County, __ P.3d __ 2014 WL 5465404 at *4 (Wn.App. Div. 1, October 27, 2014); Sargent v. City of Seattle, 179 Wn.2d 376, 314 P.3d 1093 (2013). Sargent considered the application of RCW 42.56.240(1) and upheld Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997), holding the categorical application of the exemption when a law enforcement investigation is active and on-going and has not been referred to the prosecuting attorney.

The Court of Appeals application of the plain language of RCW 42.56.250(5) in this case is consistent with Sargent. The Court of Appeals decision states that “[a]lthough the County did not conduct a criminal investigation of Mahmoud’s EEO claim, as in Newman, the relevant records pertained to an open case, future remedial proceedings were possible, and production before the case was closed would have impaired the investigating agency’s ability to perform its given role.” Mahmoud, 2014 WL 5465404 at *4. This conclusion considered and mirrored the

public policy of Newman, conforms to the plain statutory language of RCW 42.56.250(5), and does not conflict with any Washington case law. As a result, there is no basis for review on this issue.

Additionally, the Court of Appeals correctly concluded that a letter referencing a different request did not “re-request” these exempt records. Mahmoud, 2014 WL 5465404 at *5. Again, this conclusion is consistent with Washington law and does not provide a basis for review.

2. The PRA Statute Of Limitations Bar Claims Brought More Than One-Year After An Agency Claims An Exemption Or Last Produces A Record On A Partial Or Installment Basis.

The Court of Appeals correctly determined that the remainder of Mr. Mahmoud’s requests were barred by the PRA statute of limitations, RCW 42.56.550(6). The County responded to each of Mr. Mahmoud’s five other requests more than one-year prior to the amendment of his Complaint by claiming an exemption or last producing records on an installment basis.

Mr. Mahmoud’s assertions that the County failed to provide sufficient exemption information to trigger the statute of limitations is unsupported by the law and the record. The County’s logs identified “the date, citation to statutory exemption, author, recipient, and type and description of the record.” Mahmoud, 2014 WL 5465404 at *5. This comports with the “brief explanation” requirement articulated by the Court

in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539-40, 199 P.3d 393 (2009). Additionally, for each of these requests, the County produced records on an installment basis, which triggers the statute of limitations in RCW 42.56.550(6), even when the explanation of the claim of exemption is insufficient. The Court of Appeals ruling on this issue is consistent with Washington law and does not provide a basis for review. Mr. Mahmoud's argument seems to turn on his belief that the County knew additional records existed and "silently withheld" those records by failing to include them on any log. There is no evidence in the record to support this claim.. To the contrary, the evidence shows that the County conducted an adequate search that did not discover the records Mr. Mahmoud alleges were responsive to his requests. Mr. Mahmoud's baseless assertions do not support a grant of review.

3. The Court of Appeals Opinion Is Consistent With Other Courts Of Appeals Decisions.

Finally, with regard to request number 10-08592, the Court of Appeals Opinion is consistent with Division II of the Court of Appeals. Bartz v. Dep't of Corr. Public Disclosure Unit, 173 Wn.App. 522, 297 P.3d 737 review denied, 177 Wn.2d 1024 (2013); Johnson v. Dep't of Corr., 164 Wn.App. 769, 265 P.3d 216 (2011). The County produced one installment of records on December 9, 2010, believing it would have

additional installments. The County then notified Mr. Mahmoud on January 29, 2011, that no additional records were located. This was nineteen months before he filed his lawsuit. The Court of Appeals ruled, consistent with Division II of the Court of Appeals, that the statute of limitations was triggered. Mahmoud, 2014 WL 5465404 at *5. Thus, this decision does not conflict with other decisions of the Courts of Appeals and review is not warranted. See RAP 13.4(b)(2).

V. CONCLUSION

For all of the foregoing reasons, this Court should deny Mr. Mahmoud's petition for review under RAP 13.4(b).

Respectfully submitted on February 6, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



SARA J. DI VITTORIO, WSBA #33003
Deputy Prosecuting Attorney
Attorneys for Respondent

DECLARATION OF SERVICE

I, Cindy Ryden, hereby certify that on the 6th day of February, 2015, I caused to be delivered and served a true and correct copy of the foregoing Answer to Petition for Review upon the entity and persons listed herein by the following means:

Washington State Supreme Court
415 12th Avenue SW
Olympia, WA 98501-2314
(per to Supreme Ct. Order dated 9/4/97)

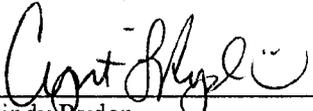
E-Filing:
Supreme@courts.wa.gov
 Facsimile
 Express Mail
 U.S. Mail
 Hand Delivery
 Via ABC Messenger Service
for Service by 4:30pm on _____

Hardeep S. Rekhi
Gregory A. Wolk
REKHI & WOLK, P.S.
1411 Fourth Ave., Ste. 1101
Seattle, WA 98101

E-Service:
hsrekhi@rekhiwolk.com
greg@rekhiwolk.com
 Facsimile
 Express Mail
 U.S. Mail
 Hand Delivery
 Via ABC Messenger Service
for Service by 4:30pm on _____

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 6th day of February, 2015.



Cindy Ryden
Legal Asst. to Sara J. Di Vittorio,
Lyndsey M. Downs, and Sean D. Reay
Deputy Prosecuting Attorneys

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, February 06, 2015 10:47 AM
To: 'Ryden, Cynthia'; 'hsrekhi@rekhiwolk.com'; 'greg@rekhiwolk.com'
Cc: Di Vittorio, Sara; Downs, Lyndsey
Subject: RE: Petitioner Kamal Mahmoud v. Respondent Snohomish County; Wash. Supreme Ct. # _____ [Court of Appeals #70757-4-I]

Rec'd 2/6/2015

From: Ryden, Cynthia [mailto:Cynthia.Ryden@co.snohomish.wa.us]
Sent: Friday, February 06, 2015 10:42 AM
To: OFFICE RECEPTIONIST, CLERK; 'hsrekhi@rekhiwolk.com'; 'greg@rekhiwolk.com'
Cc: Di Vittorio, Sara; Downs, Lyndsey
Subject: Petitioner Kamal Mahmoud v. Respondent Snohomish County; Wash. Supreme Ct. # _____ [Court of Appeals #70757-4-I]
Importance: High

Attached is Snohomish County's Answer to Petition for Review for:

Kamal Mahmoud v. Snohomish County

Handed up from Court of Appeals #70757-4-I (Supreme Court # still pending)

Filed by attorneys for Snohomish County:

- Sara J. Di Vittorio (WSBA #33003) – Sara.DiVittorio@snoco.org
- Lyndsey M. Downs (WSBA #37453) – SPALMD@snoco.org
- (425) 388-6330 (ph)
- (425) 388-6333 (fax)

Please file this document with the Wash. St. Supreme Court. Copies of this document are also being sent to petitioner's counsel pursuant to prior consent to electronic service.

Please contact me at (425) 388-6385 if there are any questions or you need additional information in order to process this filing.

Thank you. ☺



*Cindy Ryden, Legal Assistant
Civil Division - Land Use
Snohomish County Prosecutor's Office
Robert J. Drewel Bldg., 8th Fl., M/S 504
3000 Rockefeller Avenue
Everett, WA 98201-4046
Tel: (425) 388-6385 / Fax: (425) 388-6333
CRyden@snoco.org*

NOTICE: All emails, and attachments, sent to and from Snohomish County are public records and may be subject to disclosure pursuant to the Public Records Act (Chapter 42.56 RCW).

CONFIDENTIALITY STATEMENT: This message may contain information that is protected by the attorney-client and/or work product privilege. If this message was sent to you in error, any use, disclosure or distribution of its contents is prohibited. If you receive this message in error, please contact me at the telephone number or e-mail address listed above and delete this message without printing, copying, or forwarding it. Thank you.