No. 91442-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

vs.

PETE HOLMES, SEATTLE CITY ATTORNEY'S OFFICE, CITY OF SEATTLE,

Respondents,

RESPONSE TO APPELLANT'S PETITION FOR DISCRETIONARY 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 Arthur West ("West").

II. INTRODUCTION

West seeks review under RAP 13.4(b) of the Court of Appeals unpublished decision *West v. Pete Holmes*, No. 70597-1-I, 2015 WL 303462 (Jan. 20, 2015). Both the trial court and the Court of Appeals found that West had not requested the records he now claims entitle him to a Supreme Court review. There is no reason to accept review of the Court of Appeal's well-reasoned decision that the City complied with the Public Records Act ("PRA").

West's petition focuses on calendar printouts. He claims that because he was not provided calendar printouts, the Court of Appeals decision conflicts with precedent and should be reviewed. Nothing in the Court of Appeals holding conflicts with precedent because the cases West cites are inapplicable. The reason City did not produce calendar printouts is because West did not request calendars.

In *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014), the Court found that under the PRA, the City should have produced a partially responsive record from a database. Here, the City

produced all responsive records including those maintained electronically. The Court of Appeals decision is unrelated to and entirely consistent with *Fisher*.

In *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011), the Court found that the adequacy of the search should be determined by the search itself and not the search results. Here, the City performed an adequate search by using appropriate terms, locations and custodians. The Court of Appeals decision is consistent with *Neighborhood Alliance* because it imposes no obligation to search for records not requested.

In *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014) and *PAWS v. University of Washington,* 125 Wn.2d 243, 884 P.2d 592 (1994), the Courts found that the definition of "public records" is broad. Here, the City produced all requested public records. The calendars were not requested. The Court of Appeals decision is unrelated to but consistent with *Nissen* and *PAWS*.

In *Utter v. Building Industry Ass'n of Washington*, 341 P.3d 953 (2015), the Court explained that lobbying records should be made public. Here the City released all records related to I-502. The Court of Appeals decision did not address the statute discussed in *Utter,* RCW 42.17A. It is unrelated to and consistent with *Utter*.

Finally, West argues that because calendars are important, the Court of Appeals decision should be subject to review. This argument misses the mark. The criteria for review under RAP 13.4(b)(4) concerns whether the issue is of substantial public interest. The issue here concerns the requester's failure to request particular records. This issue is not of substantial public interest.

West claims that the City failed to produce calendars printouts because they were maintained electronically; because of an inadequate search; because of a misunderstanding of the definition of public record; because they concerned a political issue; and because of a disregard for the importance of calendars to public officials. None of these arguments are relevant. The Court of Appeals correctly found in the City's favor based on the scope of West's request and West's petition for review should be denied.

III. COUNTERSTATEMENT OF ISSUES

1. Under the Public Records Act, should an agency be required to produce weekly calendar printouts when the requester did not request calendars, did not clarify his request after he was informed of the search parameters, limited his request to one subject area, and was provided copies of individual appointments regarding the designated subject area?

2. Should the Court revisit and overturn *Neighborhood Alliance*, which held that in determining the adequacy of a search, the focus should be whether the search was adequate, when the requester did not submit evidence to dispute the adequacy of the search but only claimed he was entitled to records not requested?

3. Should the court revisit and overturn *Bonamy v. City of Seattle*, 92 Wn.App. 403, 960 P.2d 447 (1998) which held that an agency is not required to be a "mind reader" when the requester failed to request calendars or respond to requests for clarification?

IV. COUNTERSTATEMENT 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 West's inaccurate factual contentions.

West submitted a three part public records request to the City on August 27, 2012. CP 6. The request concerned records relating to Initiative 502, including correspondence and communication between the City Attorney or the City Attorney's Office and the U.S. Attorney's Office, representatives of Hempfest, and the Initiative 502 campaign. CP 10.

The City's public disclosure officer informed West he would search the records, communications, and correspondence as West had

defined them: "any paper records, or records of telephone calls, LUDs, text messages, PDA communications, or emails from any mobile or stationary device" and included a list of search terms it would use to search the email accounts. CP 38-41. The City asked West for clarification if it had misinterpreted his request on three occasions. *Id.*

The City used the search terms "Initiative 502," "I-502," "I 502" and "Durkan" to search all Outlook records, including email and calendar entries. CP 41. The City further manually reviewed documents stored on computer drives in addition to several hundred pages of hard copy documents kept in files during the course of business by City employees. CP 67. The City provided West with five installments comprised of thousands of pages of records. CP 3, 33. These records included the full text of all 39 individual calendar entries related to I-502. CP 34.

West did not request Mr. Holmes' calendar in his public records request. West never objected to the scope of the City's search or the proposed search terms, clarified his records request, or expanded the scope of his request beyond record related to I-502. The City prevailed on summary judgment in King County Superior Court. On appeal, the Court of Appeals held that the City complied with the PRA when it provided records related to I-502 and that calendars were beyond the scope of the request.

V. ARGUMENT IN OPPOSITION TO REQUEST FOR REVIEW

Under RAP 13.4(b), the Court grants review only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case meets none of the grounds for discretionary review. West fails to demonstrate that the Court of Appeals decision conflicts with any Supreme Court or other Court of Appeals decision, involves a constitutional question, or is of substantial public interest. West's Petition for Review primarily concerns issues the parties did not litigate including whether the calendar print outs are public record, whether calendars are important to public officials, and whether calendar print outs would have been helpful to West. The Court should deny review.

A. The Court of Appeals decision is Consistent with the Public Records Act and Supreme Court Precedent.

West argues that because the Supreme Court in *Fisher* found that the City had to produce records from a database, the Court of Appeals decision was made in error. However, these decisions are factually and legally unrelated. The request in *Fisher* concerned a record that must be created by combining data maintained in two separate data management systems. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d at 523. The *Fisher* Court found that under the PRA, the City was not required to create a record by combining the databases but should have produced a "partially responsive record" by providing data from one database. *Id.*

Unlike *Fisher*, the present case, does not concern complex records management systems, partially responsive records, or creating records. In contrast to *Fisher,* here the City produced the requested electronic records. In his Petition, West ignores that his request did not encompass calendar print outs. He refers to the calendars repeatedly as "responsive records" as if using that label will make them so. *See* Pet. at 2, 5, 7, 9, 10, 14, 15. He further fails to recognize that the City provided him with responsive calendar records – 39 individual appointments related to I-502. The Court of Appeals correctly found that the City released all responsive records and in doing so, complied fully with the PRA.

Nothing in *Fisher* required the City to produce records not requested. The Court of Appeals decision is consistent with *Fisher* and does not meet the standard for review under RAP 13.4(b)(1).

B. The Court of Appeals Decision is Consistent with Court of Appeals Precedent

The Court of Appeals decision is not in conflict with *Neighborhood Alliance*. In *Neighborhood Alliance*, the court held that, under the PRA, a search for requested records must be reasonably calculated to uncover all relevant documents. *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d at 721. The City located electronic records. It searched personal devices. Finally, contrary to West's assertion, the City searched hundreds of pages of paper records. CP 6-7, 29, 30. West agreed that the received records responsive to all parts of his request. RP 28-32. The Court of Appeals properly found that City's search was adequate and consistent with the *Neighborhood Alliance* standard. Op. at 6.

West argues that because one part of his request included "all records . . . about or concerning I-502," under the *Neighborhood Alliance* standard, the City should have searched for and produced the five calendar printouts. In so arguing, he disregards the basic facts of his request. The request was titled "I-502 Related Correspondence." CP 38. His request did not mention records related to the hundreds of other issues the City

Attorney may address through his work. The record identifies record types to include "any paper records, or records of telephone calls, LUDs, text messages, PDA communications, or emails from any mobile or stationary device." CP 38. This list does not encompass calendar printouts. The Court of Appeals correctly determined that "West's PRA request does not reasonably suggest that he was seeking complete calendar views, whether daily, weekly or monthly." Op. at 6.

The Court of Appeals correctly observed that West provided no evidence that the City's search was inadequate. Op. at 8. In his Petition, West makes the circular argument that the City's failure to produce the calendar printouts is evidence of an inadequate search. Pet. at 13. This argument is in direct conflict with the holding in *Neighborhood Alliance* that the focus of the search should be on the search, not on records. *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d at 721. The City conducted an adequate search when it located responsive records by using carefully chosen search terms, locations and custodians. CP 30-33. This finding is consistent with *Neighborhood Alliance* and provides no basis for review. The *Neighborhood Alliance* case does not require agencies to conduct searches to locate records not requested.

Despite West's failure to request calendars, the City produced individual electronic calendar records responsive to the request. The

Outlook system comprises .ICS files which are individual calendar appointments that can be viewed in a variety of ways from daily to weekly to monthly. CP 33. The City used its email archive system to retrieve the 39 calendar appointments related to I-502 and produced those records in their entirety to West. CP 34.

West cites to several Court of Appeals cases in his section headings, but fails to cogently argue that the Court of Appeals decision conflicts with the cited cases. Pet. at 12, 15. The cited cases, *Nissen* and *PAWS*, concern, in part, the definition of public record under RCW 42.56.010(3) and RCW 42.56.010(4). West appears to be claiming that the holdings in the cited cases required the City to provide the calendar printouts because they are public record. Pet. at 12, 15. Nothing in the *Nissen* and *PAWS* decisions, regardless of the definition of public record, requires the City to provide records not requested. The Court of Appeals decision did not address the definition of public record and therefore could not possibly conflict with any prior decisions that would merit review under RAP 13.4(b)(2). Similarly, the United States Environmental Protection Agency policy regarding the retention of printed versions electronic calendars, cited by West, is irrelevant to the issues and provides no basis for discretionary review.

Finally West argues that the Court of Appeals decision conflicts with *Utter,* a case concerning political campaigns regulated under RCW 42.17A. Pet. at 11. RCW 42.17A governs disclosure of lobbying expenditures. The Court of Appeals' decision is not inconsistent with *Utter* because it did not address the standards for disclosure under RCW 42.17A. West raises this issue for the first time in his Petition for Review. The *Utter* case does not affect disclosure of records not requested and provides no basis for review under RAP 13.4(b)(2).

C. No Constitutional Question is at Issue

West does not argue that a constitutional question is at issue. There is no basis for review under RAP 13.4(b)(3).

D. The Petition Raises No Issue of Substantial Public Interest

West's remaining arguments focus on the importance of electronic calendars to public officials. Pet. at 5-6, 8-10, 17-18. While electronic calendars may be of significant public interest because they show the activities of public officials, West did not request calendars. An agency is not required, under the PRA, to read a requesters mind concerning their records request. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 412. The Court of Appeals correctly noted that West has an "obligation to identify the records that he seeks with sufficient clarity to permit the City to locate them." Op. at 8. The City did not produce the calendar printouts because

West failed to include calendars in his request or respond to the City's communications regarding their search.

The *Consumer Federation of America v. Dept of Agriculture*, 455 F.3d 283, 372 U.S.App.D.C. 198 (2006) case is inapplicable here. Pet. at 16-18. In *Consumer Federation,* the request specified "access to public calendars." *Consumer Federation of America v. Dept of Agriculture*, 455 F.3d at 285. The court determined that electronic calendars of USDA employees were agency, not personal, records based on the purposes for which the calendars were used. *Id.* at 289. The court's analysis in *Consumer Federation* creates no issue of substantial public interest subject to review. At no time was the use of calendars litigated by the parties or decided upon by a court. It should not support review under RAP 13.4(b)(4). The Court should deny the Petition because the issues it is being asked to review are not the subject of the underlying litigation.

VI. CONCLUSION

West has met none of the criteria for accepting review under RAP 13.4(b). The Court of Appeals decision correctly applied the standards in *Neighborhood Alliance* and *Bonamy*. Nothing in West's petition supports revisiting those standards. Review by this Court is not merited.

DATED this 20th day of April, 2015.

Jessica Nadelman, WSBA #27569
Assistant City Attorney
Attorney for Respondents

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 April 20, 2015, I caused to be delivered by Electronic Mail and United States Mail, First Class, postage pre-paid, addressed to:

Arthur West
120 State Avenue NE #1497
Olympia, WA 98501

awestaa@gmail.com

a copy of Response to Appellant's Petition for Discretionary 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 20th day of April, 2015, at Seattle, King County, Washington.

Susan Williams

OFFICE RECEPTIONIST, CLERK

To: Williams, Susan E
Cc: awestaa@gmail.com; Nadelman, Jessica
Subject: RE: Response to Petition for Discretionary Review 91442-7

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Sent: Monday, April 20, 2015 2:35 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: awestaa@gmail.com; Nadelman, Jessica
Subject: Response to Petition for Discretionary Review 91442-7

Good afternoon,

Attached please find Response to Petition for Discretionary Review.

Case Name: Arthur West v. Pete Holmes, et al.

Case No.: 91442-7

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