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No. 70597-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

ARTHUR WEST,
appellant,
Vs.

CITY OF SEATTLE, et al
respondents

APPELLANT'S OPENING BRIEF

On appeal from the rulings of the honorable Judge Linde

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II. SUMMARY OF ARGUMENT

This case involves deliberate silent withholding of records of weekly calendars, responsive records that were withheld from plaintiff in violation of the Public Records Act.

Significantly, while withholding these public records from West, the City provided the very same City Attorney's calendar records to the Public Disclosure Commission, where they were employed as the crucial evidence to establish violations of the Campaign laws regarding the use of City resources to conduct partisan campaign activity on behalf of I-502, in a formal enforcement proceeding by the PDC.

As the Superior Court itself recognized...

> Seeing... how those scheduled events fit in and to a calendar is key to understanding what our public officials are doing... (See transcript of May 10, 2013, at page 37, lines 20-22)

It is beyond reasonable dispute that the weekly calendars of the Seattle City Attorney that were withheld from the plaintiff in this case were public records as defined RCW 42.56.010(3), and that they were responsive to West's request.

The withheld calendars were "writing" concerning the conduct of government and the performance of governmental functions "owned, used or retained[1]" by a local agency. (the City of Seattle)

They were known to exist and discoverable by any reasonable search, such as the search conducted for the PDC, which uncovered the existence of these records almost immediately.

The weekly calendars, as provided to the PDC, constitute "records" as defined in the Public Records Act, and also constitute "records" that the City was

[1] RCW 42.56.010(3) provides that a..."Public record" includes any writing containing

aware of the existence of, as it admits it knew of their existence yet refused to provided them to the plaintiff until after suit was filed, after the City had stated that its search and production was complete, and after it had disclosed the same records to the Public Disclosure Commission.

Nor does the City's contention that production of individual isolated entries from the outlook calendars was the same as producing the actual calendars, as counsel admitted in argument (at page 35 of the Transcript of 5-10-13, at lines16-23) that the information on the calendars and individual entries was not identical.

The City's actions in this case violate both the letter of the law and the broad remedial intent of the Public Records Act that citizens like plaintiff West be

informed of the activities of their elected public officials such as Seattle City Attorney Pete Holmes.

Significantly, other agencies such as Snohomish County routinely provide calendar information in response to records requests.

III. ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN CONSTRUING RCW 42.56.010(3) NARROWLY TO DETERMINE THAT CALENDARS OWNED, USED AND RETAINED BY THE SEATTLE CITY ATTORNEY TO SIMULTANEOUSLY MANAGE OFFICIAL CITY APPPOINTMENTS AND I-502 CAMPAIGNING WERE NOT PUBLIC RECORDS RESPONSIVE TO A REQUEST FOR RECORDS ABOUT OR CONCERNING INITIATIVE 502.

II. THE COURT ERRED IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR SILENTLY WITHHOLDING RESPONSIVE CALENDAR RECORDS FROM WEST THAT WERE DISCLOSED TO, AND USED BY. THE PUBLIC DISCLOSURE COMMISSION TO ESTABLISH MULTIPLE VIOLATIONS OF STATE LAW BY THE SEATTLE CITY ATTORNEY IN EMPLOYING CITY RESOURCES TO SUPPORT AND CAMPAIGN FOR INITIATIVE 502.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. DID THE COURT ERR IN CONSTRUING RCW 42.56.010(3) NARROWLY TO DETERMINE THAT CALENDARS OWNED, USED AND RETAINED BY THE SEATTLE CITY ATTORNEY TO SIMULTANEOUSLY MANAGE HIS OFFICIAL CITY APPPOINTMENTS AND HIS I-502 CAMPAIGNING WERE NOT PUBLIC RECORDS RESPONSIVE TO A REQUEST FOR RECORDS ABOUT OR CONCERNING INITIATIVE 502 ?

II. DID THE COURT ERR IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR SILENTLY WITHHOLDING RESPONSIVE CALENDAR RECORDS FROM WEST THAT WERE DISCLOSED TO, AND USED BY. THE PUBLIC DISCLOSURE COMMISSION TO ESTABLISH MULTIPLE VIOLATIONS OF STATE LAW BY THE SEATTLE CITY ATTORNEY IN EMPLOYING CITY RESOURCES TO SUPPORT AND CAMPAIGN FOR INITIATIVE 502 ?

IV. STATEMENT OF THE CASE

1. On August 27, 2012, Appellant West made a request for records to the City of Seattle. Section 3 of the request sought

> "**All records, communications or correspondence (see above) about or concerning I-502** or between the City Attorney or City Attorney's office and any sponsor or representative of the I-502 campaign, January of 2011 to the present."

2. On 10 / 08 / 2012, plaintiff West filed a complaint for violation of the PRA. The Original Complaint clearly alleged unreasonable delay in the production of records, and withholding of records, (See Complaint at 1.1, 2.2, 3.8, 4.1, 5.1) claims that included within their scope delays and nondisclosure caused by silent withholding. (CP 49-66)

3. On January 7, 2013, the PDC and Pete Holmes entered an agreed order stipulating to 3 violations of the Public Disclosure Act involving

illegal use of City resources by Pete Holmes to campaign for I-502 (CP 1-8)

4. The records that the PDC used to establish the violations principally featured the calendars owned, used and retained by City Attorney Pete Holmes (and his secretary) to simultaneously manage his duties as Seattle City Attorney and campaign for I-502. (CP 86-92)

5. These critical records of the activities of a public official, although responsive to West's request, and known to exist by the city, were not disclosed to West until specifically requested under discovery. (CP 83-5)

6. On 3 / 25 /2013, the defendants filed a Motion for Summary Judgment. (CP 67-30)

7. On 05 / 10 / 2013, the court granted summary judgment of dismissal. An Order was signed on 5 / 10/2013. (CP 175-77)

8. Plaintiff moved for reconsideration on 5 / 20 / 2013. (CP 178-252)

9. Plaintiff filed a declaration re new evidence on 05/07/ 2013. (CP 153-74)

10-. On 06 / 04/ 2013 the Court entered an Order denying reconsideration (CP 315)

11. On 07/03/ 2013, the Plaintiff filed a timely Notice of Appeal (CP 316-21)

V. ORDERS ON APPEAL

Appellant appeals from and assigns error to the following Orders. **1.** The Order Granting the City's Motion for Summary Judgment. (CP 175-7), and **2 .** The Order of denying Reconsideration (CP 315).

VI. STANDARD OF REVIEW

The Standard of review of a Summary Judgment is de novo. Parrilla v. King County 138 Wn. App. 427, (2007). Factual issues are reviewed under the substantial evidence standard and issues of law are reviewed de novo. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). Appellant contends the Court's rulings were marred by errors of fact and law and were not based upon substantial evidence or any reasonable inference therefrom.

VII. RELIEF SOUGHT

Appellant seeks an Order vacating the dismissal of the trial court and n Order of remand with instructions for the Superior Court to, find a violation of the PRA, and award appropriate penalties, fees, and costs.

VIII. ARGUMENT

I THE COURT ERRED IN CONSTRUING RCW 42.56.010(3) NARROWLY TO DETERMINE THAT CALENDARS OWNED, USED AND RETAINED BY THE SEATTLE CITY ATTORNEY TO SIMULTANEOUSLY MANAGE HIS OFFICIAL CITY APPPOINTMENTS AND HIS I-502 CAMPAIGNING WERE NOT PUBLIC RECORDS RESPONSIVE TO A REQUEST FOR RECORDS ABOUT OR CONCERNING INITIATIVE 502.

This case concerns calendar records of the Seattle City Attorney's calendar that were provided to the Public Disclosure Commission, but withheld from Appellant West. (See Transcript of 5-10-13, p. 15, lines 16-19).

The Court erred in the Orders of _____ and ____ (CP) in construing the PRA and West's request narrowly to exclude these responsive records relating to the conduct of government and the performance of governmental functions prepared, owned, used, or retained by the City of Seattle.

RCW 42.56.010(3) provides that a...

> "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

As a remedial statute, and by the express language RCW 42.56.030, the intent section of the Public Records Act, the PRA is required to be liberally construed to effectuate its purposes.

In addition, agencies are required to afford requestors the fullest assistance in the identification and provision of responsive records.

Yet in this case the Court narrowly construed the PRA and RCW 42.56.010(3) to exclude the City Attorney's calendars, when these were beyond any reasonable argument...

"records,...about or concerning I-502"

By deliberately withholding records as basic as the weekly tabular register of the official activities of the Seattle City Attorney, the City defendants violated the manifest intent of the people in adopting the PRA, that they be informed of the activities of the agencies that serve them.

As RCW 42.56.030 specifically provides...

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected...

By narrowly construing the PRA, and by holding that Calendars containing I-502 related communications and campaign information were not

responsive to a request for **"records,...about or concerning I-502"**, the Superior Court failed to effectuate the intent of the PRA that the people retain control over the instruments they have created and that the public interest be fully protected.

The Court also, in finding the Calendars containing I-502 related meetings and events non-responsive, committed errors of act and law when no evidence or reasonable inference therefrom supported their determination, and when the determination was not supported by substantial evidence. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

II THE COURT ERRED IN FAILING TO FIND THE CITY IN VIOLATION OF THE PRA FOR SILENTLY WITHHOLDING RESPONSIVE CALENDAR RECORDS FROM WEST THAT WERE DISCLOSED TO, AND USED BY. THE PUBLIC DISCLOSURE COMMISSION TO ESTABLISH MULTIPLE VIOLATIONS OF STATE LAW BY THE SEATTLE CITY ATTORNEY IN EMPLOYING CITY RESOURCES TO SUPPORT AND CAMPAIGN FOR INITIATIVE 502.

The type of "silent withholding" practiced by the City in this case to hide the calendars of the Seattle City Attorney is among the worst type of violations of the Public Records Act.

The Supreme Court has repeatedly denounced silent withholding, declaring "silent withholding" illegal and noting that an "agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain" See Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 269-71, 884 P.2d 592 (1994) (PAWS II), Rental Hous.

Ass'n v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009)

> As the Court explained in PAWS...
>
> > The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 269-71, 884 P.2d 592 (1994) (PAWS II) See also Rental Hous. Ass'n v. City of Des Moines, 165 Wn.2d 525, 540, 199 P.3d 393 (2009), Zink v. City of Mesa, 137 Wn.App. 271, 274, 152 P.3d 1044 (2007), Fisons, 122 Wn.2d at 350-55.

Further, despite the fact that the City has admitted that it knew of the existence of tabular registers of activities of the Seattle City Attorney containing responsive records, these were deliberately concealed from the plaintiff. Yet these same records were later provided to the PDC!

These deliberate omissions and the City's refusal to disclose known records are exacerbated by the fact that the omitted and concealed records were the smoking gun evidence necessary to clearly establish violations of the campaign laws, which the City and the Settle City Attorney had an evident interest in concealing.

Obviously, a search performed of one's supervisor's records such as that performed by Mr. Holmes subordinates may not be designed to produce evidence that would cast one's supervisor in an unfavorable light.

Under these circumstances, the failure of the City Attorney's office to conduct anything but a perfunctory in house "search" designed to miss the most damning evidence can reasonably be questioned, as an overzealous subordinate might find

their employment prospects dim after finding and disclosing clear evidence of illegal conduct by their boss.

In 20 years of seeking to hold government accountable to the public plaintiff has reviewed hundreds of thousands of pages of records. Often, buried under hundreds of pages of records are a few records that demonstrate beyond any dispute the existence of impropriety and misconduct. To paraphrase Mr. Clemens, the difference between these type of smoking gun records and others that merely imply wrongdoing is as vast as the difference between lightning and a lightning bug.

This smoking gun evidence of the weekly calendars that the City disclosed to the Public Disclosure Commission –but not to West- manifestly

demonstrated the improper use of public resources by the Seattle City Attorney to support I-502.

These smoking gun records were improperly withheld from plaintiff by the City until after a settlement was reached in the PDC complaint West filed concerning the City's use of public resources to support I-502.

If the Court allows defendants to prevail in their arguments in this case, agencies will be free to conceal this type of damning evidence from the public behind a specious smokescreen of a deliberately inadequate search made in bad faith designed to avoid records known to exist that might cast the agency in a bad light.

Under such circumstances, the intent of the Public Records Act and the Public Disclosure Act will be undermined and the requirement that the people

be informed of the activities of their government will vanish behind a shell game where agencies will be free to conceal even the most basic records of their activities such as the weekly calendars of the City Attorney of the City of Seattle.

The requirement of a reasonable search was never intended to be used as a shield to justify deliberate withholding of records, particularly records as basic and fundamental to understanding governmental operations as a weekly calendar demonstrating the official job related activities of a City Attorney.

The City simply cannot be allowed to hide behind the spurious smokescreen of a "reasonable search" when records known to exist were concealed, for, as the Supreme Court and the federal judiciary have recognized, the agency bears the burden,

beyond material doubt, of showing its search was adequate in cases involving disclosure of public records.

> To do so, the agency... should establish that all places likely to contain responsive materials were searched. Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), citing Valencia-Lucena, 180 F.3d at 325.

The City in this case cannot meet this burden because they did not conduct a search of, or produce the Calendar records of, the of governmental functions of the Seattle City Attorney that they have certified were known to exist.

The City records officer did not contact the Seattle City Attorney and Search his paper records or review even the most basic records as his weekly calendar.

These were places that were reasonably likely

to have responsive records, especially since it was no secret that Mr. Holmes was an outspoken and active proponent of I-502.

As the Supreme Court underscored in the Neighborhood Alliance decision...

> ...(A)gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. Valencia-Lucena v. U.S. Coast Guard, 336 U.S. App. D.C. 386, 180 F.3d 321, 326 (1999). The search should not be limited to one or more places if there are additional sources for the information requested. Valencia-Lucena, 180 F.3d at 326. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." Oglesby v. U.S. Dep't of Army, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (1990).

The City should not be allowed to veil nondisclosure of responsive records behind a perfunctory search and claim that they believed that only isolated entries existed when they were very

well aware that actual "calendars" in the form of weekly calendar records were available and "Used" by the City Attorney to manage his schedule.

Significantly, the defendants have not alleged that they were unaware of the existence of these tabular registers in the form of weekly calendars. In fact, the declaration of Mr. Jaeger demonstrates that the City was well aware of the existence of these "records" but deliberately decided not to disclose them. (See Jaeger Declaration at page 2, lines 9-10)

Defendants attempt to advance the equally false representation that a "Calendar" is merely an "index" of unrelated events, a representation that contradicts common sense the dictionary definition of calendar, and the meaning of the term calendar as it has been used for hundreds of years.

As any schoolboy is aware, a calendar is not an merely an "index" of unrelated events, but a **tabular register of sequential activities,** in this instance a complete tabular record of the official duties of a public official, Seattle City Attorney Pete Holmes, and, coincidentally, the clear and evident record that I-502 campaign activities were scheduled as part of the official duties of the Seattle City Attorney.

> Mirriam Webster's defines Calendar as...
>
> a tabular register of days according to a system usually covering one year and referring the days of each month to the days of the week
>
> And further...
>
> an orderly list: as... a list or schedule of planned events or activities giving dates and details

This is in accord with the original Latin Kalendarium, which was used for centuries to describe monthly account books.

> By contrast, the definition of "index" is...
>
> An alphabetical list of names, subjects, etc. with references to the places they occur, typically found in a book...

Contrary to the defendants' claims, a "calendar" is not an "index", but is a **tabular register**, a compendium containing a linear continuum of sequential appointments represented in columns or tables, and an integrated whole greater than the sum of its parts. This is the crucial distinction that the defendants attempt to blur and the smokescreen behind which they mendaciously attempt to hide their withholding of records and violation of the public Records Act behind.

Significantly, the courts have uniformly found silent withholding to constitute a violation of the PRA, and uniformly applied the penalty provision of RCW 42.56.550(4) when an agency has been found to

silently withhold records, as the City has in this current case. As the Supreme Court explained in PAWS...

> The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore,... an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety. PAWS II

By withholding the responsive calendar records that were known to exist and which were admittedly different from the isolated entries that were produced, the City violated the Public Disclosure Act.

IX. CONCLUSION

As the Superior Court implicitly recognized, the calendars owned, used and maintained by a public official such as the Seattle City Attorney are a

category of records within the central core of what types of information the PRA was enacted by the people to ensure disclosure of.

The fact that the PDC relied upon these selfsame records to establish violations of the campaign laws demonstrates the imperative that the records of the activities of our public officials and guardians of law and order be readily available.

This is essential if the public is to remain informed of what their public officials, (like Seattle City Attorney Pete Holmes) are doing[2]. In this case he was using public resources to illegally support and campaign for a partisan initiative.

The circumstance that these selfsame records were readily provided to the PDC but withheld from the plaintiff establishes a case of silent withholding

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[2] **See RCW 42.56.030, Juvenal, Satire VI, lines 347–8, (date unknown)**

of the most evident and undeniable nature, especially since they formed the evidentiary basis for a stipulated finding of multiple violations of the Public Disclosure Act by the Seattle City Attorney by the PDC.

Respectfully submitted ~~February 21~~ March 6th, 2013.

ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that this document has been ~~Served on and/or~~ Emailed to counsel for the respondents at their address of record on or before ~~February 21~~ March 6th, 2014.

Done ~~February 21~~ March 6th, 2014.

ARTHUR WEST