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NO. 70901-1-I

In the Court of Appeals of the State of Washington
Division 1

JEFFREY R. MCKEE, Appellant

v.

KING COUNTY, Respondent

APPELLANT'S REPLY BRIEF

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B) ARGUMENT

1. Absence of bad faith not basis to grant summary judgment.

"Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records." RCW 42.56.550(1). "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." *Id.* "Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). "In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said

public record." *Id.* However, a "court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state...correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1).

In other words, in an action under the Public Records Act, if the agency fails to meet its burden of establishing the applicability of a particular statutory exemption, the requester-petitioner is a prevailing party. A prevailing party, regardless of whether he is serving a criminal sentence at the time of his request, is entitled to "costs... incurred in connection with [the] legal action." RCW 42.56.550(4). Whether a prevailing party is serving a criminal sentence at the time of his request is only relevant as to whether statutory penalties should be imposed (and, unrelated to the present action, whether an agency may seek injunctive relief against the requester-inmate). RCW 42.56.565. Thus, the absence of bad faith on the part of an agency is never grounds for dismissal of an action under the Public Records Act.

Here, King County did not raise the issue of bad faith in its summary judgment motion or its reply. CP 73-82, 17-23. Therefore, its argument regarding the absence of bad faith should not be considered for

the first time on appeal. *See* RAP 9.12. But even if King County were able to establish an absence of bad faith[1], such an absence cannot provide a basis to uphold the trial court's granting of King County's summary judgment motion. Therefore, this Court should reverse the order dismissing this action and remand for further proceedings.

2. Copying cost charge irrelevant regarding records claimed exempt from production.

"No fee shall be charged for the inspection of public records." RCW 42.56.120. "No fee shall be charged for locating public documents and making them available for copying." *Id.* "A reasonable charge may be imposed for providing copies of public records...which charges shall not exceed the amount necessary to reimburse the agency...for its actual costs directly incident to such copying." *Id.* "An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request." *Id.* "If an installment of a records request is not

[1] Moreover, it is far from clear King County could have established the absence of bad faith on these facts. An agency that claims an exemption with "no basis in law" may act in bad faith. *Amren v. City of Kalama*, 131 Wn.2d 25, 38 (1997). Alternately, an agency's "farfetched" arguments against production of responsive records may constitute bad faith. *King County v. Sheehan*, 114 Wn. App. 325, 356-357 (2002). King County concedes *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1 (2011), which was factually indistinguishable regarding the jail records portions of Mr. Sargent's and Mr. McKee's requests, was issued three months before the County claimed the exemption under RCW 70.48.100. Brief of Resp. at 19. Whether King County's claim of exemption was so divorced from the law as it was understood at the time constitutes bad faith for the purposes of penalty assessment is at the very least a factual dispute that would preclude summary judgment.

claimed or reviewed, the agency is not obligated to fulfill the balance of the request." *Id.*

"[D]isclosure by promptly mailing copies [of public records] at a reasonable charge [ordinarily] satisfies [an agency's] statutory obligation." *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 89 (2005). And an agency may ordinarily refuse to mail copies of the records if payment is not received. *Id.* at 85. But that refusal to mail without payment does not constitute a claim of exemption or denial of a public records request. *Id.* at 88-89; *see also Gronquist v. Dept. of Corrections*, 159 Wn. App. 576, 586 (2011). In other words, because an action under RCW 42.56.550(1) necessarily involves an allegation an agency "denied an opportunity to inspect or copy a public record," and a refusal to mail without payment of copying charges is *not* treated as a denial under the statute, an action under RCW 42.56.550(1) must be concerned with some action that constituted a denial. Moreover, the question as to whether the requester ultimately paid for the copying charges is irrelevant in the context of a judicial review of an agency action except to the extent that there constituted a "balance of the request" as yet unfulfilled. *See* RCW 42.56.120.

Here, King County claimed some records were exempt. CP 37, 54-59. These records were not provided, and would not have been provided, at least not in an unredacted form, regardless of whether Mr. McKee paid

the full amount of the copying cost requested by King County. Thus, that Mr. McKee only paid part of the copying cost to King County is irrelevant for the purposes of the issues raised in this appeal, and irrelevant for the purposes of resolving the issues legitimately considered by the trial court in granting King County's summary judgment motion. To the extent the trial court granted summary judgment on the basis that Mr. McKee had not paid the full copying cost requested, that was in error. And this Court should not consider whether Mr. McKee paid the full amount of copying costs requested as relevant to its resolution of the issues.

3. RCW 42.56.210(1) not ambiguous, and does not yield absurd results.

"The people of this state do not yield their sovereignty to the agencies that serve them." RCW 42.56.030. "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." *Id.* "The people insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.* The Public Records Act "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." *Id.*

Ordinarily, "the exemptions of [the Public Records Act] are inapplicable to the extent the information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought." RCW 42.56.210(1). In other words, "[i]n general, the Public Records Act does not allow withholding of records in their entirety." *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS* II), 125 Wn.2d 243, 261 (1994). "Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption." *Id.*

"The court's duty in statutory interpretation is to discern and implement the legislature's intent." *Lowy v. Peacehealth*, 174 Wn.2d 769, 779 (2012). "Where the plain language of a statute is unambiguous and legislative intent is apparent, [courts should] not construe the statute otherwise." *Id.* "Plain meaning may be gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* (internal citation omitted). "It is fundamental in construing any statute we avoid absurd results." *Id.*

The "avoiding absurd results" canon of statutory construction only applies if the plain meaning of the statute is ambiguous. *State v. Day*, 96 Wn.2d 646, 648 (1981). "A statute is ambiguous if it can reasonably be

interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable." *State v. Keller,* 143 Wash.2d 267, 276 (2001). The court is not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." *Id.*

Here, there is no showing that RCW 42.56.210(1)—in its mandate that redaction, not withholding, be employed whenever possible—is unambiguous. Therefore, notwithstanding King County's assertion the statute yields absurd results, this Court need not construe the statute, as opposed to simply reading its plain meaning, at all.

Furthermore, other examples in which a statute has been construed to avoid an absurd result reveal a stark dissimilarity with the present case. For example, "it would be an absurd result to contemplate that, in light of two arguably applicable statutes of limitations, the legislature intended no time limitation for PRA actions involving single-document production." *Johnson v. Dept. of Corrections*, 164 Wn. App. 769, 777 (2011). Or, it would yield an absurd result to construe the Public Records Act to require a government agency to respond to a request for "*all* of an agency's documents" because it would render "the identification [of records] requirement...essentially meaningless." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004). Or, it would yield an absurd result to allow "even a slight public interest" to mean no injunction is available under RCW

42.56.540. *See Brown v. Seattle Public Schools*, 71 Wn. App. 613, 610, fn. 5 (1993) (discussing predecessor injunction statute).

Here, on the other hand, RCW 42.56.210(1) simply required King County to parse records that contain work product, redact the work product from those records if possible, and produce the redacted records. In the context of emails, that would mean portions of the records—including the email's author's name, his email address, the intended recipients' names, their email addresses, the subject, the date, and arguably other aspects, such as routing metadata or informal communications (e.g. "How are the kids?") contained therein—are almost always non-exempt under the work product privilege. On the other hand, in the context of, say, handwritten attorney notes from a motion hearing, the record may not contain anything redactable. This is entirely consistent with the statute, its purpose, and court opinions interpreting the statute. And in no way is it absurd the Public Records Act should require agencies to engage in precisely this process.

C) CONCLUSION

King County wrongfully withheld jail records under RCW 70.48.100 because they actually had written permission from Mr. McKee to release the records, rendering the exemption inapplicable. Whether King County could demonstrate an absence of bad faith does not mean the

records were wrongfully withheld, or that Mr. McKee should be a prevailing party.

Furthermore, King County withheld a number of emails, all of which were capable of being redacted and thereby transformed into records that did not contain work product, thus rendering the exemption under RCW 42.56.290 inapplicable. RCW 42.56.210(1)'s requirement of redaction, where possible, is unambiguous, and does not yield absurd results.

Moreover, the trial court abused its discretion, given the lack of information provided by King County as to how the work product exemption applied to the emails, in declining to review the emails in camera.

Finally, whether Mr. McKee fully paid the copying costs is irrelevant as to those records withheld, in whole or in part, by King County.

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For these reasons, the trial court erred in granting summary judgment, and this court should reverse and remand for further proceedings.

DATED this 22nd day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S REPLY BRIEF was delivered this 22nd day of September, 2014 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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