No: 922209

SUPREME COURT OF THE STATE OF WASHINGTON

ANNE BLOCK,

Appellant/Petitioner,

v.

CITY OF GOLD BAR,

Respondent.

BRIEF OF AMICI WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, ALLIED DAILY NEWSPAPERS OF WASHINGTON, AND THE MCCLATCHY COMPANY

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TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF AMICI..... 4

II. STATEMENT OF THE ISSUE..... 4

III. ARGUMENT..... 5

A. Ensuring That The Purpose And Spirit Of The Public Records Act Are Protected--And The Act Properly Construed--Is In The Public Interest..... 5

B. The Issues In This Case Will Surely Be Repeated And Therefore It Is In The Public Interest For This Court To Determine The Proper Outcome..... 6

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

Page

Cases

Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985).....9

Morgan v. City of Federal Way, 166 Wn.2d 747, 213 P.3d 596 (2009) ...9

Neighborhood Alliance of Spokane County v. Spokane County,
172 Wn.2d 702, 261 P.3d 119 (2011) 5, 6, 7, 8, 9, 10

Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45 (2015) 7

Progressive Animal Welfare Soc'y v. Univ. of Wash.,
125 Wn.2d 243, 884 P.2d 592 (1994) 5

Statutes

RCW 42.56 ..... passim
RCW 42.56.030 .....5, 6, 9

Court Rules

RAP 13(b)(4) 6

I. IDENTITY AND INTEREST OF AMICUS

Amici curiae are Allied Daily Newspapers of Washington, the Washington Newspaper Publishers Association, the Washington Coalition for Open Government, and The McClatchy Company, collectively "Amici." The identities of Amici are further described in the accompanying Motion to File Amici Curiae Brief. This case deals with issues related to what constitutes a reasonable search under the Public Records Act, RCW 42.56, ("PRA" or the "Act"), and whether the attorney-client and work product privileges were properly invoked by the agency under the Act. This Court's decision will directly impact the Amici, who are frequent users of the PRA to inform their readers and constituents. Amici are sometimes compelled to pursue litigation to achieve access to public records. Amici have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on all record requestors, not only the parties.

II. STATEMENT OF THE CASE

The Amici rely on the facts set forth in the Petition for Review and Answer to Petition for Review.

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III. ARGUMENT

A. Ensuring that the purpose and spirit of the Public Records Act are protected--and the Act properly construed--is in the public interest.

The Public Records Act ensures effective government oversight and protects the right of Washington's citizens to remain informed of what their government is doing in their name. "Passed by popular initiative, it stands for the proposition that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society."" *Neighborhood Alliance of Spokane County v. Spokane County,* 172 Wn.2d 702, 714-15, 261 P.3d 119 (2011), *citing to Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 125 Wn.2d 243, 251, 884 P.2d 592, 607 (1994). There are few laws in this state with broader impact on the people than this Act, which ensures that the people "remain[] informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Government agencies are afforded authority solely through the will of the people; without the ability to know what the government is doing in their name, the citizens lose a vital right. *See id.* ("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.").

Crystal clear in the PRA is the concept that agencies must ensure liberal access to public records, "to assure that the public interest will be fully protected." *Id.* A central tenet and corollary to that concept is the idea that exemptions to production of public records must be construed narrowly. *Id.* It is important for an appellate court to "take into account the policy of the PRA that free and open examination of public records is in the public interest, even if examination may cause inconvenience or embarrassment." *Neighborhood Alliance,* 172 Wn.2d at 715.

Pursuant to RAP 13.4(b)(4), this Court may accept review of an appellate court decision if the issues are "of substantial public interest." The PRA itself and its 40 years of jurisprudence highlight that proper access to public records is, in and of itself, in the public interest.

B. The issues in this case will surely be repeated and therefore it is in the public interest for this Court to determine the proper outcome.

Of the several issues presented in the Appellant's Petition for Review, two in particular concern significant public interests. The first issue is whether the City of Gold Bar ("City") carried its burden of proving that it conducted a "reasonable search" for the requested records; the second is the extent to which the City can claim attorney-client and work product privileges with respect to records pertaining to its compliance with the Act itself.

1. Reasonable searches must be proven by nonconclusory and admissible testimony.

In this case, the City used conclusory declarations containing opinions of non-experts to show that its search for records on the former Mayor's cell phone was "reasonable," as required by the Act and by *Neighborhood Alliance*. The agency, which had the burden of proof at the summary judgment stage, purportedly met said burden with a declaration from the former Mayor, commenting that the emails were simply gone. The City did not submit testimony from a qualified witness, with information technology knowledge, to prove that the emails were not retrievable by any means. Instead, the trial court, and then Division I, would have the *requester* prove that the email service provider *did not* lose the emails--an impossible standard to meet when it is the agency itself that controls access to such relevant information.

In light of this Court's recent decision in *Nissen v. Pierce County,* 183 Wn.2d 863, 357 P.3d 45 (2015), regarding pubic agency employees' use of private cell phones, the Court should take this opportunity to clarify that not only must a public employee submit an affidavit describing his or her search for records on a private cell phone, per *Nissen*, but that the affidavit may only properly contain factual testimony, and not purported expert testimony as to what may have happened to "lost" emails, and the

supposed search capacity of certain email service providers. The holding in *Nissen* is meaningless if an employee may submit inadmissible and conclusory testimony regarding the search for responsive records. Public agencies, employees, and requesters alike would benefit from the direction of the Supreme Court on this issue; review is in the public interest.

2. Records describing response to a public records request must not be withheld as privileged.

In this case, the City argued that all of its records pertaining to its response to the Appellant's public records request are exempt because the Appellant had intimated that she may sue the City if records were not produced. The City claimed this constituted "threatened" litigation, triggering the work product privilege. However, if an agency is permitted to simply withhold all such information regarding its response to a request, no requester would ever be able to conduct reasonable discovery as to an agency's potential bad faith in withholding records, or its overall culpability. This result is contrary to this Court's holding in *Neighborhood Alliance,* that an agency that made an honest mistake should be "sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment." 172 Wn.2d at 718. In fact, this Court specifically stated that "[d]iscovery is required to differentiate between these situations." *Id.* If an agency is

permitted to hide behind the veil of the work-product privilege with respect to its compliance or noncompliance with the Act, the requester will never be able to withstand a summary judgment motion by the agency. The requester cannot produce facts in support of his or her position when all of the facts are withheld under the guise of privilege.

Moreover, the work product privilege may not be used to "shield records created during the ordinary course of business." *Morgan v. City of Federal Way,* 166 Wn.2d 747, 754, 213 P.3d 596 (2009), *citing to Heidebrink v. Moriwaki*, 104 Wn.2d 392, 296-97, 706 P.2d 212 (1985). It cannot reasonably be said that responding to public records requests is not part of a public agency's ordinary course of business. While a public agency may certainly turn to its attorney for legal advice about the Act, it cannot alter the character of relevant, responsive records of the agency's search into work product or privileged communications by failing to clearly distinguish between legal advice and records of PRA compliance.

It is in the public interest for this Court to reiterate that its holding in *Neighborhood Alliance* must not be ignored. Discovery must be permitted into the issue of whether and how the agency responded to the public records request. Citizens do not yield their sovereignty to public agencies such that public agencies may decide what is good and what is not good for the people to know. *See* RCW 42.56.030. According to the

City and the appellate court's decision, the agency may do just that, simply by involving the agency's attorneys in the process. This cannot be what this Court intended by the holding in *Neighborhood Alliance*, and it is in the public interest for the appellate court's holding to be corrected.

IV. CONCLUSION

Washington Coalition for Open Government, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, and The McClatchy Company urge the Court to accept review of the appellate decision in order to clarify the contours of how a "reasonable search" may be proven under the Act, and to provide guidance as to the extent to which an agency may invoke the attorney-client or work product privileges as they relate to the agency's response to a public records request. Addressing these issues is in the public interest both to provide direction to agencies in their future responses to records requests, and to ensure that the PRA is properly applied by future superior and appellate courts.

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Respectfully submitted this 9th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Emily K. Arneson, certify under penalty of perjury that on the 9th day of November, 2015, I caused a copy of the foregoing BRIEF OF AMICI WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, ALLIED DAILY NEWSPAPERS OF WASHINGTON, AND THE MCCLATCHY COMPANY to be served on the following by the method indicated:

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Greetings:

Attached please find the second of two emails with materials for filing in Block v. Gold Bar, No. 922209.

This email contains the following:

1. Amicus Curiae Brief

The attorney filing this material is Emily K. Arneson, WSBA #42749, attorney for Proposed Amici Washington Coalition for Open Government, Washington Newspaper Publishers Association, Allied Daily Newspapers of Washington, and The McClatchy Company. My contact information is below.

Please confirm receipt. Thank you.

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