THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 93819-9
Court of Appeals No. 73165-3-I

Eric Hood

Petitioner

v.

South Whidbey School District,

Respondent.

REPLY TO RESPONDENT'S ANSWER

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I. INTRODUCTION

Despite numerous opportunities before this and lower courts, the South Whidbey School District's ("District") Answer once again fails to support, with material evidence, crucial statements in its affidavits. Why? Because no such evidence exists – i.e., contrary to its employees' and attorneys' testimony, the District's promises were false, its responses reckless, and its searches inadequate. Its failure to address the issue of relevancy betrays its inability to explain why it withholds, destroyed, lost, and untimely disclosed records multiple times over the course of many years. Its presentation and defense of conclusory affidavits in Courts of Law further betray its bad faith.

The District asks this Court to endorse conclusory affidavits, ignore the relevancy of its multiple untimely records productions and destructions, and hence disregard the letter and intent of the Public Records Act. This Court should instead reject the District's bad faith affidavits and defenses and grant Hood's Petition for Review ("Petition").

II. ARGUMENT

A. The District's Answer Fails To Cite Any Material Evidence Of An Adequate Search

Because a public agency controls public access to the public records that it alone possesses, it "bears the burden, *beyond material doubt*, of showing its search was adequate." [1] The District could have both borne its burden *and* rendered Hood's Petition futile by citing to just one material document in its Answer to Petition for Review ("Answer").

But other than to conclusory District affidavits, the District's Answer cites not even one document supporting its Records Officer's / Superintendent's crucial testimony that she repeatedly directed multiple employees to timely search their files in response to Hood's "essential" requests made in summer and fall of 2011. Division I Opinion, p. 3. It cites no documents supporting its Technology Director's crucial testimony that the District timely addressed its email system's ongoing auto-deletion of emails. It does not cite to a single record attesting to the authenticity of the "processing matrix" that the Court of Appeals relied upon to conclude that the District's search was adequate. Petition, pp. 13-14. Despite its purportedly exhaustive efforts, it does not – *because it cannot* -- cite even

[1] *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011) (emphasis added).

one material document evincing its purported "diligence" and "good faith" relating to search adequacy. Answer, p. 5. Therefore. repeating its practice in the lower courts, the District's Answer instead cites crucial but conclusory statements in employee affidavits. *Id*., pp. 4-6.

B. The District's Answer Admits Hood's Assertion Regarding Relevancy

The District's Answer does not even mention the issue of "relevancy" presented to this Court for review. Petition, pp. 2, 17-18. In other words, the District does not address its failure to explain "*why* documents were withheld, destroyed, or even lost." [2] For example, the District's Answer cites no documents explaining how the Technology Director printed, from an electronic database, purportedly forgotten records that existed only as hardcopies in a *records storage* vault that it failed to timely search. Petition, p. 4. Why? Because no material document exists that could explain this simultaneous defiance of physical laws and dereliction of duty. Similarly, the District's Answer cannot cite a single material document that either explains or justifies its failure to address its email system's auto-deletion of emails, despite knowing that

[2] *Neighborhood Alliance*. 172 Wn.2d at 718 (emphasis in original)

that problem compromised its searches. It similarly fails to cite any material evidence that could explain relevant anomalies and dubieties associated with its searches and productions.[3]

Does the District hope that this Court will, like the lower courts, somehow overlook or ignore the issue of relevancy? Or does it believe that conclusory statements sufficiently replace relevancy? Regardless, its failure to address this singular issue must be deemed an admission of Hood's assertion that "Division I ignored the extraordinary *relevancy* of the District's multiple untimely productions." Petition, p. 18 (emphasis in original).

The significance of the District's tacit admission is supported by numerous rules governing courts – e.g., "Every defense, in law or fact, to a claim for relief in any pleading… shall be asserted in the responsive pleading thereto if one is required…." CR 12; "The matter is admitted unless…the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter," CR 36; "an evasive or incomplete answer is to be treated as a failure to answer," CR 37. While this Petition is neither an initial complaint nor a set of discovery questions, it is yet both a pleading and a

[3] Those anomalies and dubieties were presented at length to the courts below and indicated in Hood's Petition.

means of informing this Court. Like its presentations of conclusory affidavits, the District's failure to address the relevancy of its untimely records productions and destructions affronts the purpose of courts.

C. Prejudicial Arguments In The District's Answer Are Not Appropriate To This Court

Continuing to employ stratagems that met with success in the lower courts, the District's Answer begins by disparaging Hood. *See, e.g.*, "[Hood] was fired for poor teaching performance," Response, p. 1; Hood's appeal is based on "his own self-serving allegations," *Id.*, p. 2, repeated p. 14; Hood's petition is "simply [re-argument] of credibility issues," *Id.*, repeated, pp. 5, 11, 12. This Court rightly rejects such stratagems. *See e.g., Matter of Dann*, 960 P. 2d 416 - Wash: Supreme Court 1998, at 421 and fn. 4 (ad hominem characterizations deemed irrelevant and unpersuasive.)

To further disparage Hood, the District's Answer cites his unsuccessful litigation in other courts. *See e.g.*, discussion of arbitration, p. 3; lengthy discussion of lower court findings that Hood did not appeal, p. 6, ¶ 2; and discussion of federal court sanctions, p. 13, ¶ 2. Even if they were adequately supported, those citations are irrelevant to the issues before this Court. *See e.g., State v. Wright*, 888 P. 2d 1214 - Wash: Court of Appeals, 1st Div. 1995 at 821(irrelevant information disallowed

because it "potentially prejudices" opposing party.) Such irrelevance is also contrary to the letter and intent of the Public Records Act:

> Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request….

RCW 42.56.080, and

> Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550 (3). (*See* Appendix A for full text.)

By presenting discrediting but irrelevant information about Hood and his motives, the District seeks to prejudice this Court and thereby shield its continued withholding of requested records, including promised metadata. CP 1278-1289, 1313, 1349, 1367, 1617-1652, 2219-2220, 2528, 2544, 2598-2674 (Citations to undisclosed District documents produced by other agencies, and to undisclosed documents referenced in records produced by the District. *See* Opening Brief, pp. 25-29, 32, 52.)

The District's deliberately inaccurate revision of Hood's first "Issue Presented for Review" further seeks to prejudice this Court. Hood's first issue requests this Court to "clarify, in Public Records Act cases, the evidentiary standards for affidavits relied on by agencies and courts to determine the adequacy of an agency's searches." Petition p. 1. The

District's convoluted first "Counterstatement of Issues Presented" distorts Hood's issue as "an invitation to create a new 'evidentiary standard' solely for agency testimony regarding the scope of the agency's search for public records." [4] Answer, p. 2. The District's second counterstatement then uses its distortion of Hood's first issue to impeach its own distortion. *Id*., p. 3. In short, the District's "Counterstatements of Issues Presented" are straw men whose purpose is to pervert substantial issues of public interest.

The District falsely states, "there is no indication anywhere that the Court of Appeals failed to apply the proper evidentiary standards to the testimony of District witnesses or to properly allocate the burden of proof," and that Hood provides not a "scintilla of evidence" that it "destroyed or was silently withholding records in bad faith." Answer, pp. 8, 13. In fact, Hood's Petition references numerous instances in which the Appeals Court improperly misinterpreted conclusory statements as facts and ignored material evidence that contradicts conclusory statements relied upon by lower courts. Petition, pp, 11-17. Both Hood's Petition and

[4] Elsewhere it distorts Hood's first issue as a request to "create specialized standards for agency testimony:" or to "set a new, unarticulated standard for the number of 'conclusory' statements in a declaration that will render the witness testimony inadmissible in a PRA case;" and as a pretext for this Court to "examine [Hood's] credibility allegations for a third time." Answer, pp. 9, 15.

especially his briefings in the lower courts meticulously cite to material documents evincing the District's bad faith.

In summary, the District's attempts to discredit Hood aim to divert rather than enlighten this Court.

D. The District's Actions, Arguments And Defenses Betray Its Bad Faith

Contrary to District claims that its employee's affidavits evince good faith, an agency establishes bad faith when, as here, it fails to conduct an adequate search while attempting to excuse its mistakes as "inadvertence" or "minor errors." Answer, p.5. Moreover,

> Bad faith is associated with the most culpable acts by an agency. Penalties are owed when an agency acts unreasonably with utter indifference to the purpose of the PRA. [… A] wanton act made in bad faith [occurs when] the agency knew it had a duty to conduct an adequate search for the requested records but instead performed a cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA.

Faulkner v. Wash. Dept. of Corrections, 183 Wn. App. 93, 332 P.3d 1136 (2014), at 105 (citations and quotations omitted). The *Faulkner* court's heightened threshold for a finding of bad faith requires that an agency act wantonly. "One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not." *Id.*, at 103-04.

Despite Hood's repeated requests and the District's repeated promises, the District wantonly failed to search its employees' files, remained indifferent to its ongoing auto-deletion of emails, failed to timely search its records storage vault, failed to track its productions, and continues to withhold records: The District is *culpable* for these and numerous other wanton acts detailed in Hood's briefings. But its bad faith runs deeper.

The District claims that its response involved great effort, was adequate, and shows good faith. Answer, p. 10. Why then, does it not materially support its conclusory statements? Why does it resort, in this *Supreme* Court, to ad hominem attacks, straw men, and red herrings? Why, in short, does it stoop to conquer? Because it must – i.e., because other than deceptive but ultimately conclusory affidavits and defenses, it offers nothing to Courts of Law.

III. CONCLUSION

Denying Hood's Petition for Review would affirm the District's bad faith. Hood's Petition for Review should be granted.

DATED this 19th day of December, 2016**.**

s/Eric Hood
Eric Hood, Pro Se

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on December 19, 2016, in Seattle, County of King, State of Washington, per agreement I emailed the foregoing documents to the following parties:

TO:

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By: s/Eric Hood Date: December 19, 2016
ERIC HOOD

Appendix A.

RCW 42.56.080
Facilities for copying—Availability of public records.
Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or 42.56.240(14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained 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. 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.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. 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.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.