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NO. 97775-5

SUPREME COURT OF THE STATE OF WASHINGTON

HEALTH PROS NORTHWEST, INC.,

Petitioner,

v.

STATE OF WASHINGTON et al.,

Respondent.

THE DEPARTMENT OF CORRECTIONS' ANSWER TO AMICUS BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE SEATTLE TIMES, AND WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

Since 2014, the Court of Appeals has consistently interpreted the Public Records Act (PRA) to not require an agency to provide an estimate of when it will complete its production of records. Amici present no persuasive reason for this Court to accept review and overturn that interpretation. To the extent they address the statutory interpretation question at all, their arguments actually illustrate that interpretation is correct.

Instead of focusing on the statutory language, Amici list a host of public policy concerns and hypothetical scenarios that they believe warrant changing the law. When examined closely, those concerns have nothing to do with the actual issue presented by HPNW's petition. Amici's primary concern appears to be that courts can only review an agency's estimate for its first production of records. But the Court of Appeals clearly stated that the reasonable estimate of time requirement applies to all estimates. The Department of Corrections (DOC) has consistently conceded as much. After reviewing the entirety of DOC's response to HPNW's large and complicated request, the trial court concluded that DOC had acted with reasonable diligence. HPNW has not challenged that portion of the trial court's decision. As such, Amici's arguments do not present a persuasive reason for granting HPNW's petition for review.

II. RESPONSE TO ARGUMENTS OF AMICI

A. Amici Provide No Persuasive Reason That the Court of Appeals' Consistent Interpretation Is Wrong

Although much of Amici's brief discusses the general PRA framework, this framework does not appear to be related to any issue in dispute and Amici fail to provide any real argument that the Court of Appeals' analysis of RCW 42.56.520(1)(c), the statute at issue in this case, was wrong. Amici's Brief, at 5-8. For example, DOC agrees with Amici that the PRA requires agencies to respond promptly and provide a reasonable estimate of time to requesters. DOC also agrees that a requester can file a lawsuit to challenge the agency's response if it believes the agency's response is unreasonably slow. Neither DOC nor the Court of Appeals ever suggested otherwise. Given the agreement on these issues, Amici do not present any reason to grant HPNW's petition for review.

Without engaging in any analysis of the statutory language, Amici then asserts that the Legislature must have intended to require an agency to provide an estimate of when it would provide all requested records. Amici's Brief, at 10. This argument is largely based on public policy concerns that DOC addresses below. But the argument actually illustrates why the Court of Appeals' interpretation is correct.

In allowing an agency to provide a reasonable estimate to comply with the five-day requirement, the Legislature could have easily required an estimate of the time by which the agency would provide all requested records. Indeed, it used language about "providing the record" elsewhere in RCW 42.56.520. *See* RCW 42.56.520(1)(a). But the Legislature did not use such language when describing the estimate of time requirement in RCW 42.56.520(1)(c). Instead, it described the relevant estimate as the time needed "to respond to the request." *Id.* When the Legislature made significant amendments in 2017 to RCW 42.56.520 to address a Court of Appeals decision that had concluded agencies did not comply with RCW 42.56.520 by seeking clarification in a five-day letter, it chose not to amend the statute to require an estimate of the agency's complete response even though the same Court of Appeals decision (and a previous Court of Appeals decision) had concluded that an agency was not required to provide such an estimate. *See Health Pros Nw. v. State*, --- Wn. App. 2d ---, 449 P.3d 303, 309 (2019) (discussing this legislative history). The Court of Appeals correctly recognized that the statutory language and legislative acquiescence lead to the conclusion that the Legislature did not intend to require an estimated date of completion in a five-day letter. Amici does not present any persuasive reason for this Court to take review of this case and overturn the Legislature's conscious decision.

B. Amici's Policy Concerns Are Not Presented by the Court of Appeals Decision

Rather than focusing on the statutory interpretation question, Amici makes a series of unsupported arguments about the nature of the Court of Appeals decision and DOC's response to HPNW's request. These arguments are based on perceived public policy concerns. Such concerns are best left to the Legislative branch. *See Associated Press v. Wash. State Legislature*, --- Wn.2d ---, --- P.3d ---, 2019 WL 6905840, at *7 (2019) (recognizing these types of policy arguments are within the purview of the Legislature). Regardless, a close review of these concerns illustrates that they are not presented by this case.

First, Amici claims that the Court of Appeals precluded judicial review of anything but the estimate of the first installment. Amici's Brief, at 1. That is demonstrably incorrect. The Court of Appeals stated that the reasonable estimate of time requirement "applied to all time estimates and not just the estimate for the initial installment." *Health Pros Northwest*, 449 P.3d at 311. The trial court conducted a review of DOC's progress at the time and determined that DOC was responding with reasonable diligence. HPNW chose not to appeal that issue and instead focused on whether the agency is required to provide an estimated date of completion in its five-day letter. Thus, Amici's concern is not presented by this case.

Second, Amici claim that a rule that allows an agency to provide only an estimate of its initial response would effectively prevent a requester from challenging the timeliness of an agency's response. Amici's Brief, at 7-8. Again, this concern is not borne out by this case. HPNW received DOC's initial estimate and filed a lawsuit shortly after receiving the first installment. The lack of an estimate of the date by which DOC would complete its production of records in response to HPNW's large request did not prevent HPNW from seeking judicial review of the timeliness of DOC's response. Additionally, as discussed in DOC's Answer to HPNW's petition, DOC's Answer, at 15, it is not entirely clear that HPNW's position provide greater review. Leaving that aside, requiring an agency to come up with a completely speculative estimate of when it will provide all records in response to a large request within five business days would take away from the agency's time in actually gathering records for such a request. In not adopting such a requirement, the Legislature could have recognized these competing policy concerns.

Third, Amici suggests that the Court of Appeals decision will encourage agencies to decline to communicate with requesters and faults DOC for failing to communicate with HPNW about how long its response would take. Amici's Brief, at 7. Communication between a requester and agency is important and courts should consider communications in

determining whether an agency is responding reasonably. Amici's claims, however, do not fairly reflect DOC's attempts to communicate with HPNW on a number of occasions. For example, when HPNW asked about the number of installments on the same day that it got a cost estimate for the first installment, DOC explained that it was estimating that there would easily be over ten installments. CP 165. HPNW responded by accusing DOC of failing to follow PRA. CP 168-70. When DOC asked if HPNW wanted to prioritize any portion of its request, HPNW declined to do so. CP 200. Amici's concerns about communications simply reflect their view that the agency should be required to provide a complete estimate, including in response to large and complicated requests, within five business days. Because Amici's concerns are not presented by this case, such concerns do not warrant granting HPNW's petition.

C. Amici's Public Policy Arguments Appear to Be More Concerned with the Fact That Agencies Can Produce Records in Installments or Revise Their Estimates

Amici's public policy concerns appear largely based on the idea that nefarious agencies will improperly delay the disclosure of records. To be clear, HPNW has never asserted that DOC is using installments in such a nefarious way; there is no evidence that it is. Additionally, absent evidence to the contrary, courts should assume that agencies are going to follow the law and will not intentionally delay providing records. Other

than hypotheticals, Amici present no evidence that suggests these concerns represent an actual, systemic problem. Given that this case does not present such facts, this case would also not present an opportunity for this Court to determine if an agency that intentionally uses estimates to delay production of embarrassing records violates the PRA.

Furthermore, Amici's concerns do not appear to actually be based on the possibility that an agency will only estimate the first installment of records in their five-day letters. Instead, Amici's concerns appear to be based on the fact that the PRA allows agencies to produce records in installments at all. As discussed in more detail below, this is clear from the hypotheticals that Amici present. Such hypotheticals also demonstrate that granting HPNW's petition will have no practical effect on Amici's scenarios. Instead, the check on potential agency abuses stems from a court's ability to review an agency's response to determine if it is responding with reasonable thoroughness and diligence. *See Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 653-54, 334 P.3d 94 (2014).

Amici appears to claim that this result strips PRA time estimates of any meaning and makes judicial review pointless. But as long as a time estimate is reasonable (something that Amici, HPNW, DOC, and the Court of Appeals decision all agree is required), there does not appear to be much practical difference in terms of judicial review between an

estimated date of completion and an estimated date of a first production. For example, Amici uses an example of a reporter needing 100 specific documents.[1] Using Amici's scenario, consider if the agency receives this request on January 2, and on January 9, the agency tells the requester that it will provide all documents by June 1. Assuming the agency is challenged when it provides the five-day letter and demonstrates that its response is reasonable, the requester will lose that challenge. Now take a situation in which the agency receives the same request on January 2 and provides an estimate for a first response of February 2. This agency provides records on that date, and then the agency continues to provide estimates and installments until it completes its response on June 1. Again, if the agency is challenged, the agency will prevail as long as the agency can show—as DOC did here—that its response was reasonable. Of course, if the agency is producing one record at a time (as Amici posit), the agency will have a difficult time showing that its response was reasonable. In other words, the check on agencies is not the existence of an estimate, but the requirement that any estimate be reasonable. As long as the timeframes are reasonable, the agency will prevail in any challenge.

[1] This scenario is unlikely to occur as described because it is unlikely that a requester would identify 100 specific documents in a request. It appears most large requests are similar to HPNW's request in that they seek broad categories of records and the agency must determine what records are responsive. Moreover, this hypothetical does not acknowledge the possibility that a requester and an agency can communicate, especially about prioritization of certain items of the request, as DOC sought to do here.

At their core, Amici's arguments appear premised on the idea that agencies should not be permitted to produce records in installments, or that agencies should be bound by the initial estimate provided in the five-day letter. The PRA clearly allows agencies to make records available in installments. RCW 42.56.080(2). Nothing in this case will change that. As a result, nothing decided by this case will prevent a truly nefarious agency—if such agencies actually exist—from using installments to intentionally delay records. The real check on such agencies would be a court's ability to review the agency's response to determine its reasonableness—an issue that is no longer part of this case and one about which the agency bears the burden of proof.

Amici's concerns also appear to be based on its disagreement with another established PRA principle—that agencies can revise estimates under appropriate circumstances. The Court of Appeals have consistently concluded that agencies can do so without violating the PRA so long as the processing of the request as a whole is reasonable. *See, e.g.*, *Rufin v. City of Seattle*, 199 Wn. App. 348, 357-58, 398 P.3d 1237 (2017); *Andrews*, 183 Wn. App. at 653-54. HPNW itself has conceded that agencies can make such revisions so that question is not presented here.

But if agencies can revise estimates, Amici's concerns would not be addressed by adopting HPNW's proposed rule. This becomes apparent

by examining another one of Amici's examples in which a requester asks for records related to a candidate before the election. Even if the agency provides an initial estimated date of completion before the election, the agency can still revise that estimate as long as it is responding reasonably. Again, the real check on such agencies is the requester's ability at any time to file an action and require the agency to justify the reasonableness of the timeframes of its response. DOC demonstrated its response was reasonable in this case. Thus, Amici's hypothetical concerns and public policy arguments do not present a persuasive basis for granting review.

III. CONCLUSION

This Court should decline to take review to address an argument that has been repeatedly rejected by the Court of Appeals. However, this Court should accept review on the issue raised in DOC's Answer.

RESPECTFULLY SUBMITTED this 9th day of January, 2020.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the DEPARTMENT OF CORRECTIONS' AMICUS BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE SEATTLE TIMES, AND WASHINGTON COALITION FOR OPEN GOVERNMENT by US Mail Postage Prepaid to the following addresses:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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