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SUPREME COURT NO. 99648 2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

YAKIMA SCHOOL DISTRICT NO. 7,

Respondent,

v.

ANDREW L. MAGEE,

Petitioner.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The petition for review dwells on unsupported fact-specific claims that have repeatedly been resolved against Mr. Magee. The petition's points of law are re-argument of theories that have also repeatedly been found wrong.

The petition does not track the grounds authorizing review pursuant to RAP 13.4(b). Mr. Magee mistakes his disagreement over the Court of Appeals' decision for an actual conflict between the decision and any other precedent.

Mr. Magee seeks to re-frame this lawsuit in a manner not supported by the record. He does not address longstanding authority that public agencies may pursue declaratory relief to resolve disputes arising under the Public Records Act ("PRA"), Ch. 42.56 RCW. Mr. Magee disagrees with the Court of Appeals' conclusion that YSD did not waive its right to invoke an exemption by producing records while simultaneously trying to work cooperatively with Mr. Magee and avoid the dispute that has arisen. The Court of Appeals' conclusion was driven by the record and controlling authority, and was correct. The petition for review should be denied.

II. RESTATEMENT OF ISSUES FOR REVIEW

Yakima School District ("YSD") restates the issues as follows:

1. Was it error for the Court of Appeals to impose a monetary sanction on Mr. Magee for failing to comply with the Rules of Appellate Procedure, in lieu of striking his appeal brief entirely?

2. Did the Court of Appeals err in following longstanding precedent that public agencies may initiate court action under the PRA and Uniform Declaratory Judgment Act ("UDJA"), Ch. 7.24 RCW, for the purpose of ascertaining the application of the PRA to specific records?

3. Did the Court of Appeals err by finding that YSD's attempts to assert its position with respect to a claimed exemption in correspondence with Mr. Magee in an effort to avoid litigation was inconsistent with a knowing, voluntary, and intentional waiver of YSD's right to claim that exemption?

III. RESTATEMENT OF FACTS

YSD adopts the facts recited by the Court of Appeals in *Yakima School District No. 7 v. Andrew L. Magee*, No. 37505-6-III (March 18, 2021). Although Mr. Magee's version of the facts is largely refuted by the Court of Appeals, a few specific points must be addressed.

Mr. Magee soft-pedals his interactions with YSD on matters concerning his public records request. Mr. Magee concedes that he "call[ed] into question YSD's initial response" to his public records request.

(Petition for Review, at 10). In fact, Mr. Magee's December 5, 2018, email to YSD conveyed an unambiguous intent to litigate:

> It is our position that your response is wholly insufficient and not in compliance with the law, and as I believe was mentioned, will be the basis for taking legal action seeking sanctions to be imposed for your/YSD's lack of response in providing access to the documents described. (CP 000056).

Mr. Magee never retracted this statement. Nor did he give any indication to YSD that he had changed his position. Argument that "[i]t is/was YSD alone who threatened and insisted on initiating this litigation" is simply untrue. (*See* Petition for Review, at 12).

IV. WHY REVIEW SHOULD BE DENIED

The petition filed by Mr. Magee fails to comply with RAP 13.4(c) and should be stricken. In addition, no circumstance warranting review under RAP 13.4(b) is present. The Court should deny the petition.

A. The petition for review should be stricken due to Mr. Magee's failure to comply with RAP 13.4(c).

This is the second petition for discretionary review filed by Mr. Magee in this matter. The first was rejected because Mr. Magee failed to comply with RAP 13.4(c)(9) and RAP 13.4(f). (Letter from Supreme Court Clerk Susan L. Carlson dated May 20, 2021). Despite being given a second opportunity to file a petition that meets the requirements of RAP 13.4, Mr. Magee has not done so. The petition is deficient in three ways.

First. A petition for discretionary review must contain a statement of the case, defined as a "statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record." RAP 13.4(c)(6). Here, the statement of the case merely summarizes errors Mr. Magee attributes to the Court of Appeals. (Petition for Review, at 5).

Second. Factual contentions in appellate pleadings must be supported by record citation. *See* RAP 13.4(c)(6). The petition filed by Mr. Magee contains a lengthy discussion of unrelated federal court litigation about an alleged "illegal drug-testing operation" and Mr. Magee's motivation in submitting the public records request at issue in this lawsuit. (Petition for Review, at 11-12). This portion of the petition is unsupported by citation to the record. It is also unsupported by the record. *See Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 626 n.1, 160 P.3d 31 (2007) (declining to consider "facts recited in the briefs but not supported by the record.").

Third. A petition for review must contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4(b)], with argument." RAP 13.4(c)(7). While Mr. Magee criticizes the Court of Appeals' decision, he does not do so in relation to the tests set forth in RAP 13.4(b). Mr. Magee

does not allege that the Court of Appeals' decision conflicts with any decisions of the Washington Supreme Court or the Washington Court of Appeals. The Court of Appeals' ruling raises no issues under the state or federal constitution. Mr. Magee does not argue that the claims adjudicated by the trial court and affirmed by the Court of Appeals involve issues of substantial public interest.

The Court should disregard or strike Mr. Magee's petition to the extent if fails to comply with RAP 13.4.

B. The Court of Appeals did not err.

Mr. Magee is wrong that the Court of Appeals erred.

1. The Court of Appeals did not err in imposing a monetary sanction against Mr. Magee.

The Court of Appeals imposed a sanction on Mr. Magee in the amount of $1,000 for failing to comply with RAP 10.3. In the petition, Mr. Magee complains that his brief was "*misapprehended*" because of "titling." (Petition for Review, at 7-8 (emphasis in original)). Mr. Magee argues that Court of Appeals was wrong, and that his brief actually complied with RAP 10.3. (*Id.*, at 9). Finally, Mr. Magee argues that the Court of Appeals' decision to impose a monetary sanction was inconsistent with policy statement in RAP 1.2(a) that the RAPs should be interpreted to

"promote justice and facilitate the decision of cases on the merits." (*Id.*, at 8).

a. The Court of Appeals did not misapprehend the manner in which Mr. Magee titled his opening brief.

Mr. Magee references the manner in which YSD titled certain headings in its answering brief to the Court of Appeals, complaining that "[a]s a matter of fundamental fairness and justice, if Mr. Magee's pleadings are to be overlooked, *misapprehended*, ignored because of their titling, then so should YSD's." (Petition for Review, at 7-8 (emphasis in original)). However, the Court of Appeals did not sanction Mr. Magee because of the manner in which he titled discrete sections of his opening brief. Mr. Magee was sanctioned because his opening brief included an unauthorized preamble, a nine-page introduction, and an argumentative and largely unsupported statement of the case. (Opinion, at 8-11). Mr. Magee never filed a motion to strike any portion of YSD's answering brief. The Court of Appeals made no rulings concerning YSD's answering brief. Mr. Magee's complaint that the Court of Appeals ruled on an issue raised in YSD's answering brief is not a basis for review under RAP 13.4(b).

b. The Court of Appeals did not err in finding that Mr. Magee's brief failed to comply with RAP 10.3.

Mr. Magee's opening brief failed to include a statement of the case meeting the criteria of RAP 10.3(a)(5). (Opinion, at 9-10). Mr. Magee argued to the Court of Appeals that RAP 10.3(a) only states that an opening brief "should" include a statement of the case; not that an opening brief "shall" include a statement of the case. (Opinion, at 10). The Court of Appeals rejected this argument because RAP 1.2(b) provides: "Unless the context of the rule indicates otherwise: 'Should' is used when referring to an act a party or counsel for a party is under an obligation to perform." The Court of Appeals ruled: "In this context, 'should' means 'shall.'" (Opinion, at 11).

In his petition for review, Mr. Magee makes the following curious argument:

> Mr. Magee is both a party to this matter and is acting as counsel; as to the word 'shall,' RAP 1.2 actually reads to say, 'The word 'shall' is used when referring to an act that is to be done by an entity other than the appellate court, a party, or counsel for a party. (RAP 1.2) Accordingly, the Court of Appeals errs in application of RAP 1.2 in applying the word 'shall,' instead of 'should' to Mr. Magee's brief. (Petition for Review, at 9).

It is incorrect that the Court of Appeals applied the word "shall" to Mr. Magee's brief instead of the word "should." (Opinion, at 10-11). The Court of Appeals simply acknowledged the manner in which the term "should," as defined at RAP 1.2(b), operated in the context of RAP

10.3(a). Together, these rules obligated Mr. Magee to draft a fair statement of the facts without argument. The Court of Appeals did not err, and Mr. Magee's argument to the contrary is without merit.

c. The Appellate Court's decision was consistent with the policy objectives set forth in RAP 1.2(a).

It should be no surprise that the Court of Appeals imposed a sanction on Mr. Magee for failing to comply with RAP 10.3(a). *See* RAP 1.2(b) ("The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified."). Instead of striking his opening brief entirely, as requested by YSD, the Court of Appeals imposed a monetary penalty on Mr. Magee in the amount of $1,000. (Opinion, at 11). The Court of Appeals' choice of sanctions allowed the appeal to be adjudicated on its merits in a manner consistent with RAP 1.2(a).

C. The Court of Appeals did not err in affirming the trial court's determination that YSD had standing under the UDJA.

Mr. Magee argues that the Court of Appeals erred in finding that YSD had standing to seek declaratory relief from the trial court. (Petition for Review, at 9-12). Mr. Magee does not cite or distinguish the authority relied upon by the Court of Appeals. Instead, Mr. Magee provides a lengthy background explanation about why he submitted the public

records request and why he actually had no "quarrel" with YSD. (*Id.*, at 10-12). Mr. Magee is really trying to re-write the history of this lawsuit without record support. This new version omits, for example, Mr. Magee's unambiguous statement that he intended to sue YSD under the PRA. (CP 000056).

Mr. Magee argued to the trial court that YSD could not assert the exemption at RCW 42.56.250(2) to withhold records in response to his public records request. (CP 000130-32). Mr. Magee continues to take this position, while simultaneously arguing that he has no dispute with YSD concerning the records. (Petition for Review, at 16).

The Court of Appeals' decision, like that of the trial court before it, is consistent with precedent recognizing that public agencies may invoke both the PRA and the UDJA to resolve disputes arising on the context of PRA requests. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007) (concluding that agencies may initiate court action pursuant to RCW 42.56.540 to resolve PRA disputes); *Benton County v. Zink*, 191 Wn. App. 269, 275, 361 P.3d 801 (2015) ("In late January 2014, rather than wait for potential per diem penalties to accumulate, Benton County filed a declaratory judgment action seeking a court determination of its obligations under the PRA."); *City of Fife v. Hicks*, 186 Wn. App. 122, 128, 345 P.3d 1 (2015) (city filed declaratory judgment action against

requestor alleging that certain records sought by requestor were not public records or, in the alternative, were exempt from disclosure under the PRA); *City of Seattle v. Egan*, 179 Wn. App. 333, 335-36, 317 P.3d 568 (2014) (city filed declaratory judgment action against requestor in order to "resolve any uncertainty and to avoid the accumulation of potential penalties should [the requestor] delay suing."); *City of Lakewood v. Koenig*, 176 Wn. App. 397, 400, 309 P.3d 610 (2013), *aff'd*, 182 Wn.2d 87, 343 P.3d 35 (2014) (city filed a declaratory judgment action against requestor seeking "an order declaring that it had fully complied with [the requestor's] public records request."); *Yakima v. Yakima Herald Republic*, 170 Wn.2d 775, 788, 246 P.3d 768 (2011) (county filed "a motion for relief pursuant to RCW 42.56.540 to enjoin the Herald-Republic from gaining access to sealed court records because the PRA did not apply or, alternatively, pursuant to Ch. 7.24 RCW, to have the county's responsibilities with respect to the paper's records request declared and delineated.").

Finally, Mr. Magee argues that "[a]t the very least, the Court of Appeals identifies a dispute as to a material fact" which should have precluded summary judgment in favor of YSD. (Opinion, at 16). Mr. Magee does not actually identify the fact he is referring to. The Court of

Appeals plainly did not find any material fact disputes. Mr. Magee's argument on this point has no basis in the record.

D. The Court of Appeals did not err in affirming the trial court's determination that YSD did not waive its right to invoke an exception under the PRA.

Mr. Magee argues that the Court of Appeals erred in finding that YSD did not waive its right under the PRA to invoke the exemption at RCW 42.56.250(2) to withhold records. (Petition for Review, at 16-20). Mr. Magee relies on *Gipson v. Snohomish County*, 194 Wn.2d 365, 449 P.3d 1055 (2019), to argue that YSD waived any exemptions it did not assert within five days of the request. (*Id.*, at 17). Mr. Magee also argues that YSD waived its right to invoke the exemption by producing three installments of records. (*Id.*, at 19-20). Neither argument has merit.

1. Mr. Magee misapprehends the law.

All agencies must provide an initial response to public records requests within five days of receipt. RCW 42.56.520(1). Mr. Magee argues that any claims of exemption not asserted in an agency's five day response letter are waived. (Petition for Review, at 16-18). Mr. Magee relies for authority on *Gipson*, which says nothing of the sort.

In *Gipson*, the Washington Supreme Court clarified that the time period relevant for determining the applicability for exemptions is the date of the request and not the date of subsequent installments. 194 Wn.2d at

374. The opinion does not hold that exemptions must be asserted or lost within five days of a request because any such requirement would be unworkable. Consider for example, if Mr. Magee had instead requested all emails sent to or from a human resources employee over the preceding five years. Such a request would implicate thousands of discrete and potentially sensitive records. It would be impossible for an agency to ascertain and assert all potentially applicable exemptions within five days. The PRA does not require a public agency to identify each exemption it will claim with its initial response. Mr. Magee's argument to the contrary is unsupported by legal authority.

2. The Court of Appeals properly determined that YSD's conduct was not consistent with waiver.

The Court of Appeals, like the trial court before it, correctly found that YSD's conduct was not consistent with an intention to waive its rights under the PRA. In the petition, Mr. Magee merely re-hashes argument made and rejected by both courts. Specifically, he argues that YSD's decision to provide him with records while trying to resolve its dispute with Mr. Magee was an affirmative waiver. The Court of Appeals considered and rejected this argument: ". . . YSD's election to avoid per diem penalties by producing the three batches of records and trying to

work cooperatively with Magee are not acts wholly inconsistent with its later intent to assert the objection." (Opinion, at 17).

Mr. Magee does not argue that the Court of Appeals got the law wrong. He concedes that this issue is resolved under the common law doctrine of waiver. (Petition for Review, at 18). Mr. Magee simply disagrees with the manner in which the trial court and Court of Appeals applied the facts to the law. (*Id.*, at 18-20). But the Court of Appeals' conclusion is amply supported by the record. YSD asserted its claim of exemption in letters to Mr. Magee dated April 11, 2019, May 7, 2019, and June 4, 2019. (CP 000089-98, 0000102, 0000104-112). Efforts to mitigate potential liability in anticipation of a lawsuit by Mr. Magee by producing records until the applicability of the exemption could be determined are not consistent with waiver.

V. CONCLUSION

The petition does not present any issue that warrants review under RAP 13.4(b) and it should be denied.

RESPECTFULLY SUBMITTED this 2nd day of July, 2021.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 2nd day of July, 2021, I filed the foregoing Answer to Petition for Review with the Supreme Court of the State of Washington through the Washington State Appellate Portal, and arranged for service of a copy of the same as follows:

Mr. Andrew L. Magee Attorney at Law Andrew L. Magee LLC 44th Floor 1001 Fourth Ave. Plaza Seattle, WA 98154 amagee@mageelegal.com	☒ Via Court Portal ☒ Via U.S. Mail ☒ Via Email: amagee@mageelegal.com

DATED this 2nd day of July, 2021, at Yakima, Washington.

/s/Cindy Maley
Cindy Maley, Legal Assistant

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