

Judge finds that city withheld and destroyed records

by [KATIE METZGER](#), Mercer Island Reporter Staff Writer
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The city of Mercer Island was fined \$10,000 due to discovery violations in a long-running lawsuit involving Susan Camicia, a former resident who sued the city after crashing her bicycle into a wooden bollard on the I-90 trail. Camicia suffered serious injuries after her 2006 accident, rendering her a quadriplegic.

Judge Laura Inveen of the King County Superior Court found on Sept. 14 that the city destroyed and withheld records that may have helped Camicia's case, and that the court would favorably consider a "spoliation of evidence" instruction to the jury.

The city and its defense counsel "willfully violated the discovery rules by not conducting a reasonable search for its records" when the discovery requests were made in 2007, Inveen wrote.

City Attorney Kari Sand said that the incident is "very unfortunate" and that the city is taking positive steps in the wake of the ruling, including imposing a litigation hold to ensure that no other litigation-related records are inadvertently destroyed.

Cities periodically destroy records based on retention schedules set by the Washington State Archivist, and records "may have been destroyed at the end of the regular retention period," according to a city memo sent Oct. 12.

But Inveen also found that the city did not provide records maintained by the Fire Department, at which "city officials have known since before Plaintiff's accident that records of bicycle accidents, (including bike-collard collisions) are kept."

The city said that Fire Department Medical Incident Report Forms are confidential patient health care information and not subject to disclosure under state and federal law, according to the memo.

The court disagreed, and in May 2015, Inveen ordered the city to produce documents of other accidents from 1997 to 2014.

In the days following, the city "produced hundreds of records," uncovering five similar accidents and several complaints about the safety of the bollards.

Islanders may be reminded of a recent case involving the city withholding public records from former City Attorney Loni Lindell in 2011, but this case involves violation of discovery rules, not the Public Records Act, Sand said.

"Every record the city has is arguably a public record, but this is not a public records case per se," Sand said.

Camicia sought personal injury damages from Sound Transit subcontractor Howard S. Wright Construction and the city of Mercer Island after her accident.

She received a confidential amount in an out-of-court settlement with the construction company, which had signage and fencing intruding on the trail at the site of the accident, and since then, has continued to seek damages from the city.

Camicia's case has already been before the Superior Court, Court of Appeals and state Supreme Court.

The city hired attorney Andrew Cooley in June 2006. He has been the lead attorney on the trial since it began in August 2007, working with former City Attorney Katie Knight, who retired in April 2015.

Initially, Cooley asked for a summary judgement in the city's favor.

Mercer Island should have immunity, he said, because the trail is for recreational purposes and park users assume the risk of using it. Camicia argued that the trail is a transportation corridor, a claim supported by a WSDOT deed.

That distinction was a “fundamental issue that took years” to work out in the courts, Sand said, and received a lot of attention state-wide due to the implications for trail use.

The state Supreme Court, in a close 5-4 decision in January 2014, ruled with Camicia, sending the case back to the Superior Court for a jury trial because it was essentially too close to call.

The court ruled that a judge or jury must decide whether the trail qualifies to be treated as park, which has immunity from lawsuits, or a roadway, which does not.

Camicia’s case is set for jury trial beginning Monday, Nov. 2.

The city and defense counsel decided to split the \$10,000 fine, 50-50.

But that won’t “bring back potential relevant evidence which was destroyed after the City was served with Plaintiff’s discovery requests,” Inveen wrote.

The city could not comment further on the lawsuit.

“Because the case is active and still pending, we are not at liberty to comment further on the substance of the litigation,” Sand said.

Residents are concerned about the transparency of city records, following the Lindell suit in which the city had to pay \$90,560 in penalties for withholding public records, and \$1 million to settle the case.

“We are committed to the transparency of the City’s work and to providing records in litigation,” City Manager Noel Treat said in a statement.

The I-90 trail that traverses the north end of the Island carries tens of thousands of users every year.

“The safety of bicyclists and all trail users is of utmost importance to the City. Fortunately, no other I-90 trail incidents of this scale have occurred since this one, and we hope to maintain that record of safety,” Treat said.

On Tuesday, Oct. 13, the parties voluntarily met with a mediator in efforts to settle the case, Sand said, but mediation was unsuccessful.

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