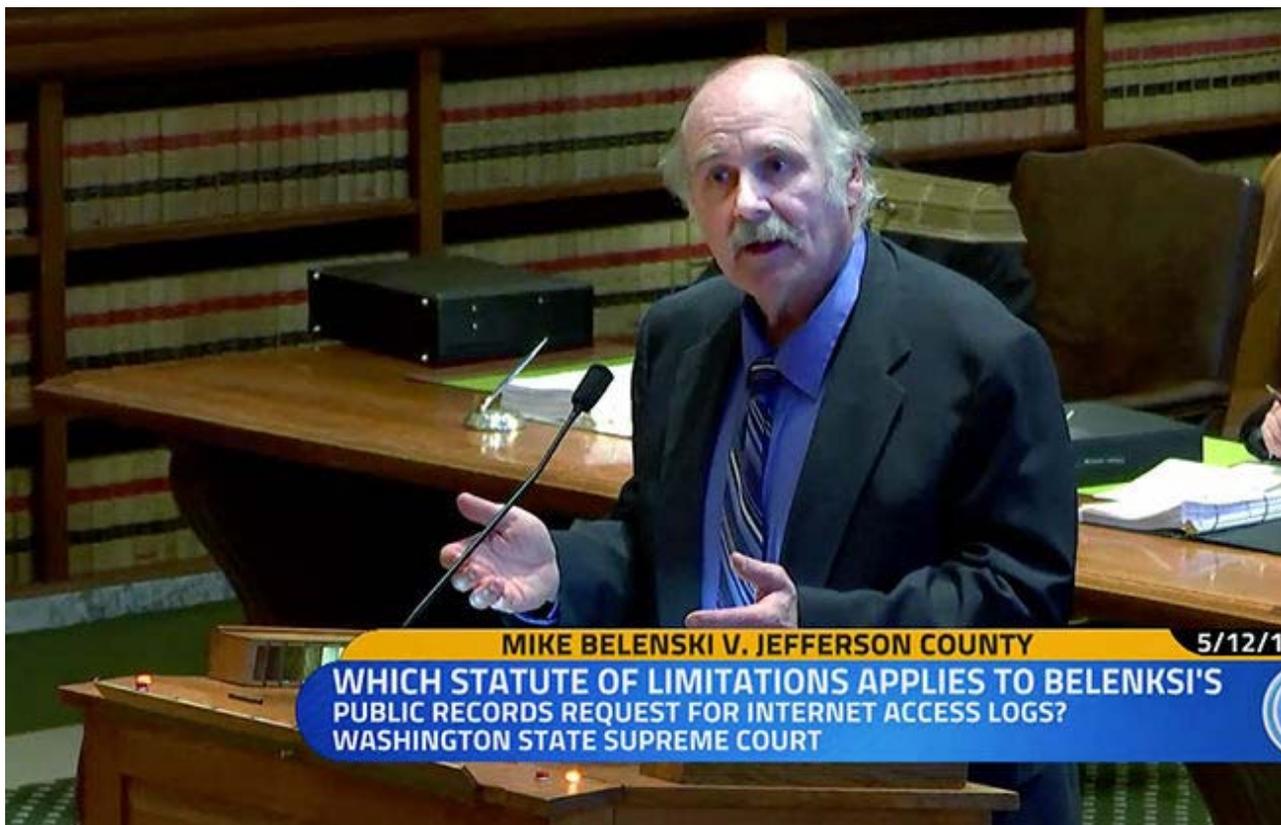


http://www.ptleader.com/news/jefferson-county-public-records-case-hits-state-supreme-court/article_ada58722-1c7c-11e6-94ca-0f62267b39bb.html

Jefferson County public records case hits state Supreme Court

Belenski says county gave inadequate response to request

By Nicholas Johnson of the Leader 9 hrs ago



This screenshot shows Mike Belenski arguing his case May 12 against Jefferson County in front of the state Supreme Court. The justices have 60 days for the justices to issue an opinion on the case, after which it would return to Clallam County Superior Court for a decision.

A Jefferson County man is awaiting a decision after arguing his Public Records Act (PRA) case against the county May 12 in front of the state Supreme Court.

Mike Belenski, 59, is best known for his prolific history of requesting public records, suing elected and public officials, and getting under the skin of the county's civil deputy prosecutor, David Alvarez.

Alvarez also appeared in court May 12, but he let Olympia-based attorney Jeffrey Myers of Law, Lyman, Daniel, Kamerrer & Bogdanovich argue on behalf of the county.

Joining Belenski as a friend of the court, and making closing arguments, was Michele Earl-Hubbard of the Allied Law Group, representing individual newspapers around the state as well as the Coalition for Open Government, Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association, of which the Port Townsend & Jefferson County Leader is a member.

“This is really the first time in the 16 years I've been here that the county has been in front of the state Supreme Court for a civil case,” Alvarez said. “It's very rare.”

INTERNET ACTIVITY

At issue in this case is a request Belenski, who lives in the Mats Mats area north of Port Ludlow, made in September 2010 for Internet access logs – or metadata about the websites county employees visit while on the job – from the prior eight months.

Nine years earlier, then-Washington State Auditor Brian Sonntag wrote a letter to the county, in part acknowledging a concern of Belenski's that county employees had violated county policy by listening to Seattle Mariners baseball games online.

Through an earlier records request, Belenski found a memo from then-Central Services director Gary Rowe asking department heads to ensure employees don't listen to games online because it was bogging down the system, writing: “We would all be pretty embarrassed if information about Internet usage were published in the local newspaper.”

The fact that employees had been visiting adult sites, gambling sites, fortune-telling sites, sports sites, celebrity fan sites, as well as a gore fetish site, eventually did make the newspaper in March 2005.

'NO RESPONSIVE RECORDS'

Days after filing his 2010 request, the county responded to Belenski, advising it had “no responsive records.”

“When they say no responsive records, it means [there are] no records,” Belenski told the court's nine justices May 12, pointing out that the county offered no further explanation. “The county has repeated hard drive failures; They could have reconfigured their software, which they've done; They could have had a massive hard drive failure. Give a person some kind of a reason.”

In March 2011, Alvarez told Belenski he did not receive the logs because “we don't use them for anything so we don't have to keep them,” suggesting they did not exist.

Following a subsequent request in November 2011 for that year's logs, Belenski was told a catastrophic hard drive failure had wiped out nearly all of them.

In January 2012, Belenski attended a county meeting where he asked then-Information Services Manager David Shambley why he hadn't received any records. Shambley told him an employee “decided that you didn't have the software to look at them,” confirming the existence of the records.

In August 2012, Belenski filed another records request, this time learning that one day after he submitted his 2010 request, the same Information Services employee wrote an email to Alvarez acknowledging the existence of the records but expressing concern about Belenski's ability to read the logs without generating “a human readable” report.

FILING SUIT

On Nov. 19, 2012, nearly 26 months after making his 2010 request, Belenski filed suit against the county in Clallam County Superior Court. The county won on summary judgement, arguing it did not provide the logs because it decided they were not public records.

On appeal, the logs were found to be public records, but the court still dismissed Belenski's claim because not only had the PRA's one-year statute of limitations to bring a lawsuit expired, but so too had a generic two-year statute usually applied when no other is provided.

The question before the state Supreme Court: Which statute applies in Belenski's case? The court's answer will apply to all such cases statewide.

"We'll be making a rule that applies to all requesters, not just to this one requester," Justice Sheryl Gordon McCloud said.

OPENING ARGUMENT

Belenski, along with Earl-Hubbard, argued the generic two-year statute of limitations does not apply to PRA cases as the PRA is already equipped with such a statute.

"The two-year statute of limitations can never apply in a PRA case because it is a gap filler and the PRA has a statute of limitations: it is the one-year," Earl-Hubbard said.

Under PRA, a requester may file suit within one year of an agency's claim of an exemption or its last production of a record on an installment basis.

"When I ended up filing the lawsuit, it still hadn't started to run because I hadn't gotten the exemption log or the records," Belenski told the court, adding that he could not be expected to bring suit sooner as he did not yet know whether the records he requested even existed.

"The agency is the one that has all the knowledge about the records," he said. "You're requiring the requester to be a mind reader. If you go to court, you need proof, and if somebody tells you 'no responsive records,' how do you know there actually are records?"

COUNTY'S ARGUMENT

Myers, arguing on behalf of the county, said it would be “an absurd consequence” to conclude the statute of limitations can only be triggered by one of the two prescribed agency responses, thus potentially allowing a requester to sue many years later upon discovering the agency failed to produce a record.

“There are lots of other kinds of public records responses,” Myers said. “I think it’s an absurd consequence to say that [the start of the statute] jumps around depending on how the agency chooses to respond. What if it was a single record, and it wasn’t done in installments? I think you have to clarify that. You could also read it to say the last production of a record is also the date that you determined there are no records to produce.”

Myers said generally a statute of limitations begins to run when a person has the right to sue and, in this case, he said Belenski had the right to sue when the county made its initial response.

“So you're recognizing somebody might be forced to bring a lawsuit while they're still negotiating back and forth with the county?” asked Justice Debra L. Stephens.

“I think that is a possibility,” Myers said.

“Wouldn’t that tell all requesters: ‘Always sue; As soon as you get that, always sue, just in case?’” Justice McCloud asked.

“I think that is one strategy people might use,” Myers said.

CLOSING ARGUMENT

Earl-Hubbard said the PRA ensures the public's right to inspect public records and entitles requesters to an adequate response. Without an adequate response, she said, the requester does not know whether they have cause to sue.

“You said in numerous cases that the failure to give an adequate withholding explanation is a violation of the adequate response because the person doesn't know what they've been denied,” she said. “If we'd been here on Wade's Eastside Gun Shop involving lead contamination of people and we'd been told there's no responsive records, I would have thought that meant there was not a lead contamination investigation by L&I of this particular place. In 20 years of seeing PRA denials that say that, I think it means there are no records.”

Earl-Hubbard said Myers' assertion that a requester should be prepared to sue within a year of receiving an initial response puts too much of the onus on the requester.

“You do not want to cut short this idea of negotiation, you don't want to force people into court and then try to discover and negotiate later,” she said. “Yes, a person might be able to sue if they think the response is inadequate, but that puts a burden on our courts we don't want to impose and puts a requirement on a requester that the law doesn't allow.”

Earl-Hubbard said the county should have told Belenski in the first place why it would not provide the records.

“They knew they had records, they decided they weren't public records and they could have, in their explanation, at least said that and then he would have had a choice: Do I go to court? Do I question this? Do I fight with them?”

RETAINING RECORDS

When Belenski made his 2010 request, the county's software was, by default, retaining the last 13 months of logs, automatically deleting the oldest day of logs with each new day.

The county stopped retaining records of employee computer use all together in January 2015, Alvarez said.

“Because of the potential cost to the county of having to maintain those records and redact for exemptions, we were forced to turn those things off so they wouldn't become a potential liability,” county Administrator Philip Morley said, noting that a single day of logs amounted to 2.7 million Internet Protocol (IP) addresses. “The primary reason is to be able to take out internal IP addresses so we don't compromise the security of the county network.”

The county still has the ability to turn on the log-retaining function, Morley said, but instead it relies on employees and department managers to monitor each other and report concerns for follow up.

“We try to minimize the risk of misuse by turning off access to a number of inappropriate sites,” he said. “But there is always the possibility that an employee could misuse something.”

“When they say no responsive records, it means [there are] no records.”

Mike Belenski

plaintiff