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No: 66630-4-1

**COURT OF APPEALS DIVISION I
STATE OF WASHINGTON**

SUSAN FORBES,

Appellant

v.

CITY OF GOLD BAR,

Respondent.

REPLY BRIEF OF APPELLANT SUSAN FORBES

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I. INTRODUCTION

Appellant Susan Forbes respectfully submits this response brief in support of her appeal of the trial court's judgment.

II. REPLY TO STATEMENT OF THE CASE

The City does not deny and the evidence of this record documents that the City's current Mayor Joseph Beavers (Beavers) is hiding public records. CP 72. The City now concedes that this case revolves around three public records requests that Susan Forbes (Forbes) requested from the City. RP 2. The City argues that Forbes's public records requests were very broad but the City never requested Forbes's to clarify or narrow her requests. RP 3.

The City concedes several points. First, it admits that the first release of records occurred on November 6, 2009 and that it sent nonresponsive records to Forbes. RP 09 . Secondly, the it now admits that it released paper copies when the records reflects that it was in possession of thousands of .pst files two weeks prior to and two after Forbes's first public records request. RP 09; CP 81-82; CP 119. Third, the City admits that city officials were using personal email addresses. RP 11; RP 33. Finally, the City admits that it failed to log, label, and

state a statutory exemption for thousands of records it silently withheld from disclosure. RP 32.

The City's assertion that it was not until January 2010 when it had the capability of retrieving records in electronic format is simply not true. The evidence of record documents that the City had thousands of .pst file (electronic) emails records in its possession two weeks prior to and two weeks after Forbes's first public records request. CP 75-84. But now the City appears to be making an argument that somehow printing off paper copies because it did not have an exchange server is relevant to the fact that it failed to answer Forbes's public records requests with readily available records (.pst files) it had in its possession at the time of Forbes's first request.

Contrary to the City's response, the verbatim trial transcript and the pleadings in this case do not support actual compliance. Judge Kurtz concluded that the Defendant had met its burden under the PRA by showing that it "acted reasonably ..." and that Forbes's public records requests amounted to a "fishing expedition."

See Oral Argument at 24, ¶ 13.

The City claims that it did not have the capability of providing responsive records to Forbes until February 2010. RP 12. This

contradicts the evidence of record which clearly shows that Eastside Computers had already retrieved thousands of .pst files from former Mayor Crystal Hill's Blackberry device weeks prior to and weeks after Forbes's first public records request in 2009. CP 119; CP 81-82. The City argument also fails to address why Forbes received continuous extension letters from the City from May 2009 to May 2010. CP 64-65; CP 94-101; CP 434 -440. If, as the City claims, Forbes's public records request were in fact responded to, it would not have sent out extension letters from May 2009 to May 2010.

In this case, the City is asking this court to simply allow the agencies to decide what if any records are subject to the PRA. The City admits that its employees and officials were using personal email accounts to conduct city business. RP 32. The City does not deny that the city failed to enact adequate policies against using personal email accounts to conduct government business. The City's response provides no legal authority for its silent withholding and appears to be trying to carve out an exception under the PRA that because it said so the over three thousands records that it silently withheld from disclosure until Oral Argument, and unilaterally declared not conduct of government business, are in fact private.

The Trial Court did not conclude the City's time was reasonable nor did it hold that the City actually complied with the PRA. In fact, the trial court failed to address this issue altogether. Judge Kurtz did hold that the City acted "reasonably... and the Forbes's public records requests were "emotional..." and "amounted to a fishing expedition."

III. REPLY ARGUMENT

Our Legislature's intent was clear when it enacted RCW 42.56.070 (1), 42.56.550(1). The Burden is on the government agency to show a withheld record falls within an exemption to disclosure under the Public Records Act (PRA), and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request.

A record is either "disclosed" or "not disclosed." If the record's existence is revealed to the requester, it is "disclosed" regardless of whether it is produced. Sanders, 169 Wash.2d at 836, 240 P.3d 120. An undisclosed record results in the prohibited silent withholding discussed in PAWS, 125 Wash.2d at 270, 884 P.2d 592. The City does not deny, and its own evidence supports, that it silently withheld over three-

thousand email records from Forbes until Oral Argument. *See* Oral Argument at 18, ¶ 4-5.

1. AN AGENCY HAS A LEGAL DUTY TO LOG, LABEL AND STATE EXEMPTIONS AND SILENT WITHHOLDING IS PROHIBITED UNDER THE PUBLIC RECORDS ACT

The burden is on the agency to show a withheld record falls within an exemption, *and* the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); Sanders v. State, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010). The City in this case not only refused to provide an exemption log, but it also failed to advise Forbes that it silently withheld any records until Oral Argument. *See* Oral Argument at 24, ¶ 4-5.

To support its assertion that the over three thousand emails records it silently withheld from public disclosure are not public records the City cited Dragonslayer, Inc. v. Washington State Gambling Com'n 139 Wn.App. 433, 161 P.3d 428 (2007). Although *Dragonslayer* articulates what a public record is, the record in this case failed to establish whether or not the City ever complied with the Forbes's three public records requests. The City does not deny that it silently withheld over three thousand email records from disclosure

until the day it appeared at Oral Argument. This is a very large number of records in light of the fact that the City's current Mayor Beavers admits to hiding public records. CP 72.

In exercising review of agency actions the statute mandates that:

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) The statute further directs Courts that "The public records subdivision of this chapter shall be liberally construed and its *exemptions narrowly* construed to promote this public policy." RCW 42.17.251; *PAWS II*, supra at 251.

A. The City Admits That it Withheld Thousands Of Email Records From Public Disclosure Until Oral Argument Thus Depriving Forbes a Right to Challenge City's Claim That Its Records Are Exempt

The City's response failed to address Rental Housing Association v. City of Des Moines, 165 Wn. 2d. 393, 525 (2009) which requires that an agency log, label and state statutory exemptions for any records it withholds. In this case, the City appears to be suggesting that this court should simply trust that an extremely large number of records are in fact exempt from disclosure because it said so. The City

provides no legal authority for its silent withholding. The City stated during Oral Argument “there is no requirement for a log and, in fact, the City would probably run into some Fourth Amendment issues trying to go through their private emails and log them.” *See* Oral Argument at 10, ¶ 22-25. This begs the question of how could the city know whether or not any of the silently withheld records are in fact private if it never searched the over three thousand records it silently withheld from disclosure? Here, the City is requesting this court believe that over three thousands records it silently withheld from Forbes’s are in fact private because it said so, but it fails to provide a legal basis for its silent withholding.

The burden is on the agency to show a withheld record falls within an exemption, *and* the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); Sanders v. State, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010).

In this case, the issue of whether or not the records Forbes’s sought to review are in fact private could have been addressed by simply having each public official subject to disclosure affirm to such, but the City did not provide a single declaration in support of the City’s

assertion that the over three thousand email records it silently withheld until Oral Argument are in fact private. Forbes's argues that the City did not because it cannot. The proper remedy is to provide a log, label, and state a statutory exemption(s) for each record it silently withheld from disclosure thus giving Forbes an opportunity to challenge the City's claims of exemptions.

2. The Trial Court Committed Reversal Error

In Forbes's appeal she correctly indemnities that the trial court failed to address whether or not the City actually complied with her specific public records requests. At Oral Argument Judge Kurtz failed to address whether or not the City actually complied, but he did state that Forbes's public records request were "emotional..." "amounted to a fishing expedition..." and that somehow the release of over twenty eight thousand email records, whether or not response to Forbes's public records request, is evidence of actual compliance under the PRA is the not the legal standard under the PRA and should not be affirmed. Quoting from the trial court's transcript, Judge Kurtz concluded:

"... Having stated the importance of public disclosure in a free society, the Court does, and should also recognize efforts by entities if

they act reasonably in response to public disclosures requests, particularly, in this era of limited public resources... when one adds that up, I believe that comes to a total of 11 disclosures for a total of 28,290 records or documents made available. Now, this is admittedly not determinative of itself. But any fair-minded observer would conclude that that is a huge number -- and suggests and indicates that the City has, indeed, made good faith efforts at compliance with the public disclosure requests in this matter... The City has met its burden of showing that it has acted reasonably – not perfectly, perhaps—but perfection is not required. The City has acted reasonably; and accordingly, the bottom line is that the

City's motion to dismiss shall be granted and plaintiff's cross motions are respectfully denied....”

See Oral Argument at 23-29.

In Zink v. City of Mesa, 140 Wn. App. 328, 166 P.3d 738 (2007) the court held that reasonable compliance in public records cases was not sufficient to establish that the City actually complied with the PRA. Simply put, the trial court's ruling in Forbes's case that the City's showing that it released 28,290 records to various requesters, whether or not responsive to Forbes's public records requests,

somehow suggests that the City legally complied with the PRA constitutes reversal error.

IV. AN EN-CAMERA REVIEW IS NECESSARY TO DETERMINE THE APPLICABILITY OF AN EXEMPTION

Forbes's appeals because the trial court allowed the City to silently withhold over three thousand records from disclosure until Oral Argument without providing Forbes's with an opportunity to challenge the City's claims that the records are private. The City appears to suggesting that Forbes's should have objected to, prior to Oral Argument, of the City's silent withholding. This argument appears to be asking this Court to accept that requesters should have ESP powers or be clairvoyant when the requester had no reason to believe that the City was silently withholding any records until a City decides, when if ever, to reveal its withholding. In this case, the record is clear that the City's revelation that it had over three thousands records it silently withheld from disclosure until Oral Argument.

In Limstrom v. Ladenburg (*Limstrom II*), 136 Wn.2d 595, 963 P.2d 869 (1986), the court remanded a case for an *in-camera* review of records claimed to be work product and finding that "in this case the

only way that a court can accurately determine what portions, if any, of the files are exempt from disclosure is by an *in-camera* review of the files.”) (citation omitted). Forbes’s argues that the trial court abused its discretion by refusing to conduct an in-camera review of the records the City silently withheld as exempt from disclosure. Without the in-camera review the trial court had no legal basis to know whether or not the City violated or actually complied with the PRA.

V. APPEALANT IS THE PREVAILING PARTY THUS ENTITLED TO ATTORNEY FEES, COST, AND AN AWARD OF PENALTIES ON APPEAL

Spokane Research & Defense Fund v. City of Spokane 155 Wash.2d

89, 117 P.3d 1117 the court explained,

Rather, the “prevailing” relates to the legal question of whether the records should have been disclosed *on request*. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time.

Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit

RCW 42.56.100 requires agencies to adopt reasonable rules to ensure that citizens have “full public access to public records” and to “protect public records from damage or disorganization.” The City’s refusal to implement policies against public officials to use of personal email addresses as a repository for public records thus failing to “protect public records from damage or disorganization.” RCW 42.56.100.

The burden of proof is on the agency to show that its denial of access to public records complies with a statute which exempts, prohibits or limits disclosure of the public record. RCW 42.56.550(1). The court is required to take into account the broad policy of the Public Records Act favoring disclosures, regardless of whether or not such disclosure “may cause inconvenience or embarrassment to public officials and others.” *Id.*

In this case, the evidence of record is undisputed that the City’s employees and its public officials used personal email accounts to conduct city business. RB 33. Because of the City’s failure to implement policies against use of personal email accounts, Eastside had to retrieve email communication from public officials’ personal computer systems and other electronic devices. CP 74-84. This

violation alone establishes a violation of the PRA.

Under the facts of this case, the City's silent withholding and its refusal to log, label and affirmatively state statutory exemptions exacerbated its failure to respond to three very simple public records request. The City's silent withholding and refusal to log, label and state any statutory exemptions for over three-thousand records is admission enough to establish a violation of the PRA.

A plaintiff is the "prevailing party" for purposes of public disclosure act authorizing award of costs, including attorney fees, to prevailing party, and certain monetary penalties, if prosecution of the action could reasonably be regarding as necessary to obtain the information, and the existence of the lawsuit had a causative effect on the release of the information. RCW 42.17.260, 42.17.340. The City's response resists payment of attorney fees and costs by repeatedly asserting that it complied with the PRA, but the evidence in this case clearly establishes that the City refused to log, label and state any statutory exemptions for the over three thousand records it silently withheld from disclosure until the day it appeared at Oral Argument.

Because the trial court refused Forbes's Motion for en-camera review of the City's silently withheld records, Pro Se Forbes's was left

with two choices, either file this appeal or accept the City's assertion that thousands of records are in fact private. But this is not the legal standard for which Our Legislature intended when it enacted the PRA. By allowing an agency to decide what a citizen can or cannot know runs contrary to RCW 41.17.251 which states:

"The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The Public Records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy"

In Sanders v State of Washington, 169 Wash.2d at 827, 870, 240 P.3d 120, the Court held that determination of the prevailing party in an appeal of a Public Records Act judgment relates to the question whether the records should have been disclosed on request and whether the requestor had a right to receive a response. 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. RCW 42.56.550(4).

VI. CONCLUSION

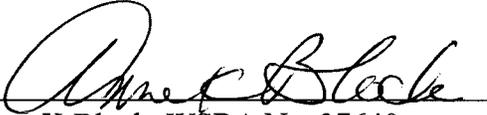
A healthy democracy is open, and Our Legislature's intent was clear that "the people of this state do not yield their sovereignty to the agencies that serve them... and do not allow the agency to decide what is good for them to know or not know." The PRA expressly commands agencies to make records available to a requester upon request and the burden is on the agency to justify nondisclosure. The burden is never on the requester, but that is exactly what the City is asking that this court to do in this case. To place the burden on the requester to overcome the agency's claim that because it said so the thousands of records it silently withheld from disclosure in this case are in fact exempt.

This Court has the opportunity to confirm the policy behind the PRA and to send a strong message to the City of Gold Bar that silent withholding is prohibited under the PRA. Without such statement from this court to this effect, very few citizens will follow in Forbes's footsteps, and very few lawyers will assist ordinary citizens in their efforts to expunge records from an agency that delays, conceals, hides,

and silently withholds disclosure of any record it unilaterally deems not conduct of government business. The City's conduct cannot stand without setting dangerous precedent.

For the foregoing reasons, Forbes's respectfully request relief submitted in her briefs.

Respectfully submitted on this 16th day of November 2011.


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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I**

SUSAN FORBES,
Appellant,

vs

NO. 66630-4-1

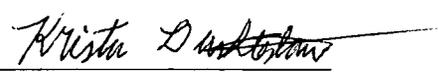
CITY OF GOLD BAR,
Respondent.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct. I, Krista Dashtestani, declare that on the 16th day of November 2011, I served a true copy of the foregoing reply brief of Appellant Susan Forbes to the following counsel of record in person at the address below:

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Dated this 16th day of November 2011, at Gold Bar, Washington



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Declaration of Service

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