

71052-4

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No. 71052-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF MARYSVILLE,

Appellant,

v.

CEDAR GROVE COMPOSTING, INC.,

Respondent.

MARYSVILLE'S RESPONSE BRIEF
TO
AMICI BRIEFS

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A. INTRODUCTION

Two entities with an interest in Public Records Act, RCW 42.56 (“PRA”) issues have filed amicus briefs in this action: the Washington Coalition for Open Governments (“WCOG”) and the Washington State Association for Municipal Attorneys (“WSAMA”). The following is the response of the City of Marysville (the “City” or “Marysville”) to both submissions.

B. ARGUMENT

- (1) WCOG's Brief Offers an Unworkable Standard Making All Records of Private Government Contractors Public Records and Imposing PRA Liability When Records Were Not Denied.

As the WSAMA brief recounts, that organization consists of attorneys for cities and towns of every size throughout Washington, all of which are affected by court decisions on the PRA. Its membership must advise cities as to what are “public agencies” subject to the Public Records Act, RCW 42.56 (“PRA”). As a result, WSAMA's views are those of experienced lawyers who have real world experience in the complexities of PRA compliance. WSAMA’s insight into what are workable standards to ensure PRA compliance and effectuate its intent should be helpful to this Court.

WSAMA's approach is particularly striking when compared to that taken by WCOG. While WCOG claims its mission is "to foster open government processes" and that the "PRA is an essential tool of transparency," WCOG br. at 1, a review of its brief indicates that WCOG seems more intent on sanctions and attorney fees than disclosure of governmental information. Perhaps this is because WCOG, like the trial court, was seduced by Cedar Grove's soundbite approach that claims a nefarious scheme by the City to avoid its PRA responsibilities. However, there is no substantial factual basis to make such a claim.¹

That WCOG is not seriously interested in disclosure is most obvious in its effort to justify draconian penalties for the material relating to attorney-client privilege here. With no basis in fact, WCOG claims that the City "improperly withheld records under the attorney-client exemption." WCOG br. at 5-6. It uses this assertion to then claim that the privilege is being misapplied in an effort to somehow undermine the Supreme Court's holding in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004).²

¹ Perhaps that is why WCOG claim of such a scheme is footnoted with three question marks. WCOG Br. at 8.

² WCOG was an amicus in that case urging that the privilege not apply in PRA cases.

But WCOG's contentions cannot be taken seriously in light of the following facts: (1) City files were searched for responsive records, including the files of the City Attorney's outside law firm. CP 553-54, 556; (2) Documents were provided in regular installments. CP 554, 1827; (3) The City Attorney reviewed the voluminous documents for privilege. CP 556; (4) Exemption logs were provided with each installment. CP 1814-15; (5) The exemptions logs reflected the basis for the withholding or redaction of a document. CP 557; (6) The requestor's attorney questioned why certain documents were being withheld on the basis of privilege and asked the City to review certain items. CP 2044-47; (7) The City not only reviewed what was requested, it provided unredacted versions of all the documents being questioned before this lawsuit was filed, even while not waiving privilege. CP 1657; (8) Later, the trial court found most of the documents being claimed as privileged were properly designated, with only 15 documents incorrectly designated, all of which were provided prior to the filing of the lawsuit as part of the City's internal review. CP 1461. Thus, Cappel, the requestor, and/or Cedar Grove, were given copies of *all documents before litigation* which they questioned on the basis of privilege from logs which were provided. They were provided copies of documents the trial court later found were properly privileged. In short, *before the litigation commenced, the City provided documents it*

could have properly withheld. Providing more documents than required, including those properly designated as subject to attorney-client privilege, prior to litigation, cannot be a "scheme to circumvent the PRA." For WCOG to assert that such a scheme undermines its credibility.

Recent Court of Appeals decisions indicate that courts should begin to take a more practical approach to agency conduct in PRA cases. In *Andrews v. Washington State Patrol*, ___ Wn. App. ___, 334 P.3d 94 (2014), Division III dealt with whether the State Patrol should be penalized for failing to meet the disclosure schedule it had originally estimated in the case. In finding no liability, the Court stated:

Although RCW 42.56.100 requires that agencies provide “the fullest assistance to inquirers and the most timely possible action on requests for information,” the statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed. Rather, the purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public requests.

Id. at ¶ 22.

Division II confirmed that in these circumstances there is no PRA violation as to the attorney-client privileged documents as a matter of law. In *Hobbs v. State*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 501110 (2014),³ the Court of Appeals considered the issue of whether the State

³ In *Hobbs*, Division II also specifically referenced *Andrews*, citing it approvingly for the proposition that courts should not impose a “mechanically strict finding of a PRA violation” whenever timelines are missed. *Hobbs, supra* at *7.

Auditor violated the PRA when the requestor filed suit for alleged PRA violations prior to the time the Auditor had taken final action on the request. The Court held there was no violation of RCW 42.56.550(1) because the litigation was premature. Requestor Hobbs took the position that he was permitted to initiate a lawsuit *prior* to an agency's final action denying and closing a public records request. The Court stated:

The PRA allows no such thing. Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record.

Id. at 5. The Court found that under RCW 42.56.550(1), a superior court may only hear a motion to show cause when a person has “been denied an opportunity to inspect or copy a public record by an agency.” [Quoting the statute]. *Id.* While noting the statute does not specifically define “denial,” the Court of Appeals concluded that a denial of public records “occurs when it reasonably appears that an agency will not or will no longer provide responsive records.” *Id.*

Here, it is undisputed that *all* records (those that were initially properly and improperly designated as privileged) were provided *prior* to litigation. Under *Hobbs*, neither Cedar Grove nor WCOG has any basis to assert that the City should still be subject to PRA liability because it only provided those records after Cappel and counsel Moore requested the City

to review its exemptions and produce the records. In *Hobbs*, the Court observed that is exactly how the PRA process should work, and “the purpose of the PRA is best served by communication between agencies and requestors, not by playing “gotcha” with litigation.” *Id.* at *8 n.12. As in *Hobbs*, here the City acted upon the request by Cappel that it reconsider its exemptions, it did and provided the records. Its “final” action was to provide the disputed documents, not to “deny” them to the requestor. Therefore, as a matter of law it “remedied any alleged violation of the PRA” ... before “final action” ... and “there is no violation entitling the requester to penalties or fees.” *Id.*

(2) Cedar Grove Does Not Have Standing

WCOG asserts that an undisclosed principal, but not necessarily an actual record requestor, may prosecute a PRA lawsuit. WCOG provides no authority for such a proposition because there is none. Such a proposition is hard to square with the actual language of RCW 42.56.550(1) which allows an action to be brought as follows: “Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency.” Thus, the statutory language has a specific requirement that the person bringing the lawsuit or motion must have actually requested such a record.

To date, Washington law has only allowed an undisclosed principal to bring a suit when the record request was made by an attorney. *Kleven v. City of Des Moines*,⁴ 111 Wn. App. 284, 291, 44 P.3d 887 (2002). However, in *Kleven* both the requestor (the attorney) and the principal were present in the lawsuit, a fact significant to the court because it could rely upon an attorney's ethical obligations in pleadings and representations. Those considerations are not present here.

Further, WCOG has no real answer to the fact that under *Burt v. Dep't of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010), a PRA requestor is an *indispensable party* to PRA litigation.

More significantly, there is no particular policy purpose served by allowing undisclosed principals to sue with no requirement that the actual requestor be included in the lawsuit. WCOG claims, with no evidentiary support, that hiding the identity of a requestor precludes an agency from discriminating against such a requestor. However, it simultaneously admits that such actions are prohibited by RCW 42.46.080, and thus a basis for increased penalties. WCOG then claims that the failure to require that the requestor Cappel bring the action should not be significant

⁴ In *Hobbs* the request was made by Hobbs' attorney. While not entirely clear from the context, it appears that the attorney there disclosed he was acting on Hobbs' behalf.

because the City believed the records were intended for Cedar Grove. WCOG br. at 5.⁵

The City's adherence to its time schedule for production and ease in making records available led requestor Cappel to compliment the City for its responsiveness. CP 2042. That eliminates any ability to claim the City discriminated against Cedar Grove. It also illustrates that if the requestor was satisfied with the City's responsiveness, it is incongruous to allow some unidentified person to come into court seeking maximum penalties for conduct it claims is objectionable when the actual requestor of the records makes no such contention.

This highlights why the position of WCOG and Cedar Grove is untenable from a policy perspective. As the Court of Appeals makes clear in *Hobbs*, the PRA envisions an *interactive process* between the agency and the records requestor. That is what happened here. Cappel asked the City to review the documents for which privilege was being claimed. The City did so and provided all the documents identified prior to suit. No evidence was introduced that Cappel was dissatisfied with the City's approach. Cedar Grove's interest is entirely derivative from Cappel's.

⁵ What if the City had guessed incorrectly? It appears WCOG is proposing a "lucky guess" rule. There is nothing in the record to put the city on notice that Cedar Grove, not Cappel was the actual requestor until after the lawsuit was filed. Even Moore's letter did not disclose that he acted for anyone other than Cappel. Obviously the city deduced his true client after he filed the lawsuit for Cedar Grove.

Without some showing, including participation in the lawsuit, that the requestor is somehow aggrieved, there is no standing for an undisclosed principal.

This point is particularly cogent as it relates to the 173 Strategies Records in Batch 3. It is undisputed that *none* of these documents were ever in the City's possession. Unrebutted declarations established that Strategies acted independently from the City and generated these documents on its own accord, without specific direction from the City and did not provide these records to the City. CP 662-68. Nevertheless, Cedar Grove is contending that it is entitled to recover penalties for documents that were never in the City's possession. Yet, it has no standing to do so because Cappel never requested such documents. Each of her document requests is for "Records of communication between or among the City of Marysville" and some third party. CP 1372-73. Attorney Moore in his letter to the City, in which no mention is made of Cedar Grove, makes it specifically clear Cappel's request is for documents between and among the City "[and]" the named persons which follow. CP 2044. Hence the city did not have fair notice that the request sought the internal Strategies e-mails, its emails with other clients or its e-mails with citizens that were not provided to the City.

WCOG is not asking this Court to allow lawsuits by undisclosed principals. It is asking this Court to grant standing to an undisclosed principal to prosecute a lawsuit and obtain penalties and attorney fees for documents its ostensible agent never requested and who is missing from the lawsuit. This Court should reject such a proposition.

(3) The City Never Used the 173 Strategies Records

WCOG again erroneously claims that Strategies' was hired to circumvent the PRA. WCOG br. at 7. That proposition is belied by the fact that Strategies had expertise the City did not have. However, WCOG makes this allegation in a feeble attempt to hide that it is really advocating for a rule *would make every single document of a private contractor who contracts with government a public record subject to the PRA*. The proposed WCOG standard, which is no standard at all, is summarized in this sentence: "While every record of that private entity may not be a public record, those created at the direction of and for the benefit of the agency should be disclosable." WCOG br. at 10-11. When a private entity contracts with government, *every* document it creates to fulfill the contract would be "at the direction of and for the benefit of the agency." Thus, WCOG provides no workable standard at all -- *every* document of a private government contractor even if such documents had no nexus to government decisionmaking as required by our Supreme Court in

Concerned Ratepayers Ass'n v. Public Utility District No. 1 of Clark County, 138 Wn.2d 950, 983 P.2d 635 (1999). WCOG seeks to implicitly overrule *Concerned Ratepayers* by ignoring its central holding in defining a public record under RCW 42.56.010(3).

WCOG blithely claims that the City could have asked Strategies for documents, ignoring that those relating to a mailer were for a project a City expressly rejected. The documents were communications between Strategies and another of its clients, the Tulalip Nation. CP 1367-68, 663, 665. Nowhere does WCOG explain how a public agency, which never received any documents, can force a private entity to produce documents prepared for another client and that do not relate to an agency project. Yet it claims high end PRA penalties and attorney fees should be awarded when they are not produced, even though they have not been requested.

In contrast, WSAMA suggests a practical standard well grounded in Washington law: “[T]he PRA does not encompass records in the possession of independent contractors where an agency never possesses or reviews the records, or factors the records into any decision.” WSAMA br. at 9.

WSAMA also differentiates the out-of state cases relied upon by Cedar Gove as inapplicable as those jurisdictions define public records differently than Washington. WSAMA br. at 10-12.

(4) A Need for Practicality on Penalties

The instant case presents the situation where the City produced thousands of documents, including from Strategies, on a regular schedule which it then met. The City used an electronic search system with search terms specifically developed to obtain responsive documents. Strategies documents were specifically sought, including using the Strategies domain name. The City even searched the personal computers of the Mayor and City Administrator and then provided responsive documents it obtained. The City Attorney's private firm records were searched. Special electronic access was set up to assist the requestor. Detailed privilege logs were provided. When the requestor or her counsel questioned items withheld, and the City was asked to reconsider, it did. It even hired outside counsel to make the assessment. It produced all the documents for which privilege was claimed *before* litigation. All claims of privilege were later upheld with the exception of 15 documents, which the City had already recognized and provided to Cedar Grove along with a trove of documents to which it was not entitled prior to commencement of this litigation.

Nineteen other documents were inadvertently missed in the production, and were later provided by stipulation. Those documents are not significant in any manner. Some had no content; others were

cancelled meeting notices on Outlook, and others were email chains of an “FYI” with the underlying material having already been produced.

Finally, there are 173 documents that the City never possessed, many of which relate to a project of the Tulalip Tribe, a mailer that the City rejected and had no involvement in producing. None of this is disputed. Yet, for failing to produce documents it did not have, the City was penalized almost \$144,000 by the trial court. CP 455. The trial court’s findings are akin to the complaints that were rejected by the Court of Appeals in *Hobbs*, including “Outlook appointment records.” *Hobbs* at 17.

As the Court of Appeals in *Hobbs* noted, Washington courts have adopted the federal courts’ reasonableness standard in regard to adequacy of the search. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012) (quoting *Trentadue v. Fed. Bureau of Investigation*, 572 F.3d 794, 797-98 (10th Cir. 2009)). Thus, the focal point of judicial inquiry must be the agency’s search process, not the outcome of its search. An objective view of the actual process conducted by the City here demonstrates it was reasonable. That is all the law requires. The fact that a handful (19) of insignificant documents out of approximately ten thousand produced were missed (an error rate of 0.19% -- including some which were never in the City’s server) does not make the City’s search

unreasonable or subject to severe penalties. Neither does not producing 173 Strategies documents that the City never possessed, could not necessarily obtain, and which the City would not have known at the time of the search were being requested. The City could not anticipate that these documents would later be found to be public records *ex post facto* by the trial court.

Here, by trumpeting an inaccurate sound bite approach are urging a mechanical approach, Cedar Grove and WCOG are urging a mechanical approach to the PRA divorced from the realities facing public agencies in complying with PRA requests. Under the concept of “reasonable thoroughness and diligence,” articulated in the recent PRA cases like *Andrews* and *Hobbs* discussed *supra*, the City acted appropriately here and the trial court erred in imposing enhanced penalties. Unlike WCOG, this Court should not be seduced by claims of perfidy based upon an errant comment by an employee at Strategies who was communicating with a different client – a representative of the Tulalip Tribes.⁶ The facts demonstrate a concerted effort by the City to comply with the PRA. The trial court's draconian penalties are inappropriate, as noted by WSAMA.

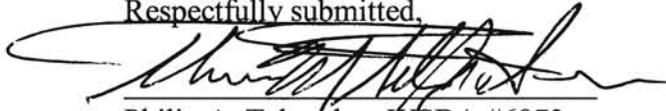
⁶ No one at the City made the statement about "plausible deniability" that troubled the trial court. The City's conduct in complying with Cappel's PRA requests here belies this statement.

C. CONCLUSION

The City requests that the Court grant the relief it has requested in its briefing to the Court.

DATED this 15th day of October, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Marysville's Response Brief to Amici Briefs in Court of Appeals Cause No. 71052-4-I to the following parties:

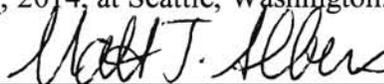
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 15th, 2014, at Seattle, Washington.



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