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No. 40866-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID K. CHESTER,
Appellant,

v.

THE DEPARTMENT OF CORRECTIONS,
Respondent.

OPENING BRIEF OF
DAVID K. CHESTER

David K. Chester, Pro se
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Airway Heights, WA
99001-2049

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I. INTRODUCTION

The Public Records Act (PRA) empowers all citizens to file suit if an agency refuses to release records that should be public. An agency cannot shroud its refusal in mystery. Rather, to make sure that any citizen and courts have enough information to evaluate an agency refusal, the PRA requires agency's to explain specifically why each withheld record is exempt from disclosure.

This case concerns public records requested by a Washington State prisoner for records from the Department of Corrections (DOC). The request sought public records regarding misconduct by a DOC medical care provider responsible for Mr. Chester's health care while incarcerated at Airway Heights Corrections Center (AHCC).

Washington Public Record Act (PRA) requires that public agency's "provide for the fullest assistance to inquirers." RCW 42.56.100, See also *O'Neil v. City of Shoreline*, 145 Wn.App.913, 187 P.3d 822, 828 (2008). Inherent in this basic obligation are the general requirements to timely produce requested records, properly and promptly state any claim of exemption, and explain those claims of exemption to the requester.

The respondent DOC has repeatedly refused to be specific

about the more than 700 pages of documents it has been silently withholding from the appellant David Chester since May 2007, contrary to the PRA. Nor would the DOC explain which of the PRA's limited exemptions allegedly applied to each record, although such an explanation is required. The DOC has refused to provide even a minimal description of each withheld record and never provided any response regarding certain requested records. This court should reverse the dismissal because the appellant's complaint stated a claim under the PRA upon which relief can be granted.

II. ASSIGNMENT OF ERROR

A. Decision in Error

The trial court erred by entering an order of dismissal on May 7, 2010, and by misconstruing RCW 42.56.550, which says that; (1) "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records"; and (2) judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 "shall be de novo."

B. Issues Pertaining to Error

1. Did the trial court err by not requiring the DOC to

2.

demonstrate their burden of proof in the agency's vague assertions that more than 700 unidentified pages of public records were being exempt from disclosure requirements, when the agency did not identify the records being withheld nor explain how and why each record was allegedly exempt, and when the PRA requires a claim of exemption to address each record specifically?

2. Did the trial court err by failing to recognize the agency has not provided a detailed exemption or withholding log to identify each individual record and how the exemption claimed to authorize the withholding of more than 700 pages of unidentified records, thus Mr. Chester's PRA complaint stated a claim upon which relief can be granted?

3. Did the trial court err by failing to recognize the agency has not provided an explanation of how the exemption claimed by the agency to authorize the withholding of more than 700 pages of unidentified records applied to each individual record, thus Mr. Chester's PRA complaint states a claim upon which relief can be granted?

4. Did the trial court err by dismissing Mr. Chester's PRA suit without reviewing the more than 700 page of unidentified public

records the agency claims to be exempt from disclosure in their entirety based on attorney-client privilege and work product, thus Mr. Chester's PRA Complaint stated a claim upon which relief can be granted?

5. Did the trial court err by dismissing PRA suit without conducting a statutorily required de novo review of the agency's actions, when the agency acted inequitably, thus Mr. Chester's PRA complaint stated a claim upon which relief can be granted?

III. STATEMENT OF THE CASE

Appellant David Chester, is a Washington State prisoner currently in the custody of the Department of Corrections and incarcerated at the Airway Heights Corrections Center (AHCC). (CP 4) On November 15, 2007, Mr. Chester filed a complaint for violations of the Public Records Act (PRA) in Spokane County Superior Court No. 07-2-05187-7(CHESTER I)(CP 85), alleging specifically that the DOC failed to promptly respond to Mr. Chester's PRA request within five business days as required by RCW 42.56.520. (CP 91)

On March 20, 2009, in a memorandum decision in Spokane County Court No. 07-2-05187-7, the court granted the agency's motion for order to show cause or in the alternative summary judgment. (CP 95-98). On

May 11, 2009, an order dismissing the matter was entered. (CP 100) Mr. Chester filed a timely notice of appeal (CP 54).

On February 16, 2010, Mr. Chester filed a complaint for violations of the PRA in Thurston County Superior Court No. 10-2-00288-7. (CP 04)(CHESTER II), alleging DOC violated the PRA by failing;(1) to provide a detailed privilege/withholding log identifying each of the more than 700 unidentified pages of public records DOC is withholding in their entirety (CP 20);(2) the agency failed to adequately describe individually the more than 700 unidentified withheld records by stating the types of records withheld, date, number of pages, and author/recipient or explain which individual exemption applied to which individual records (CP 20);(3) failed to timely provide records after the agency's estimated date for completing the request; (5) failed to provide a reasonable estimate of time it had to produce the requested records; and (6) failed to claim a valid statutory exemption to deny Mr. Chester disclosure of more than 700 unidentified pages of public records (CP 21).

On March 12, 2010, judgment was entered on the cause of action contained within Mr. Chester's complaint in Spokane County Court No. 07-2-05187-7(CHESTER I). Mr. Chester agreed to release and discharge only the existing cause of action as set forth in CHESTER I;

Washington Court of Appeals No. 28126-4-III. (CP 107), in return Mr. Chester received judgment in a settlement agreement which paid Mr. Chester three thousand dollars (\$3,000). This settlement amount was in relevant part to resolve Spokane County Cause No. 09-2-02850-2 (CP 107), a PRA case not at issue herein.

On March 16, 2010, Mr. Chester served the Respondent DOC his summons and complaint in the Thurston County Court matter (CHESTER II) (CP 110). DOC filed a CR 12(b)(6) motion to dismiss on the theories that Mr. Chester's claims were barred by the doctrines of res judicata, collateral estoppel, and accord and satisfaction. (CP 24-33)

On May 7, 2010, Thurston County Superior Court Judge Thomas McPhee granted DOC's motion to dismiss. (CP 143) Mr. Chester filed a motion for reconsideration which was subsequently denied. (CP 191-192). Mr. Chester now appeals the trial Court's dismissal of his action.

IV. ARGUMENT

The sole issue is whether the trial court erred by dismissing Mr. Chester's PRA claims against the DOC based on the agency's "theory" that the appellant's claims are barred by res judicata, collateral estoppel and accord and satisfaction.

A. STANDARD OF REVIEW

1. Review in CR 12(b)(6) Motion to Dismiss.

A trial court's decision to grant a CR 12(b)(6) motion to dismiss is a question of law that the appellate court's review de novo. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A complaint may be dismissed by a trial court under 12(b)(6) if it fails to state a claim upon which relief can be granted. Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), adhered to on recons., 113 Wn.2d 148, 776 P.2d 963 (1989). A CR 12(b)(6) motion to dismiss should be granted sparingly. Such a dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Lawson v. State, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986)(internal quotation marks omitted)(quoting Bauman v. John Doe Two, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)).

2. Review in PRA Cases.

Where as here, the trial Court decides a case based on a documentary record, without live testimony, the appellate court "stands in the same position as the trial court in looking at the facts of the case and should review the record de novo." Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); RCW

42.56.550. The Washington Supreme Court has declared the PRA to be a "strongly worded mandate for broad disclosure of public records", and thus "it is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed." Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997).

Indeed, the PRA itself - in three separate places-explicitly mandates liberal construction of the disclosure provision and narrow construction of the exemptions. See RCW 42.56.030; King County v. Sheehan, 114 Wn.App. 325, 338, 57 P.3d 307 (2002)(acknowledging the "'thrice-repeated' legislative mandate that exemptions under the PRA are to be narrowly construed."). The PRA further instructs that its policy is 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).

B. Mr. Chester's complaint states a PRA claim upon which relief can be granted because DOC failed to cite a valid claim of exemption to authorize the withholding of more than 700 unidentified public records since DOC did not explain why each withheld records was exempt.

The question here is: What constitutes "the agency's claim of exemption" for compliance under the PRA. The answer is readily apparent in the plain language of the PRA. RCW 42.56.210(3) says exactly how a claim of exemption must be made.

1. A claim must address each record specifically.

When interpreting the PRA, the court's primary objective is to ascertain and give meaning to legislative intent. Koenig v. City of Des Moines, 158 Wn.2d 173, 181, 142 P.3d 162 (2006). "[W]e begin with the statute's plain language and ordinary meaning." Id. Thus, in determining what constitutes a "claim of exemption" under the PRA, this court looks first to the plaintiff language of the statute.

In general, the PRA mandates that:

agencies shall, upon request for identifiable public records make them promptly available to any person.

RCW 42.56.080. While there are limited exemptions from this requirement (see, e.g., RCW 42.56.240 & .270), an agency cannot simply declare a record to be exempt without providing a specific explanation.

The PRA says:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemptions applies to the record **withheld.**

RCW 42.56.210(3)(bold italics added).² Thus, the plain language of the

² See also: RCW 42.56.070 (1), which says that when it is necessary to delete personal information, the "justification for the deletion shall be explained fully in writing" (italics added).

PRA shows the Legislature's intent for agencies to make a claim of exemption in a very specific way (stating a specific exemption and explaining how it applies to a specific record). Id.

As this court said in PAWS:

[W]ithout a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated. **The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity.** Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.

PAWS, 125 Wn.2d at 270. (bold italics added). The identifying information for each record should include "the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient." Id. at 271.

Under RCW 42.56.210(3), an agency must provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or in part) as part of its response to a request. This allows a requester to determine if the claimed exemptions are valid. PAWS, 125 Wn.2d at 270; Citizens for Fair Share v. State Dept of Corr., 117 Wn.App. 411, 431, 72 P.3d 206 (2003). A brief explanation or withholding log of records would describe, for example,

to whom the records were addressed and from whom they came, the subject, the date, and a brief explanation of why the agency believes the record is exempt. Failure to provide a brief explanation of the ground for withholding violates the act and makes the requester, Mr. Chester, the "prevailing party" entitled to attorneys fees, costs, and penalties. Citizen for Fair Share, 117 Wn.App. at 431.

Although RCW 42.56.210(3) says precisely what a claim of exemption must consist of, the DOC essentially concludes that a "claim of exemption" is whatever the agency says it is.

In other words, DOC cannot continue to play "hide the ball" by alleging generally that the more than 700 unidentified pages of public records it continues to withhold from the appellant, fall under one exemption or another, as the DOC has done in this case.

When the DOC initially refused in May 2007 to allow inspections or copying of whole records without identifying any of them specifically, and without explaining how a specific exemption applied to each record, it did not comply with the plain terms of RCW 42.56.210(3). Therefore, Mr. Chester's PRA complaint properly stated a claim upon which relief can be granted (CP 20-22).

C. Mr. Chester's PRA complaint properly stated a PRA claim upon which relief can be granted because the PRA must be construed liberally to promote judicial review

of the more than 700 unidentified pages of public records being withheld in their entirety.

1. Judicial oversight is essential to ensuring disclosure.

The strong policy in favor of disclosure is enforced through the citizen suit provision. The PRA authorizes "any person having been denied the opportunity to inspect or copy a public record" to file an action in Superior Court. RCW 42.56.550(1). Our Supreme Court has recognized, in fact, that "judicial oversight is essential" to ensuring that government agencies comply with the PRA's disclosure mandate. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 100, 117 P.3d 117 (2005).

The appellant, Mr. Chester, made a reasonable attempt as a citizen requester to obtain a de novo review of the DOC's actions by filing suit in Spokane County Court No. 07-2-05187-7 (CHESTER I), however, due to his lack of legal training, as a citizen requester, filed a PRA complaint that did not provide him the more than 700 unidentified pages of public records DOC was silently withholding. In fact, his PRA complaint in CHESTER I (CP 91) only alleged as a cause of action that DOC failed to promptly respond to his original request within the five business days as required by RCW 42.56.520.

Although the trial court in that matter was to conduct a de novo review of the agency actions, it did not and memorialized its review in a memorandum decision dated March 20, 2009. (CP 95-98)

DOC was permitted to shroud its actions in secrecy because an average citizen without legal training was not able to wrangle the legal complexities of our court system to properly challenge DOC's unlawful silent withholding the more than 700 unidentified pages of public records the agency withheld from him.

The appellant Mr. Chester, a citizen requester, seeking public records from DOC, filed his action in Spokane county Court No. 07-2-05187-7 (CHESTER I) in an attempt to obtain a judicial review of the agency's refusal to comply with the Act. Mr. Chester counted on the intent of legislature to allow an ordinary citizen, untrained in the law to obtain a de novo review of DOC's actions under the PRA.

"[P]ermitting a liberal recovery of costs [in PRA enforcement actions] is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records." ACLU, 95 Wn.App. at 115.

Mr. Chester has made very reasonable attempt to adhere to the Court rules to obtain judicial review. In CHESTER I, his statement of the claim for which he sought relief was for DOC's failure to promptly

respond within five business days. Mr. Chester entered into judgment on this sole issue.

2. The Trial Court erroneously construed the PRA to defeat rather than promote the public interest in judicial review.

Instead of construing Mr. Chester's allegations in his PRA complaint liberally to protect the public interest in judicial oversight, the trial court accepted DOC's theory that Mr. Chester's claims in his complaint are barred by res judicata, collateral estoppel and accord and satisfaction. This was based on DOC's theory that the claims set forth in his complaint were or should have been subject to the litigation out of Spokane County (CHESTER I) which the appellant went to judgment on the sole issue of the agency's failure to promptly respond within the five business day requirement of RCW 42.56.520.

This restricted view of the statute fails to "assure that the public interest will be fully protected" because it encourages agencies to be vague. RCW 42.56.030. If citizens cannot effectively evaluate whether records are withheld improperly, they must either litigate based on guesswork or decline to seek judicial oversight.

When construing the PRA, Courts must "take into account the policy...that free and open examination of public records is in the public interest, even though such examination may cause inconvenience."

RCW 42.56.550(3). By concluding the DOC's flawed theories were acceptable, that Mr. Chester's Thurston County PRA claims in his complaint alleging silent withholding of more than 700 unidentified page of public records were somehow barred by res judicata, collateral estoppel and accord and satisfaction, the trial court improperly placed the agency's interest in convenience above the public interest in free and open examination of public records.

It may well be inconvenient for an agency to provide a detailed explanation for its secrecy, and for a court to measure the proffered explanation against the specific standards of the PRA. Such inconvenience cannot override the mandate to construe the PRA liberally in favor of citizen access to information. RCW 42.56.030. Proper constructions would not allow agencies to avoid judicial scrutiny by using evasive tactics, as the DOC did here.

The DOC filed a CR 12(b)(6) motion to dismiss this action because, according to their theory, CHESTER I went to judgment. The DOC claim this action is barred from review. Putting this into perspective, DOC does not want a Court to review the agency silent withholding of more than 700 unidentified pages of public records it has withheld in their entirety. The DOC argues the parties are the same, and the issues are the same since Mr. Chester's complaint in Thurston County (CP 4)

incorporated all his claims CHESTER I, Spokane County Court No. 07-2-05187-7. This may be true. The same documents are at issue in both cases and the parties are the same.

Mr. Chester's new claim of attorney-client privilege and work product were never reviewed by any court, nor were they ever resolved and thus prosecuted here. The DOC theory argues that final judgment in CHESTER I renders any questions in this case academic since the Court granted the relief Mr. Chester sought, the settlement of three thousand dollars (\$3,000) for DOC's viotions of the PRA.

However, the Court in CHESTER I did not consider the claims of attorney-client privilege and work product for the more than 700 unidentified pages of public records the agency is withholding in their entirety, and thus those claims are not barred by DOC's theories even though everything else about the two cases is identical, being between the same parties for the same documents sought in the same requests. If Chester prevails in this case (both here and on remand) he would be entitled to attorneys fees, costs and sanctions. Thus, Accordingly dismissal of the suit should be reversed.

D. Attorney's Fees on Appeal

The fees provision of the PRA includes fees on appeal. PAWS II, 125 Wn.2d at 271 (citing RCW 42.56.550(4)). Mr. Chester respectfully requests reasonable fees and expenses under RAP 18.1.

V. CONCLUSION

The Department of Corrections violated the Public Records Act by wrongfully withholding more than 700 unidentified public records and failing to identify and explain its claimed exemptions as applied to each of the individual documents. The trial court erred in dismissing this case without conducting a de novo review of the agency actions. This Court should reverse, order the Department of Corrections to produce all non-exempt records and award Mr. Chester all of his fees and costs. A strong penalty in this case will deter further Department of Corrections actions that undermine the PRA's Broad mandate of disclosure and force the DOC to be better stewards of taxpayers hard earned money.

DATED this 13th day of December, 2010.

Respectfully submitted,



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COURT OF APPEALS, DIVISION TWO

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No: 40866-0-II

CERTIFICATE OF SERVICE

I, David K. Chester, Appellant, in the above entitled cause, under the penalty of perjury, do hereby certify that on the date noted below, I sent copies of: Appellant's Opening Brief, Cover letters and Certificate of service.

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Dated this 15th day of December, 2010.

Respectfully Submitted,

Petitioner