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STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY 

SHAWN D. GREENHALGH,
Appellant,

V.

OFFICE OF THE ATTORNEY GENERAL,
Respondent.

APPELLANT'S REPLY BRIEF

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RESTATEMENT OF THE CASE

This case involves the granting by the trial court of a motion for summary judgment filed by the Office of the Attorney General. The motion was based upon the assertion by that Office that its attempt to comply with a request for public records under Washington's Public Records Act, Chapter 42.56 RCW, by a prison inmate, Mr. Greenhalgh, was reasonably sufficient although unsuccessful. The choice of procedural avenues, summary judgment, was the Office's choice. Mr. Greenhalgh moved for reconsideration of the summary judgment order and the trial court denied the motion on September 10, 2010. CP 273-274.

The public records requested by Mr. Greenhalgh were records and forms created by the Office of the Attorney General and records which were utilized by that Office. The trial court found that the search for the Office's records was reasonable, although the evidence demonstrated that the search was conducted in the wrong places.

Mr. Greenhalgh submits respectfully that the standards appropriate to summary judgment proceedings were not applied by the trial court, and that there was insufficient evidence that a reasonable search was conducted. The records requested were certificates of settlement created by the Office of the Attorney General and used for

recording settlement of Public Record claims by prison inmates during the time period running from January 1, 2005 through January 1, 2008. (CP p.86).

ARGUMENT

A. Principles applicable to summary judgment proceedings were not applied at the trial level.

The initial argument made by the Office of the Attorney General in its response seems to suggest that the proceeding below was not a proceeding conducted as a hearing on its own motion for summary judgment. (Respondent's Brief, p. 14, 15). Mr. Greenhalgh does not dispute the argument that there are other ways to pursue judicial determination regarding the validity of a Public Records Act request . However, the choice in this case was a motion for summary judgment, and the choice was the choice of the Office of the Attorney General. Because of that election the parties were bound by the procedural and evidentiary rules which apply to motions for summary judgment. Review of a summary judgment is a review of those proceedings de novo. Spokane Research and Defense Fund v. City of Spokane, 155 Wn. 2d 89, 97, 117 P.3d 1117 (2005). In this regard, the movant bears the burden initially of establishing the absence of material disputed fact. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992). The nonmovant, Mr.

Greenhalgh, was entitled to all reasonable inferences which could be drawn from the evidence presented by him or the movant. Smith v. Safeco Insurance Co., 150 Wn. 2d 478, 78 P.3d 1274 (2003). Affidavits at summary judgment may not be conclusory. The mere fact that the Office concluded repeatedly and self-servingly that its failed search was reasonable is not outcome-determinative.

Case law, and Mr. Greenhalgh, supports the Office's argument, and concession, that affidavits at summary judgment are sufficient if they are "relatively detailed, non conclusory, and not impugned by evidence on the record of bad faith on the part of the agency." Neighborhood Alliance v. Spokane County, 153 Wn. App. 241, 257, 224 P.3d 775 (2009), review granted 168 Wn. 2d 1039 (2010). Although this standard is agreed upon by the parties, Mr. Greenhalgh insists that application of that standard was not observed in this case. As noted below, the absence of bad faith is not enough to make an unreasonable search reasonable.

B. The requestor for public records should not be held responsible for the deficiencies of the requestee's search.

The Attorney General's Office seems to blame Mr. Greenhalgh for not providing it with more information relating to his public records request. It asserts that Mr. Greenhalgh, named in the Office's certificate as a party in a prior settlement in a previous prisoner lawsuit should have

informed the Attorney General's Office that what he was requesting was something that he had previously been privy to. This is in good measure speculative, because there is no evidence that Mr. Greenhalgh possessed a copy of the Attorney General's form and record which he was requesting, regardless of whether his name appeared on one of those forms.

Additionally, his public records request went beyond any settlement records bearing Mr. Greenhalgh's name. The request extended to prisoner settlement certificates during the period of time between January 1, 2005 and January 1, 2008. CP 86. As the record demonstrates, the request, after the lawsuit was filed, and ultimately produced substantially more records than the single certificate bearing Mr. Greenhalgh's name. CP 109,272.

In Public Records Act cases there may be supportable claim that a request is inordinately vague, and thereby confusing to the requestee. Wood v. Lowe, 102 Wn. App. 872, 10 P. 3d 494 (2000); Bonamy v. City of Seattle, 92 Wn. App. 403, 960 P.2d 447 (1998). The present case implicates a different wrinkle: Mr. Greenhalgh is faulted for being too specific in his request. (Respondent's Brief, p. 16). Case law is clear in holding that the obligation to conduct a search lies with the requestee and that that obligation of the requestor is no more than to provide a reasonably specific request. Hangartner v. City of Seattle, 151 Wn.2d 439,

448, 90 P. 3d 26 (2004). As indicated by the Supreme Court, “if a request is too vague an agency can request a clarification.” Id at 448.

In the present case, the extent of the search offered as reasonable, was the conducting of two separate searches of the same records. Not surprisingly, duplicated searches, without expansion to other identifiable and more reasonably propitious sites, and in this case the site where the Office’s Department of Corrections Division created and maintained its prisoner Public Records Act settlement data, would be no more productive the second time around and would not satisfy the agency’s obligation to search an area likely to be productive. Failure to search such a site should raise a genuine issue of material fact in the summary judgment context.

Neighborhood Alliance of Spokane County, supra at 259, citing Campbell v. United States Department of Justice, 164 F.3d 20, 29 (DC Cir.1998).

Recourse to federal cases interpreting provisions of the federal Freedom of Information Act is acknowledged by Washington courts as a useful aid to interpretation of the Public Records Act. Dawson v. Daley, 120 Wn. 2d 382, 791, 845 P.2d 995 (1993).

C. The evidence is devoid of an affirmative representation that all files likely to contain responsive materials were searched.

Both parties rely upon the holding in the case of Neighborhood Alliance of Spokane County v. County of Spokane, 153 Wn. App. 241,

224 P.3d 775 (2009), review granted 168 Wn. 2d 1039 (2010). In that case, the requestee's motion for summary judgment, granted by the trial court, was reversed because the searchers failed to search a computer site which was no longer in use but which was available for searching. An analogy to this case does not tax the mind: in this case, the site, the productive Corrections Unit Division records, was not only available, but was still active.

The Neighborhood Alliance case highlights certain requirements expected of affidavits in the Public Records Act context, requirements which were not observed in the present case. Significantly, that Court noted that there must be an averment "that all files likely to contain responsive material, if such records exist, have been searched." Neighborhood Alliance, supra citing Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Circuit 1990). Not only was there no vindicating averment presented in the materials provided the trial court, but the materials presented actually established that the Office's Department of Corrections Division records, ignored until after the lawsuit was commenced, was precisely the division and site likely to contain the responsive materials relating to the prisoner claims Mr. Greenhalgh had requested. An agency may not ignore additional sources which are likely to produce the material requested. Neighborhood Alliance, supra at 259.

Additionally, and again observing the cautions of Neighborhood Alliance of Spokane County, supra, the movant Office of the Attorney General does not attempt to indicate why it was reasonable not to have made inquiry of the Department of Corrections Division records in the first place. As noted in Neighborhood Alliance of Spokane County, review of a given search's reasonableness must be based on what agency comes to know at the conclusion of the search rather than what the agency speculated at its inception. *Id.* at 259. Such retrospection is not evident in this case. Nor does a partial search satisfy the duty to promote "full access" to non-exempt public records. Amren v. City of Kalama, 131 Wn. 2d 15, 31, 929 P.2d 389 (1997).

D. Although metadata was not mentioned, the scope of the request made by the requestor was sufficient to elicit more than what was produced.

Mr. Greenhalgh has admitted in Appellant's Brief that he made no express request for material identified by him as "metadata." Mr. Greenhalgh has also agreed that the Washington Supreme Court, after the trial court ruling in this case, established that in order to secure metadata, a requestor must specifically request metadata. O'Neill v. City of Shoreline, 170 Wn. 2d 138, 240 P.3d 1149 (2010). On the other hand, Mr. Greenhalgh did enlarge his request with regard to email such that he had

requested an “original format” of the records sought which should have produced the identity of the email addresses utilized in-house by the Office of the Attorney General in connection with its opposition to prisoner requests for public records. It is submitted that the contents of his requests should be reviewed again by the trial court in light of the Supreme Court’s admittedly adverse ruling in O’Neill, supra.

E. The evidence at summary judgment did not establish that the actual and billing cost of the records were within the statutory limit.

The Attorney General’s Office suggests that in its brief that all costs quoted to Mr. Greenhalgh for copying or scanning of the requested records were provided. The billed “set-up cost” was a formulaic administrative hypothetical rather than a cost empirically incurred. Therefore, there was a failure to provide Mr. Greenhalgh with an actual accurate, and allowable itemization of costs to the requestor as required by the statute. RCW 42.56.120. The costs of copying the documents requested should not have exceeded the statutory limit of \$.15 per page. Excessive billing is an impairment to the public access to public records.

F. Mr. Greenhalgh should be considered the prevailing party and entitled to costs and attorney’s fees.

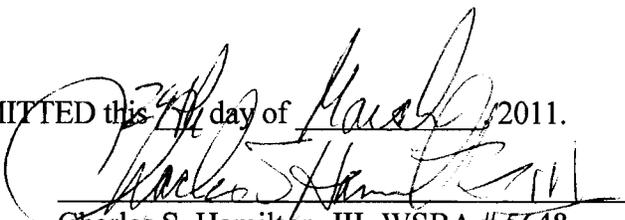
As noted in his initial brief, Mr. Greenhalgh should be the prevailing party both on this appeal and at the trial level. It would appear

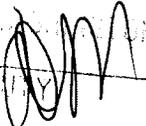
that the trial court must first assess the issues of costs and attorney's fees and penalties. In this regard Mr. Greenhalgh, without intended presumption, urges that he is entitled to costs and reasonable attorney's fees both on appeal and at the trial level because he submits that reasonably he should prevail in this case.

CONCLUSION

The appellant submits that the search for public records proffered in this case by the Office of the Attorney General, to support a motion for summary judgment was not a reasonably comprehensive nor reflective search for records of its own creation and that the statutory and judicial mandates regarding a public agency's affirmative duties of attention to Public Records Act requests were not satisfied in this case. For the reasons stated in this brief and in appellant's initial brief, it is respectfully submitted that the trial court's order granting summary judgment and its order denying Mr. Greenhalgh's motion for reconsideration should be reversed and the case should be remanded to the trial court, and that appellant should be awarded his costs and attorney's fees at both trial and appellate levels.

RESPECTFULLY SUBMITTED this 7th day of March, 2011.


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Attorney for Appellant

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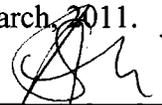
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent a copy of Appellant's Reply Brief to Respondent's counsel via United States Postage, first-class postage prepaid on March 24, 2011 and I sent a copy via legal messenger to the Court of Appeals Division I.

DATED this 24th day of March, 2011.


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