

No. 43787-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Thurston County Superior Court Cause No. 11-2-2266-5)

ARTHUR WEST,

Appellant,

v.

ASSOCIATION OF WASHINGTON CITIES

Respondent

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

Plaintiff and Appellant Arthur West submitted an opening brief to this Court where he argued that the Trial Court erred in concluding late disclosed records and a late disclosed exemption log were not responsive to his public records request to Defendant and Respondent, the Association of Washington Cities ("AWC"). In response, AWC argued that Mr. West had made a series of new requests to AWC, and that the late disclosed records and late disclosed exemption log were responsive to the *new* requests, not to the request at issue in this lawsuit. But the AWC's counsel's arguments conflict with the statements that AWC made to the Trial Court. Mr. West also argued that there was no basis for the imposition of sanctions by the Trial Court and no findings supporting any sanctions. In response, AWC argues that Mr. West's actions in filing the case, throughout the whole of the case, and especially in filing a motion for reconsideration, constituted procedural bad faith. This argument has no basis in fact or in law.

This Court should review the late-disclosed records *de novo* and conclude that they were responsive to Mr. West's request, should reverse the award of attorney fees, and then remand the case back to the Trial Court for further proceedings.

II. REPLY TO RESTATEMENT OF RELEVANT FACTS

AWC argues that this case, at its core, is a "discovery dispute." It is not. At its core, this case is about AWC's attempts to weaken Washington's Public Records Act and Mr. West's efforts to use the PRA to make requests to AWC under the PRA – in order to discover the depth and breadth of AWC's lobbying for new laws to restrict the scope of the PRA. And as to the PRA itself:

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56:030.

AWC's response to Mr. West's arguments is premised on the notion that Mr. West had made a series of new public record requests to AWC, and that the late disclosed records and exemption log were responsive to the later requests, not the February 9 request that the Trial Court ruled is at issue in this lawsuit. However, the fact is that all of the requests that AWC's appellate counsel now characterizes as "new," were

characterized by the AWC at the time and to the Trial Court as “renewals.”

When Mr. West’s February 9 request was extinguished by the settlement agreement between the parties, Mr. West sent a March 3 email saying, “Please regard this as a renewal of all pending records requests...”. CP 63. Next, on April 21, Mr. West wrote an email to AWC writing, “Please consider this as a formal request under RCW 42.56, for disclosure of records, including all previous requests. This request incorporates by reference all previous requests.” CP 69. AWC’s General Counsel, Ms. Sheilah Gall, responded on April 28, saying, “The e-mail is to acknowledge your April 21 renewal of a request.” CP 69. Consistently, Ms. Gall declared to the Trial Court that Mr. West’s April 21 “request” was a renewal: “Plaintiff sent another email to me again renewing his requests for records under the PRA.” CP 43. But AWC, in its brief to this Court, argues that the April 21 renewal was a *new request*: “On April 21, 2011, West sent another new PRA request to AWC via e-mail.” AWC’s Brief at 8.

Similarly, after Mr. West received Ms. Gall’s April 28 acknowledgement of his renewal and request for clarification, he wrote back, saying “Thank you. please regard this as a request to reopen all pending requests, and especially the most recent requests.” CP 69.

Consistently, Ms. Gall declared to the Trial Court that this email from Mr. West was also a renewal: "Within three (3) hours of receiving my e-mail, plaintiff responded with another e-mail again renewing his requests." CP 43. But AWC, in its brief to this Court, argues that this was another new request. "Within three hours of sending this e-mail to West on April 28, 2011, West responded with yet another new PRA request." AWC Response at 9.

AWC's arguments in its Response also are premised on the notion that AWC's response to Mr. West's February 9 request was completed with the transmission of the records that AWC sent to Mr. West on June 30, 2011, based on one sentence in AWC's accompanying letter of that same date: "With this installment, AWC is considering your documents request to be closed." CP 76. But this sentence is taken out of context and ignores the rest of the letter. "In further response to your April 21, 2011, renewal of your request for public records, enclosed is a disk with additional records related to correspondence regarding Public Records legislation.¹ An exemption and redaction log for your requests will be

¹ While the April 21 renewal of the March 3 renewal included more than one records request (the February 9 request that the Trial Court ruled was at issue in this lawsuit and other requests that the Trial Court ruled were not), these records, "additional records related to correspondence regarding Public Records legislation" were on their face responsive to the February 9 request at issue here, since it sought "All records of any

sent to you next week. With this installment, AWC is considering your document request to be closed.” CP 76. When this letter is read in context, it appears that AWC intended the promised exemption log to be a part of “this installment,” after which the document request would be closed. AWC’s current argument ignores the fact that at the time, AWC promised Mr. West an exemption log.

When no exemption log arrived, after two-and-a-half months, Mr. West emailed Ms. Gall a notice of violation. “Please regard this as a notice that the AWC is in violation of the Public Records Act in regard to its statutory duty to reply to the recent request for records of AWC lobbying and AWC contacts with Mike Armstrong. Please let me know if a full reply will be forthcoming or whether it will be necessary to compel the AWC to comply with the Public Records Act.” CP 182. Though this notice of violation states that it is a notice of violation, refers to a “recent request,” and paraphrases the February 9 request, AWC makes the argument in its Response Brief that this was actually a *new request*. “Over two months later, on September 12, 2011, West submitted yet another PRA request to AWC. (CP: 181-182). West mistakenly titled this request as a “Violation of Public Records Act.” AWC Response at 10.

lobbying or correspondence concerning the PRA, from June of 2010 to present, and any proposed alterations or amendments.” CP 50.

When AWC's interim general counsel, Mr. Mark Erickson, wrote to Mr. West and sought clarification, Mr. West responded: "In response to the recent letter, I am seeking the records identified in the original request that was filed, not the records as they were described in the complaint filed in the Superior Court [that similarly used shorthand to describe the substance of his February 9 request, just as the Notice of Violation had done], which generally identified the request and subject matter of the records, please review the PRA request for clarification, if any is necessary." CP 184-85.

AWC also takes out of context its counsel's CR 11 letter to Mr. West and Mr. West's response. AWC's counsel, Mr. Jeffrey Bilanko, had written a letter to Mr. West. CP 37. AWC argues to this Court that Mr. Bilanko's letter was "asking West to identify the basis of his lawsuit." Response at 12. However, Mr. Bilanko's letter, which threatened Mr. West with CR 11 sanctions, does not ask Mr. West to identify the basis of the lawsuit. CP 37. Even though Mr. Bilanko's letter did not ask Mr. West to identify the basis of the lawsuit, Mr. West was forthcoming: "Are you aware of the 2 recent additional disclosures made by your client that post-date the suit, and of [sic] the silent withholding that this demonstrated?" CP 39. Yet AWC only focuses on Mr. West's response to Mr. Bilanko's CR 11 threats and ignores Mr. West's identification of

the basis of the lawsuit – the November 18 production of records and the December 1 production of records and the exemption log, all of which were produced after Mr. West filed his lawsuit. AWC Response at 12; 14.

AWC had originally moved for summary judgment and sought CR 11 sanctions against Mr. West, arguing that Mr. West had intended to file this lawsuit from the time he renewed the February 9 request. CP 30-31. Mr. West rebutted this charge in full. CP 174-175.

7. After March 3, 2011, when Judge Hilyer signed and entered the settlement agreement, I couldn't file that [already drafted] summons and complaint as a new matter, because I had agreed to a six month moratorium in the settlement agreement. But I did write to Sheila Gall, the AWC General Counsel, and gave her notice of my "intent to refile for an action for fraud and violation of the PRA in September 2011." I was referring to the summons and complaint that I had drafted and attached to my declaration submitted to Judge Hilyer opposing the entry of the settlement agreement.

8. I believe that Ms. Gall knew exactly what I was referring to: the "action for fraud and violation of the PRA" as that summons and complaint I had drafted and attached to my declaration. I did not intend to refer to my pending February 9 public records request. I believe it is disingenuous for AWC to now attempt to argue that my "intent to refile for an action for fraud and violation of the PRA" that I write back in March actually referred to my February 9 request, when the AWC was still responding to my request. This is merely an attempt to get this Court to award CR 11 sanctions against me, and has no basis in fact.

CP 175. AWC never set forth any facts to rebut Mr. West's Declaration, and continued to ignore it both in its pleadings to the Trial Court (*see* CP

367) and in its Response Brief here. "AWC added to its basis for sanctions against West by setting forth facts and argument demonstrating that West's litigation tactics were troublesome and bordering on dishonest. (CP: 367-369)." AWC's Response at 14. But, again, AWC never controverted the facts set forth in Mr. West's Declaration, including Mr. West's statements that in addition to sending Ms. Gall and AWC his "Notice of Violation," he also attempted to reach Ms. Gall by telephone and that he stopped by AWC and personally spoke with AWC's interim general counsel, Mr. Erickson, in an attempt to get the promised exemption log, before he filed this lawsuit. *Cf.* CP 367-369 with CP 176.

AWC also takes another statement in Mr. West's Declaration out of context, arguing that it shows an improper purpose for bringing this lawsuit. AWC response at 20. AWC quotes the statement: "I was angry. I still am. I feel that AWC tricked me," as support for the argument that this Court should affirm the Trial Court's imposition of sanctions. AWC Response at 19-20. But this argument fails. The complete quote reads:

4. During the course of our settlement negotiations, I thought that AWC and I had a meeting of the minds. I thought that we had agreed to, in a settlement agreement and two stipulated motions, settle our case (including a penalty amount and AWC's agreement that it is a public agency subject to the public records act), dismiss the appeal, and dismiss the action in federal court.

Accordingly, I prepared a stipulated motion for dismissal of the federal court case for my signature and AWC's. I also signed the settlement agreement in this case [Thurston County Cause No. 07-2-02399-0].

5. However, after I signed the settlement agreement in this case [Thurston County Cause No. 07-2-02399-0], AWC's counsel, Mr. Jeffrey Bilanko (who was representing AWC in the federal court and is also representing AWC here), wrote to me and said that his firm's representation of AWC had nothing to do with the negotiated settlement, and that his firm had no knowledge of any negotiations. I was given to understand, then, that the final order of dismissal I had prepared for the federal case was not included, so far as the AWC was concerned, in the settlement.

6. I was angry. I still am. I feel that AWC tricked me. I opposed the entry of the settlement, without the federal court dismissal that we had negotiated. Judge Hilyer signed and entered the settlement, but it is what it is. However, what is important here is that I had drafted a summons and complaint alleging fraud on the part of AWC with regard to the settlement agreement, and also alleging public records act violations for their failure to respond to some earlier requests (requests prior to and not at issue in this lawsuit...). I submitted that unfiled summons and complaint as an exhibit to a declaration to demonstrate to Judge Hilyer just how fundamental the lack of our meeting of the minds was.

CP 174-75. AWC does not attempt to contradict any of the facts set forth by Mr. West in his declaration, only to take three sentences out of context and argue that they are Mr. West's admission of an improper purpose in filing this lawsuit.

However, Mr. West elsewhere set forth the purpose behind his public records request to AWC, even though the Public Record Act does

not require a requestor to have a purpose. RCW 42.56.080; RCW

42.56.070. Mr. West declared:

I made one of the requests that is at issue in *this lawsuit* on February 9, 2011 [the Trial Court has ruled that this is the *only* request at issue in this lawsuit]. I had learned that the AWC was lobbying the legislature to weaken and limit the application of the public records act. That disturbed me and still does. In the February 9 request, I requested inspection of the following records: "1. All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation; 2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alterations or amendments; and 3. All information and communications on your "members only" website areas."

CP 175-76. AWC ignores this declaration, and failed to set forth contradictory facts before the Trial Court.

As further support for its argument this Court should affirm the Trial Court's imposition of sanctions against Mr. West, AWC alleges that Mr. West forced AWC "to spend attorney fees responding to a Motion for Reconsideration that simply re-argued a motion already lost, in violation of the rule governing motions for reconsideration. (CP: 432)." AWC Response at 15. It is not clear what AWC means by "in violation of the rule governing motions for reconsideration." Mr. West's motion for reconsideration was based on CR 59(a)(8), that allows reconsideration for errors of law occurring at trial and objected to at the time of trial. When

AWC responded to Mr. West's Motion for Reconsideration, it complained that CR 59(a)(8) was unavailable to Mr. West, since there had been no trial – the case was decided on summary judgment. CP 432. But CR 59, by its terms, applies not just to verdicts after trials, but also to “any other decision or order.” CR 59(a). It was appropriate for Mr. West, when seeking reconsideration of an order granting summary judgment, on the basis of an error in law, to cite to CR 59(a)(8).

It also may be that AWC is arguing that Mr. West violated the rule governing motions for reconsideration because AWC alleges he “simply re-argued a motion already lost.” But there is no requirement in CR 59 that an aggrieved party come up with new and novel arguments to advance to the Trial Court; that would defeat the purpose of the rule and would fly in the face of all of our rules on finality.

III. ARGUMENT

A. The Three Emails Late-Produced on November 18 Are Responsive to Mr. West's February 9 Request

AWC argues that Mr. West's “Notice of Violation” is in fact a new records request, rather than what it says it is on its face – notice to AWC that Mr. West believed them to be in violation of the Public Records Act by failing to properly and fully respond to his earlier request.

AWC argues that Mr. West's "Notice of Violation" is a new records request because Mr. West had never before sought "records of AWC lobbying and AWC contacts with Mike Armstrong. (CP: 182)." However, please review the February 9 request. Mr. West sought:

1. All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation;
2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alterations or amendments;
- and 3. All information and communications on your "members only" website areas.

CP 175. And Mr. West had clarified to AWC that he intended the scope of "lobbying" to be construed broadly. CP 69. It therefore appears that the "records of AWC lobbying" is, indeed, a paraphrase of parts 1 and 2 of Mr. West's February 9 request.

Likewise, Mr. West declared to the Trial Court that Representative Mike Armstrong was "one of the members of the legislature that AWC was lobbying in its efforts to support the bills that would weaken or limit the Public Records Act." CP 177. AWC never put forth evidence to contradict this statement in Mr. West's declaration, and never – not in pleadings, nor in oral argument – argued to the Trial Court that Representative Armstrong was not one of the members of the legislature

that AWC was lobbying to weaken or limit the Public Records Act. Now, for the first time to this Court, AWC argues that Mr. West's statement about Representative's sponsorship of the legislation at issue is "without citation to authority." AWC Response at 18. AWC argues that the documentary evidence that Mr. West put before the Trial Court showing the *substance* of the legislation at issue shows that Representative Armstrong was not a "named sponsor" of the subject legislation. AWC Response at 18, *citing* CP 156-172.

Yet consider the documentary evidence at CP 156-172; these are reports on *Senate* Bills 5025, 5022, and 5089. Representative Armstrong is not a Senator; he is a Representative. If this Court wishes to see the corresponding *House* Bill reports for the subject legislation, reports that name Representative Armstrong as a "named sponsor," they are available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1034&year=2011> (HB 1034); <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1139&year=2011> (HB 1139); and <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1033&year=2012> (HB 1033).² Thus it may be fairly said that Mr. West's

² AWC did not argue to the Trial Court that Representative Armstrong was not the sponsor of the legislation at issue; at summary judgment, the Trial Court would have taken Mr. West's uncontroverted declaration as true. Accordingly, Mr. West has no need to move this Court under RAP 9.11 to accept the new evidence of House Bill Reports, since additional proof of facts is not needed here to fairly resolve the issues on review, nor would

reference to "Representative Armstrong" in his "Notice of Violation," was likewise a reasonable paraphrase of parts 1 and 2 of his February 9, 2011 request.

Furthermore, the person at AWC with whom Mr. West had been corresponding, Ms. Sheila Gall, could be expected to understand that Mr. West was paraphrasing his February 9 request. That Ms. Gall was on sabbatical, or that AWC's email servers would bounce back Mr. West's emails (directed to the address given to him by AWC), or that when Mr. West called or visited AWC that no-one would know anything about the promised exemption log, were not circumstances that Mr. West could have or should have anticipated. "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 269, 884 P.2d 592 (1994) (PAWS).

AWC argues that its search – a search that did not include a search for correspondence with Representative Armstrong, the member of the

the additional evidence probably change the decision being reviewed. RAP 9.11 (a)(1) and (2). Instead, Mr. West merely mentions the existence of these House Bill reports in passing in order to illustrate his point that the *Senate* Bill Reports that are part of the record before this Court (submitted by Mr. West to the Trial Court for the purpose of showing the substance of the subject legislation) would not name Representative Armstrong, since he is not a Senator.

legislature that AWC was lobbying in its efforts to support bills that would weaken the Public Records Act – was adequate. But “The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case.”

Neighborhood Alliance of Spokane County v. County of Spokane, 172

Wn.2d 702, 720, 261 P.3d 119 (2011) (internal citations omitted). It was not reasonable to fail to search for AWC’s correspondence with Representative Armstrong, since he was one of the primary sponsors of the legislation for which AWC was lobbying.

Further, the correspondence that AWC did disclose to Mr. West on November 18 included three emails between the AWC and Representative Armstrong concerning the conference materials that he was planning on presenting at AWC’s annual conference, in a presentation on Washington’s open government laws. The one email refers to “changes” to Washington’s open government laws. Ms. Gall had earlier disclosed these conference materials to Mr. West as being responsive to his request. AWC should have, upon finding the conference materials, conducted a search for correspondence between AWC and Representative Armstrong, since that would have been an “obvious lead.” “Additionally, agencies are required to make more than perfunctory search and to follow obvious

leads as they are uncovered. Neighborhood Alliance, 172 Wn.2d at 720 (internal citation omitted). Again, parts 1 and 2 of Mr. West's request sought: "1. All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation; 2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alterations or amendments." CP 175. Correspondence with Representative Armstrong concerning the Public Records Act is certainly responsive.

B. The Exemption and Redaction Log Produced By AWC Was in Response to Mr. West's February 9 Request

AWC argues that the exemption and redaction log produced by AWC to Mr. West on December 1, 2011, was in response to an entirely different request from Mr. West. Yet why, then, did Ms. Gall write to Mr. West: "...enclosed is a disk with additional records related to correspondence regarding Public Records legislation. An exemption and redaction log for your requests will be sent to you net week." CP 76. Mr. West does not merely allege that because the three records on the exemption log fall within the time frame of his request, that the records are responsive. He so argues because the subject matter of the three records is

also responsive. AWC has admitted that the law firm of Foster Pepper represented AWC in Public Records Act litigation. The records at issue include "redacted description related to trial strategy for pending litigation" and "redacted description related to discussions and legal advice to clients." CP 385. This is correspondence concerning the Public Records Act; since it is within the time frame of Mr. West's request, it is responsive.

C. This Case Was Brought By Mr. West for A Proper Purpose

Mr. West has filed a separate motion to strike the inadmissible citations to unpublished trial court orders from the U.S. District Court for the Western District of Washington and the argument therewith. This Court should strike the citations and argument. As to the substance of AWC's argument, that Mr. West brought this action for an improper purpose, Mr. West fully answered those charges in his uncontroverted Declaration that he submitted to the Trial Court (*see Reply to Restatement of Relevant Facts, above*). The Trial Court declined to impose CR 11 sanctions on Mr. West when it granted summary judgment to AWC. AWC neither sought reconsideration of that denial nor assigned error to that denial here. Not only is the argument that Mr. West brought this lawsuit for an improper purpose itself in bad faith, but it is untimely.

**D. Mr. West's Conduct Does not Rise to the Level of
"Procedural Bad Faith"**

Under separate cover, Mr. West has moved this Court to strike AWC's citation to an unpublished decision from this Court and the attendant argument. This Court should strike the citation and argument. As to the substance of the argument, AWC is arguing that Mr. West's conduct amounts to procedural bad faith such that this Court should affirm the Trial Court's sanctioning Mr. West (in a manner not in accordance with any rule, nor supported by any findings). The allegations against Mr. West amount to allegations that he missed a scheduling conference and failed to meet and confer with AWC counsel, allegations that Mr. West filed a Supplemental Memorandum in Support of his Cross-Motion for Summary Judgment, and that Mr. West filed a Motion for Reconsideration. These simply do not rise to the level of procedural bad faith.

AWC also alleges that when Mr. Bilanko wrote to Mr. West, that he asked Mr. West to explain the basis of the lawsuit and that Mr. West refused to do so. Actually, the converse is true. When Mr. Bilanko wrote to Mr. West, he *did not ask Mr. West to explain the basis of the lawsuit*, but Mr. West, unasked, informed Mr. Bilanko of the basis of the lawsuit: "Are you aware of the 2 recent additional disclosures made by your client

that post-date the suit, and of the silent withholding that this demonstrated?" CP 39. There is no basis for sanctions here.

CR 59 and CR 11 are not fee-shifting mechanisms, and, indeed, CR 59 does not provide for fees! Further, the Trial Court did not award fees under CR 59 or CR 11, or make any findings of fact supporting an award of sanctions. A trial court has inherent powers to impose sanctions for contempt. There is no contempt here, nor did the Trial Court make any findings of contempt. And while AWC is correct that procedural bad faith is sanctionable behavior, Mr. West's behavior here simply does not qualify. This Court should reverse the fee award.

E. Request for Attorney Fees

Mr. West repeats his request for attorney fees and costs under RCW 42.56.550(4) and RAP 18.1.

IV. CONCLUSION

Based on the foregoing facts and arguments, this Court should reverse and remand the case to the Trial Court.

RESPECTFULLY submitted this 11th day of February, 2013.

CUSHMAN LAW OFFICES, P.S.

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CERTIFICATE OF SERVICE

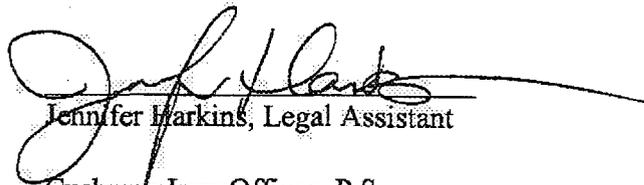
The undersigned declares under penalty of perjury as follows:

On February 11, 2013, I caused a copy of Appellant's Reply Brief to be electronically filed with the Court of Appeals, Division II and to be delivered electronically and via legal messenger to the party as listed below:

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Comments:

Attached is Appellant's Reply Brief

Sender Name: Jennifer Harkins - Email: jenniferharkins@cushmanlaw.com

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