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**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

NO. 271846

NEIGHBORHOOD ALLIANCE
OF SPOKANE COUNTY
a nonprofit corporation

Petitioner,

v.

COUNTY OF SPOKANE,
a political subdivision of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

EVANS, CRAVEN & LACKIE, P.S.
Patrick M. Risken, WSBA# 14632
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200

ATTORNEYS FOR RESPONDENT

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1. Introduction.

At the outset, this case does not involve a request for public records that is either denied or where an exemption is claimed. The Neighborhood Alliance of Spokane County presented a request under RCW 42.17 to Respondent County of Spokane on May 16, 2005 (CP 51-52) which resulted in the provision of records responsive to one part of the request, and a response to the other part that disclaimed the responsibility to explain or interpret documents. CP 54-55. The core fact of the case is that the records requested did not exist.

The May 16, 2005, request by the Neighborhood Alliance sought information. During the last hearing on this case this counsel for the NASC argued:

. . . my client was not seeking, in this action, to litigate whether or not those people should have been hired or – hired. They just wanted a record to show their identity.

TR, 05/13/08, p. 23 ll. 5-7. Aside from the fact that they May 16, 2005, Public Records Act (“PRA”) request did not ask Spokane County to identify anyone beyond “Ron” and “Steve” (CP 405), that statement and other statements in briefing proves that the NASC considered the PRA request herein to be a verification request.

But now, on appeal and with great hyperbole Petitioner Neighborhood Alliance of Spokane County (hereinafter "NASC") clouds the complete lack of proof of its claim by contending:

This appeal presents critical issues related to citizens' ability to prevent corruption of local government through the Public Records Act . . .

Brief of Petitioner, p. 1.

The NASC has *finally* admitted that the intent of its May 16, 2005, request and this lawsuit was to create a vehicle for unbridled access to any corner of Spokane County's offices that it sees fit to investigate. Once a lawsuit is filed, according to the NASC, the Civil Rules discovery rules allow for inquiry into whatever issue the NASC would like to explore. According to the NASC, the Public Records Act is actually a scalpel; it may be used to expose and excise perceived corruption.

In this case, Spokane County refused to provide public records which it feared might reveal illegal hiring practices and successfully resisted discovery for two years for the very same reason.

Brief of Petitioner, p. 1. The last statement is what the NASC had obviously hoped to express and yet that is not what it requested on May 16, 2005. As will be demonstrated by the NASC's own arguments and the record herein, what it was *really* seeking were documents which confirmed their suspicions of specific names; it sought to verify that the

names on the “seating chart” were individuals named Ron Hand, Steve Davenport and Steve Harris. CP 75, 77, 124, 125, 161-162, 186, 187. If the NASC had wanted such verification it could have done so in some other way.

Verification requests seeking information about an employee’s position, salary, and length of service relate neither to the conduct of government, nor the performance of any governmental function. Verification requests are not within the scope of the act and are not subject to disclosure.

Dawson vs. Daly, 120 Wn.2d 782, 789, 845 P.2d 995 (1993). What the NASC requested was verification. At the very least it requested an explanation.

At pp. 27-28 of the *Brief of Petitioner* and at the *Hearing* held May 13, 2008 (p. 21-22), the NASC admitted that it received *from Spokane County* documents which *might* be responsive to the May 16, 2005, PRA request. Those three emails – provided to the NASC by Spokane County in November 2005 – were held by the NASC for over two years and then sprung on the Trial Court and Spokane County when the NASC was faced with Spokane County’s renewed summary judgment motion seeking dismissal. It is clear that the only motivation for this lawsuit is the possibility of an award of a penalty and attorney’s fees and costs if the NASC can convince this Court that three unrelated emails *that it already had in its possession* should have been produced immediately in response

to the May 16, 2005, PRA request. It is difficult to imagine that our Legislature anticipated that the PRA would be extended to allow sandbagging as a basis for an award of attorney's fees, costs and a penalty for the failure of a public agency to respond to a records request.

The central purpose of the public records act is the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. *King County vs. Sheehan*, 114 Wash.App. 325, 57 P.3d 307 (2002). Respondent County of Spokane respectfully submits that the purpose of the PRA is not to ensnare public agencies in the manner in which the NASC promotes. A single PRA request is not a gateway to boundless disconnected "investigation."

The entirety of the NASC's appeal is that Spokane County did not perform a "reasonable search" when presented with the May 16, 2005, PRA request. *Brief of Petitioner*, Table of Contents. It issued so many PRA requests in May, October and November 2005 that it seems the NASC could not keep them straight. Regardless it presents nothing but speculation and innuendo to support its argument that "there must be something there." That alone cannot survive summary judgment.

2. Respondent's Statement of Facts.

On May 16, 2005, the NASC provided two Public Record Requests to Spokane County, *to wit*:

1) The complete electronic file information logs for the undated county planning division seating chart provided by [Spokane County employee] Ms. Knutsen to the Neighborhood Alliance on May 13th. This information should include, but not necessarily be limited to, the information in the "date created" data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document.

2) The identities of "Ron & Steve" individuals who are situated near the center of the seating chart referenced in item #1. Also, the identity of the individual listed as "Steve" in the cubicle with the number 7221 at the top of the chart.

CP 405. Note that Ms. Knutsen had provided the "seating chart" pursuant to a PRA request just a few days earlier. This was the follow-up.

By letter dated June 6, 2005, Spokane County responded to those Public Record Requests. In response to what is now referred to as "Item #1" Spokane County provided the electronic log that was requested. CP 54-56. With regard to what is now referred to as "Item #2" Spokane County responded that no such records existed and that, further, Spokane County was not required to explain or interpret records in order to

respond. CP 55-56. Ms. Knutsen stated that even though Ms. Malzahn had answered that Spokane County was not required to explain public records, Knutsen had looked and found nothing which referenced the seating chart and identified “Ron” and “Steve.” CP 62. Months passed with no action by NASC.

Attorneys from the Center for Justice took over. On October 7, 2005, those lawyers issued a letter to the Spokane County Deputy Prosecutor attempting to “gain compliance” with the May 16, 2005, PRA request. CP 68-70. From that letter it is clear that what the NASC sought by the May 16th PRA request was the verification or confirmation of its suspicions: “confirm that Steve Harris was the ‘Steve . . .’” CP 68.

Further:

. . . my client believes that person is Steve Harris but wants to confirm this belief with the County’s own documents – that Steve Harris is, indeed, the person listed in the February 16 seating chart.

CP 69.

On October 25, 2005, those lawyers issued another letter to the Spokane County Deputy Prosecuting Attorney to explain what the NASC really meant in its May 16, 2005, request – and particularly Item #2. It also requested information regarding Item #1 that was far beyond what it had requested on May 16, 2005. *Id.* That was followed by a letter from

the Center for Justice to the Deputy Prosecutor dated October 31, 2005 (CP 488-489) which added new requests regarding Item #1 and the maintenance of Ms. Knutsen's computer. Spokane County responded timely. CP 491, 493-592. The Center for Justice and the NASC did not further challenge those responses. Several more months passed.

On May 1, 2006, just shy of one year after the PRA request at issue herein was submitted to Spokane County, NASC filed this lawsuit.

*Complaint.*¹ The allegations contained therein are very specific, to wit:

1. The County has violated and continues to violate the Act by **refusing to disclose public records which are not exempt** from disclosure under the Act since the request for the opportunity to review public records created, received, and/or retained by Pam Knutsen, or any other county official or employee, that record the identities of "Ron & Steve" in violation of RCW 42.17.320.
2. The County has violated and continues to violate the **essence** of the Act by **chilling** the requestor's and other requestors' efforts to enforce the Act by asserting that such actions would be frivolous and **threatening** to pursue attorneys fees against the requestor.
3. **Upon belief**, the County has violated and continues to violate the Act by **intentionally erasing public records** from Ms. Knutsen's computer and **failing to provide the requested records** or to state the specific exemption authorizing the withholding of the complete electronic file information logs for the undated county planning division seating chart in violation of RCW 42.17.320.

¹ The Designation of Clerk's Papers agreed between the parties contains the designation of the *Complaint*. However, the *Complaint* is not listed in the Index of Clerk's Papers.

Complaint, pp5-6 (Emphasis added). Of note is the fact that the NASC's own *Complaint* states that the alleged activity concerning Ms. Knutson's computer happened *before* any PRA request was made by the NASC – April 27, 2005 vs. May 16, 2005. Regardless, the only “claim” asserted in the *Complaint* is that Spokane County's response to the NASC's May 16, 2005, request for records violated RCW 42.17.320. *Complaint “Claims”* ¶¶ 1 and 3 at pp. 5-6 and *Complaint “Request for Relief”* ¶ 2 at p. 6. The case is framed by the allegations of the *Complaint* and that one claim. That Spokane County “refused to disclose” and “intentionally erased responding records.” *Complaint*, pp. 5-6.

The NASC issued certain written discovery in June 2006, including Requests for Admission. CP 150-173. The discovery explores not only the May 16, 2005, request but also the additional requests made on October 31, 2005. At this point the claim made by the NASC included everything it had discussed with the Deputy Prosecutor in October 2005 and yet those requests were not part of the lawsuit. The NASC's claim became fluid.

The vast majority of the Responses to those Requests for Admission were objections based upon the nature of the lawsuit – an action under RCW 42.17.340 – and the irrelevance of the “facts” set forth for admission or denial. To “discover” relevant facts regarding the #1

electronic log and #2 the identities of 'Ron & Steve', the NASC required Spokane County to admit or deny:

- That it received a PRA request dated May 3, 2005, RFA 1,2;
- The dates stated on documents provided in response to the May 3, 2005, PRA request, RFA 3,4,5;
- The content of the electronic log provided, RFA 8,9;
- That the log had been modified, RFA 10;
- That the "seating chart" had specified names on it, RFA 11, 12, 21;
- That "Steve" was really one Steve Davenport, RFA 13, 15;
- That Ms. Knutsen said certain things to a newspaper reporter, RFA 14;
- That Spokane County had records which would identify certain individuals to the "seating chart", RFA 16, 17,;
- The identity of "Ron & Steve", RFA 20;
- That Spokane County refused to provide responsive documents (RFA 23, 25) or failed to respond, RFA 24.

CP 152-171. Spokane County objected to every one of the 26 Requests for Admission and answered only six of them. The NASC never pursued a motion to compel answers.

At the same time the NASC propounded Interrogatories and Requests for Production of Documents (CP 175-188), which Spokane

County did not answer. Rather, Spokane County moved for a Protective Order. CP 133-134. The discovery propounded by the NASC included:

- Hiring practices and job postings, Int. 7, 9;
- Information about County meetings whereby the participants discussed withholding records, Int. 8;
- The identify of those receiving documents regarding the qualifications of applicants for two specific job titles, Int. 10;
- The identity of those who make the hiring decisions, Int. 11;
- The identity of anyone who may have a document regarding work space assignments, Int. 12;
- The number of people who applied for a certain job, Int. 13;
- The experience and qualifications of those applying for a certain job, Int. 14;
- The correlation of certain documents, Int. 22;
- The full names of any first name stated on the "seating chart" and the relationship of each to one certain County Commissioner, Int. 23;
- Ms. Knutsen's promotion date and the process of her hiring, Int. 25, 26;
- Facts regarding the hiring of three specifically named individuals who have nothing to do with this case, Int. 27, 28, 29, 30, 31 and 32.

CP 179-185. The Requests for Production (CP 185-188) involved much of the same, including records for Ms. Knutsen's job promotion (Req.Prod. 9) the hiring of three people completely unrelated to the

seating chart (Req.Prod. 10-12), all “requests for administrative interpretations and administrative interpretations provided by the Building and Planning Department between April 1, 2003 through the present” (Req.Prod. 15) and finally “the first five documents that contain the name ‘Steve Harris’ or ‘Stephen Harris’ that were created between May 3, 2005 and May 16, 2005” (Req.Prod. 16) and the same for Ron Hand and Steve Davenport. Req.Prod. 17 and 18; CP 186-187.

This all brings us back to the original quoted material and the NASC’s crusade against perceived corruption within Spokane County. The NASC wished to use this litigation as a gateway to examine every possible aspect of Spokane County hiring practices; to root around to discovery what it may. Spokane County considered this type of discovery as beyond the spirit and intent of the Public Records Act and did not answer the interrogatories and requests for production.

Spokane County moved for summary judgment on November 17, 2006. CP 39-40, 41-47, 66-70. The NASC responded with a Motion to Continue the summary judgment hearing and with a motion to compel discovery. CP 71-73. The NASC demanded answers to the interrogatories and requests for production of documents, and the deposition of any Spokane County employee “with information about records that include the names of Ron Hand, Steve Davenport and Steve Harris . . .” CP 124-

125 (proposed Order). Of course that is not what was requested on May 16, 2005. Spokane County requested a protective order. CP 133-134.

On December 5, 2006, the Lincoln County Superior Court heard argument regarding discovery. It is important to note that counsel for NASC had submitted a declaration in advance of that hearing which stated that if discovery was allowed, "I would question county employees as to the existence of records that would have fulfilled my client's request both for documents that included the names Ron Hand, Steve Davenport, and Steve Harris." CP 190.

At the very onset of that hearing, counsel for the NASC admitted that the discovery requests outlined above were too far ranging. TR 12/05/06, p 6, ll. 6-13. The NASC submitted that it should be able to inquire regarding (1) whether records exist and (2) what was done to find them. TR 12/05/06, p. 7 ll. 4-5. It recognized the need to limit its discovery. TR 12/05/06, p. 7 ll. 8-11. Then it insisted that the May 16, 2005, PRA request covered the following:

Was there a record with Ron Hand's name on it? Was there a record with Steve Davenport's name on it? *Were those people on the seating chart . . . identifiable?*

TR 12/05/06, p 7, ll. 16-20 (emphasis added). The May 16, 2005, request did not ask for those documents.

The Trial Court recognized that the NASC's case was based on nothing more than an unidentified seating chart and hearsay statements. TR 12/05/06, p. 23. Spokane County offered to participate in a CR 31 deposition upon written questions (TR 12/05/06, p. 20, ll.17-21) because of the far-ranging nature of the previous discovery. TR 12/05/06, p. 20 ll. 7-16. The NASC was concerned that would "take more time." *Id.*, at 21, ll. 16-21. The Court noted that the discovery that the NASC had already issued was "pretty far out from . . . what they're required to do." TR 12/05/06, p. 24 ll. 1-2. Counsel for the NASC stated that he would "draft some much narrower . . . questions than the package I sent before." TR 12/05/06, p. 24 ll. 7-11. Counsel for the parties therefore stipulated that the areas of inquiry would be limited to (1) whether responsive documents existed, and (2) the process to look for them. *Id.*, p. 24 ll. 14-21. Spokane County's summary judgment motion was continued indefinitely (*Id.*, p. 25) and the NASC offered to draft an order. *Id.*

The deposition questions were served on counsel for Spokane County on September 7, 2007 – ten months later. CP 386-420. The NASC had "narrowed" the field of questions to include inquiries:

- Confirming quotes from a newspaper article, or correcting same, to identify a person known as "Steve Davenport," Nos. 14, 15;

- Confirming whether the seating chart referred to Steve Davenport and his telephone extension, Nos. 16, 17, 18, 19, 20, 21;
- Confirming that Steve Davenport is listed at a certain number in the Spokane County telephone directory, Nos. 22, 23;
- Efforts to locate documents which included Steve Davenport's name to identify him to the seating chart, No. 24;
- Confirming that Spokane County had documents in its possession with the name "Steve Davenport" on them, Nos. 27, 28
- The same sequence of questions regarding the newspaper and Ron Hand (Nos. 29, 30) the seating chart (Nos. 31, 32) confirming Ron Hand's employment (Nos. 33, 34), the telephone directory (Nos. 35, 36), efforts to locate documents identifying Ron Hand to the chart (No. 37), and that Spokane County had documents with the name "Ron Hand" thereon. Nos. 40, 41.
- Finally, the same sequence with regard to Steve Harris. Nos. 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52.

It is crystal clear that the NASC was indeed looking for documents which specifically identified individuals named Ron Hand, Steve Davenport and/or Steve Harris *to the seating chart*. Any other possible "Ron" or "Steve" simply would not do. The NASC was demanding specific identifications or identities, not documents. It was demanding the verification of what it apparently suspected.

The foregoing amply demonstrates that the NASC intended to use the May 16, 2005, Public Records Act request as a gateway to litigation so

that the Washington Court Rules allowing discovery could be used to examine anything the NASC saw fit – related or not to the May 16, 2005 PRA request. Even though it agreed to “narrow” its inquiries it continued to pursue discovery beyond the May 16, 2005, PRA request, beyond the stipulation of December 5, 2006, and into areas which simply are not a part of a Public Records Act dispute: verifications, explanations, and admissions of facts which are not “documents.” The litigation was just as wide-open as it had been in December 2007.

Spokane County advised the Center for Justice that its would not answer any CR 31 questions that it believed were beyond that which was stipulated and appropriate. CP 422-423. The NASC decided not to pursue a ruling from the Trial Court but rather went ahead with the CR 31 deposition on October 12, 2007. CP 425-462. Spokane County attached its objections as an exhibit to that deposition. CP 477-485.

In the deposition, Spokane County’s Pam Knutsen informed the NASC that her computer was probably the only one on which the seating chart would have existed (CP 431) and that she was the only one who would have worked with the seating chart. CP 432. Aside from a few other questions that was the extent of the deposition aside from follow-up with additional answers provided by Spokane County in February 2008. CP 609-612.

Unknown to counsel for Spokane County, the NASC gathered some rather fantastic Declarations from Spokane County employees (CP 282-328, 329-335, 336-340 and 341-349) in violation of RPC 4.2. Mr. Dellinger told an interesting story about a printer in the County's Building and Planning Department (CP 337) and speculated as to the full names of "Ron" and "Steve." CP 338. Mr. Davenport also had assumptions as to who "Ron" and "Steve" might be although this is all offered in hindsight. CP 329-335. As a planner, he also offered his insight into when and how computers are replaced. *Id.* There was also titillating recollections of Commissioner Harris hanging around in Mr. Davenport's boss's office. CP 332. Ms. Liberty likewise speculated regarding "Ron" and "Steve" (CP 342-344) and engaged in an interesting story about union hiring concerns. *Id.* All of those Declarations were presented on Center for Justice letterhead and each contained the disclaimer "I am not a speaking agent for Spokane County in this matter." CP 333, 338, 344. Remarkable how those private citizens knew to make that statement.

At the request of the Center for Justice, Spokane County Commissioner Mager also provided a *Declaration* to which was attached another copy of a *separate* May 16, 2005, PRA request, 147 pages of documents provided in response thereto and finally a copy of the response the NASC received regarding the May 3, 2005, PRA request including

seating charts. CP 249-280. Finally, Mr. Hunt (another County Planner) spoke of Ms. Knutsen's qualifications to perform her job, seating charts and the hubbub that the chart created in the office. CP 283-284. He speculated about the identity of "Ron" and "Steve" as well. CP 285-286. As a planner Mr. Hunt offered his take on computer maintenance and recordkeeping procedures. CP 287-288. He also voiced an opinion regarding the use of a "reorganization chart" such as that at issue. CP 288. He then explained his own whistleblower complaint regarding the hiring of "Steve" and its dismissal. CP 289 -290, 296-328. None of that shed any light on documents that would have been responsive to the May 16, 2005, request. Spokane County again moved for a protective order regarding discovery. CP 617-623.

At that point it was clear that the NASC had no evidence that Spokane County had failed to comply with the provisions of the Public Records Act with regard to the request of May 16, 2005. Instead the NASC thought it "refused to disclose" or "intentionally erased" responding documents. *Complaint*, pp. 5-6. The NASC hoped to keep the Trial Court's interest by submitting nothing more than the specter of treachery in Spokane County's hiring practices. That strategy did not work, the court granted Spokane County's Motion for Summary Judgment and the case was dismissed. CP 654-657.

The basis upon which the NASC seeks reversal requires this Court to undermine the Trial Court's decision on purely subjective grounds. That is, according to only the NASC, Spokane County failed to "conduct reasonable searches for records responsive to NASC's requests" and yet the NASC offered no evidence to support that contention. Its complaint is merely that it was not happy with the results of the search, so therefore the search was inadequate.

Secondly, the NASC contends that Spokane County failed "to disclose existing responsive records," and yet the only way the NASC can support that argument is to expand the area of inquiry beyond the boundaries of the May 16, 2005, request. The fact is that the NASC failed to provide any credible evidence to the Trial Court that Spokane County's response to the May 16, 2005, Public Records Act Request somehow violated its responsibilities under that Act. NASC was merely disappointed that it did not receive what it had hoped to receive.

For those reasons and as fully demonstrated by the record herein, Respondent Spokane County respectfully submits that the Trial Court properly dismissed the NASC's claims under the Public Records Act against Spokane County on May 13, 2008. Therefore, the decisions of the trial court should be affirmed.

3. Argument In Response.

A. Standard of Review

It is true that the standard of review on appeal from a summary judgment is *de novo*, with the appellate court engaging in the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004). The appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence. *Wood vs. Lowe*, 102 Wn.App. 872, 10 P.3d 494 (2000), citing *Progressive Animal Welfare Society vs. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

What this Court must examine, therefore, is each and every pleading, declaration, and exhibit submitted by the NASC either supporting its Motion to Compel Discovery in December 2005, or supporting its own Motion for Summary Judgment or opposing Spokane County's summary judgment motion, all of which were before the Trial Court on May 13, 2008. In December 2005 and May 2008, Spokane County challenged the NASC to provide admissible, credible evidence demonstrating how Spokane County violated the Public Records Act when it responded to the NASC May 16, 2005, PRA request. To this day the NASC has offered nothing beyond wild speculation and conspiracy theories.

Reasonableness is the guiding principal for a court faced with a public records act summary judgment motion. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59 (D.C.C. 2003)(in that case the FOIA). It is not the result of the search that is the court's focus, but its adequacy. *Id.* Adequacy "is judged by a standard of reasonableness and depends, not surprisingly, on the facts of each case." *Id.*, at 62. Here, Spokane County has explained more than once its process when presented with the May 16, 2005, PRA request. It was the NASC's responsibility to present credible evidence that Spokane County's actions were not reasonable. It failed to present such evidence.

B. The NASC Failed to Preserve Issues Regarding Discovery.

The cornerstone of the NASC's appeal is that Spokane County stonewalled discovery and actually destroyed documents responsive to the May 16, 2005, PRA request. The NASC makes those latter allegations (CP 200, 651-652) without any proof whatsoever. At to the former, the NASC waived that argument when it went forward with its own summary judgment motion at the hearing on May 13, 2008.

Pages 31-37 of the *Brief of Petitioner* challenge the Trial Court's failure to order further discovery and Spokane County's refusal to answer a good number of written discovery requests made by the NASC during

the litigation. While the NASC may have initially filed a motion to compel discovery back in the fall 2006, it never followed through on that motion. Faced with the prospect of dismissal at that time, the NASC stipulated to a CR 31 deposition upon written questions only as to (1) whether documents existed, and (2) what was the process to look for them. TR 12/05/06, p. 24. "I can live with that" is what the NASC's counsel said at the time. *Id.* The CR 31 deposition questions were not provided for ten months and again delved into areas of inquiry totally unrelated to the May 16, 2005, request. *Supra* at p. 10.

CR 37 is the mechanism by which a party may compel another party to answer discovery. The record before the Trial Court contained all of the objections to the NASC's Interrogatories, Requests for Production of Documents and Requests for Admission, as well as its CR 31 Deposition Upon Written Questions (and recognized at CP 198 by the NASC), and yet the NASC never secured an order from the Lincoln County Superior Court compelling Spokane County to answer that discovery. In April 2008 it argued that "given Defendant's truculence and almost absolute refusal to engage in discovery for almost two years, [NASC] renews its request for an order compelling discovery under CR 37(a)." CP 198. Yet when it came time for argument counsel for the NASC waived the issue.

At the beginning of the summary judgment hearing on May 13, 2008, discussing the status of the case and the fact that seventeen months had elapsed between the two hearing dates, counsel for the NASC pointed out that the County had answered some, but not all, of the CR 31 Deposition Questions. TR 05/13/08, pp 8-9.

MS. BEAVER [counsel for NASC]: Well, they answered eighteen of fifty-three [CR 31 Deposition Questions]. So – *I think they answered enough that we can go to our Motion for Summary Judgment.* But, if the Court doesn't grant that, there are several other ones that would be – be relevant.

TR 05/13/08, p 9, ll. 2-10, emphasis added.) The NASC lost the summary judgment motion. CP 654-657. It cannot now be heard to complain that further discovery should have been allowed when the NASC failed to preserve that issue before the Trial Court. When it mattered the most the NASC waived the issue.

C. The NASC's Discovery Was Overreaching.

Since the Public Disclosure Act closely parallels the federal Freedom of Information Act (FOIA), judicial interpretations of the FOIA are particularly helpful in construing Washington's Public Records Act. *Smith vs. Okanogan County*, 100 Wn.App. 7, 13-14, 994 P.2d 857 (2000).

The inquires which may be made in a case involving an alleged violation of RCW 42.17.340 (the "Public Disclosure Act") are limited.

The issues in such a lawsuit or claim involve either (1) whether the document requested was provided timely, or (2) whether a specific exemption cited by the agency actually excuses production of the document or record requested. Actions under the Public Disclosure Act do not examine what a document or record might say or represent; the Act does not require agencies to research or explain public records, but only to make those records accessible to the public. *Smith vs. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000). In this case, the *Complaint* references only one request for public records – the May 16, 2005, letter by Ms. Mager – and the response thereto.

FOIA cases limit discovery to an inquiry of whether complete disclosure has been made by an agency in response to an individual's request for information. *Niren vs. Immigration and Naturalization Service*, 103 F.R.D. 10 (D.Or. 1984). Whether a thorough search for documents has taken place and whether withheld items are exempt from disclosure are permissible avenues of discovery. *Id.* at 11. Where courts have permitted discovery in FOIA cases, it generally is limited in scope to the agency's search and its indexing and classification procedures. *Heily vs. U.S. Dept. of Commerce*, 69 Fed.Appx. 171 (4th Cir. 2003). It is well established that discovery may be greatly restricted in FOIA cases.

Simmons vs. United States Department of Justice, 796 F.2d 708 (4th Cir. 1986). However, discovery is not automatic.

In *Schiller vs. Immigration and Naturalization Service*, 205 F.Supp.2d 648 (D.Tx. 2002), reporters sought information identifying certain individuals who had been taken into custody under a program called "Operation Safe Neighborhoods". That request was denied, and a FOIA lawsuit followed. The cause of action contended that the plaintiffs "seek identifying information regarding individuals who have been secretly detained and imprisoned by the United States government", names, birthdates, criminal convictions and other information. The INS answered that the information was exempt and sought dismissal.

In response to that motion, the plaintiff argued that any summary judgment determination should be postponed until initial discovery was conducted, including discovery into the policies and procedures under Operation Safe Neighborhoods. Apparently, the plaintiffs' sought to show that the INS was using the Operation Safe Neighborhoods program to target certain individuals for detention and/or deportation. That discovery was beyond the information originally requested under the FOIA. After noting the scope of discovery in FOIA cases, that court held:

Here, plaintiffs seek through discovery, information concerning the policies, procedures, and operational guidelines for Operation Safe Neighborhoods as well as

facts and circumstances surrounding the apprehension, detention, and any removal proceedings involving the individuals taken into custody and for which they filed the FOIA request. This discovery far exceeds the limited scope of discovery usually allowed in a FOIA case concerning factual disputes surrounding the adequacy of the search for documents. *Ajluni vs. Federal Bureau of Investigation*, 997 F.Supp. 599, 608 (N.D.N.Y. 1996); see *Public Citizen [Health Research Group vs. Food & Drug Admin.]*, 997 F.Supp. 56 (D.C.Cir. 1998)] 997 F.Supp. at 72 (recognizing discovery limited to “investigating the scope of the agency search for responsive documents, the agency’s indexing procedures, and the like”). This discovery also far exceeds the information sought in the original FOIA request, i.e. the names, birth dates, and basis for arrest of the individuals taken into custody during Operation Safe Neighborhoods. .

...

Schiller vs. INS, 205 F.Supp.2d at 654. The *Schiller* Court ruled that the discovery sought would be barred partly because “plaintiffs’ discovery requests far exceed the scope of discovery typically allowed in a FOIA case and plaintiffs’ original FOIA request.” *Id.*

Here, the NASC sought discovery of the names of Spokane County personnel who “were responsible for receiving public records requests” (Interrogatory No. 4), the identities of personnel “who determine whether documents constitute public records” (Interrogatory No. 5), their training and experience (Interrogatory No. 6), and the identity of personnel “involved in or responsible for responding to NASC’s May 16th request for public records.” Interrogatory No. 7; CP 179-180. The NASC’s written discovery then jumped the tracks.

For example, the NASC requested “all communications” amongst County personnel regarding the NASC’s May 16, 2005, request (Interrogatory No. 8), the identity of personnel involved with job postings and applicant qualifications (Interrogatory Nos. 9 and 10), the identity of personnel who make hiring decisions (Interrogatory No. 11), and the identity of personnel who decide where employees will physically sit while at work. Interrogatory No.12. CP 180-181. The NASC asked for information regarding job applicants for a particular position and their qualifications (Interrogatory Nos. 13 and 14), the identity of a computer used to generate a seating chart (Interrogatory No. 15), computer document practices (Interrogatory Nos. 16 and 17), the maintenance of one particular employee’s computer (Interrogatory No. 18) and then for *all* computers within a certain department (Interrogatory No. 19). CP 181-183. The NASC further inquired as to the identity of a specific computer or network (Interrogatory No. 21). CP 183. None of that had anything to do with the provision of “the complete electronic information logs for the undated county planning seating chart provided by [County employee] to the Neighborhood Alliance.” CP 405.

Furthermore, the NASC continued to press for information regarding the identities of persons referenced on a seating chart that was provided to Ms. Mager on May 13, 2005 (Interrogatory No. 23), and the

date the seating chart was created (Interrogatory No. 24). CP 183. That again was outside the relevant inquiry in a claim under RCW 42.17.340. The NASC also requested information, by Interrogatories, such as the identity of whoever was involved in decisions regarding Ms. Knutsen's computer (Interrogatory No. 20), Ms. Knutsen's "promotion" (Interrogatory No. 25) and the process by which Ms. Knutsen was hired (Interrogatory No. 26). CP 183-184. The final straw was a series of discovery requests for Spokane County personnel who were never referenced in any public document or, to the point, in Ms. Mager's May 15, 2005, PRA request. See Interrogatory Nos. 27, 28, 29, 30, 31 and 32. CP 184-185.

The vast majority of the written discovery, including the Requests for Admission, was irrelevant and completely invasive. It showed that the NASC was not so much interested in the "seating chart" but rather a wide-ranging examination of Spokane County hiring practices. The underlying lawsuit was merely a gateway for the NASC and its lawyers to probe Spokane County employment practices in whatever manner they deemed fit – in this case, using the Civil Rules. This case amply demonstrates how the intent of the Public Records Act can be used as a veneer for an underlying harassing and invasive strategy to "watchdog" government by methods outside the normal course. The irony is inescapable.

Regardless, the NASC waived its discovery complaints at the outset of the hearing on May 13, 2008. Summary judgment based upon the record before the Trial Court was therefore appropriate.

D. The NASC's Claim Is Based Purely Upon Its Dissatisfaction With The Result And Not Fact Supporting The Claim.

[The NASC] doubted that the County would admit the illegal hiring of Commissioner Harris' son, so [it] crafted a public records request under RCW 42.17 that would ask only for documents, not information.

CP 221. Perhaps this is where the NASC outfoxed itself? In its attempt to pin specific names to the seating chart in order to support the "bigger picture" the NASC actually provided a PRA request so ambiguous that it was virtually impossible to respond without guessing what it meant. Ms. Malzahn and Ms. Knutsen tried. CP 48-56, 60-65.

[NASC] requests that this court order [Spokane County] to answer all written and deposition discovery that is reasonably calculated to lead to the discovery of evidence relevant to: 1) the existence of the records that contain the full names of Ron Hand, Steve Davenport and "Steve"; and 2) the motivation of any individual that sought to resist the production of these records so that the appropriate daily penalty can be assessed by the court.

CP 77. That December 2006 demand by the NASC did not track the May 16, 2005, PRA request but it *did* confirm that the May 16, 2005, PRA request was a verification request. Yet closely examined this demand is

for unfettered access to Spokane County records of any sort – “reasonably calculated to *lead to the discovery* of evidence *relevant to . . .*” *Id.*

The specific target of Item #2 in the NASC’s May 16, 2005, request is elusive. The agency’s obligation to search is limited to the four corners of the request. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 64 (D.C.C. 2003)(in that case the FOIA). The agency processing the request is not required to divine a requestor’s intent. *Id.*

. . . the request was for reasonably identifiable records that already existed . . .

CP 238, 649. Five lines later on the same page the NASC argued that:

. . . if such records existed . . .

CP 238, 649. And then:

Because the County exercises custody and control over its documents and employees, it is hard to know exactly what documents the County might have had that would have been responsive to this request or what the County labeled these. (sic)

CP 650. This series of argumentative statements admits that the NASC had no proof that the County withheld anything from the PRA request.

She [Knutsen] is an Assistant Director of the Building and Planning Department and cannot plausibly deny that she did not know the names of the employees, current or proposed that were on the seating chart she created.

CP 234, 644. This again proves that the May 16, 2005, PRA request was a request for verification. An agency is not required to answer questions disguised as a public records request. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 64 (D.C.C. 2003)(in that case the FOIA). The PRA requires disclosure only when there has been a request for “identifiable public records.” RCW 42.17.270; *Kleven vs. City of Des Moines*, 111 Wn.App. 284, 293, 44 P.3d 887 (2002).

The NASC’s argument regarding the “reasonable” extent of the search for the requested documents assumes that Spokane County submitted nothing to the trial court to explain its response to the May 16, 2005, request. The NASC’s argument is purely subjective. Notably the NASC failed to submit any evidence of any procedure for document location that Spokane County may have violated, or any other admissible, credible evidence that Spokane County failed to conduct a reasonable search. Ms. Knutsen and Ms. Malzahn explained exactly what they did to search for responsive documents. CP 60-65, 48-56, respectfully. The NASC merely complains that the search “just wasn’t good enough.”

There is no doubt that “where the requests are ‘well-defined’ and the complainants submits positive indications of overlooked materials” (*Valencia-Lucena vs. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)), summary judgment may be inappropriate. Note that the May 16,

2005, PRA request was modified by the NASC by letter from its counsel dated October 7, 2005. CP 68-70.

Almost three years after the May 16, 2005, request the NASC trotted out three e-mails that had been provided to it by Spokane County in response to a *different* request and proposed “arguably, these three records together” would have been responsive to the May 16, 2005, request. CP 239. There is no cause of action under the Public Records Act to enforce the re-disclosure of records known by the complainant to already be in his possession. *Daines vs. Spokane County*, III Wn.App. 342, 349, 44 P.3d 909 (2002). That includes records provided to the complainant in another separate action or request. *Id.*

By fleeting reference to Item #1 of the May 16, 2005, PRA request the NASC states that:

The county is under a duty to preserve its records in compliance with the Record’s Retention Act, Chapter 40.14 RCW.

(*Brief of Petitioner*, p 18.) An examination of RCW 40.14.010 – Definition of Classification of Public Records – shows that a computer hard drive awaiting rehabilitation is not a “public record.” See also RCW 42.56.010(2). The NASC has failed to specify which of the provisions of RCW 40.14 apply to this situation. Mr. Fiedler’s affidavit (CP 57-59) explains that each and every document that existed on Pam Knutsen’s

computer was transferred to the new computer in April 2005 (before the NASC request). There is no evidence that anything was destroyed. Ms. Knutsen explained in her *Affidavit* that with regard to Item #1, all of the information requested by the NASC had been stored on her computer. CP 61. With regard to Item #2, there were no documents on her computer, exempt or non-exempt. CP 62. The NASC has never presented any credible evidence to the contrary. Mr. Hunt suggests what policy or procedure might be but his Declaration contains no evidence of actual County record-keeping policies or requirements.

Furthermore, the fact the hard drive of Ms. Knutsen's old computer was then sent for rehabilitation does not make that hard drive in-of-itself a "public document" as defined in the State of Washington. Even if it did, the NASC did not ask in May 2005 for the "hard drive" to Ms. Knutsen's computer, but rather a copy of the "complete electronic file information logs." CP 51. Absent a specific request for the search of the hard drive, the responding agency is under no obligation to search them. See *Antonelli vs. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 2006 WL 367893 (D.D.C.).

The distraction of Ms. Knutsen's computer and Item #1 became a subject of a distinct PRA request itself. On October 31, 2005, the NASC requested all of the records regarding maintenance that it claims were

withheld from it herein. CP 488-489. Spokane County timely responded. CP 491, 493-592; a full 100 pages of documents. The NASC, through the Center for Justice, asked for even more records and clarification on November 28, 2005. CP 594-595. Again Spokane County responded. CP 597-598. Spokane County supplied further documents on December 5, 2005. CP 601-607. The NASC did not file suit on that PRA request but it did pursue those very issues in its CR 31 deposition of Ms. Knutsen and received much the same information. CP 609-612. And it continues to argue:

Not only does the County admit it does not know and has no records showing when the hard drive in Ms. Knutsen's old PC was wiped, where it was wiped, or who did it, it admits it made *no effort* to find out in response to the May 16, 2005, request.

CP 232, 642. The May 16, 2005, request did not ask for that information. The November 28, 2005 request *did* ask for those records and the NASC received a response which it never challenged. Regardless, public records acts do not require an agency to reorganize its files in anticipation of or in response to a public records request. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 63 (D.C.C. 2003)(in that case the FOIA). Rather, the agency may keep its files in a manner best designed to suit its internal needs. *Id.*

What becomes lost in the NASC's arguments and allegations of nefarious conduct by Spokane County employees are two undisputable facts: (1) information on Pam Knutsen's "old" computer was transferred to the "new" computer a full three (3) weeks *before* the NASC's PRA request; and (2) there is no evidence that the transfer of files from one computer to the other omitted or erased any document that has existed on the "old" computer. Bill Fiedler's affidavit (CP 57-59) explains that process. The NASC has never submitted any credible evidence to the contrary. The NASC cannot keep its *Complaint* alive by alleging (without any credible proof) anything beyond the fact the NASC was not provided documents it *hoped* it would obtain. It fully explored the computer maintenance issue in a separate PRA request and did not sue Spokane County on that one.

What the NASC also refuses to recognize and has failed to rebut in any respect is Mr. Fiedler's explanation that once a hard drive is "wiped" it is indeed erased of any material that was previously on the hard drive. CP 58, 611. Once the hard drive documents on Ms. Knutsen's hard drive were transferred to the new computer, the old hard drive was sent to the shop for rehabilitation. CP 57-58. To follow the NASC's argument, as soon as any Public Record Request is received, every hard drive in the shop that is awaiting rehabilitation would have to be checked for

documents which might respond to a pending Public Record Request. Neither RCW 40.14 nor any other statute or administrative code provision requires such exhaustive and tedious search measures.

At page 18 of its brief, the Petitioner cites “RCW 41.17.290” for the proposition:

. . . under the Public Records Act, an agency must retain possession of a requested record and may not destroy or erase it while a pending Public Records Request is resolved.

The Revised Code of Washington does not contain a valid statute known as “RCW 41.17.290.” Furthermore, RCW 42.17.290 was recodified in 2005. That statute provides:

If a Public Records Request is made *at a time when such record exists but is scheduled for destruction in the near future*, the agency . . . shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

(RCW 42.56.100) Again, please note the sequence of events: Ms. Knutsen’s computer was exchanged three weeks *before* the May 16, 2005, Public Records Request by the NASC. CP 57-58. All of the documents on her “old” computer were transferred to the “new” computer on April 26 and 27, 2005. *Id.*; CP 61-62. When those documents were transferred, no documents were left behind on the “old” computer. CP 58. The NASC failed to produce any credible evidence to rebut that. A public records

request pertains only to documents in the possession of the agency at the time of the request. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 66 (D.C.C. 2003)(in that case the FOIA). That means documents which existed on May 16, 2005.

Any reference to “routine policy” by County’s senior planner Bruce Hunt is without credibility. Even so, FOIA does not impose a document retention requirement on agencies. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d at 66, citing *Green vs. National Archives & Records Admin.*, 992 F.Supp. 811, 818 (D.Va. 1998). Even where an agency was obligated to retain a document (which Spokane County does not concede here) and failed to do so, “that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse.” *Folstad vs. Bd. of Governors of the Fed. Reserve Sys.*, 1999 U.S. Dist. LEXIS 17852 at 4 (W.D. Mich. 1999) cited at *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 66-67 (D.C.C. 2003).

An agency must show that it made a “good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested. *Oglesby vs. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir.1990). An agency’s failure to find a particular document does not undermine the determination that the search was adequate. *Wilbur vs. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004). The

court is guided by principals of reasonableness. *Oglesby*, 920 F.2d at 68. See also *Goland vs. CIA*, 607 F.2d 339, 369-370 (D.C.Cir. 1978). The Affidavits submitted by Ms. Knutsen and Ms. Malzahn (CP 60-65 and CP 48-56, respectively) explain what they did in response to the May 16, 2005 request. The NASC has consistently failed to produce any evidence that responsive documents actually existed and were not produced and it has provided nothing credible against which the County's efforts can be measured. Its complaint is really nothing more than "the documents just had to be there somewhere." There is nothing which shows that Spokane County's efforts were unreasonable or inadequate, especially since the NASC changed what it requested later in correspondence between its lawyer and Spokane County. CP 68-70.

Mr. Hunt summarizes "based on my experience working for the county" that a draft seating chart would be such a critical document that it should be saved in a directory. CP 288. It was, in Ms. Knutsen's directory. Mr. Hunt's *Declaration* (quoted at page 19 of *Petitioner's Brief*) provides nothing but statements that "it is well understood" and "we are taught" and "this is common practice." Mr. Hunt's characterization of the document as involving "agency rather than personal matters" (CP 288) is novel. The only indication that the chart was "used by staff and

administration as a reorganization tool” is by Messrs. Hunt, Davenport and counsel for the NASC on Center for Justice letterhead. CP 235, 288, 646.

E. Spokane County’s Response To “Item #2” Was Appropriate.

Plaintiffs seek to establish through discovery the existence of documents responsive to its May 16, 2005 request or evidence of its destruction, specifically, “the existence of records that would have fulfilled my client’s requests both for documents that include the names of Ron Hand, Steve Davenport and Steve Harris, and records contained on Ms. Knutsen’s hard drive that had not been wiped clean prior to my client’s May records requests.”

CP 211, referring to a previously filed Declaration of NASC counsel.

The May 16, 2005, PRA request did not ask for documents with the names Ron Hand, Steve Davenport or Steve Harris. In response to Item #2 of the May 16, 2005, PRA request, Spokane County stated that it was not required to explain documents. Ms. Knutsen and Ms. Malzahn actually looked for documents which might respond but found none. CP 62, 49-50. The changing explanation of what the NASC was after with that request (“documents with the names Ron Hand, Steve Davenport and Steve Harris”, CP 75, 77, 124, 125, 161-162, 186, 187) confirms the fact that the NASC requested verification. Spokane County’s response to the May 16, 2005, PRA request was appropriate. *Smith vs. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000).

The core of this analysis is what the NASC identifies as a “reasonably identifiable request” in Item #2. What the NASC requested in May 2005 – documents identifying “Ron” and “Steve” to the seating chart – is different than the documents described at pages 22-23 of the *Brief of Petitioner*. NASC contends that “it is simply not believable that the county could not identify records responsive to the request, i.e. records with the full names of the employees on the chart it created” (*Brief of Petitioner*, p. 23) and yet at no time has the NASC produced any credible evidence otherwise.

Thus, if such records existed that contained the information identifying the named individuals on the chart, then those public records would have been responsive to this request and should have been provided.

Brief of Petitioner, p 27. This statement brings the ambiguity of the NASC’s Item #2 request directly into focus. As argued in the *Brief of Petitioner*, the NASC intended to procure any document in the Spokane County’s system which might identify “Ron” or “Steve.” Yet the May 16, 2005, records request specifically asked for documents which held “the identities of ‘Ron’ & ‘Steve’ individuals who are situated near the center of the seating chart referenced in Item #1.” CP 51. As understood by those responding to it, the PRA request was looking for documents which identified two individuals to the seating chart. CP 48-50, 62. There were

none. *Id.* Just as the NASC argues it is “conceivable” and “reasonable to believe” the documents existed which identified “Ron” & “Steve” to the seating chart, it is also “conceivable” that any document in the Spokane County system with the name “Ron” or “Steve” should have been provided in response to the request. Specificity is certainly lacking.

Thus, it is reasonable to believe there must be records with the names of employees who work in the cubicles on the chart and which were used by the county to either allocate space, provide logistical support and/or supplies of which concerned other administrative and personnel decisions.

Brief of Petitioner, p 27. Again, the documents requested on May 16, 2005, had to be specifically related to the “seating chart” and not just any document with the name “Ron” or “Steve.” As Ms. Malzahn and Ms. Knutsen explained in their *Affidavits*, there were no such documents. The NASC failed to present any evidence to the contrary. The summary judgment dismissing its case was properly granted.

The three documents referred to at pages 27-28 of the *Brief of Petitioner* were addressed by the Trial Court at the second summary judgment hearing on May 13, 2008. The NASC admitted that those three documents were provided to the NASC by Spokane County in response to a completely separate PRA request. TR 05/13/08, p 21-22. That is, *the NASC had those particular documents in its possession since November 7, 2005* and as it turns out it sued Spokane County for their non-disclosure

anyway. At the May 13, 2008, hearing the NASC tried to sandbag Spokane County with their alleged non-discloser specific to the May 16, 2005, request. A court will not require an agency to re-disclose records known by the complainant to already be in its possession. *Daines vs. Spokane County*, 111 Wn.App. 342, 44 P.3d 909 (2002).

Even so, ignoring the fact that none of those documents refer to the seating chart, the NASC would tie those documents to the “seating chart” by declaring “they might” in order to make its case. *Brief of Petitioner*, p. 28. The best the NASC can do is to argue “it is reasonable to infer” that these three documents may have responded to the May 16, 2005, request.

Arguably, these three records [CP 517, 529, 530] **together** would have been responsive to the May 16, 2005 request as they are identifiable public records that provide a nexus between Ron Hand and Steve Harris and the cubicles on the seating chart.

. . . Clearly the “list” referred to herein **may** have been responsive.

. . . The phone line would **presumably** have been for Mr. Hand’s cubicle.

. . . Mr. Harris’ phone and PC **no doubt** went into his cubicle.

CP 239, 650-651 (emphasis added). If nothing else this confirms the ambiguous nature of the NASC’s May 16, 2005, PRA request Item #2.

Even the NASC's counsel has to guess as to what might or might not have been responsive to that request.

Even if those documents were responsive, Spokane County had already provided them to the NASC on November 14, 2005. CP 493-494, 517, 529, 530. A release of documents at another time does not prove that the original search was inadequate, but rather shows good faith on the part of the agency that it continues to search for the responsive documents. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 63 (D.C.C. 2003)(a FOIA case).

The only possible reason for this tactic would be to slam the governmental entity with daily penalties and attorney's fees. In good faith, if the NASC had documents in its possession from which it could make its "hiring practices" arguments, it should not be rewarded for holding those documents for two and one-half years (and now three years on appeal). If anything, this situation clearly demonstrates that the NASC's perceived dispute with Spokane County is not a dispute under RCW 42.17.

F. The NASC's Argument Regarding the "Inadequate" Search for Records is Purely Subjective.

There is no reason for her [Ms. Knutsen] not to have expanded her search to include the employees' full names – Ron Hand and Steve Harris.

CP 650. Yes, there is a reason: the May 16, 2005, PRA request did not ask for those documents with that specificity. This lawsuit claims that the May 16, 2005, request targeted the names “Ron Hand” and “Steve Davenport” and “Steve Harris” but the May 16, 2005 request simply did not ask for documents with those names. Ms. Knutsen would have had to guess that is what the NASC was really after. The agency processing the request is not required to divine a requestor’s intent. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 64 (D.C.C. 2003).

As acknowledged by the NASC, Ms. Knutsen explained that the County’s search for records responsive to Item #2 turned up nothing. CP 62. The trigger description in the May 16, 2005, NASC Public Records Request was “the seating chart”, chosen by the NASC. That counsel for the NASC prepared declarations for Messrs. Hunt, Davenport and Dillinger which used different terminology is transparently self-serving. It is glaring that Messrs. Hunt, Davenport, and Dillinger failed to produce any documents relating “Ron” and “Steve” to “an electronically produced floor plan,” “reconfiguration chart,” “cubicle layout,” or “floor plan.”

The NASC’s complaint herein is driven solely by the fact that it did not receive what it apparently had hoped to find: documents tying the specific names of Ron Hand, Steve Davenport and Steve Harris to the seating chart. Spokane County was under no obligation to create those

documents. *Smith vs. Okanogan County*, 100 Wn.App. 7, 994 P.2d 857 (2000).

4. Conclusion.

One of the biggest obstacles faced by the NASC is that it has no right to inspect or copy records that do not exist. *Sperr vs. City of Spokane*, 123 Wn.App. 132, 136-137, 96 P.3d 1012 (2004). On May 16, 2005, it requested (1) electronic logs/documents and (2) documents that identified the full names on a seating chart. Spokane County provided documents responsive to the first and could not for the second in that the responding officials thought the request was for an explanation of another document already provided pursuant to a previous request. Other RCW 42.17 requests followed from the NASC. A year later the May 16, 2005, request became a lawsuit.

In order to reverse the Trial Court and actually find that Spokane County violated the PRA, this Court must side with the NASC in all respects: that its May 16, 2005, request and particularly Item #2 was unambiguous, that Spokane County withheld clearly responsive documents, that Spokane County failed to conduct a reasonable search, and that Spokane County should therefore be fined and assessed fees and costs. After three years the Neighborhood Alliance of Spokane County

still cannot present any credible evidence that Spokane County failed in its response to the May 16, 2005, Public Records Act request.

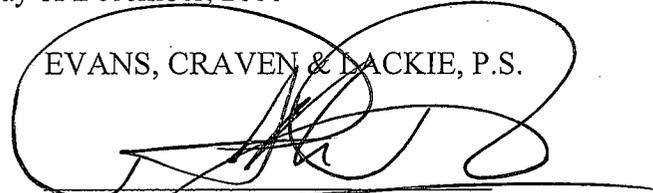
The case involves more though. What became evidence after the series of letters between counsel for the NASC and Spokane County in the fall of 2005 is that the NASC considered the May 16, 2005, request and this subsequent lawsuit as a gateway into a full-blown examination of Spokane County hiring practices. RCW 42.17 is not a vehicle by which citizens may indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency. *Limstrom vs. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998); cited in *Limstrom vs. Ladenburg*, 110 Wn.App. 133, 141 n. 7, 39 P.3d 351 (2002).

While subsequent records requests and later pleadings and arguments by counsel attempt to explain what that May 16, 2005 request really meant, the fact remains that there is no proof that Spokane County failed to respond appropriately. When confronted with the possibility of dismissal almost three years to the day after that May 16, 2005, request, the NASC argued from other records received in response to other requests – records already in its possession. RCW 42.17, under those facts, is a trap for a well-intentioned public agency.

Based upon the record herein and the case law and argument presented, Respondent County of Spokane respectfully submits that the Order dismissing the *Complaint* by the Neighborhood Alliance of Spokane County was correct and must be affirmed in all respects.

DATED this 16th day of December, 2008

EVANS, CRAVEN & LACKIE, P.S.

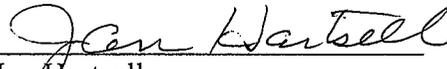
A handwritten signature in black ink, appearing to read 'Patrick M. Risken', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

Patrick M. Risken, WSBA # 14632
Attorneys for Respondent
County of Spokane

DECLARATION OF SERVICE:

On the 16th day of December, 2008, I caused the foregoing document described as **Respondent's Appeal Brief** to be personally served on all interested parties to this action as follows:

Breean L. Beggs
Center for Justice
35 W. Main Ave., Ste. 300
Spokane, WA 99201


Jan Hartsell
Jan Hartsell