

Supreme Court No. 84108-0

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

NEIGHBORHOOD ALLIANCE  
OF SPOKANE COUNTY  
a nonprofit corporation

Petitioner,

v.

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

Respondent.

---

**ANSWER TO AMICUS BRIEF BY  
RESPONDENT SPOKANE COUNTY**

---

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

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
11 JAN 18 PM 2:48  
BY RONALD R. OXFENTER  
CLERK

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

<b>1.</b>	<b>Introduction.....</b>	<b>1</b>
<b>2.</b>	<b>Argument.....</b>	<b>7</b>
	<b>A. The Amicus Brief Adds Nothing But Spin To This Analysis.....</b>	<b>7</b>
	<b>B. The Amicus Argument Regarding "Adequacy Of Search" Is Cumulative.....</b>	<b>8</b>
	<b>C. The Discovery Argument Made By Amicus Is Also Cumulative.....</b>	<b>10</b>
	<b>D. The Amicus' Daines Argument Creates A Springboard To Litigation. ....</b>	<b>13</b>
<b>3.</b>	<b>Conclusion. ....</b>	<b>14</b>

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Daines v. Spokane County</i> , 111 Wn.App. 342, 44 P.3d 909 (2002).....	13, 14
<i>Mains Farm Homeowners Ass'n. v. Worthington</i> , 121 Wn.2d 810, 854 P.2d 1072 (1993).....	7
<i>Schuster v. Schuster</i> , 90 Wash.2d 626, 585 P.2d 130 (1978).....	7
 <b>OTHER AUTHORITIES</b>	
RAP 10.3(e) .....	7
RAP 10.3(f).....	8
RPC 4.2.....	10

**1. Introduction.**

This case draws a distinction between the production of documents under the Public Records Act and the interpretation of documents produced. It appears that in 2005 the Neighborhood Alliance of Spokane County intended to use the Public Records Act as a gateway to developing some sort of corruption claim against Spokane County. Various requests were made, including an ambiguous request dated May 16, 2005. Spokane County was sued under the Public Records Act solely upon its response to that request. The NASC charged ahead with wide-ranging but irrelevant discovery demands to examine Spokane County hiring practices and other matters unrelated to the original or follow-up requests. Now the Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, The Seattle Times, Tacoma News Tribune and the Tri-Cities Herald (hereinafter "Amicus") have jumped on board, exaggerating the facts to buttress the NASC's case, certainly in self-interest. Yet when examined the Amicus has not presented anything really new by way of argument or analysis.

As has been presented by Spokane County repeatedly in the case brought by the NASC, in order to support the relief that Amicus supports evidence of records that actually existed *at the time of the request* is and which were not produced by Spokane County in a timely manner is

absolutely critical to the NASC claim and any subsequent rulings regarding penalties, fees and costs if the case gets that far. The record in this case is absolutely devoid of any evidence that Spokane County failed to produce records responsive to the request that existed at the time of the request. Both the Neighborhood Alliance and Amicus require that critical fact to be *assumed* before their arguments make sense -- that additional documents existed on Pam Knutsen's old recycled hard drive on the date that the request was made that related to the so-called "seating chart."

Amicus' suggestion that Spokane County's search for documents was "superficial" is merely a subjective, self serving qualification. Its description of the case itself (*Amicus*, p. 2) would make for a fine newspaper article. The "facts" that it cites are the regurgitation of arguments made by the NASC, including conclusions regarding the nature and intent of the so-called "seating chart." *Id.* It is unclear whether Amicus is citing evidence, argument or the appeal briefs of the NASC as "fact." *Id.*, at 3.

It is difficult to follow the argument made by Amicus regarding discovery. The bald statement "The limited discovery allowed in this case meant that NASC was unable to determine what records in possession of the County could have been responsive to its requests, and what the County did and did not do to search for records." *Id.*, at 4. The record

shows that the "discovery" sought by the NASC was a trawler approach to access whatever it could dream up within Spokane County government, regardless of the fact that the vast majority of that discovery was not connected in any way to the so-called "seating chart." Regardless, the NASC waived any complaints regarding discovery at the time of the summary judgment hearing. TR 05/13/08, p. 9. That state of facts has been briefed extensively.

The subsequent requests made by the NASC (October 31, 2005, CP 488-489; November 14, 2005, CP 493-494; November 28, CP 594-595) and the responses thereto, while all related to the May 16, 2005 request, are not the target of this litigation. By letters dated October 21, 2005 (CP 614-615) and October 31, 2005 (CP 488-489) the NASC, for the first time, raised questions regarding the recycling of Ms. Knutsen's computer. In fact, it appears that the NASC actually merged the May 16, 2005, request into the October 21 and 31 requests by further clarifying what it meant on May 16, 2005. CP 488. By waiting until late October 2005 to pursue that line of inquiry, the NASC admitted that it needed to clarify its original request for documents dated May 16, 2005, which is the *only* request that is subject to this litigation. Answers to that inquiry were provided, with documentation, by Spokane County letters dated December

5, 2005. CP 597-599; 601-606. By the time that NASC raised the issue – October 31, 2005 – Ms. Knutsen's previous hard drive had been recycled.

Because the NASC had waited all summer and most of the fall of 2005 before clarifying or expanding its request for computer records, it was then impossible to reclaim any documents that might have remained on the old hard drive. Both the NASC and now Amicus continue to ignore that state of facts. The PRA request that is the subject of this litigation was provided to Spokane County one month *after* Ms. Knutsen's hard drive had been recycled out of her office. Because there was no pending request for information from that hard drive, Spokane County submits that it was reasonable for it to follow its usual practice of recycling computers. In other words, it is unreasonable to expect a governmental agency to copy every single document that it might ever produce and store those documents in anticipation of records requests that might never come. Yet that is what the NASC and Amicus demand.

Amicus arguments are to a large extent exactly the same as those presented by the NASC. At p. 6 of its *Amicus Curie Brief* it does present, for the first time, a claim that the Spokane County response to the May 16, 2005, request was not timely. In that regard please consider the lapse of time between Spokane County's response to the May 16, 2005, request and the next inquiry from the NASC – October 21 and 31, 2005 – seeking

further information regarding Ms. Knutsen's "old" computer. CP 614-615; 488-489. Since the NASC and Amicus require this Court to assume critical facts not in evidence, such as the actual existence of responsive documents on Ms. Knutsen's "old" hard drive on May 16, 2005, further analysis must include a determination of whether it was reasonable for the requesting party – NASC – to wait five months before calling the recycling into question. Under the NASC's timeline of inquiry, as adopted by Amicus, there is no duty of reasonable diligence on the part of the requesting party.

There were no records showing when the computer hard drive was wiped clean or who did the work. CP 610-611. Once a PC is "wiped" there is no reason to check to see if that process was completed or successful." *Id.* It is just as likely that the computer was wiped clean before the NASC issued its May 16, 2005, request as it is that the hard drive was "wiped" after the request was made; there is no record. According to the NASC and Amicus, that results in instant liability under the PRA *because* there is no evidence that explaining what was on the "old" hard drive as of May 16, 2005. Under that analysis there is no requirement of diligence on the part of the requestor.

Adding further to the confusion is the entire argument regarding whether the "Ron and Steve" documents requested on May 16, 2005,

specifically related to Ron Hand, Steve Harris or Steve Davenport. If the NASC so suspected, it should have made its inquiry more specific; again, a requirement that the requesting party act reasonably to make clear exactly what it is requesting. Because it was not that specific on May 16, 2005, the NASC and Amicus cannot claim that documents provided later fit within the request. Obviously the notations "Ron" and "Steve" could have related to anyone with those names. The entirety of the Amicus argument in that regard (a reiteration of that provided by the NASC) is again sandbagging. The practical effect of that argument is to convince this Court to bless "gotcha" litigation, something that the Legislature surely could not have intended when it enacted the PRA. Consider the fact that liability is claimed because a document produced to the requestor *could* have been responsive to a different request. Then again, it was perhaps mere coincidence.

When it made its requests dated October 21 and October 31, 2005, the NASC merged its May 16, 2005, request therein. It is obvious that there was an objective, good faith dispute regarding what exactly was requested on May 16, 2005. Unfortunately, by the time that the NASC initiated that discussion the "old" hard drive had been wiped clean and put back into service. Spokane County respectfully submits that a party

requesting under the PRA has both the duty of clarity and diligence when making the initial request.

**2. Argument.**

**A. The Amicus Brief Adds Nothing But Spin To This Analysis.**

Amicus attempts to create issues in this case regarding the "timeliness" of the PRA response by Spokane County (*Amicus Curie Brief*, p. 6), exemption (*Amicus Curie Brief*, p. 7), "silent withholding" (*Amicus Curie Brief*, p. 9), or that this is "a case regarding records concerning the hiring of 'Ron' and 'Steve' who showed up on a seating chart prior to the posting of the positions." *Amicus Curie Brief*, p. 18. This Court will not consider issues raised solely by Amicus. *Schuster v. Schuster*, 90 Wash.2d 626, 585 P.2d 130 (1978). See also *Mains Farm Homeowners Ass'n. v. Worthington*, 121 Wn.2d 810, 826, 854 P.2d 1072 (1993). Additionally, those arguments are not supported by citation to any part of the record in this case. Once those arguments are rejected there is little more than re-argument of the NASC case in the Amicus brief.

The purpose of an amicus brief is to help the court with points of law and not to reargue the facts. See RAP 10.3(e) (limiting the content of an amicus brief to the issues of concern to amicus). In this case not only does Amicus merely reargue the facts already briefed at great length, but it

puts its own distinctive spin on those facts. The arguments are the same as those presented by the NASC. In that regard Amicus has not added anything helpful to this analysis and its arguments should be disregarded.

**B. The Amicus Argument Regarding "Adequacy Of Search" Is Cumulative.**

RAP 10.3(f) requires the answer to an amicus brief to be limited to the issues raised by amicus. In this case the Amicus has merely re-argued the points made by the NASC on numerous occasions. From that, Spokane County has no choice but to respond to those arguments again.

There is absolutely nothing offered by Amicus in this regard that is new and supported by the record. It attempts to inject claims of exemption into the case (*Amicus*, p. 7-8) but Spokane County never claimed an exemption from production under the Act. Amicus claims "silent withholding" of records and yet there is no evidence that Spokane County withheld anything. There is no evidence that records existed on May 16, 2005, and the NASC and Amicus insists that because there is no evidence of records on that date liability must attach regardless *because the agency cannot disprove the existence of records*. The potential for litigation and award to requesting parties under the PRA is astounding. Under the scenario promoted by the NASC and Amicus, a requestor could wait until normal agency document purging policies are followed, make a vague

request for documents and then claim that because the documents cannot be found they *must* have existed. Requesting parties must be held to an objective standard of clarity and diligence in order to protect the agency from "targeting" claims. Following the arguments of the NASC and Amicus will result in an entire litigation industry targeting the absence of documents with claims of "silent withholding." Again, in this case because the NASC waited five months before clarifying its request for computer records the County was prejudiced in its ability to respond.

Here, it is clear that responsive records existed at some point. . . . Hence, *if the records existed* and were therefore improperly withheld by the County, the failure to perform an adequate search is at a minimum a distinct PRA violation . . . .

*Amicus Curie Brief*, p. 9, emphasis supplied. This broad assumption is the cornerstone of agency liability in this case and yet the NASC never provided any evidence to support the existence of responsive documents at the time that its May 16, 2005, request was made. Amicus recognizes that critical component by arguing "if the records existed." The entire claim is based upon pure speculation under the disguise of "silent withholding."

The remainder of the Amicus argument regarding reasonable search assumes nefarious conduct by Spokane County, again without evidence. Amicus argues that the County's actions were "egregious" for a complete lack of search. *Amicus Curie Brief*, p. 9. That is a purely

subjective conclusion and ignores all of the correspondence between the parties in 2005. Objectively, while the "old" hard drive was not searched there is no evidence that the "old" hard drive contained any documents on May 16, 2005. In order to visit liability on Spokane County for failing to search the trash there must be some evidence that documents existed and were overlooked or withheld, leading to an objective analysis of "reasonable search." The NASC has never presented any evidence to support that analysis, even through Declarations and Affidavits supplied in violation of RPC 4.2. CP 249-280, 282-328, 329-335, 336-340, 341-349.

**C. The Discovery Argument Made By Amicus Is Also Cumulative.**

It is factually dispositive to this issue that the NASC filed its motion for summary judgment (CP 217-218) *after* taking discovery that it stipulated would be sufficient. TR 12/05/06, p. 24. At the hearing of the competing summary judgment motions counsel for the NASC told the Trial Court "*I think they answered enough that we can go to our Motion for Summary Judgment.*" TR 05/13/08, p. 9. The summary judgment sought a determination of liability under the PRA. Therefore, the NASC waived any further argument regarding discovery and took the risk of an adverse determination.

The arguments made by Amicus herein are the same as those made by the NASC throughout this litigation. Spokane County submits – as it has all along – that "relevance" analysis under the rules of discovery is appropriate in a PRA case. Wide ranging, trawler-type discovery using a PRA lawsuit as a gateway into the management of the public entity, regardless of the subject matter of the discovery, is not such a relevant inquiry. For example, in this case the NASC propounded discovery regarding how three specific individuals not associated with the so-called "seating chart" or even the Planning Department were hired, hiring practices and job postings, information regarding meetings wherein it was assumed that participants discussed withholding documents, the number of people who applied for certain jobs, the identity of those who made hiring decisions, the experience and qualification of those applying for certain jobs, the correlation of documents, Ms. Knutsen's promotion dates and the process of her own hiring, and other activities clearly not associated in any respect with the so-called "seating chart." CP 17—185, 185-188. Spokane County could not agree more when the Amicus makes the following statement:

The constraints on discovery in a PRA case should be derived from the concept of relevancy, and in the likelihood of leading to relevant evidence viewed in light of the unique statutory framework.

*Amicus Curie Brief*, p. 12. When "viewed in light of the unique statutory framework", relevant inquiries involve the existence of documents and either their production or claim of exemption. Certainly this Court cannot agree that inquiring into Ms. Knutsen's own hiring had anything to do with the so-called "seating chart."

There has never been a "refusal to allow inspection." The Amicus' generalized argument regarding what might have been relevant was presented to the Trial Court and the Court of Appeals by the NASC. In the end what the NASC is really requesting a separate answer which divulges the identity of "Ron" and "Steve" and yet it never came right out and asked. Rather, it asked for *documents related to the seating chart that contained those identities*. At the Trial Court the NASC 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, is not nearly that clear. "Were those people identifiable?" Perhaps they were identifiable but the PRA deals with documents, and Spokane County answered after search that there were no such documents that identified "Ron" and "Steve" to the seating chart. CP 48-56, 60-65. Now Amicus sides with the NASC regarding discovery into irrelevant matters.

Finally, the Amicus speculates that the destruction of documents might be in play. Again, there is no evidence that responsive documents beyond those produced ever existed, regardless of what Amicus concludes – "there is clear evidence" – without citation to the record. *Amicus Curie Brief*, p. 14.

The NASC stipulated to a CR 31 deposition upon written questions for discovery purposes and only as to (1) whether documents existed, and (2) what was the process to look for them. TR 12/05/06, p. 24. At the time of the dispositive hearing it waived any argument regarding discovery and went forward with argument of its own motion for summary judgment without preserving the issue. TR 05/13/08, p 9. Neither the NASC nor Amicus can now re-open that inquiry. Beyond that, it appears that all parties agree that "relevance" sets the limits of discovery in a PRA case. Spokane County once again submits that the issues of a PRA lawsuit in turn set the limits on "relevance."

**D. The Amicus' Daines Argument Creates A Springboard To Litigation.**

The logic behind the decision in *Daines v. Spokane County*, 111 Wn.App. 342, 44 P.3d 909 (2002) is simple: full disclosure is the goal under the Public Records Act; an industry of litigation based upon "gotcha" inquiries (as Amicus' *Daines* argument suggests) was not the

intent of our Legislature. If the NASC could not determine whether later disclosures were responsive to the May 16, 2005 request (*Amicus Curie Brief*, p. 19), then it stands to reason that the May 16 request was so vague or ambiguous that Spokane County would not deem the documents provided later as responsive to the first request. The fact of the matter is that the documents were provided to the NASC and then Spokane County continued to provide documents in follow-up for months thereafter. During that interchange other documents were produced that may or may not have been responsive to the vague request of May 16, 2005.

Discarding *Daines* would pave the way for requests wherein the requesting party already had the document in hand, just to see if it could make a case for a PRA violation. Spokane County submits that such tests or traps was never the intent of the PRA and its penalty and fees provisions. The *Daines* decision is a logical extension of the purposes of the PRA: to promote the full disclosure of public records under a predictable framework.

### **3. Conclusion.**

This was not "a case regarding records concerning the hiring of 'Ron' and 'Steve' who showed up on a seating chart prior to the posting of the positions", as Amicus claims. *Amicus Curie Brief*, p. 18. If that was in fact the case then the records request made by the NASC should have been

substantially different. The NASC set the parameters of the case when it submitted the May 16, 2005, PRA request to Spokane County and then sued only on that request. It had nothing to do with "the hiring of 'Ron' and 'Steve.'" Rather, it inquired as to supporting documents for the so-called seating chart. There were none. It is not unreasonable to assume that some documents simply have no supporting or companion documents; that a document may indeed stand alone.

Spokane County respectfully submits that the PRA is not the mechanism by which a person or group may explore the working of government by fishing. Expanding the reach of the PRA as requested by the NASC and Amicus, in both liability and discovery, goes far beyond the intent of the Legislature when the PRA was enacted.

Respondent County of Spokane respectfully submits that the arguments provided by Amicus in this case are cumulative and do not advance any particular interest of Amicus or the general public not already covered by the Neighborhood Alliance of Spokane County. For the reasons stated above, those arguments should be ignored.

//

//

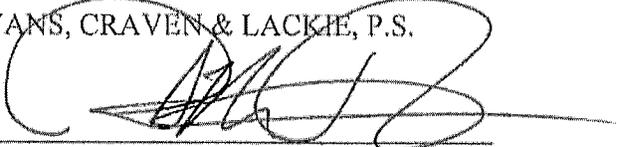
//

//

RESPECTFULLY SUBMITTED this 18th day of January, 2011.

EVANS, CRAVEN & LACKIE, P.S.

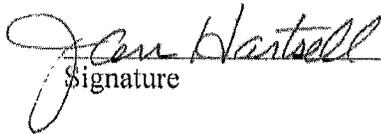
By

  
PATRICK M. RISKEN, #14632  
Attorneys for Respondent County of  
Spokane

CERTIFICATE OF SERVICE

Pursuant to RAP18.5, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 18th day of January, 2011, the foregoing was delivered to the following persons in manner indicated:

Breean L. Beggs Bonne W. Beavers Center for Justice 35 W. Main Ave., Ste. 300 Spokane, WA 99201	Via Regular Mail <input type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile 835-3867 <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/>
Michele Earl-Hubbard Chris Roslaniec Allied Law Group, LLC 2200 Sixth Avenue, Ste. 770 Seattle, WA 98121	Via Regular Mail <input checked="" type="checkbox"/> Via Certified Mail <input type="checkbox"/> Via Facsimile 206/428-7169 <input checked="" type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/>

  
Signature

1/18/11  
Date

Spokane, WA  
Place