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No. 37446-3-II

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

DAVID KOENIG,

Appellant;

v.

THURSTON COUNTY,

Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT

MICHAEL C. KAHR, WSBA #27085
ALEX B. BROWN, WSBA #39402
Attorneys for Appellant Parmelee
5215 Ballard Ave. NW, Ste. 2
Seattle, WA 98107
(206) 264-0643

ORIGINAL

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A. IDENTIFY AND INTEREST OF AMICUS

The mission, membership, and interest of the Washington Coalition for Open Government (“WCOG”) is set forth in WCOG’s *Motion for Leave to File Brief of Amicus Curiae*, filed with this brief. However, to put this mission succinctly, WCOG’s mission is to enforce the principals of the Public Records Act (“PRA”) as set forth in RCW 42.56 et seq. The public, through WCOG, has a legitimate interest in assuring that the Court is adequately informed about the impact that this case may have on the ability of the public to obtain information about their government under the Public Records Act if agencies are allowed to ignore the redaction requirement of the PRA.

B. INTRODUCTION

The mission, membership, and interest of the Washington Coalition for Open Government (“WCOG”) in this case are set forth more fully in WCOG’s *Motion for Leave to File Brief of Amicus Curiae* (December 9, 2008). WCOG is concerned that if an agency is allowed to withhold documents in their entirety whole instead of choosing redacting only exempt portions, the agency is ignoring its obligations to the citizens of Washington to release non-exempt portions of public records so that the public will be informed so as to monitor and maintain control over

agencies that serve them. RCW 42.56.030. WCOG is further concerned that agencies are not being held accountable when such a choice is made, given the explicit emphasis on access to records set forth both by statute and as emphasized by our Supreme Court.

C. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the parties' briefs.

D. ARGUMENT

In this case entire records were withheld from the requestor without any attempt by the county to redact non-exempt portions. WCOG asserts that redaction must be considered rather than blanket non-disclosure, given the purpose, interpretation, and statutory scheme of the Public Record Act.

1. AN AGENCY MUST ATTEMPT REDACTION RATHER THAN BLANKET NON-DISCLOSURE TO FULFILL THE PURPOSE OF, INTERPRETATION OF AND STATUTORY SCHEME OF THE PUBLIC RECORD ACT.

- a. The Purpose of the Public Records Act From Its Conception Has Been To Provide Governmental Transparency To The Sovereign Citizens of Washington.

The purpose in drafting of the Public Records Act was to make our government open and accountable. The PRA, previously known as the Public Disclosure Act, was originally enacted by the people of the State of

Washington through Initiative 276. It was modeled on the federal Freedom of Information Act. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). At the time the initiative was passed, “[t]he Coalition for Open Government (“COG”) was the moving force behind Initiative 276.”¹ After filing the initiative, the signature drive succeeded, placing the initiative on the ballot. Many diverse citizen groups joined in the movement.² *See Fritz v. Gorton*, 83 Wn.2d 275, 285, 517 P.2d 911 (1974). The type of disclosure expected by the drafters was set forth in the voters pamphlet for the initiative.

“The initiative would require all . . . ‘public record[s]’ of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record” Further, the statement expressly provided that the law ‘makes all public records and documents in state and local agencies available for public inspection and copying’ except those

¹COG can be considered the predecessor of WCOG because of the mission goals of both organizations.

²American Association of University Women (3,200 members in Washington State Chapter, St. 415b); League of Women Voters of Washington (3,000 members, St. 415b); the Municipal League of Seattle and King County (3,500 to 4,000 members, St. 357); Common Cause (4,500 members in Washington, St. 415b); Young Republicans of King County (200-300 members, St. 358); The Washington Environmental Council (2,000-4,000 members, St. 358); the Washington State Council of Churches; the Seattle Press Club; CHEC-Choose an Effective City Council (approximately 1,000 members, St. 358); Seattle-King County Bar Association, Young Lawyers Section. *Fritz*, 83 Wn.2d at 285-86.

exempted to protect individual privacy and to safeguard essential governmental functions.

Hearst Corp., 90 Wn.2d at 127 (quoting Official Voters Pamphlet, 1972 General Election, November 7, 1972, at pages 10, 108). The Act itself, in RCW 42.56.030, states the following:

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. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

Every time an agency claims an exemption, it erects barriers to the public's right to assert their sovereignty so clearly enumerated in this statutory scheme. To protect this right, judicial review should be sought. To do otherwise is to violate the stated purpose of the Public Records Act. The purpose of the drafters of the Act is clear and unambiguity – the citizens reign supreme.

b. Our Courts Have Interpreted The Act To Correspond With The Purpose Stated By The Drafters.

In upholding this interpretation of the purpose of the Act, the Supreme Court stated that “[t]he Public Records Act ‘is a strongly worded

mandate for broad disclosure of public records.” *Progressive Animal Welfare Society v. Univeristy of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (“PAWS”) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The Supreme Court in *PAWS* further emphasized that “[a]gencies have a duty to provide ‘the fullest assistance to inquirers and the most timely possible action on requests for information.’” *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)). This duty exists, despite the fact that “such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.17.340(3) (now RCW 42.56.550(3)). And it is abundantly clear that it not for the agency to interpret the act: “[L]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp.*, 90 Wn.2d at 131. There is no wiggle room for an agency – it must fulfill its obligations under the PRA.

c. The Statutory Scheme Favors Redaction Over Blanket Non-Disclosure.

The PRA begins with a presumption of discloseability. RCW 42.56.210. Section (1) states as follows:

Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are

inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

The Supreme Court has interpreted this provision as requiring an agency to cite specific statutory exemptions justifying non-disclosure and provide “a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210(3); *see also PAWS*, 125 Wn.2d at 261 (“agencies must parse individual records and must withhold only those portions which come under a specific exemption.”) The Supreme Court’s decision in *PAWS* requires careful review of the records by agencies to determine non-exempt portions. *Id.*

In *Prison Legal News*, the Department of Corrections redacted all health information pertaining to inmates including their names, treatments, medical conditions in accordance with RCW 70.02.020 as incorporated through then RCW 42.17.312 (now RCW 42.56.360(2)). *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2004) (“*PLN*”). After a discussion on how health care has been defined by Washington Courts, the Supreme Court invoked RCW 42.17.340(1) (now RCW 42.56.550(1)) and *Hearst Corp.*, rejecting “DOC’s blanket approach in redacting all health care information conflicts

with the requirement to construe exemptions narrowly.” *PLN*, 154 Wn.2d at 645-46; *Hearst Corp.*, 90 Wn.2d at 129-30.

Further, the broad mandate favoring disclosure under the PDA requires the agency demonstrate that each patient's health care information is 'readily associated' with that patient in order to withhold the health care information under RCW 70.02.010(6). Where there is a dispute over whether health care information is readily identifiable with a specific patient even when that patient's identity is not disclosed, the trial court can use in camera review should it need to examine unredacted records to make its independent determination.

Id. (citing *ACLU of Wash. v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004)).

Thus, both the statute and case law require an agency must first make a determination as to whether or not the document is a public record and then analyze whether the document, in part or whole, is exempt from disclosure because of an enumerated statutory exemption. This leaves the agency and a reviewing court with a conflict – how to meet the policy requirements of the PRA to release all possible records when exemptions are claimed.

In defense of its blanket non-disclosure, the County has argued that victims will be unlikely to provide a truthful and complete statement knowing that portions would be available to the public. The County argues that if the agency's decisions “may be overruled by a judge,” the

Prosecutor's Office would be unable to gain the trust of a victim. Brief of Respondent, p. 24. This argument ignores the fact that the Prosecutor's office cannot guarantee that the court would seal a victim's statement contained in a court file because the entire discretion to seal a court record is exercised exclusively by the court. If the court does not order the document sealed, the document is part of the public court file. Just as an agency cannot guarantee that its request for sealing would be upheld, an agency cannot guarantee redaction in the Public Records context would be upheld. Such a possibility, however, does not justify the prosecutor's office ignoring its statutorily mandated duty to "parse" a victim's statement to determine non-exempt portions.

WCOG objects to any argument asserted by an agency that in effect writes RCW 42.56.210(1) out of the PRA by allowing the creation of broad categories of public records that, by agency definition, contain not one word that is subject to disclosure.³

³Our courts look to "viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). In this context, RCW 42.56.210(2) supports WCOG's assertion that agencies must examine records to determine if they are discloseable with proper redaction.

Moreover, the Prosecutor's argument suggests that an agency can guarantee promise to a person making a statement as part of the criminal case record in question that the entire statement will be maintained as confidential. The Supreme Court has explicitly rejected that an agency's promise to keep a record confidential can override the disclosure requirements of the PRA. *Police Guild v. Liquor Control Bd.*, 112, Wn.2d 30, 40, 769 P.2d 283 (1989). It is simply not authorized under the PRA for an agency to maintain any such confidentiality and any such promise is unenforceable under the PRA.

2. PENALTIES MUST BE INCREASED IF AN AGENCY IGNORES ITS DUTY TO REDACT IN FAVOR OF BLANKET NON-DISCLOSURE.

The purpose of the attorney fees provision "is to encourage broad disclosure and to deter agencies from improperly denying access to public records." *Confederated Tribes Confederated Tribes v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998) (citing *Lindberg v. Kitsap County*, 133 Wn.2d 729, 746, 948 P.2d 805 (1997)). The statutory penalty of \$5 to \$100 is mandatory. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004) ("*Yousoufian I*") (limiting a court's discretion on fees to amounts *not less than* \$5).

After consideration of the various opinions by the Supreme Court, Division I adopted the use of the jury instructions for degree of culpability in the civil context. *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 78-79, 151 P.3d 243 (2007) (review accepted 162 Wn.2d 1011, 175 P.3d 1095 (2007)) ("*Yousoufian II*"). Specifically used were the Washington Pattern Instructions ("WPI") for negligence, gross negligence, wanton misconduct, and willful misconduct. These are defined in the WPI as follows:

"Negligence" is

the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01.

"Gross negligence" is:

the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.

WPI 10.07.

"Wanton misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard of the consequences and under such

surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another.

WPI 14.01.

"Willful misconduct" is:

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury.

WPI 14.01.

Yousoufian II, 137 Wn. App. at 248.

Consideration of these definitions of negligence and misconduct arose from the Supreme Court's stated rationale for penalties under the PRA:

The case law states that a showing of bad faith or economic loss "are factors for the trial court to consider in determining the amount to be awarded" for a violation of the PDA. Furthermore, "[w]hen determining the amount of the penalty to be imposed the 'existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.'"

Yousoufian II, 137 Wn. App. at 247 (quoting *Amren v. City of Kalama*, 131 Wn.2d at 25, 37-38, 929 P.2d 389 (1997) (quoting *Yacobellis v. City of Bellingham*, 64 Wash. App. 295, 825 P.2d 324 (1992))).

Where, as here, an agency has ignored a statutory and court directed mandate to review a record so that non-exempt portions can be determined and redacted, then such a willful abandonment of

responsibility suggests an act of bad faith. Refusing to consider redaction involves a willful decision by an agency to ignore an affirmative duty imposed on it by the language of the Act. The consequences for such a willful act must be an enhancement in the penalties assessed so as to reinforce the public's right to monitor the conduct of agencies and public servants.

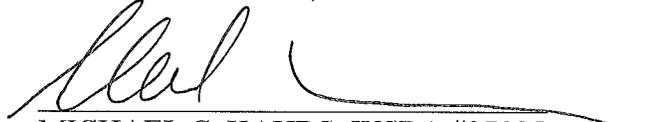
E. CONCLUSION

For the reasons stated above, the Washington Coalition for Open Government asks this Court to rule that blanket barriers imposed by an agency to a records request interferes with the right of the people to access information so as to monitor the agencies who serve them. To withhold a document in its entirety when redaction of that document meets all possible exceptions constitutes such a barrier. WCOG asks this Court to determine that redaction is an integral part of the Public Records Act and must be undertaken as mandated by statute and applicable case law. Failure by any agency to understate such a mandated duty must also be a significant factor in determining appropriate penalties from non-compliance under the PRA.

DATED THIS 12th day of December, 2008.

Respectfully submitted,

KAHRS LAW FIRM, P.S.

A handwritten signature in cursive script, appearing to read "Michael C. Kahrs", written over a horizontal line.

MICHAEL C. KAHRS, WSBA #27085

ALEX D. BROWN, WSBA #39402

Attorneys for Amicus Curie Washington
Coalition for Open Government