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No. 87656-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AUTHORITY,

Appellant,

v.

RESIDENT ACTION COUNCIL,

Respondent.

BRIEF OF *AMICUS CURIAE*

WASHINGTON COALITION FOR OPEN GOVERNMENT

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 SEP 26 P 5:04
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Aviva Kamm (WSBA #37199)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000

Attorneys for Amicus Washington
Coalition for Open Government

 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG”) is an independent, nonpartisan, nonprofit organization dedicated to promoting and defending the public’s right to know in matters of public interest and in the conduct of government in the state of Washington. It represents a cross-section of the public, press and government. WCOG has long been an advocate for open government as envisioned by the state’s Public Records Act, RCW 42.56 (“PRA”).

WCOG’s interest in this case is to ensure that citizens receive the rights entitled to them by the PRA. This interest stems from the public’s need to receive full access to information regarding conduct of the people’s business through their government. The public can only ensure that the government is complying with its obligations to act in the public interest and to do so in a transparent and ethical manner if such information is made available.

WCOG promotes the public good through open government and increased awareness of issues important to the public welfare. WCOG advocates for transparent government and the free flow of discussion regarding government actions through the promotion of the PRA and other open-government laws. WCOG’s experience in promoting open government will assist the Court by providing an important perspective on

the broader public policy impacts of the case that the individual parties cannot provide.

II. STATEMENT OF THE CASE

WCOG adopts and incorporates the Statement of the Case presented in Resident Action Council's brief at pages 3 through 9 and the trial court's findings in its October 7, 2010 Order, CP 163-172, and the trial court's May 13, 2011 Order, CP 305-311.

III. ARGUMENT

A. Summary of Argument

This case presents an opportunity to bring up to date the PRA's mandate to advance transparency of government action by facilitating access to documents with "the fullest assistance." SHA's failure to identify its redactions or to claim reliance on a statutory exemption violated the PRA to dissuade citizens from requesting public records. The standardless and uncoordinated redaction process employed by SHA results in arbitrary redactions unjustified by the PRA and which overreach both the PRA and the HUD regulations SHA hides behind. As such, the trial court's injunction was necessary and appropriate to avoid future PRA violations, and the trial court's assessment of penalties was appropriate and should be affirmed. Given developments in technology and file storage, electronic production of documents effectuates the statute through

efficient and cost-effective production. In these modern times, a refusal to produce records electronically operates to dissuade citizens from requesting public records.

B. The PRA requires transparency and presumes disclosure

“The people insist on remaining informed so that they may maintain control over the instruments that they have created.”

RCW 42.56.030. Those words from the PRA embody the fundamental principles at issue on this appeal. Because transparency is essential to good government, “[t]he 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.” *Id.*

As this Court has recognized many times, the PRA is “a strongly worded mandate for broad disclosure of public records.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011), quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Courts must construe the PRA liberally and construe exemptions narrowly “to assure that the public interest will be fully protected.” RCW 42.56.030. The party trying to block access must cite specific statutory exemptions and bears the burden of proving that the statute prohibits disclosure. RCW 42.56.210(3), RCW 42.56.550(1).

Unless an exemption applies, the agency must produce records, even if disclosure “may cause inconvenience or embarrassment.” RCW 42.56.550(3). If the statute exempts portions of a document, the agency may redact those exempt portions but must release the remainder of the record. RCW 42.56.210(3); *see also Bainbridge Island Police Guild*, 172 Wn.2d at 413-16. An agency’s “promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the requirements of the disclosure law.” *Hearst*, 90 Wn.2d at 137; *see also Spokane Police Guild v. State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989).

C. SHA failed to fully or properly respond to the records request.

1. SHA did not explain its redactions nor claim the redacted information was exempt.

Despite the PRA’s clear requirements for production except when statutorily exempt and when the grounds for exemption are specified to the requestor, SHA provided a haphazard collection of documents. SHA produced (and charged copying costs for) over one hundred pages of records that were not requested, duplicate copies and, most significantly, pages conspicuously redacted. At the time of disclosure, SHA neither referenced nor explained in correspondence the redactions or the statutory exemption that applied to those redactions. In addition to violating the PRA requirement that public agencies provide the fullest assistance to

requesters, SHA violated the PRA at the outset by failing to identify the statutory basis for any exemption. As a result, RAC was forced to seek judicial review of SHA's unjustified withholding of public records. Not until six weeks after disclosure of the public records, in the Declaration of Nancy Sundt, did SHA first refer even generally to the HUD regulations it hides behind.

2. **SHA's redactions are arbitrary and do not meet any PRA exemption.**

SHA insists that it is required to redact information in keeping with an HUD regulation ordering agencies to store copies of grievance hearing decisions "with all names and identifying references deleted." Appellant's Brief at 7, 24 C.F.R. § 966.57(a). As it acknowledges in its brief, "HUD does not define 'identifying references,' leaving it up to individual housing authorities to implement the C.F.R. as they see fit." *Id.* What SHA fails to acknowledge, however, is that rather than adopt standards "to implement the C.F.R.," it allows various employees to redact the records without direction. Employees applied differing standards and wildly different interpretations of the C.F.R., which resulted in redactions that were arbitrary, inconsistent and, most significantly, which vastly overreached the C.F.R. In some records, names and addresses of residents, witnesses, SHA staff, attorneys, advocates and police officers

were redacted. CP 31. In others, names and addresses were left untouched. CP 32. As examples of overreaching, SHA redacted its own letterhead, the title of a newspaper article and the date of an eviction notice — none of which are arguably “identifying information” under any definition of that term. CP 52, 56, 61, 67, 166.

SHA has not met its burden to prove that any portion of the grievance hearing records are exempt under the PRA. Indeed, it does not identify any statutory exemption that applies and openly admits that it does not rely on any exemption listed in the PRA. Appellant’s Brief at 30. The reasons that the HUD regulation does not justify SHA’s conduct are discussed fully in RAC’s brief.

D. The trial court did not abuse its discretion in ordering records be produced in electronic format.

At its core, the PRA is a tool for government action to be accessible to the public. As such, public agencies have a statutory duty to provide “fullest assistance to inquirers.” *Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009); *see* RCW 42.56.100. When it is “reasonable and feasible” to disclose records electronically, a trial court may require an agency to do so. *Mitchell v. State Dep’t. of Corrections*, 164 Wn. App. 597, 607, 277 P.3d 670 (2011), citing *Mechling*, 152 Wn. App. at 849–50.

In 2012, it should be a rare circumstance when electronic disclosure is *not* “reasonable and feasible.” SHA contends that electronic production would have required unnecessary duplication of its records — unnecessary duplication is the only circumstance in which courts have refused to order electronic production in lieu of paper production. *See* Appellant’s Brief at 25-28; *Mitchell*, 164 Wn. App. at 607; *Mechling*, 152 Wn. App. at 849-50. In *Mitchell* and *Mechling*, the electronic versions of documents contained information that required redaction, so a hard copy was created in order to make the redactions, and the redacted copy was then duplicated.¹ Here, as SHA repeatedly attests, it merely photocopied documents which it already had redacted. SHA has equipment which can convert hard copies into electronic images. CP 167.² Pressing the “scan” button on a photocopier/scanner requires exactly the same effort as pressing the “copy” button on the same machine. But just as SHA could

¹ Software that is readily and inexpensively available and is used by virtually every public agency (such as Adobe Acrobat) allows for creation of a modifiable electronic copy of a document which can be redacted electronically (as opposed to manually with marker, correction fluid or correction tape). *Mechling* and *Mitchell* ignored a software solution even though such software was available to the agencies at the time. A software that allows for electronic redaction has become even more common since those decisions. The ubiquity of such software should advance courts’ confidence in ordering public agencies to provide electronic production. For purposes of this case, *Mitchell* and *Mechling* are distinguishable on the factual ground that SHA did not have to create new records to respond to RAC’s request for public records.

² In fact, most modern photocopy machines create a digital image each time a document is copied, rather than making a direct copy. The copier creates a digital image and then prints that image onto paper. Assuming that SHA’s equipment is less than a decade old, SHA made digital images of the records and then intentionally printed those images onto paper rather than giving RAC the digital images.

not be bothered to explain that it had redacted the documents or cite the statutory exemption it claims justified the redactions, SHA could not be bothered to press “scan” and thereby save RAC’s time and money, not to mention honor the specificity of the request and the statutory requirement to provide the “fullest assistance” to a requestor.

At best, SHA’s failure to disclose the documents electronically is a Luddite refusal to utilize technology and equipment it already has purchased with public funds. But the stubborn assertion that “nothing in the PRA required SHA to provide electronic documents to RAC” misses the mark and may hide a more threatening motive — to dissuade citizens from requesting public records. Written before email, scanning and digitized storage and delivery of documents became the norm in the workplace, the PRA itself does not specifically address the question of electronic production. But public agencies should not interpret the Public Records Act to be frozen in time to permit only the manner of production of the types of public records that existed in the late 1970s. The PRA does not prohibit agencies from using modern technology, ubiquitous software, scanners and printers readily available to virtually every public agency. Nor does the PRA fail to anticipate the advent of newer technologies that will make the disclosure of public records easier, more efficient and

cheaper both for public agencies and for citizens interested in the actions of their government.

The section that deals directly with the mode of production (which at the time of enactment was assumed to be photocopying) makes clear that agencies should aim to disclose records at the lowest possible cost to requestors. RCW 42.56.120 prohibits any charge for “inspection” of records, nor for “locating public documents and making them available for copying.” An agency may not profit by charging for copying. *Id.* The AG’s model rules aim to fill the gap left between the statute, enacted before electronic production had been imagined, and technological advances which are now commonplace. Consistent with the PRA, courts should require agencies to use readily available and commonly used technologies to fulfill their obligations under the PRA.

In refusing to produce records electronically when it was eminently feasible to do so, SHA imposed an unnecessary burden on RAC and violated its statutory obligation to provide the “fullest assistance.” The effect of charging even reasonable copying costs (as well as the cost of a messenger service) when it could have been avoided without any added burden to the agency is to impose a burden on the requestor and risk a chilling effect on requests being made. The SHA’s interpretation of the PRA to permit it to impose the greatest possible burden and expense on a

requester seeking public records in an effort to dissuade such requests in the future should be soundly rejected by this Court. SHA is using an unnecessary cost as a proxy penalty for requesting access to public records while facially appearing to comply with the PRA. This conduct violates the spirit and purpose of RCW 42.56.120 and the entire PRA. The trial court properly determined that the records could and should have been made available electronically and this Court should affirm that decision.

E. The penalty assessed was appropriate and necessary to implement the PRA's purpose.

In withholding public records from disclosure, RCW 42.56.210(3) requires an agency to cite applicable statutory exemptions and explain why those exemptions apply. An agency that fails to do so violates the PRA. *See Sanders v. State*, 169 Wn.2d 827, 847-48, 240 P.3d 120 (2010). SHA did not cite any statutory exemption, including the “other statute” exemption, in its responses to RAC’s requests. Indeed, it merely produced redacted documents without any explanation as to how or when the documents were redacted or what standard was used in deciding what information to redact. Moreover, SHA did not respond at all when RAC inquired about the redactions, forcing RAC to use the court system to obtain an explanation — in furtherance of SHA’s efforts to make requests for its public records as burdensome and expensive as possible to dissuade

further requests in the future. By failing to cite the applicable exemption on which it would rely, SHA kept RAC guessing and wasted resources of the parties and the courts.

The PRA permits the court to assess a penalty of between \$5 and \$100 per day for the duration of the violation of the statute. RCW 42.56.550(4). The statute's goal is clear: without the threat of financial penalty for failing to effectively respond to public records requests, there would be little incentive for agencies to comply with the directive to make records available. This is true regardless of whether the violation was inadvertent or malicious, whether it was relatively minor or severe, whether just one document was improperly withheld or a far broader scope of nondisclosure. Factors such as the severity of the violation, intentionality of the wrongful conduct and bad faith are taken into account in determining the amount of the per diem award, as was done by the trial court in this matter. CP 305-311. Because SHA violated the PRA through its overzealous redactions, and its efforts to impose the greatest burden possible on RCA so as to dissuade it from making requests for public records in the future, the trial court's assessment of penalties was both proper and necessary to give teeth to the statute and this Court should affirm that award.

F. An injunction requiring future compliance was proper and necessary to effectuate the PRA.

The PRA's penalty provisions penalize agencies' failures to make documents available when requested. But penalties are not available for violations of the statute apart from withholding access to documents. A trial court with jurisdiction over a matter is permitted to grant whatever relief "as will be necessary to make the relief sought complete." *Dare v. Mt. Vernon Inv. Co.*, 121 Wash. 117, 120, 208 P. 609 (1922). The trial court's May 13, 2010 Order in this case did precisely that — it ordered SHA to take actions to bring itself into compliance with the PRA and to assure consistent and properly limited redaction in keeping with the HUD regulation. CP 310. Without the injunctive relief, SHA would continue to violate the PRA in its day to day operations. These continued violations would not only thwart future records requests by interested members of the public but, as noted by the trial court, would expose SHA to the risk of future damage awards for future violations. *Id.* The trial court did not abuse its discretion in issuing the injunctive relief and this Court should affirm that ruling.

IV. CONCLUSION

WCOG urges this Court to fulfill the PRA's mandate and purpose by upholding the trial court's conclusions that SHA's unexplained and overreaching redactions and its failure to make documents available

electronically violated the Public Records Act, affirming the modest award of statutory penalties in order to give teeth to the PRA's directions and affirming the trial court's requirement that SHA adopt and publish standards to assure future compliance with the PRA.

By: /s Aviva Kamm _____
Aviva Kamm (WSBA #37199)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000

Attorneys for Amicus Washington
Coalition for Open Government