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NO. 95937-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD KILDUFF,

Appellant

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,
and JAMIE STEPHENS, in his capacity as San Juan County Council
Member and Public Records Officer,

Respondents

**APPELLANT'S RESPONSES TO (1) AMICUS WASHINGTON
COALITION FOR OPEN GOVERNMENT AND (2) *AMICI*
WASHINGTON ASSOCIATION OF COUNTIES, ASSOCIATION
OF WASHINGTON CITIES, ASSOCIATION OF WASHINGTON
CITIES RISK MANAGEMENT SERVICE AGENCY AND
WASHINGTON STATE TRANSIT INSURANCE POOL**

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I. INTRODUCTION

Appellant Edward Kilduff submits for the Court's consideration the instant Response to the Brief of Amici Curiae Washington Association of Counties, Association of Washington Cities, Association of Washington Cities Risk Management Service Agency and Washington State Transit Insurance Pool (hereinafter, collectively "Government Amici"). Appellant agrees with, and incorporates herein, the arguments of Amicus Washington Coalition for Open Government (hereinafter "WCOG").

II. ARGUMENT AND AUTHORITY

A. **Liability exists to promote transparency and accountability so citizens may have ultimate oversight and control of their government.**

Amicus Washington Coalition for Open Government ("WCOG") correctly explains why the "administrative exhaustion" arguments of the Government Amici and San Juan County have no place in the Public Records Act ("PRA"), and why the typical justifications for administrative exhaustion do not exist in the PRA. Appellant agrees with, and incorporates herein, the arguments of Amicus WCOG.

Appellant disagrees with the arguments, and positions of Government Amici, and responds to their brief more fully herein.

At its essence Government Amici's position is that their government members do not like expending resources to comply with the Public Records Act ("PRA"); they do not like paying to defend against suits brought under the PRA; and they do not like paying the judgments awarded PRA plaintiffs. While it is an entirely predictable sentiment that Government Amici's members would appreciate less liability exposure, such a desire does not form a legal rationale for this Court to abrogate the explicit statutory rights that are provided requesters under the PRA. What Government Amici is requesting is a change in the law. For that, they need to take their concerns to the Legislature (or directly to the voters of Washington).

Indeed, Government Amici's position betrays a failure to appreciate the public policy goals that are intended to be coerced by liability – that agencies need to be incentivized to be accountable and transparent and responsive to requesters. Government Amici dubiously reference the aggregate costs of PRA penalties and fees as a reason for why liability should be limited rather than the reality that these penalties and fees indicate how poorly agencies have been performing when fulfilling the mandate of Washington's citizens that public records must be made available on request. Government agencies have had since 1972 to better train their personnel, to develop more user friendly and efficient means of indexing

and storing records for prompter adequate location and production, and yet Government Amici blame the PRA and PRA requestors for agencies' continued failures to comply with the law.

Moreover, Government Amici overlook the reality that only a tiny fraction of actual PRA violations are ever identified and even fewer are actually pursued in lawsuits. The reality is the up-front costs of bringing a suit under the PRA dissuades plaintiffs as it is the rare requester that can appreciate that a violation has occurred and also afford representation. Since only a handful of attorneys state-wide are willing to take PRA cases on a contingency or pro bono basis the reality is that only a miniscule percentage of the violations that are detected are ever pursued.

Furthermore, Agencies have the ability to minimize liability. First, they can simply do their jobs under the PRA and provide requesters with the records. In the instant case, those records were known, most were in the hands of the Prosecutor who pulled them from the file the very day they had been requested, and many of those records have still not been produced.

Second, if sued, so long as the agency was diligent, reasonable and did not withhold the record for some nefarious purpose, agencies can essentially curtail fees and penalties by immediately tendering the requested records and proffering what would be the relatively de minimis fees incurred in conjunction with the filing of a complaint. In the instant case,

San Juan County did not promptly produce the records when it was sued, has still not produced many of the records requested, and even gave Mr. Kilduff records his attorney had attached to a separate lawsuit—that bore the handwritten notes of his attorney—attempting to pass the records off as the agency’s original records that have never been produced.

Instead, agencies that could control their own litigation costs and exposures with prompt productions and compliance with the PRA, with widespread farming-out of PRA defense litigation to outside counsel, agencies are being “sold” expensive and oft-ultimately ineffective defenses which have needlessly increased the likelihood, length, complexity and the cost of PRA litigation.

While Government Amici argue that having a required internal review process would ensure that mistakes and miscommunications are timely identified and addressed, Government Amici ignore that it is the prospect of liability that serves to prevent these “mistakes” from occurring in the first place and incentivizes agencies to limit exposure by promptly providing records and adequately training staff and implementing efficient record-keeping practices within the agencies. If this Court finds that agencies can require a requester to complete an internal review process prior to a requester bringing suit, agencies will have an incentive to initially deny valid requests, (especially in cases like the one at bar where there are

politically embarrassing records documenting illegal behavior that would need to be produced) in the hopes that the requester will not follow up with his request. In other words, when an agency wants to withhold records it will do so with impunity unless the requester is especially tenacious and badgers the agency to divulge the records.

In addition, agencies are protected from excessive penalties by this Court's instruction in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010), since courts are required to evaluate the culpability of the agency for improper denials. Indeed, this Court recently reiterated the limited inquiry of reviewing courts in reviewing penalty determinations so as to discourage plaintiffs from appealing all but the most seriously defective decisions. See, *Hoffman v. Kittitas County Sheriff's Office*, __ Wn.2d __ (No. 96286-3, Wash., Sept. 26, 2019). By minimizing the costs associated with marginal appeals, agencies are further protected from excessive penalties or those that do not advance the goals of PRA.

B. The AGO's promulgated rules are consistent with the Act.

Government Amici argue that mandatory internal exhaustion is "expressly contemplated" by RCW 42.56.040. Government Amici Br. at 3. It is not. The purpose of RCW 42.56.040 is to require agencies to publish the "rules of procedures" and more specifically "the substantive rules of

general applicability adopted as authorized by law”. RCW 42.56.040. (Emphasis supplied.) There is nothing in Section .040 that permits agencies to abrogate the rights secured requesters by the PRA. Indeed, the express provisions of Section .040 that cautions agencies to publish rules of “general applicability” indicates the Act’s intention to preserve a uniform body of rules governing requests and to prevent piece meal adoption of differing rules. Given the number of agencies that are subject to the PRA, if each agency were able to adopt its own tailored rules that requesters must satisfy prior to bringing suit, requesters would be left to navigate hundreds of different rules that varied from agency to agency.

Government Amici misrepresent that the AGO has a mandatory review process that must be exhausted before suit is initiated. Government Amici state that:

Attorney Generals’ own procedures also contravenes Mr. Kilduff’s interpretation. Just like the County’s, the Attorney General’s PRA procedure provide that a requester must first file a petition for review with the Attorney General for administrative remedies to be considered exhausted for the purposes of judicial review.

Gov. Amici Br. at 6.

The AGO's internal review procedure is entirely optional, as the PRA requires. Government Amici's assertion is further contrary to WAC 44-14-08003 that specifically provides:

Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. **No mechanisms for formal alternative dispute resolution currently exist in the act** but parties are encouraged to resolve their disputes without litigation.

Accordingly, contrary to the assertions of Government Amici, the AGO, itself, recognizes there is no *required* internal process that must occur before litigation is commenced after an initial denial.

The AGO's specific recognition that there is no required alternate resolution procedure should be given particular weight as RCW 42.56.570(2) specifically mandates that the AGO "shall adopt by rule advisory model rules for state and local agencies, as defined in RCW 42.56.010 addressing the following subjects: (a) Providing fullest assistance to requestors; (b) Fulfilling large requests in the most efficient manner; (c) Fulfilling requests for electronic records; and (d) Any other issues pertaining to public disclosure as determined by the attorney general. RCW 42.56.570(4) further cautions that "Local agencies should consult the advisory model rules when establishing local ordinances for compliance with the requirements and responsibilities of this chapter." Here the County

ignored this warning at its peril and sought to enact a mandatory review process in express contravention of the rules promulgated by the AGO.

As Mr. Kilduff argued in his brief of Appellant and reply brief, WAC 44-14-080's recognition that: "Any person may obtain court review of denials of public records requests pursuant to RCW 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal" is entirely consonant with the AGO's promulgated rules and as the PRA has been historically been understood. To wit, a requester may bring suit two days after his *initial* denial.

C. That other agencies have recently adopted rules that purport to require internal exhaustion does not alter the express language of the Act.

Government Amici catalog for the Court the recent proliferation of similarly defective (and remarkably uniform) rules promulgated by its member agencies throughout the state. Government Amici Br. At 5. While such are undoubtedly a predictable product of agencies' desires to avoid liability for the reasons described earlier, such rules do not shed any light on the meaning of the PRA.

III. CONCLUSION

For the foregoing reasons, the Court should (1) accept the arguments of Amicus WCOG and (2) reject the arguments of Government Amici urging the Court to ignore the language and purpose of the PRA to allow agencies to avoid liability for PRA violations.

Respectfully submitted this 14th day of October 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 14, 2019, I filed with the State Supreme Court and delivered through the Court's portal a copy of the foregoing Brief and this Certificate of Service by email pursuant to agreement to the following:

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