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NO. 66522 - 1 - I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

Percy Levy,

Appellant,

v.

Snohomish County,

Respondent.

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REPLY BRIEF OF APPELLANT

Percy Levy
Appellant Pro Se
#951122, Unit I-A-13
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

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STATEMENT OF ISSUES

1. Was it necessary for Snohomish County to clarify Levy's original request?
2. Did the additional two page police report qualify as responsive records to Levy's request?
3. Is it necessary that a PRA action compel the production of a record, or can a suit be brought to penalize the County for not producing the record in a manner that is *reasonable and timely*?
4. Is *good faith* a defense to a records violation?

ARGUMENT

A. The County did not need to clarify the original request

As stated in Levy's opening brief, an agency can only seek clarification of an "unclear" request. The Snohomish County (hereinafter the County) has not provided any authority that support their position that clarification can be requested simply to determine if the same records have been provided in the past.

As far as any dispute regarding the clarity of the original request, the original letter from the record specialist is determinative. He specifically states that "[we] believe these records were provided to [appellant] a year ago." CP 74. He goes on to say that the file has been searched and "does not contain that record" (ibid). In no way does the record reflect that Appellants request was unclear. In fact, the record shows that Appellant's request was extremely clear on its face.

The bottom line is that the records specialist made a mistake by believing that he had previously provided the same records to Levy a year ago. Not only did the records specialist, Dave Wold (hereinafter Wold), make the mistake in the beginning, he maintained a running argument in the form of correspondence and phone calls.¹

As stated in the opening brief at page 16, the Wold was in error the entire time.² Moreover, any reference made by the County concerning Levy conceding that he had requested the same records in the past is an attempt to distort the facts. Levy never claimed to have made a *PRA* request, but stated to Wold that he had requested the records in the past.³ Levy was making reference to the fact that he had not seen the additional two pages during the original discovery request or his motion to compel additional discovery (post-trial).

B. The two page police report was a responsive and should have been timely provided.

If this court were to go strictly by the subjective mind state of the records specialist, it becomes obvious that Wold felt the two pages were, in fact, responsive records. The records specialist stated in his declaration that he “determined the officer’s report could be responsive and included it in the material to be provided.” CP 68.

¹ The Records Specialist implied in several letters that Appellant was being dishonest. CP 13, 74, 113. He also had several conversations with Diane Kennedy where he implied that he believed Appellant was being dishonest and had been provided the records the year prior. VRP 7 (Declaration of Diane Kennedy).

² The Respondent does not address in their brief the fact that Appellant brought forward evidence at the trial level proving that the request from a year before was for other records than the ones now in question.

³ Appellant filed a motion to compel discover during a Personal Restraint Petition filed shortly after being convicted. (2004)

More importantly, it would lead to an absurd result to find that a records officer found, described, and set a price to purchase *specific* records, and that at the point Levy paid for those records, it was not a *specific PRA request*.

Is it the County's position that at the point the County and the Levy understood the specific record being requested, there was a duty to file a completely separate official records request? This seems to be what the County implies, but are unable to lay it out in briefing because such a position is not supported by any authority.

The only real question involves determining if the two pages were part and parcel of the original request or a second request that began at the point the records specialist told Appellant the records existed?

C. A violation of the PRA occurs even when court action is not the event that causes disclosure.

This area of law seems to be somewhat murky in Washington case law. However, it is not murky under the PRA. The legislature specifically stated that a person prevails in the courts when they have been denied the right to "receive a response to a public records request within a reasonable amount of time." RCW 42.56.550(4). (Emphasis added)

Moreover, the Respondent's argument ignores the longstanding line of cases demonstrating that "in a PRA case part of the case remains despite the release of the records, namely attorney fees and penalties." *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meeting Laws* at 16-10 (2006). PRA cases are not moot after the release of records. *Yacobellis V. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989); *Cowles Publ'g Co. v. Spokane Police Dep't*, 139

Wn. 2d 472, 987 P.2d 620 (1999); *Limstrom v. Ladenburg*, 110 Wn. App. 133, 39 P.3d 351 (2002).

Without going into a full analysis concerning the rules of statutory construction, the County appears to be asking this court to rule that the language concerning “within a reasonable amount of time” is irrelevant.

Levy directs this Court’s attention to the language in *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn. 2d 89, 117 P.3d 1117 (2005). In that case, the court said that “nowhere in the [PRA] is prevailing party conditioned on causing disclosure ... we will not read into the statute what is not there ... prevailing relates to the legal question of whether the records should have been disclosed on request. Subsequent events do not affect the wrongfulness of the agency’s initial action to withhold the records if the records were wrongfully withheld at that time.” *Id at 103*.

D. Good faith is not an excuse for failing to penalize an agency for mistakes in adhering to the PRA

All of the County’s defenses are simply cloaked arguments of good faith. The *Yousoufian* case (*Yousoufian v. Office of King County Executive*, 168 Wn. 2d 229, 229 P.3d 735 (2010)) was quite clear that “no showing of bad faith is necessary before a penalty is imposed.”

In this case the County made two mistakes: (1) they assumed that they had provided the records a year before (and continued to argue the fact in an accusatory manner up until they were proven to be mistaken, and (2) they mistakenly failed to timely mail two pages of records to Levy. To forgive either error is a finding of good faith.

It should be noted that Levy had a hearing in another matter during the exact window of time that the two pages in this case was being withheld. The documents in question would have supported Levy's position in that case.⁴ Such a fact defeats any argument that the mistake was harmless.

CONCLUSION

This court should remand this matter back to the trial court with instructions to determine penalties using the factors set forth in Yousoufian.

Dated this 27 day of April, 2011.



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⁴ It just so happens that the respondents today are the same defendants in the case that was pending at that time.

PROOF OF SERVICE FORM

PART 1: **Delivery by U.S. Mail:** Proof of Service by Mail.

I, DIANE KENNEDY, declare that I am over the age of eighteen years and not a party to the action. My address is 4935 CLINTON AVENUE, RICHMOND, CA. 94805.

On, MAY 2, 2011, I served the REPLY BRIEF OF APPELLANT by placing a true copy in the United States mail enclosed in a sealed envelope with postage fully prepaid, addressed as follows:

WASHINGTON STATE COURT OF APPEALS
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600 UNIVERSITY STREET
SEATTLE, WA. 98101-1176

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PART 2: I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on MAY 2, 2011, at RICHMOND, California.


Signature

DIANE KENNEDY