

NO. 71052-4-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CEDAR GROVE COMPOSTING, INC.,

Respondent/Cross-Appellant,

v.

CITY OF MARYSVILLE,

Appellant/Cross-Respondent.

FILED
COURT OF APPEALS
DIVISION ONE

SEP 18 2014

BRIEF OF AMICUS CURIAE ON BEHALF OF THE WASHINGTON
STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT
OF APPELLANT CITY OF MARYSVILLE

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I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) joins in and fully supports the arguments raised by the City of Marysville (City).

WSAMA is made up of attorneys for cities and towns in the State of Washington. Washington has 280 cities and towns, ranging in population from Seattle at half a million citizens to Krupp, population 65. Cities of all sizes are affected by court decisions regarding the Public Records Act (PRA), Chapter 42.56 RCW, because cities are all defined as “public agencies” that are subject to the Act.

WSAMA urges this court to reverse the trial court’s decision, in which the court concludes the City violated the PRA. WSAMA addresses two issues: (1) the trial court’s determination that 173 records solely in the possession of an independent contractor, Strategies 360 (Strategies), which the City never possessed or saw, were “used” by the City and therefore within the scope of the PRA, and (2) the excessive penalties ordered by the trial court.

Whatever this court determines regarding the City’s response to Cedar Grove’s public records request, WSAMA respectfully requests this Court carefully craft its decision so as not to unreasonably expand the scope

of an agency's obligations under the PRA. Because even Washington's smallest cities contract with multiple private entities to provide services, this Court's decision will have statewide consequences. WSAMA urges the court to hold that the PRA does not require disclosure of documents in the possession of a municipality's independent contractor, unless each document meets the statutory definition of a public record.

II. STATEMENT OF THE CASE

WSAMA incorporates the City's Statement of the Case.

III. ARGUMENT

A. **The trial court's conclusion that the City "used" the 173 Strategies records within the meaning of the PRA is contrary to case law.**

The PRA requires public agencies to disclose "public records."

The PRA defines "public record" as follows:

"Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function [1] prepared, [2] owned, [3] used, or [4] retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(3). Because it is undisputed that the City did not prepare, own, or retain the 173 Strategies documents, whether the documents are "public records" depends on whether the City "used" the documents.

1. The City did not “use” the records under *Concerned Ratepayers*.

The Washington Supreme Court defined when an agency “uses” a public record in *Concerned Ratepayers Assoc. v. Public Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999).¹ In *Concerned Ratepayers*, a nonprofit requested technical specifications for a turbine generator from the Public Utility District (PUD). *Id.* at 953. While the PUD never received a copy of the specifications, PUD employees saw and reviewed the specifications at a meeting with the contractor hired to build a power plant, and “carefully evaluated all of the technical data related to the turbine generator.” *Id.* at 954, 961. In construing the statutory term “used,” the court stated, “[R]egardless of whether an agency ever possessed the requested information, an agency may have ‘used’ the information within the meaning of the Act if the information was either (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose.” *Id.* at 960.

The court went on to conclude that whether a record is “used” does not turn on “whether the information is applied to an agency’s final work

¹ *Concerned Ratepayers* was decided under the Public Disclosure Act, former Chapter 42.17 RCW (1995). The definition of “public records” that the court construed in *Concerned Ratepayers* is identical to the current PRA definition of “public records.” Compare former RCW 42.17.020(36) (1995), with RCW 42.56.010(3).

product,” but instead, “whether the requested information bears a nexus with the agency’s decision-making process.” *Id.* at 960. The court stated that a nexus exists “where the information relates not only to the conduct or performance of the agency or its proprietary function, *but is also a relevant factor in the agency’s action.*” *Id.* at 960–61 (emphasis added). “[M]ere reference to a document that has no relevance to an agency’s conduct or performance may not constitute ‘use,’ but information that is reviewed, evaluated, or referred to and has an impact on an agency’s decision-making process would be within the parameters of the Act.” *Id.* at 961. Applying this test, the court held the PUD “used” the specifications within the meaning of the PRA because the PUD reviewed and evaluated the specifications. *Id.* at 961.

Under the test set out in *Concerned Ratepayers*, the City did not “use” the 173 Strategies documents. It is undisputed that the City never even saw the documents. It certainly did not “review” or “evaluate” them, or incorporate the records into its decision-making process as required by *Concerned Ratepayers*. The trial court’s written ruling does not identify what, if any, decision-making process the documents had an impact on. While the court in *Concerned Ratepayers* carefully analyzed how the agency referred to, reviewed and evaluated a particular document (a set of technical

specifications) to conclude the agency “used” the documents, *id.* at 961, here the court lumped all the documents together, concluding that as a whole, all 173 documents had a general “nexus” to the City’s political goals. CP 14-15.

As the City points out, Cedar Grove’s reading of *Concerned Ratepayers* would bring all documents generated by a government contractor working on a government contract within the scope of the PRA. Reply Br. of Appellants at 18. But *Concerned Ratepayers* makes clear that an agency does not “use” a document unless it both relates to the conduct or performance of the agency *and* is “a relevant factor in the agency’s action.” *Id.* at 960–61.

The trial court’s findings demonstrate that the court did not determine with any specificity whether individual documents were “used” by the agency. This is not only inconsistent with the careful analysis in *Concerned Ratepayers*, but also with subsequent cases.

In *West v. Thurston County*, 168 Wn. App. 162, 169, 275 P.3d 1200 (2012), Arthur West filed a public records request for invoices for legal services related to the defense of the Thurston County Prosecutor’s Office. The County had a contract with the Washington Counties Risk Pool (Risk Pool) to provide liability coverage. Under the agreement with the Risk Pool, the County had a \$250,000 deductible. *Id.* at 167. The County disclosed the

invoices it received from counsel: invoices totaling up to \$250,000. But the County did not disclose the remainder of the invoices, totaling \$1.9 million, because those invoices were forwarded directly to the Risk Pool. *Id.* at 170–71. The trial court applied *Concerned Ratepayers* and concluded that the County did not “use” the invoices for fees over \$250,000 because the County did not receive them, and there was no evidence the County ever reviewed, evaluated, referred to or otherwise considered those invoices in any decision-making process. *Id.* at 185–86. On appeal, the court approved the trial court’s application of the *Concerned Ratepayers* test. *Id.* at 185–86.

In *West*, the fact that the invoices were related to the legal services provided to the County was insufficient to render them “public records.” Even where a City reviews some records of a *particular type*, like the legal invoices in *West*, the court must determine whether the City used the *particular documents* at issue. In *West*, because the County never received, reviewed, or considered the particular invoices in any decision-making process, the invoices were not “public records.” The same is true of the 173 Strategies records. *See also Nissen v. Pierce Cnty.*, No. 44852-1-II, slip op. at 11–12 (Wn. App. Sept. 9, 2014) (court closely examined whether prosecutor ever referred to private cell phone records in governmental capacity to determine “use”). *Cf. Dragonslayer, Inc. v. Wash. State Gambling Comm’n*,

139 Wn. App. 433, 445, 161 P.3d 428 (2007) (holding court’s findings insufficient because they gave no detail about how Commission used records).

In sum, no Washington case has held records like the 173 Strategies records were “public records.” While few cases have analyzed whether a record is subject to the PRA because the agency “used” it, the authority on point demonstrates that the trial court erred. The decision to expand the scope of the PRA rests with the legislature. Until then, records in the possession of a third party contractor which are not prepared, owned, used or retained by a public agency are not “public records” under the PRA.

2. The trial court decision will open the floodgates of public records liability for Washington’s cities.

The trial court’s decision will dramatically expand the obligations, and potential liabilities, of Washington cities tasked with responding to public records requests in a timely and complete manner. Even small public agencies may contract with dozens of private entities simultaneously, in order to provide for services like architects, engineers, and public works, and to obtain assistance from professionals like attorneys and environmental consultants. State law affirmatively *requires* agencies to contract for some of these services, including public works. *See* RCW 39.80.050 (process for agencies to contract for architectural and engineering services); Chapter

39.04 RCW (contracting for public works); RCW 35.23.352 (second class cities' public works contracts); RCW 35A.12.020 (city shall appoint or contract for legal counsel); RCW 35A.13.090 (same).

While contractors have a contractual responsibility to share deliverables with the agency, they may not share every document they generate in the course of a contract, whether for proprietary reasons or because the agency has no need to see a particular document. Because private entities that contract with public agencies are not subject to the PRA, they are not trained in how to keep and produce records. Yet, the trial court's ruling could make an agency liable if a contractor withheld a record from the agency, even if the agency had never seen the particular record, did not know it existed, and did not refer to or use the record for any governmental purpose. While the PRA demands accountability for Washington's public agencies, it is unfair to hold agencies accountable for a contractor's failures.

While courts liberally construe the PRA, construing the statute to punish agencies for not producing records they do not know exist is an absurd result. *Resident Action Council v. Seattle Housing Auth.*, 300 P.3d 376, 381 (Wash. 2013) (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004)) (court avoids absurd results in construing PRA).

If this court reaches the issue of whether the City “used” the 173 Strategies records, WSAMA respectfully requests this court hold that the PRA does not encompass records in the possession of independent contractors where an agency never possesses or reviews the records, or factors the records into any decision.

3. Such an expansive reading of the PRA is unnecessary to promote the intent of the PRA.

Cedar Grove contends that if this court holds the 173 Strategies records are not “public records,” government agencies could avoid compliance with the PRA by outsourcing sensitive tasks to third parties. Br. of Resp’t at 41.²

Washington law already protects citizens’ “right to know” by making some records of private contractors subject to the PRA: those “used” by a government agency, and also those held by an entity that is the functional equivalent of an agency.

The functional equivalence test adopted in *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 161, 974 P.2d 886 (1999), provides a way to reach records if a private contractor acts as the functional

² Resorting to out-of-state authority is unnecessary because the statutory language and *Concerned Ratepayers* control. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 408, 229 P.3d 693 (2010).

equivalent of a government agency. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008) (privately-run corporation contracting with tri-cities Animal Control Authority was the functional equivalent of an agency under PRA). Neither party contends the functional equivalence test applies here.

A number of other states have used some form of the functional equivalence test in the context of determining “whether public records statutes should apply to certain private entities performing government functions.” *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 77-79 (Tenn. 2002) (concluding the functional equivalency approach “provides a superior means for applying public records laws to private entities which perform ‘contracted out’ governmental services.”); *Telford*, 95 Wn. App. at 161-62 (noting federal courts construing FOIA, Oregon, and Connecticut use functional equivalence test).

In support of its dire prediction that agencies could contract out work in order to avoid the reach of the PRA, Cedar Grove suggests other states consider documents solely in the possession of private contractors to be public records. The four out-of-state cases cited by Cedar Grove do not support its position. The public records statutes addressed in those cases

define public records differently than Washington's PRA.³ For example, the Florida statute at issue in *Wisner v. City of Tampa Police Department*, 601 So.2d 296 (Fla. Dist. Ct. App. 1992), defines public records more broadly, as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received . . . in connection with the transaction of official business by any agency." *Id.* at 298 n.3 (emphasis added).

Cedar Grove mischaracterizes these cases. For example, in *Evertson v. City of Kimball*, 767 N.W.2d 751 (Neb. 2009), the city hired investigators to look into complaints that a police officer was targeting minorities. 767 N.W.2d at 756. While the city never obtained the investigators' written report, the investigators verbally informed the city of its findings, and the city fired the police officer based on that verbal report. *Id.* at 756. The court stated, "We agree with other courts that *public records laws should not permit*

³ *Evertson v. City of Kimball*, 767 N.W.2d 751, 759, 761 (Neb. 2009) (under statute defining public records as documents "of or belonging to this state, any county, city, village, political subdivision . . ." court adopts test that requiring in part that "the public body was entitled to possess the materials to monitor the private party's performance; and . . . the records are used to make a decision affecting public interest."); *Forum Publ'g. Co. v. City of Fargo*, 391 N.W.2d 169, 171 (N.D. 1986) (statute defined public records as "all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public, or expending public funds[.]"); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 678 N.E.2d 557 (Ohio 1997) (citing OHIO REV. CODE § 149.43 which defines public record as "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.").

scrutiny of all a private party's records simply because it contracts with a government entity to provide services.” *Id.* at 761 (emphasis added). The court held that a private party's records are only “public records” if the public agency was entitled to possess the materials, and the records were used to make a decision affecting public interest. *Id.* at 761. Applying that test, the court concluded the investigator's written report was a public record because the city relied on the information in the report in firing the police officer. *Id.* at 762–63. *Evertson* clearly supports the City's position, not Cedar Grove's.⁴

Cedar Grove's assertion that if this court reverses, public agencies will be able to insulate themselves from public oversight by outsourcing tasks to private contractors ignores the reality that (1) there is nothing inherently suspicious about a public agency contracting with a private entity, and (2) existing law already requires agencies to disclose some records prepared by private contractors.

⁴ As another example, *Forum Publishing* construes the term “agency” in the public record statute “to mean a relationship created by law or contract whereby one party delegates the transaction of some lawful business to another.” 391 N.W.2d at 172. But in *West*, Division Two of the Court of Appeals rejected the application of agency principles to the PRA. *West*, 168 Wn. App. at 183 (“West cites no authority extending this principal-agency relationship to the PRA context. . . [O]ur state's legislature has not yet chosen to extend the PRA this far, expressly designating ‘agencies’ as the only entities that can prepare ‘public records’ subject to disclosure under the PRA.”).

B. The trial court abused its discretion by ordering high-end penalties of \$90 a day for the 173 Strategies records and \$70 a day for the 15 records from the fifth installment initially withheld on the basis of privilege.

The trial court's \$90 per day penalty for the 173 Strategies records and \$70 per day for the 15 documents withheld as privileged is excessive. Penalizing a medium-sized city so harshly for not obtaining from a third party contractor records which it had never seen, and which it reasonably believed it had no obligation to go looking for, is unprecedented.

The court reviews the amount of a PRA penalty for an abuse of discretion. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian V*). A court abuses its discretion if it applies the wrong legal standard. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The PRA permits a trial court to impose a daily penalty of up to \$100 for PRA violations. RCW 42.56.550(4). In determining a PRA penalty, the court must consider seven mitigating factors and nine aggravating factors. *Yousoufian V*, 168 Wn.2d at 467-68.⁵

⁵ The seven mitigating factors supporting a lower penalty are:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the

While the amount of the penalty is within the court’s discretion, RCW 42.56.550(4), the Washington Supreme Court has stated that courts should reserve penalties at the high end of the statutory range for extreme misconduct. *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 459, 200 P.3d 232 (2009) (*Yousoufian IV*) (“[T]he legislature established a penalty range between \$5 and \$100 a day to contrast between the least and the most violative conduct, expecting extreme cases to fall at either endpoint with the rest falling in between.”).⁶

The total penalty ordered here, over \$143,000, is an extremely high penalty, likely one of the highest PRA penalties ever ordered. *See Yousoufian*

requestor, and (7) the existence of agency systems to track and retrieve public records.

Yousoufian V, 168 Wn.2d at 467 (internal footnotes omitted).

The aggravating factors supporting an increased penalty are:

(1) a delayed response by the agency, especially in circumstances making time of the essence, (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency’s personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, (6) agency dishonesty, (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, (8) any actual personal economic loss to the requestor resulting from the agency’s misconduct, where the loss was foreseeable to the agency, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

Yousoufian V, 168 Wn.2d at 467–68 (internal footnotes omitted).

⁶ The legislature subsequently amended the RCW 42.56.550(4) to remove the \$5 minimum. LAWS OF 2011 ch. 273 § 1. A court may now impose a penalty from zero to \$100.

v. Office of Ron Sims, 168 Wn.2d 444, 471, 229 P.3d 735 (2010) (*Yousoufian V*) (Owens, J., dissenting) (stating that penalty of \$123,780 assessed in that case “was by all accounts the largest ever assessed under the PRA.”).⁷

With respect to the 173 Strategies records, the City’s actions were consistent with *Concerned Ratepayers* and *West*, the only guidance available on the issue. Where no prior case has construed the PRA to extend to documents in the possession of a third party that an agency has never reviewed, a finding of bad faith is unwarranted. The courts should reserve such high fee awards for egregious cases of bad faith—for example, if an agency deliberately destroyed documents after receiving a request, or completely ignored a request for records—not cases where the agency complied with existing case law.

The \$70 per diem amount for the 15 records from the fifth installment is also excessive. CP 455. The City initially withheld this group of documents based on privilege. CP 1461. The trial court’s findings state that the agency’s explanation for withholding these records “was more reasonable given the need to safeguard the attorney-client privilege.” CP 20.

⁷ In reviewing cases decided since Justice Owens’ statement in *Yousoufian V*, the only case with a higher penalty was *Zink v. City of Mesa*, 162 Wn. App. 688, 701, 705, 256 P.3d 384 (2011), where the court remanded for the trial court to reconsider the amount of the \$167,930 penalty within the *Yousoufian* framework.

And the court did not find any bad faith with respect to this batch of documents. CP 20. Nonetheless, the court ordered a very high penalty of \$70 per day for these documents.

At a minimum, the court should remand because the trial court failed to consider the *Yousoufian* mitigating factors. The trial court's written decision only explicitly considers the aggravating factors laid out in *Yousoufian*. CP 19–21. This court should conclude that by not considering any mitigating factors and setting the penalty at the high-end of the statutory range, the court abused its discretion. *See Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) (quoting *Yousoufian V*, 168 Wn.2d at 460–61) (remanding for court to reconsider the penalty within the *Yousoufian* framework and noting “a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination”). Several mitigating factors could apply to the City. For example, the City properly trained its employees, and the City's reasons for not producing the documents were reasonable and grounded in existing law.

Finally, the trial court's \$143,000 penalty goes beyond what is necessary to deter future misconduct given the size of the City, particularly in comparison with the penalty imposed on the much larger King County in *Yousoufian* for its “grossly negligent noncompliance with the PRA.”

Yousoufian V, 168 Wn.2d at 463. WSAMA speaks for cities of all sizes, and has an interest in ensuring that no municipality is ordered to pay a penalty so large that it causes extreme hardship. While the penalty must be large enough to deter any misconduct, a court should also consider the size and budget of the city in imposing a penalty. *Id.* at 468 (court considers size of the agency in determining penalty).

IV. CONCLUSION

On behalf of the City of Marysville and the Washington cities for which it speaks, WSAMA respectfully requests that this Court reverse the trial court's decision.

RESPECTFULLY SUBMITTED this 18th day of September, 2014.

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