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No. 74536-1-I

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

**THEODORE ROOSEVELT HIKEL, JR.  
resident, citizen, and registered voter,  
in the City of Lynnwood, Washington, Appellant**

**v.**

**CITY OF LYNNWOOD,  
a non-charter, municipal code city, Respondent**

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**REPLY BRIEF OF APPELLANT**

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## **Appellant's Reply Brief**

### **1. Reply Argument**

**Introduction.** This case provides the appellate court with an example of a local agency's failure, if not refusal, to meet its PRA duty to adopt and enforce reasonable rules for receiving, actually doing the records gathering, notifying requesters, and making records disclosures. Several founders of the state Public Records Officer Association (CP 71, Ex. G) wrote Chapter 6: *How Agencies Should Respond to Public Records Requests, Public Records Act Deskbook* (WSBA 2d.) (2014), and give the following excellent practical advice to ensure city PRA compliance:

**"6.3 General Requirements for Records Management and PRA Compliance.**

Requirements for agencies to ensure compliance with the PRA are discussed below.

**(1) Before the Request**

Compliance with the PRA **does not begin** when someone makes a PRA request. It is more effective for an agency to take **proactive** measures than to explain to a requestor (or **court**) **after-the-fact** fact **why it lacked proper rules and procedures.**" Emphasis added.

Mr. Hikel submitted his public records request on June 22, 2015. He did not receive in either of the city's two letters acknowledging his request, any reasonable estimate of time that might take to fully respond to his request. He did not receive the normal notification of the availability of records as the city has done for years, but did after this lawsuit was filed. From July 10, 2015, until after this lawsuit was filed, Mr. Hikel received no communications from the city in regards to his records request. On September 1, 2015, he personally went to City Hall to see if a records disclosure was ready. He was told no. He left a letter inquiring about the delay. Respondent Lynnwood refused to communicate with Mr. Hikel in regard to his personal or letter inquiry about his records request until after this lawsuit was filed. Respondent Lynnwood had no appeal procedure regarding the denial of access to records. The trial court ruled that the city's absolute silence was not a reasonable basis upon which Mr. Hikel could believe that the city it would not – at some unknown time in the future get around to disclosing the records. Essentially, the trial court ruled that Mr. Hikel should have remained at home – not to inquire, *i.e. don't contact the city, they'll contact you.*

**Easy Solutions**. Mr. Hikel has requested the inclusion of the following statement in this reply brief:

"I retired from Nordstrom after 25 years in sales and customer service. I also worked at JCPenney's in management 7 years. At all times, operations, standards and rules for all employees were focused on providing excellent, timely customer service. This entire case and tens of thousands of dollars in attorney's fees and costs, could easily have been avoided by the city of Lynnwood staff providing the most basic, common sense customer service. A simple telephone call, an email, or any other communication that would take a minute or two would have solved this case. Instead, the most simple and common communications with the citizen/customer were not done, even when a letter of inquiry is personally delivered to the city. And, no PRA administrative appeal process existed either, as required by state law. Good customer service only began to occur after the necessity of filing and serving this lawsuit.

I believe that the PRA mandatory requirement for reasonable rules and regulations were put there to ensure good

customer service to citizens, just like any other business does for its customers. I ask the Court of Appeals to use this business customer service analogy when thinking about this case. I believe very strongly in the purpose of the PRA.”

**RCW 42.56.030.** “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 ensure that the public interest will be fully protected.”

But, citizens cannot “maintain control over the instruments they have created” when an agency like the city of Lynnwood conducts its actual gathering and processing of records in response to a PRA request *without any reasonable rules and regulations governing how it conducts itself*. Citizens cannot hold the city accountable when everything is done in an opaque and secretive manner. Citizens only have, ultimately, the protection of the courts in the interpretation, guidance, and application, of the PRA.

- **Reply: Public Records Act (PRA) – Necessity of Rules.** The PRA is not a self-executing statute. As with virtually all policy statutes it must be administratively put into action.

“The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties. An agency

**must publish** its **methods** of disclosure and the **rules** that will govern its disclosure of public records. RCW 42.56.040(1). **A requester cannot be required to comply with any such rules not published** unless the requester receives actual and timely notice. RCW 42.56.040(2). More generally, an agency's applicable rules and regulations must be **reasonable** and must provide full public access ...”  
Emphasis added. *Resident action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 431- 432, 300 P.3d 376 (2013).

No one need comply with **secret, unpublished or “not prominently displayed”** administrative rules and processes.

RCW 4256.040. Absolutely none of the methods, processes or rules for actual gathering and processing records requests are anywhere included in the June 2005 Lynnwood rules.

- **Reply: City of Lynnwood Did Not Answer the Complaint.**

Respondent Lynnwood now attacks plaintiffs complaint structure. Superior Court Civil Rules 3 and 4 provide that a civil action such as here is commenced by complaint. Civil rule 7 provides that there **shall** be the complaint and an answer.”

Complaint paragraph 15, and paragraph 23 which specifically incorporates **“as though fully set forth herein,”** Exhibit A which is Hikel Declaration #1 and the *Motion to Show Cause*, which further includes its **supporting memorandum and documentation**, were all

subsequently fully incorporated "as if fully set forth herein" in paragraph 24 under Claims and Causes of Actions. CP265. All of those pleadings clearly set forth the statutory basis for the **duty of Respondent Lynnwood** and that it did not **take any actions to adopt and enforce** reasonable PRA rules and regulations. Those pleadings state clearly that Respondent Lynnwood has not fulfilled that duty. That is "fair notice of what the claim is" and the "ground upon which it rests." Northwest Line Construction v. Snohomish County PUD #1, 104 Wn. App. 842, 848 – 849, 17 P.3d 1251 (2001). Appellant/plaintiff's **complaint** clearly fulfills these broad requirements of notice pleading **under** our civil rules.

Accordingly, **Civil Rule 8(b)** requires that the Respondent/Defendant Lynnwood shall admit or **deny** the averments upon which the adverse party relies. **Under** CR 8 the consequences for **failing** to answer are clear. **Allegations** will be deemed admitted unless they are denied. Neilsen v. Vashon Island School District #402, 87 Wash. 2d 955, 558 P.2d 167 (1976). Here, Respondent Lynnwood did not at any **time** answer Mr. Hikel's **complaint** by **admitting** or **denying**, or

otherwise responding **as** mandated by CR 8. Thus, Respondent Lynnwood **never** denied that it had **failed** in its duty to adopt and enforce reasonable rules and regulations as alleged in the complaint. Failure to answer the original complaint negates all of Respondent Lynnwood's attempts on appeal now to raise for the first time issues and attack the substance and structure of Mr. Hikel's complaint. The consequence of not answering the complaint is another reason that the trial court's decision of dismissal is not soundly grounded and should be reversed.

- **Reply: The Trial Court Did Not Consider the Complaint.** The trial court did not consider Mr. Hikel's complaint. Specifically, its memorandum decision at CP 5, lines 16 – 20, omits any reference that it even considered Mr. Hikel's complaint as one of the documents upon which it made its decision. The trial court's Memorandum states:

"The court having considered the plaintiff's motion, the amended motion, the **three** declarations of Theodore Roosevelt Hikel, Jr., **with** attachments, the two declarations of Donald Gough and **attachments**, the city's response, the declaration of Debbie **Karber**, the declaration of **Jerry** Vogel, and the reply memorandum of plaintiff ..." CP 5.

Note there is no reference of consideration of plaintiff's complaint. Respondent Lynnwood has not shown any authority for a trial court to ignore and not consider a complaint required under Civil Rules 3 & 4.

- **Reply: Workload & Interference Issues with City Functions Raised by Respondent Lynnwood**

The city talks incessantly about the workload placed on the Public Records Officer (**PRO**) Karber and the impact of Mr. Hikel's records request. First, the city has three public records officers: City Hall –Karber; Police Department and Municipal Court. Management of the city PRO workload has nothing to do with Mr. Hikel. The courts has spoken many times on this topic. In Zenk v. City of Mesa, 140 Wn. App. 8, 342–344, 166 P3d 738, (Div. 3 2007) a citizen couple made **172 records during 30 months** to their very small city staff. The court noted the crucial role of reasonable rules and regulations to manage records requests:

“Former RCW 42.17.290 (1995) of the PDA [now PRA] addresses how agencies should cope with record requests that become so time-consuming that other work is impacted. Specifically, the law provides that an agency is to **adopt rules to prevent undue interference with the agency's functions.** It states in part, ‘Agencies shall adopt and enforce reasonable rules and regulations ... Consonant with the intent of this chapter to provide full public access to

public records ... and to prevent excessive interference with other essential functions of the agency.’ The city does not contend that it adopted any such rules. ”

Formerly RCW 42.17.340 (2), (2005) provides that judicial review “shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience ... to public officials.” Mesa at 338.

“The city’s argument here is similar to the argument rejected by the court in Hearst Corporation. The city insists – and the trial court agreed – that the city acted in good faith and did as good a job as it could have in the face of the numerous requests made by the Zink’s ...” Mesa at 338.

But, as the court in Mesa, strict compliance is still the standard for judging agency compliance, not substantial compliance, Here, Respondent Lynnwood, just like the City has no reasonable rules and regulations to management many or sizable public records requests. The trial courts order of dismissal should be reversed.

- **Reply: Misinterpretation and Misapplication of RCW 42.56.520**

The Model Rules are very clear about the requirement to give a requestor a reasonable estimate of time for full response to a request.

**WAC 44-14-04003: Responsibilities of Agencies in Processing Requests.**

Comment: “(6) Unless it is providing the records or claiming an exemption from disclosure within the five business day period, an agency must provide a

**reasonable estimate of the time it will take to fully respond to the request. RCW 42.50.520.”**

There is no such thing as an “open ended” 5 day letter response or a clarification request. That would be creating an exception within the structure of the PRA which is not authorized or justified. The city’s and court’s interpretation of this requirement are in error, and the court’s dismissal reversed.

- **Reply: Clarification of a Records Request**

The WSBA Deskbook, Chapter 6.4(3) states:

“An agency may seek clarification of an **objectively “unclear” request**. RCW 42.56. 520, see also Levy v. Snohomish County, 167 Wn. App. 94, 98–99, 272 P.3d 874 (2012) (rejecting requestor’s assertion that the county unlawfully delayed response by seeking clarification).”  
Emphasis added.

Mr. Hikel’s June 22, 2015, public records request was as clear as it could be:

“All electronic and hardcopy communications sent by and received by Council President Lauren Simmons and Council Assistant Beth Morris from January 1, 2014 to June 22, 2015.”

The records request form indicated he wished to visually inspect records before purchasing any. In its five-day mandatory response letter (June 29, 2015), the city shows that it did an exact count of how many records there were to

be disclosed. It knew exactly where all electronic email records were located. It needed no additional time to assemble the records. The request was objectively clear, requiring no “subjective” interpretation, or need for clarification, or need to determine the “intent” of Mr. Hikel. Respondent Lynnwood had no justification under the PRA to request or require a clarification. No criteria is stated in RCW 42.56. 520, justifying any clarification.

- **Reply: PRA Rules and Procedures Must be Prominently Displayed.** Rules and regulations are NOT prominently displayed as required by the PRA. RCW 42.56.040(1). See Hikel Declaration #3 at 7, CP 91.
- **Reply: Discovery on the Rules Issue.** Cases in the normal course evolve with the fact finding and discovery. Ted Hikel in support of his issue regarding the lack of reasonable rules and regulations, did on October 30, 2015, make a disclosure records request specifically about the City of Lynnwood records and procedures. Legal counsel for the city knew, or should have known, about this discovery request, but for whatever reason has chosen not to advise the court of the fact that the “rules” issue was pursued in the case by Mr.

Hikel. See Hikel Declaration #3, **Exhibit 7**, CP 91–99, and **Exhibits 9, 10, 11**, at CP 102-113.

- **Reply: Equitable Relief – Injunction Issue.**

The Superior Court is a court of law and equity. It has inherent power and authority to include in any of its decisions any equitable relief that it on its own motion could make. Specifically, Ted Hikel’s complaint specifically asked the court, “9. For such other relief as the court deems just, equitable and proper under the circumstances.”

CP266. Making a request for equitable relief in the reply to the show cause motion, *after discovery* was pursued and the city of *Lynnwood* was *fully aware* of that issue (failure to adopt and enforce reasonable rules and regulations) is proper.

- **Reply – Diligence Issue.** In order for a trial court to determine the “diligence” of any agency, it can only review, evaluate, measure an agency’s actions in regard to a handling a records request if it has some *relevant rational management criteria* and *methods*, and agency rules governing the handling of various sizes of requests,

reasonable level and scope of records searches, sequencing records work, prioritizing, notice to requesters, avoiding excessive interference, ensuring necessary communications with requesters regarding delays and notices that disclosures are available, and an appeal process for denial of access which is **required** by the PRA. None of these topics were even mentioned in the 2005 Lynnwood PRA procedures. (For a quality example of PRA reasonable, comprehensive, administrative rules and regulations, See **City of Kirkland** ordinance, resolution, and administrative rules and procedures at **Gough Declaration #2, Exhibit #E, CP 44 – 59; and Exhibit #F, CP 60 – 70**. Since Respondent City of Lynnwood has no such criteria, methods or rules, the trial court cannot adequately do its job and its dismissal decision here should be reversed.

- **Reply: No Issue on Digital Disclosure Formats.** There is no issue regarding digital format of disclosures, which Respondent Lynnwood admitted could be changed. Notice was given to the trial court that the digital issue regarding disclosure formats was resolved before the December 8, 2015 hearing.

- **Reply: “Strict compliance”** (Ap. Br. At 19) is still the standard for the review of the conduct of the city.
- **Reply: “Mistake”**: The trial court says that the consequences of the alleged unilateral “mistake” of the city of Lynnwood, all falls on Ted Hikel. The trial court decision means that Ted should have just stayed at home made no contacts, nor leave an inquiry letter as to the city’s delay, but, merely wait for the city to get around to contacting Ted, and that he should sit there having never been given a reasonable estimate of time by the city for fully responding to his request as required by the PRA. The effect of the trial court’s decision creates an absurd result.

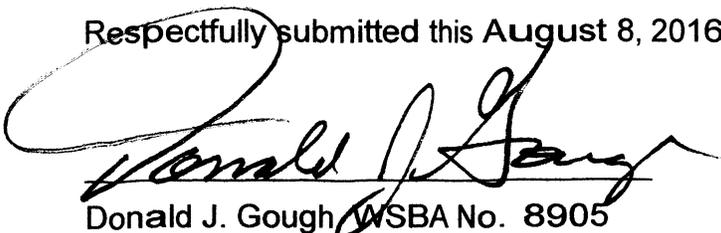
### **Reply: Conclusion & Summary of Requests to the Court**

We believe and request that the Court:

- Based upon the issues raised in this appeal that should be adjudged in Ted Hikel’s favor, and guidance given about express PRA polices, and mandated agency duties, and that the trial court’s order dismissing Appellant/Plaintiff’s Complaint, first and Amended Show Cause Motions should be reversed; and

- The case be remand to the trial court for further proceeding consistent with clear and workable guidance, especially on the express PRA policies, and mandated agency duties that Respondent City of Lynnwood should be actively seeking to accomplish such as developing, adopting and enforcing a quality set of reasonable rules and regulation which have appropriate “*methods*” and ways to ‘*facilitate*’ proper records request processing; and
- Remanding for the purpose of considering daily penalties; and
- That Appellant be awarded all PRA reasonable attorney fees, and actual reasonable costs, incurred for this appeal, based upon a submission to the court at the end of this case.

Respectfully submitted this August 8, 2016.



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ENCLOSED 8/8/2016 DECLARATION OF SERICE

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

AUG 8 - 2016

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

THEODORE ROOSEVELT HIKEL, JR. )  
an individual, resident, citizen, and )  
registered voter, in the City of Lynnwood, )  
Washington, )

Appellant (Plaintiff), )

vs. )

CITY OF LYNNWOOD, )  
a non-charter, municipal code city, )

Respondent (Defendant). )

No. 74536-1-I (Appeals Ct.)

DECLARATION OF SERVICE  
RE: APPELLANT'S REPLY  
BRIEF

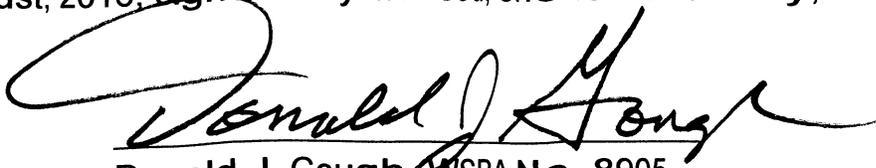
CLERK'S ACTION REQUIRED

I, Donald J. Gough, Attorney for Appellant, under penalty of perjury under the laws of the State of Washington, do hereby declare that on August 8, 2016, true and accurate copies of the following document(s) were served by email [rlarson@insleebest.com](mailto:rlarson@insleebest.com) and by U.S mail to the law offices of the Lynnwood City Attorney, Rosemary Larson, at 10900 N.E. 4<sup>th</sup> Street, Suite 1500, Bellevue, WA 98009-9016:

1. Appellant's Reply Brief
2. This declaration of service

Said document was also filed with the Court of Appeals on August 8, 2016.

**DATED** this 8<sup>th</sup> day of August, 2016, signed at Lynnwood, Snohomish County, Washington.



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