NO. 1034865

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE TREE FRUIT ASSOCIATION,

Petitioner,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Washington State Tree Fruit Association sued the Employment Security Department under the Public Records Act after the Department produced the second of many estimated installments of responsive records. Applying well settled precedent, the superior court properly dismissed the Association's improper withholding claims without prejudice because the claims were premature, as the Department had not taken final action on the Association's request. In an unpublished opinion, the Court of Appeals affirmed this straightforward ruling. *Wash. State Tree Fruit Ass'n v. Emp. Sec. Dep't*, No. 58341-1-II, slip op. at 1-2, 6-7 (Wash. Ct. App. Aug. 20, 2024) (unpublished).

While the superior court also properly concluded that the Department's estimate of time to produce the first installment of records was reasonable under the facts of the case, the Court of Appeals declined to consider the Association's appeal of that claim because the Association failed to adequately brief it. *Wash.*

State Tree Fruit Ass'n, slip op. at 2, 8-9. In seeking this Court's review, the Association has either abandoned this claim or briefs it so inadequately now as to warrant no consideration.

This case does meet any of the criteria for review under RAP 13.4(b). The Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

Did the superior court properly dismiss the Association's wrongful withholding claim without prejudice when the Department was continuing to produce large installments of records and had not yet taken final action?

III. STATEMENT OF THE CSE

A. The Public Records Request

In March 2022, attorney Sarah Wixson submitted a public records request to the Department on behalf of her client, the Washington State Tree Fruit Association.[1] CP 159, 165. The

[1] The Department was unaware that the Tree Fruit Association was the interested requestor until this suit was filed. All previous correspondence was conducted with Ms. Wixson or her firm.

request sought records related to an active federal lawsuit concerning the prevailing wage survey of agricultural workers conducted by the United States Department of Labor, *Torres-Hernandez v. Su*. *Id.* The Department was a party to that lawsuit because it administers the annual survey on behalf of the Department of Labor. The federal district court in that case had issued an order sealing specific records, which was binding on the Department. CP 163.

The request was assigned to Emily Kok, a Public Records Manager. CP 160. Ms. Kok and other Department staff began working to identify where responsive records may be stored, which staff may have responsive records, the required scope of a search, and best approaches for locating responsive records. CP 160. Originally, Ms. Kok estimated that a first installment of records would be available on April 5. CP 159.

B. A Technology Malfunction Impeded the Department's Ability to Promptly Conduct a Reliable Search

But in April 2022, ESD discovered that the electronic discovery software it uses to conduct records searches was not

producing reliable search results. CP 320. The Department immediately began working to resolve these issues with the vendor that provides the discovery software. *Id.*

It took approximately two months to fully fix the software issues so that the Department could reliably search for, locate, extract, and review responsive public records. *Id.* During that time, the Department regularly communicated to Ms. Wixson that it needed to extend its estimate of time for producing a first installment. CP 160-61; 173-84.

C. The Department Began to Produce the First of Many Anticipated Records Installments

Once the Department was finally able to conduct an adequate and reliable electronic search for records in mid-June, it initially identified tens of thousands of potentially responsive records. CP 162-63. It then began reviewing them for responsiveness and disclosure exemptions. *Id.* Given the nature of the request and the various state and federal confidentiality provisions that potentially applied, including the federal district court's sealing order in the pending litigation, the Department

sought input from subject matter experts and the Attorney General's Office to review whether the records or information was exempt from disclosure. CP 163.

Approximately one month after the technology issues were resolved, the Department mailed a first installment of more than 1,000 pages of records to Ms. Wixson. CP 161, 201-02. Some of those pages were redacted for attorney-client privilege and to comply with the federal district court's sealing order. CP 161, 210-12. Ms. Wixson then asked if the revocation of the sealing order would result in the production of unredacted records, and Ms. Kok responded with her understanding that the Public Records Act required the agency to apply the exemptions that existed at the time the request was made. CP 214.[2]

The following month, the Department produced a second installment of records. CP 161, 230-31. The Department again

[2] The *Torres-Hernandez* sealing order was lifted weeks after ESD produced the first installment of records, and approximately one week after this exchange. CP 9, 214-16.

redacted some records for attorney-client privilege or the *Torres-Hernandez* sealing order. CP 161, 230-31. The Department informed Ms. Wixson that it would continue to produce further installments of records. CP 161, 233, 242-43, 320-21.

D. After the Second Records Installment, the Association Sued the Department

Two days after the Department mailed the second installment of records, the Association sued the Department under the Public Records Act, setting forth two claims. CP 5-11. First, the Association alleged that ESD improperly withheld records as attorney-client privileged or exempt on the basis of the sealing order in the federal *Torres-Hernandez* case. CP 10, 27-32. And second, it claimed that ESD failed to provide a reasonable estimate of time for the production of records. CP 10.

E. The Superior Court Dismissed the Improper Withholding Claim Without Prejudice Because It Was Not Ripe, and Concluded the Department's Estimate of Time Was Reasonable

The Department moved for summary judgment dismissal of the claim for improper withholding without prejudice, because

its production of records responsive to the request was ongoing. CP 247-54. In fact, the Department was still responding to the request at the time it filed its motion. CP 242-43. Accordingly, the agency had not taken any final action, and any allegation of improper redaction or withholding was premature. CP 333-35.

The superior court granted the Department's motion and dismissed the Association's improper withholding claims without prejudice. CP 333-34. The Court orally ruled: "The court at this time is granting the motion for summary judgment, but only as to the particular allegation of a violation of the PRA based upon improper withholding of responsive records." VRP Vol. 1, 15:24-16:2. The court's written order reflected this: "It is further ordered that Plaintiff's claim for improper withholding of records under Washington's Public Records Act, chapter 42.56 RCW is dismissed without prejudice." CP 334.[3]

[3] After filing its Notice of Appeal, the Association filed an untimely motion for reconsideration in the superior court, which it improperly captioned a "Motion for Clarification," asserting that the summary judgment order had not dismissed its improper

Later, on the merits of the estimate of time claim, the superior court ruled that the Department's estimate of time to produce the first installment of records was reasonable under the circumstances, given the ongoing technology challenges and the complexity and volume of records the Department later needed to review and produce. CP 545-47; VRP Vol. 3, 16:2-17:6.

F. The Court of Appeals Affirmed the Dismissal of the Association's Withholding Claims Without Prejudice and Declined to Review the Estimate of Time Ruling

On appeal, the Association argued that the Department had taken "final action" when it clarified and declined to "rescind" its redactions. Appellant's Opening Br. at 16-17. It further argued that the trial court erred in interpreting its own oral summary judgment ruling as dismissing without prejudice its improper redaction claim, which the Association argued was somehow distinct from its improper withholding claim. *Wash. State Tree*

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withholding claim. CP 352-56. That motion was denied. CP 426-28; *see also* VRP Vol. 2, 6:15-18 ("The Court: . . . So I'm going to read directly from the order. 'It is ordered that the plaintiff's claim for improper withholding of records under the Public Records Act is dismissed without prejudice.'").

Fruit Ass'n, slip op. at 5-6. It suggested it should be permitted to proceed with its improper "redaction" claim. It made this argument despite the fact that it expressly stated at the summary judgment hearing, "we think that the redactions are a failure to produce the records." CP 385.

The Court of Appeals concluded that the superior court's summary judgment order "unambiguously dispose[d] of the improper withholding claim," and "the written order controls over any conflict with the trial court's ruling." *Wash. State Tree Fruit Ass'n*, slip op. at 7. Accordingly, "the Association's argument that it should be allowed to proceed with its improper redaction claim fail[ed]." *Id.*

With respect to the estimate of time claim, the Court found that the Association failed to challenge the relevant factual findings and inadequately briefed the issue. *Id.* at 7-9. Accordingly, it declined to review the issue under RAP 10.3(a)(6). *Id.* at 9.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Association's Petition for Review barely musters an argument for this Court's review of a run-of-the-mill public records case involving settled law. Petition at 6-8. In an attempt to generate a conflict where none exists, it misconstrues *Cedar Grove Composting, Inc. v. City of Marysville* to claim that it should be permitted to sue an agency for wrongfully withholding or redacting public records before the agency has taken final action. Petition at 7-8. And it is not even clear whether the Association continues to challenge the superior court's ruling that the Department's estimate of time to produce records was reasonable under the circumstances. If it does, any argument is woefully insufficient to merit this Court's consideration.

Because there is no conflict with any appellate decision, and the Petition does not involve any issue of substantial public interest, the Court should deny review. RAP 13.4(b).

A. Review of the Wrongful Withholding Claim Should Be Denied

The Association mistakenly claims that the superior court's dismissal without prejudice of the wrongful withholding claims as premature conflicts with *Cedar Grove Composting, Inc. v. City of Marysville*. Petition for Review at 7-8. It does not.

Washington courts have consistently held that the Public Records Act, chapter 42.56 RCW, requires an agency to take a "final action" withholding records before a requestor may bring a claim for improper withholding under RCW 42.56.550(1). "Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record." *Hobbs v. State*, 183 Wn. App. 925, 935-36, 335 P.3d 1004 (2014); *Cortland v. Lewis Cnty.*, 14. Wn. App. 2d 249, 259, 473 P.3d 272 (2020) (requester's lawsuit challenging the County's claim of an exemption was premature when the County was in the process of providing requester another installment of records); *Freedom Found. v. Dep't of Soc. & Health Svcs.*, 9 Wn. App. 2d 654, 664,

445 P.3d 971 (2019) ("a requestor cannot initiate a lawsuit" challenging the denial of a records request "until the agency has denied *and closed* the request at issue" (emphasis added)).

Here, the Department had produced just two installments of records when the Association filed suit. CP 201-02; 230-31. It had informed the Association that it intended to continue to produce records on an installment basis. CP 161. And in fact, it continued to produce large installments of records throughout the litigation. CP 320-21. Yet the Association sued the Department only two days after the Department mailed the second installment of records. The superior court thus properly applied *Hobbs* and dismissed the Association's wrongful withholding claims without prejudice as premature, because the Department had not yet taken final action. *Hobbs*, 183 Wn. App. at 935-37; CP 388. If a requester could immediately file suit each time it received an installment with allegedly improper redactions, any large production of records could result in multiple PRA lawsuits

and piecemeal litigation for the same request, clogging the courts and overburdening agencies.

The only case the Association claims is in conflict is *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 704, 354 P.3d 249 (2015). But there is no conflict. Unlike here, in that case, the City had produced its final installment of records before the plaintiff filed suit. *Id.* at 705. Thus the Court did not even consider whether the claims for wrongful withholding were premature, because those were not the facts presented. Rather, the Court considered whether the City's post-final-production but pre-litigation disclosure of previously redacted records precluded the trial court from imposing penalties for the original, wrongful redactions. *Cedar Grove*, 188 Wn. App. at 713-15. It was in that context that the Court stated the City's "pre-litigation production of . . . records" did not "insulate[] it from all PRA penalties." *Id.* at 715. That simply does not conflict with the superior court's dismissal of the Association's wrongful withholding claims without prejudice,

which was based on the fact that the agency's response to the records request was ongoing. The superior court was not considering whether penalties were appropriate based on later-produced, unredacted records; it merely considered whether the claims could be brought now.

Because there is no conflict with a decision of the Court of Appeals, review should be denied. RAP 13.4(b)(2).

B. The Reasonable Estimate of Time Argument is Waived

As it did in the Court of Appeals, the Association inadequately briefs the estimate of time claim. In fact, in its Petition, it is not even clear whether it is seeking review of this issue. The only hint that it is continuing to pursue this argument is a few paragraphs, under the heading, "This Case Involves an Issue of Substantial Public Interest." Petition at 6. The Association cites and quotes PRA cases, making oblique reference to "'diligently mak[ing] every reasonable effort." Petition at 6. But it is not clear whether this is an attempt to articulate a basis for reviewing the dismissal of the improper

withholding claim or an attempt at seeking review of the estimate of time ruling. Either way, the Association's boilerplate language about the importance of the Public Records Act does not come close to demonstrating that the case involves an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

If the estimate of time issue was not waived below by inadequate briefing (and it was, as the Court of Appeals found), it certainly is waived now. Review should be denied.

V. CONCLUSION

The Court should deny the Petition for Review.

This document contains 2,424 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of November, 2024.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of November 2024, in Seattle, Washington.

MICHAEL SAWYER, Paralegal

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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