

No. 70657-8-I

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

BETH and DOUG O'NEILL,

Plaintiffs/Respondents

v.

CITY OF SHORELINE and MAGGIE FIMIA,

Defendants/Appellants

AMICUS CURIAE BRIEF OF
WASHINGTON COALITION FOR OPEN GOVERNMENT
IN SUPPORT OF PLAINTIFFS/RESPONDENTS

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I. INTRODUCTION

WCOG is interested in this case because it affects the public's ability to hold public officials accountable for how they conduct public business. A key tool that enables this ability is the mandatory attorney fees provision in RCW 42.56.550(4) that awards said fees when citizens succeed in PRA litigation. In general, Amici have an interest in "strict enforcement" of RCW 42.56.550(4), because it is a primary means by which Amici and their members and other citizens may hold government accountable.

II. INTEREST AND IDENTITY OF AMICUS

The Washington Coalition for Open Government ("WCOG") is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an engaged citizenry. WCOG regularly participates as amicus in appeals raising open government issues. For instance, WCOG was an intervenor in John Doe No. 1 v. Reed, 561 U.S. 186, 130 S.Ct. 2811 (2010), which helped establish the public's right to know who signs referendum petitions.

III. DISCUSSION

The attorney fees provision in RCW 42.56.550(4) represents a Legislative policy choice that promotes the overarching purpose of the Public Records Act. RCW 42.56.550(4) mandates that attorney fees shall be awarded to litigants who succeed in obtaining disclosure from a recalcitrant agency.

“The stated purpose of the Public Records Act (“PRA”) is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Disclosure of public records allows citizens to scrutinize how public officials conduct public business and to hold them accountable for such conduct. RCW 42.56.550(4) creates a new, substantive right to attorney fees when citizens, as in this case, successfully litigate to get such disclosure.

The PRA’s attorney fee provision, RCW 42.56.550(4), “is of critical importance to the Act. It is the glue that holds the Act together and

makes it effective.”¹ Without this provision, citizens could not afford to litigate when an agency wrongfully denies a public records request and agencies would have no financial incentive to comply with the Act. The Supreme Court requires “strict enforcement” of the attorney fee provision to discourage “improper denial of access to public records.” Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005).

“[P]ermitting a liberal recovery of costs” to a successful requestor “is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 115, 975 P.2d 536 (1999).

WCOG sees no basis to disturb the award of fees ordered by the trial court on August 2, 2012. CP 28-29. Further, the Judgment on Offer and Acceptance even states that the settlement amount, “does not include costs, including attorney’s fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument.” CP 55-56. (emphasis supplied)

The Appellants now claim that alleged non-compliance with CR 54(d)(2) precludes the court from awarding attorney fees to the

¹ “Public Records Act Deskbook,” Washington State Bar Association (2006 and 2010), § 17.1.

O’Neills. This argument fails for several reasons. First, it ignores the discretion built into the rule for the trial court, that can “otherwise provide” a different timetable, which is what the trial court did in this case.

Second, the Appellants pit the technical language of a court procedural rule against the mandatory language of a statute that creates a substantive right to attorney fees.² In this circumstance the statute prevails, and must be enforced. “If a statute appears to conflict with a court rule, we [courts] will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. Putnam v. Wenatchee Valley Med. Ctr., 166 Wash.2d 974, 980, 216 P.3d 374 (2009). State v. Diaz, 161 Wn. App. 500, 508, 251 P.3d 249 (2011).

Third, and most important, denial of attorney’s fees solely on a technical basis would contradict the important policies of the PRA as discussed above. Such a ruling would not constitute “strict enforcement” of RCW 42.56.550(4). Spokane Research, supra. It would not promote the “liberal recovery of costs” to further the PRA’s policies. Am. Civil Liberties Union, supra. WCOG foresees great harm to the PRA’s

² Statutes creating a new right to attorney fees are substantive. In re Kronenberg Family Trust, 98 Wn. App. 1058 n.30 (2000), citing State v. Blank, 131 Wn.2d 230, 250, 930 P.2d 1213 (1997).

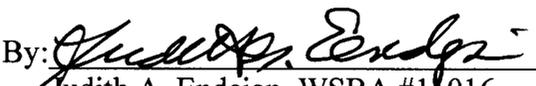
necessary enforcement mechanism if an agency is relieved of a statutorily-mandated obligation due to hyper-technical application of a court rule in the context of a CR 68 Offer of Judgment, which embodies an agreement between the parties. The trial court in August 2012 ordered that the O'Neills would be paid their fees and costs. The Appellants in their Offer of Judgment and the agreed Order agreed that the O'Neills would be paid their fees and costs in an amount to be determined by the trial court. It would be highly inequitable to relieve Appellants of this obligation and commitment. To do so provides a windfall to the Appellants and harsh punishment to the requestors—a result completely at odds with the purpose of the attorney's fee provision in the PRA.

IV. CONCLUSION

WCOG urges this Court to uphold the award of attorney fees to the O'Neills.

Respectfully submitted this 1st day of May, 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Amicus Curiae Brief of Washington Coalition For Open Government In Support Of Plaintiffs/Respondents, by **Email** pursuant to agreement with backup by **regular U.S. Mail** on the 1ST day of MAY, 2014, to the following counsel of record at the following addresses:

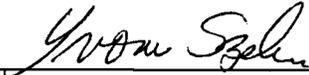
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