

No. 93120-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CARLOS BENITEZ, JR.,

Petitioner,

v.

SKAGIT COUNTY,

Respondent.

SKAGIT COUNTY'S RESPONSE TO
PETITION FOR REVIEW

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INTRODUCTION

Benitez erroneously argues that Skagit County acted in bad faith simply because it admitted that it erred when it denied his request for public records. This argument ignores undisputed evidence presented to the trial court that the county did not act in bad faith and RCW 42.56.565, which clearly and unambiguously provides that an inmate is not entitled to penalties “unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.”

Benitez does not dispute that the record establishes that Skagit County’s error was made following a good faith effort to determine whether an exemption applied to the records Benitez requested. There is no evidence that any Skagit County officer acted in bad faith or with an intent to violate the PRA. Thus, because Benitez was an inmate at the time he made his request, he is not entitled to an award of a penalty for the violation the county conceded on a later review and the court should deny his petition for review.

ISSUE PRESENTED FOR REVIEW

Benitez fails to show that review is warranted under RAP 13.5(b), but if Benitez’s Petition for Review were granted, the issue would be:

In the absence of evidence that the county acted in bad faith when it denied Benitez' request for records, did the trial court properly deny an award of per diem penalties after the county conceded error based on a change in post-denial case law?

STATEMENT OF THE CASE

Benitez does not challenge the statement of the case prepared by the court of appeals, which after discussing Benitez' burden to prove "bad faith" provides in part:

...

In his declarations below, Benitez contested few facts and focused instead on the legitimacy of Miller's legal grounds for withholding the records. He argued that Miller's legal analysis was flawed because the "other statute" exemption applies only when another statute or court rule *expressly* exempts specific records. But our courts have held that "[a]n exemption may be found in an 'other statute' even if it is not stated explicitly." *White v. Skagit County*, 188 Wn. App. 886, 890-91, 355 P.3d 1178 (2015) (citing authority existing at the time of DPA Miller's decision), *review denied*, 185 Wn.2d 1009 (Mar. 4, 2016); *see also White v. Clark County*, 188 Wn. App. 622, 636-37, 354 P.3d 38 (2015) (statutes "inconsistent with [disclosure under] the PRA" came within "other statute" exemption), *review denied*, 185 Wn.2d 1009 (Mar. 4, 2016); *John Doe v. Wash. State Patrol*, No. 90413-8, 2016 Wash. LEXIS 474 (Wash. April 7, 2016) (dissenting opinion citing cases).

Furthermore, when Miller made her decision to withhold the records, no court had yet addressed

whether a *protective order* issued under a court rule could fall within the “other statute” and/or “litigation” exemptions in the PRA, or could otherwise preclude disclosure under the PRA. Former RCW 42.17.260(1); RCW 42.56.070(1); RCW 42.56.290. That question first arose in *Mendoza De Sugiyama*, 182 Wn. App. 588, 330 P.3d 209. In a split decision, the majority concluded that a protective order does not exempt records from disclosure under the PRA unless the records are expressly not discoverable under pretrial discovery rules. The majority acknowledged, however, “that *reasonable minds might differ and reasonable minds might hold* that the government's interest in conducting its trials and handling discovery is a vital government interest that outweighs the interests of public disclosure under the PRA.” *Mendoza De Sugiyama*, 182 Wn. App. at 604 (emphasis added). The dissent framed the issue as “whether the PRA may be used by a litigant to frustrate a discovery order binding that litigant.” *Mendoza De Sugiyama*, 182 Wn. App. at 607 (Bjorgen, J., dissenting). The dissent concluded that records made unavailable by a protective order are exempt from the PRA under the “litigation” exception, RCW 42.56.290. *Mendoza De Sugiyama*, 182 Wn. App. at 609 (Bjorgen, J., dissenting). *Mendoza De Sugiyama* thus demonstrates that DPA Miller's assessment of the law was not so farfetched as to constitute bad faith.

Given the uncertainties in the relevant law, the serious safety concerns expressed by the court issuing the protective order, and the detailed and largely uncontroverted declarations submitted by the County on summary judgment, the superior court did not err in concluding there were no genuine issues of fact as to whether DPA Miller's decision was made in bad faith.

Benitez v. Skagit County, Div. I no. 73626-4-I at 18-20 (Unpublished Opinion) (April 18, 2016).

Material to the court's decision, Benitez was an inmate with the Washington State Department of Corrections at the time he submitted his June 17, 2012, request for public records. CP 292. Also material was DPA Miller's considerable Public Records Act (PRA) experience, CP 277-78, and detailed analysis of how she had considered Benitez' request for records and her reasoning for denying it. CP 279-83. Further, following the court's decision in *Department of Transportation v. Mendoza De Sugiyama*, 182 Wn. App. 588, 330 P.3d 209 (2014), Skagit County reviewed the denial, released the requested records, and conceded before the Whatcom County Superior Court in the cause under review there, *Benitez v. Skagit County*, Whatcom County Superior Court cause no. 13-2-02116-8, that the county had violated the PRA when it denied Benitez' request. CP 213. This left only one issue for the trial court to consider: whether the county acted in bad faith when it denied Benitez' June 17, 2012, request for public records. CP 221.

Benitez seeks review of the court of appeals decision finding that he failed to meet his burden of proving that Skagit County acted in bad faith.

ANALYSIS

A petition for review will be accepted only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

- A. There is no conflict between the two divisions of the court of appeals and neither decision conflicts with Supreme Court precedent.**

The PRA explicitly provides that the lack of bad faith will preclude the imposition of civil penalties on a wrongful denial of disclosure when the requestor was an inmate at the time he made his request. See RCW 42.56.565(1).

The court of appeals explained the applicable law:

"Bad faith" is defined as "'a wanton or willful act or omission by the agency.'" *Adams v. Dep't of Corr.*, 189 Wn. App. 925, 938-39, 361 P.3d 749 (2015) (quoting *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 103, 332 P.3d 1136 (2014), review denied, 182 Wn.2d 1004 (2015)). Bad faith is more than mere negligence or a mistake, but it need not be intentional. *Faulkner*, 183 Wn. App. at 102. Thus, an agency is not guilty of bad faith

"for making a mistake in a record search or for following a legal position that was subsequently reversed."

Francis v. Dep't of Corr., 178 Wn. App. 42, 63, 313 P.3d 457 (2013), review denied, 180 Wn.2d 1016 (2014). Nor is it bad faith to withhold the names of police officers if the motivation for withholding is "to protect the safety ... of [the] officers" and the basis for withholding is "not so farfetched as to constitute bad faith." *Francis*, 178 Wn. App. at 54 (quoting *King County v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002)); *Faulkner*, 183 Wn. App. at 105. An agency acts in bad faith when it acts "unreasonably with utter indifference to the purpose of the PRA." *Faulkner*, 183 Wn. App. at 105. Thus, failure to conduct a reasonable search for records, a "cursory search and delayed disclosure well short of even a generous reading of what is reasonable under the PRA," or withholding based on an indefensible view of the law may support a finding of bad faith. *Francis*, 178 Wn. App. at 63-64; *Faulkner*, 183 Wn. App. at 105; *Adams*, 189 Wn. App. at 945-52.

Benitez v. Skagit County, Div. I no. 73626-4-I at 15-16 (Unpublished Opinion) (April 18, 2016).

Benitez offers no citation to authority or reasoned analysis to show that the court of appeals decision conflicts with any decision of any other division of the court of appeals or of this court. Nor does he attempt to distinguish any of the cases cited by the court of appeals in support of its decision.

Benitez' implicit argument that the county must have acted in bad faith because it erroneously denied records ignores two key points. First, except for requests made by inmates, the imposition of penalties is independent of whether an agency acted in bad faith. Second, Benitez was an inmate at the time that he made his request, which fact requires him to demonstrate bad faith on the agency's part before any penalty may be imposed on the county.

B. Benitez' issues do not present a significant question of constitutional law.

Benitez fails to show how any constitutional right is implicated by this case.

C. Benitez' petition does not raise substantial public interest.

In *Department of Transportation v. Mendoza De Sugiyama*, 182 Wn. App. 588, 330 P.3d 209 (2014), the court clarified that, except in limited circumstances, protective orders issued under the court rules do not qualify as exemptions under the PRA. The *Sugiyama* decision effectively bars a repeat of the decision presented to Skagit County, which at the time was a question of first impression. Thus, this case does not raise a question of substantial public interest.

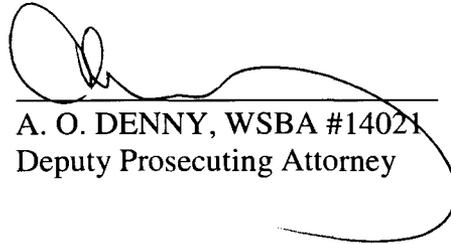
CONCLUSION

Benitez fails to meet the standard for acceptance of his petition for review. It should be denied.

RESPECTFULLY SUBMITTED this 26th day of September, 2016.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By:

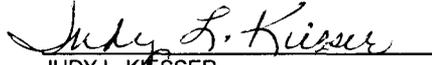

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DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; [xx]United States Postal Service; []ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to CARLOS BENITEZ, JR., DOC #715131, AHCC, PO BOX 2049, AIRWAY HEIGHTS, WA 99001.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 21st day of September 2016.


JUDY L. KIESSER