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Supreme Court No. 93819-9 Court of Appeals No. 73165-3-I

Eric Hood,

Petitioner,

v.

South Whidbey School District,

Respondent

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

This Answer to the Petition for Review is offered by Respondent the South Whidbey Island School District ("District").

II. INTRODUCTION

Proceeding pro se, Petitioner Eric Hood requests that the Court accept review to "clarify" "the evidentiary standards for affidavits" offered by agency witnesses in Public Records Act cases. Pet. at 1. There is no suggestion anywhere in the record, however, that the trial court, the Court of Appeals, or the parties' respective counsel were confused about any of the governing standards, nor did any party raise this as an issue below. More importantly, the Court of Appeals decision does not conflict with any decision of this Court, and Hood's Petition does not raise any issue of substantial public importance meriting this Court's review.

After he was fired for poor teaching performance, Hood made dozens of overlapping public record requests of the District, his former employer. Before the trial court, Hood acknowledged that the District largely complied with the PRA's procedures and that there was no evidence of intentional District malfeasance. The trial court awarded him penalties and fees for those documents that were located and voluntarily produced to him after his requests were closed.

Hood appealed, largely on the basis of his own self-serving allegations that the District's witnesses were not credible. The Court of Appeals reviewed the fact-intensive record de novo, affirmed the trial court's extensive and thorough factual findings on the PRA claims, and remanded for recalculation of the attorneys fee award. Thereafter, Hood's counsel withdrew.

Despite casting his Petition as a request for a new legal standard for a public agency's sworn statements, Hood simply reargues the same credibility issues for the third time to this Court. The Petition should be denied.

III. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Should this Court accept an invitation to create a new "evidentiary standard" solely for PRA cases—a standard that would apply only to agency employee testimony regarding the scope of the agency's search for public records—where the need for a special legal standard was not raised below, where the trial court's extensive findings regarding the agency's searches were amply supported by the entire record and affirmed after de novo review in the Court of Appeals, and where Petitioner fails to articulate what new legal standard he is proposing?

2. Does a Petitioner's request for a new "evidentiary standard" solely for agency testimony regarding the scope of the agency's search for public records raise an issue of substantial public importance?

IV. COUNTERSTATEMENT OF THE CASE

A. Background

Hood has been challenging the non-renewal of his District teaching contract since he was dismissed in 2010. CP 219 (FF 5). Initially Hood arbitrated the District's decision to fire him. FF 5. The arbitrator, the Honorable Judge Alsdorf, upheld the District's decision. FF 5; CP 2846–2958. Hood then began filing lawsuits against the District. FF 6.

Following the arbitration and beginning in June 2011, Hood made a series of public records requests of the District. FF 8, 22. As of August

¹ The trial court's December 15, 2014 Order contains over seventy findings of fact and conclusions of law. CP 218-42. Hood did not challenged the majority of the trial court's findings, which are cited individually as "FF."

² Hood's first federal lawsuit alleged that the District and Hood's Union conspired to select the arbitrator in violation of the collective bargaining agreement. The United States District Court for the Western District of Washington dismissed that case with prejudice. FF 6.

Hood's second federal case alleged, among other things, that the District's conduct in pre-arbitration discovery denied his constitutional right to access the courts in violation of 42 U.S.C. § 1983. This action was also dismissed, a dismissal later affirmed by the Ninth Circuit. FF 7; *Hood v. South Whidbey Sch. Dist.*, No. 14-35256, 605 Fed. Appx. 665, 2015 U.S. App. LEXIS 8563 (9th Cir. May 22, 2015).

5, 2011, two months after he started, Hood had already made 25 different requests of the District. FF 22. In response to Hood's requests, the District produced thousands of records to him. FF 9. Hood alleged that the District's searches for records were inadequate because some responsive records were not immediately located and produced. FF 8–9.

B. The Trial Court

Before the Island County Superior Court, the parties prepared cross motions for judgment, and the trial court heard the matter on June 27, 2014. FF 2. The court reviewed the District's actions in responding to Hood's requests de novo under RCW 2.56.550(3). FF 1. At hearing, the parties specifically agreed that the case was appropriately decided on the basis of affidavits pursuant to RCW 42.56.550(3). FF 2.

The process of responding to Hood's dozens of requests for records is set out in testimony from District witnesses, including Superintendent Jo Moccia; Brian Miller, District Director of Facilities and Operations; District attorneys Laura Clinton and Carlos Chavez; Technology Operations Manager Thomas Atkins; and Dan Poolman, the Assistant Superintendent of Business, among other record evidence. FF 29. These District witnesses provided sworn declarations, testifying in detail about the process of receiving, reviewing, and responding to Hood's requests. Superintendent Moccia testified about the dozens of requests

Hood made of the District and how she directed District staff to search for responsive records. CP 2811-2820 at ¶¶ 15–57; CP 420-28. Moccia specifically refuted Hood's speculation that she failed to supervise the review and production process, and addressed his various allegations about other records requests. CP 418–20 at ¶¶ 3-6.

Likewise, the District's technology director testified about the many searches he conducted for electronic records. CP 2794–99 at ¶¶ 4-19. District counsel testified in detail about aspects of the collection and review of records, and the creation of exemption logs to track those that were withheld. *See* CP 2864-67 at ¶¶ 3–11; CP 3051. Individual staff confirmed that they searched their files as appropriate in response to Hood's requests. *See.*, *e.g.*, CP 718-20 at ¶¶ 6-16 (Poolman); CP 3046 at 35:5–15; CP 3044 at 29:8–18; CP 3042 at 18:10–21:12 (Terhar).

District witnesses repeatedly confirmed under oath that they fully intended to provide Hood with all responsive records, that they conducted searches with diligence and in good faith, that none of them had any personal motivation to withhold materials from him, and that any minor errors in locating and producing records were a result of inadvertence and not an intent to interfere with Hood's access to public records. *See* CP 2799 at ¶ 10 (Miller) ("I have conducted all searches to the best of my ability, I have pulled and reviewed all responsive documents located by

my searches, and I have worked with the District Superintendent and its counsel to provide all records located."); CP 2820 at ¶ 47 (Moccia); CP 728 at ¶ 13 (Atkins); CP 722 at ¶ 16 (Poolman).

In response, Hood attacked the credibility of District witnesses and alleged that that he suffered actual, personal economic loss in federal court resulting from the District's conduct that should be considered an aggravating factor for penalties. FF 55–57. The trial court expressly found Hood's arguments on economic loss frivolous. FF 55; **see also* FF 56 (federal court orders show that "United States District Court Judge Richard A. Jones . . . sanctioned Hood for filing 'two motions with baseless accusations of fraud and perjury."). Indeed, the court noted that Hood's admission that District documents showed no pretextual intent to fire him was in fact a tacit admission that his federal court motions were not well grounded in fact. FF 57; see also CP 345 (Hood).

After reviewing all the evidence, the trial court found the District's searches reasonable. *See e.g.*, FF 28 ("After due consideration of all of the evidence in this case, the Court concludes that the District's searches for records in response to Hood's requests were reasonable. The District's

³ Before the Court of Appeals, Hood did not assign error to any of the findings related to his assertions that the federal court sanctioned him as a result of District conduct, nor would such a challenge have any merit. *See* CP 750–58 (federal order).

searches were reasonably calculated to uncover all relevant documents"); FF 35 ("The District engaged in earnest, good faith, efforts to respond to Hood's requests. Its searches for records were reasonable and calculated to uncover all relevant documents."); *see also* FF 31.

C. The Court of Appeals

Hood appealed, taking particular issue with the trial court's findings that the District's searches were reasonable and its related credibility determinations. *See* Hood COA Op. Br. at 2 (issue 1, challenging FF 28, 30–33, 35, 53); COA Slip. Op. at 10.

The Court of Appeals declined to apply any deference to the trial court's findings, proceeding instead to conduct a de novo review of the entire record. COA Slip. Op. at 10 (declining to apply "the principles from cases such as <u>Dolan</u> and <u>Rideout</u> when reviewing PRA decisions where the trial court resolved disputed factual issues," and instead reviewing record de novo under *PAWS*).

Accordingly, the Court of Appeals examined in detail all of the evidence concerning the District's searches. *Id.* at 11–22. After its de novo review, a unanimous panel specifically affirmed the trial court's determination that the District's searches were adequate:

After reviewing the record, we are convinced that the trial court properly determined that the District's searches were adequate. These nonconclusory declarations from District employees provide significant detail about the type of search performed, the search terms utilized, and the locations searched. On these facts, it is clear that the District's searches were reasonably calculated to uncover all relevant documents.

Id. at 20. The Court of Appeals also directly addressed Hood's continued claims that the District's witnesses were not credible:

Hood presents a number of arguments challenging the declarations of the District's employees. In general, he contends that their testimony was unreliable and incredible and that it misled the trial court. We reject all of his arguments.

Id. at 20. Hood now asks this Court to accept review under RAP 13.4(b)(1) or RAP 13.4(b)(4) in order to examine his credibility allegations for a third time. Pet. at 8 n.9; *id.* at 10 n.11.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Petition does not present a legitimate basis for Supreme Court review under either RAP 13.4(b)(1) or RAP 13.4(b)(4). Hood claims that the Court of Appeals opinion conflicts with prior holdings of this Court, and asserts that agency testimony in a PRA case should be held to "a higher evidentiary standard to ensure that agencies bear the proper burden of proof." Pet. at 7. Yet, there is no indication anywhere that the Court of Appeals failed to apply the proper evidentiary standards to the testimony of District witnesses or to properly allocate the burden of proof. Nor is there any support for Hood's contention that it is necessary for the Court

to create specialized standards for agency testimony in PRA cases and that such standards are an issue of material public importance. The Petition fails to satisfy either of the asserted criteria for this Court's review and it should be dismissed.

A. The Court of Appeals Opinion Does Not Conflict with Prior Rulings Concerning the Public Records Act.

There is no conflict between the Court of Appeals decision and any ruling of this Court. To the contrary, it is black-letter law that Washington public agencies must conduct reasonably adequate searches in response to records requests, and that the touchstone for evaluating the adequacy of an agency's search is reasonableness. Neighborhood All. of Spokane Cty. v. Spokane Cty., 172 Wn.2d 702, 720, 261 P.3d 119 (2011) ("The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents."). Reasonableness, in turn, is inherently a fact-specific inquiry: "What will be considered reasonable will depend on the facts of each case." Id. at 720; see also Bartz v. Dep't of Corrs. Disclosure Unit, 173 Wn. App. 522, 533, 540, 297 P.3d 737 (2013) (affirming dismissal under CR 12(b)(6) where DOC conducted reasonable search); Francis v. Wash. Dep't of Corrs., 178 Wn. App. 42, 63, 313 P.3d 457 (2014) (inadequate search where DOC spent no more than 15 minutes on request, failed to check any

usual record storage locations, and offered no explanation for perfunctory search).

Hood contends that the testimony of District witnesses in this case regarding the searches they conducted was conclusory and not subject to sufficient judicial examination, to such a degree that the Court of Appeals opinion conflicts with this Court's prior rulings that agencies "may rely on reasonably detailed, nonconclusory affidavits submitted in good faith." Pet at 8. This contention is demonstrably wrong.

The record details the huge outlays of staff and attorney time expended to identify, locate, and produce records to Hood. *See*, *e.g.*, CP 418–28; CP 718–20; CP 722; CP 728; CP 2794–99; CP 2811–20; CP 2864–67; CP 3042 at 18:10–21:12; CP 3044 at 29:8–18; CP 3046 at 35:5–15; CP 3051. The District's searches were reasonably calculated to collect all responsive public records. *Id.* With very few exceptions, the District's searches did in fact locate responsive documents, and it disclosed (either by exemption log or production) the responsive records that it found. *See*, *e.g.*, CP 2811–14 (Moccia, describing searches and productions); *see also Lazaridis v. U.S. Dep't of State*, 934 F. Supp. 2d 21, 31 (D.D.C. 2013) (agency demonstrated reasonable search where declarant described searches that located 212 responsive documents) (FOIA decision).

Here, the trial court examined the sworn statements of the District's witnesses carefully, in the context of the entire voluminous record, before finding that the District's searches were undertaken in good faith and were reasonable. *See* FF 35 (the District's "searches for records were reasonable . . . The testimony of the District witnesses on these issues is credible, and Hood's contrary allegations lack record support."). In response to Hood's challenges on appeal, the Court of Appeals again reviewed in detail the testimony concerning the District's searches, devoting a substantial portion of its Opinion to that review. COA Slip Op. at 11–22. Upon review, the Court of Appeals found that District employees offered "nonconclusory declarations" that "provide[d] significant detail about the type of search performed, the search terms utilized, and the locations searched." *Id.* at 20.

Hood's suggestion that the Court of Appeals unwittingly deferred to the District under traditional Administrative Procedure Act doctrine is unsupportable. *See* Pet. at 9 n.10. To the contrary, the Court of Appeals was absolutely clear that its review of both the District's actions and the trial court's findings was de novo. *See* COA Slip Op. at 10–11 (declining to apply any deference to the trial court's findings under "the principles from "cases such as <u>Dolan</u> and <u>Rideout</u> when reviewing PRA decisions where the trial court resolved disputed factual issues," and instead

reviewing record de novo under *PAWS*). The Court of Appeals decision does not conflict with any decision of this Court.

B. Hood's Continued Attacks on the Credibility of the District's Witnesses Do Not Present Any Issue of Substantial Public Interest.

The Petition does not present any issue of substantial public interest meriting review. *Contra*, Pet. at 10 n.11 (invoking RAP 13.4(b)(4)). Hood complains, without specifying further, that District witness declarations "are comprised of hundreds of statements, some of which are obviously conclusory." Pet. at 8. He asks the Court to set a new, unarticulated standard for the number of "conclusory" statements in a declaration that will render the witness testimony inadmissible in a PRA case. *Id.* at 11 (asking "how many, if any, conclusory statements should courts accept in a single affidavit? And how many, if any, conclusory or partially conclusory affidavits should determine whether an agency's total affidavits are cumulatively conclusory?"). These assertions do not raise an issue of public importance that should be decided by this Court.

To the contrary, Hood's allegations about the District's "carefully crafted conclusory statements" are simply credibility arguments. Pet. at 11 et seq. His assertions about the District's motives and his

characterization of its searches and the failure of its email program,⁴ which comprise the balance of the Petition, have already been determined against him by two courts on de novo review of the District's actions. *See* FF 35; COA Slip Op. at 11–22; *see also*, *e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994) (requestor speculation does not overcome agency evidence of adequate and reasonable search).

Before the lower courts, and without a scintilla of evidence in support, Hood repeatedly asserted that the District had destroyed or was silently withholding records in bad faith. But the District had no motive to hide records from Hood, and even he admitted that the documents he thought would contain evidence of nefarious intent surrounding his termination were completely innocuous. FF 57. *Cf. Neighborhood All.*, 172 Wn.2d at 721–22 (agency search was limited to single new computer: "the only place a complete electronic record could not be found"). His unsupported allegations that District witnesses had engaged in fraud and perjury resulted in sanctions by the federal court. CP 750–58.

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⁴ Hood's implication that the District knowingly allowed its email system to destroy responsive records rather than produce them to him is not supported by any evidence. *Cf.* CP 2796–97; CP 711–12 (Miller). His related claims about public record retention schedules are irrelevant. *See e.g., West v. Wash. State Dep't of Nat. Res.*, 163 Wn. App. 235, 245, 258 P.2d 78 (2011) (rejecting argument that failure to retain emails violated records retention act and thus the PRA) (citing *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009)).

Hood offered the trial court and the Court of Appeals his own self-serving speculation that the District was negligent in its searches, but this was woefully inadequate. *Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.*, 764 F.2d 604, 612 (9th Cir. 1985) ("[B]ald assertions, absent any evidentiary base, are insufficient . . ."). He offers the same to this Court, but this is insufficient to present an issue of public importance. Hood's allegations that some portions of some witness testimony was conclusory are not sufficient to invoke this Court's review.

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 12th day of December 2016.

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CERTIFICATE OF SERVICE

Laura K. Clinton declares under penalty of perjury as follows:

I am and at all times herein after mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto. I effected service by emailing a true copy of this document to:

Eric Hood 5256 Foxglove Lane Langley, WA 98260 ericfence@yahoo.com

DATED this 12th day of December, 2016.

BAKER & McKENZIE LLP

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