

Supreme Court Clarifies Public Agency's Duties to Search under the Public Records Act (PRA) and Discovery Obligations in PRA Litigation

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On September 29, 2011, the Washington Supreme Court issued an important Public Records Act case, *Neighborhood Alliance of Spokane County v. County of Spokane* (No. 84108-0). In this case the Court resolved several murky issues that have plagued PRA litigation, and soundly admonished public agencies to conduct “adequate” searches in response to PRA requests.

The case involved a PRA request brought pursuant to RCW Ch. 42.56 from a Spokane-based community organization that, among other things, investigated illegal hiring practices in the Spokane County Building and Planning Department (BPD).

The Alliance had received an anonymous copy of an undated BPD office seating chart placing “Ron and Steve” into cubicles; however, Ron and Steve had not yet been hired. The chart had been generated by a computer of a BPD employee. Subsequently “Ron” was hired as was “Steve”, a son of a county commissioner. The Alliance sent a PRA request to the County for all iterations of the seating chart and received three charts. The one that the Alliance had been provided anonymously was not dated, making it impossible to prove that the hiring of “Ron and Steve” was preordained. The Alliance sought to obtain a document that would show when the important seating chart was created. It was told that the computer that generated the chart in question had been replaced and therefore it was impossible to tell the original date of the chart’s creation, but the County did not search for the original hard drive that remained in the county’s control.

The Alliance sued under the PRA and the County claimed that it was not subject to normal discovery procedures because of the nature of a PRA suit. Justice Johnson, writing for the Court held that normal discovery rules under the Civil Rules of Procedure apply in PRA litigation, particularly to discover relevant information such as why documents were withheld, destroyed, or lost. These facts have a significant bearing on penalty determinations which depend heavily upon evidence of an agency's bad faith. In doing so, Justice Johnson differentiated Washington State's PRA actions from federal actions under the Freedom of Information Act ("FOIA") where discovery is limited.

However, Justice Johnson returned to the FOIA for the second holding of the case, which was that the adequacy of a search for records under the PRA is the same as under FOIA, which focuses on whether the search itself was "adequate" depending upon the circumstances of a case. Under an "adequacy" test, agencies are required to perform more than a perfunctory search and to follow obvious leads as they are uncovered, but they only have to search those places where public records are reasonably likely to be found. The Court refused to find that an agency's inadequate search constitutes a new cause of action under the PRA. Rather, it found that a failure to perform an adequate search was considered as an aggravating factor in determining any daily penalty amount.

Finally, the Court resolved the question of whether a requestor can be deemed a "prevailing party" in PRA litigation when such litigation is not necessary to ultimately obtain the records for question. Only a prevailing party is entitled to penalties and attorney's fees under the PRA. The Court found that a party is determined to be prevailing if the party can show that the record should have been disclosed upon the party's request, but was not. It held that "litigation need not be the cause of a disclosure and a party is entitled to the PRA's remedial provisions when an agency wrongfully refuses to disclose a produced requested record."

In summary, this case makes it more difficult for public agencies to avoid PRA obligations and increases potential liability for penalties and attorney's fees if an agency search is "inadequate." Further, litigation costs may increase because agencies will be obligated to respond to discovery requests that investigate why an agency withheld a record, and the sufficiency of an agency search. The case also clarifies that an agency cannot avoid liability by disclosing records once the PRA litigation has started.

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