

No. 81094-0

SUPREME COURT OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Appellant,

v.

PAT MCCARTHY, in her official capacity as Pierce County Auditor,
and PIERCE COUNTY, a Washington municipal corporation,

Respondents.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF
WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS
ASSOCIATION, WASHINGTON STATE ASSOCIATION OF
BROADCASTERS AND SOCIETY OF ENVIRONMENTAL
JOURNALISTS IN SUPPORT OF DIRECT REVIEW

Katherine George
WSBA No. 36288
Law Offices of Charlotte Cassady
15532 Southeast 25th Street
Bellevue, WA 98007
(425) 653-5516
Attorneys for Amici

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I. INTRODUCTION

The broad public import of this case is best summarized with a centuries-old adage from William Shakespeare:

*No legacy is so rich as honesty.*¹

At issue here is the public's right to know the honest, unfiltered expressions of its government. As numerous news stories illustrate, a government's e-mails can show that concerns were ignored, that pressures were exerted, or even that lies were told – aspects of the public's business that do not pop out of press releases. If the voter-approved Public Records Act, Chap. 42.56 RCW (PRA), is to function as voters intended, it must be interpreted to protect public access to e-mails. Otherwise, the legacy of honesty – instead of being ferreted from computer files - may be erased forever.

II. NATURE OF THE CASE

The appellant Building Industry Association of Washington (BIAW) seeks direct review of a trial court order dismissing the claim that Pierce County unlawfully destroyed e-mails which the BIAW requested under the PRA. The Society of Environmental Journalists, Allied Daily Newspapers of Washington, Washington Newspaper Publishers

¹*All's Well That Ends Well*, Act iii, Scene V (italics added). According to Wikipedia, the play was first published in First Folio in 1623.

Association and Washington State Association of Broadcasters (collectively “news organizations”), incorporate by reference the description of the case and decision on pages 1 through 7 of the BIAW’s Statement of Grounds for Direct Review.

III. ISSUES PRESENTED FOR REVIEW

The news organizations incorporate by reference the statement of issues on page 7 of the BIAW’s Statement of Grounds for Direct Review.

IV. GROUNDS FOR DIRECT REVIEW

The news organizations agree with the reasons for direct review stated on pages 8 through 15 of the BIAW’s Statement of Grounds for Direct Review. In doing so, the news organizations do not suggest that their interests are wholly aligned with the BIAW’s.² However, they do share an interest in a speedy resolution by this Court of the vitally important issues surrounding disclosure of government e-mails.

A. Preventing E-mail Destruction is Urgent.

Every day that the issues in this case remain unsettled is another day when governments may destroy e-mails of value to the public. The risk of permanent loss of public information, despite RCW 42.56.100’s mandate “to protect public records from damage,” imbues this case with

² Members of the news organizations sometimes take editorial positions that are critical of the BIAW. See, e.g., a March 31, 2008 editorial, “Builders Group: Bizarre Assertions,” at http://seattlepi.nwsource.com/opinion/357145_ecoed.html.

urgency and broad public import. Therefore, the case merits direct review by this Court. RAP 4.2(a)(4).

B. The Burden of Proof Must Be On Agencies, Not Citizens.

Newspapers, broadcasters and journalists serve as watchdogs, informing citizens about government activities that affect their lives and pocketbooks. In order to fulfill their watchdog role, the news organizations need access to public records. Accordingly, they have a strong interest in ensuring that courts do not improperly shift the burden of proof in PRA actions from governments to citizens, as happened in this case.

Citizens are at an inherent disadvantage when they sue to obtain records. That is because citizens cannot see the nature or content of withheld records, and therefore are ill-equipped to disprove agency claims that records are exempt from disclosure. The PRA recognizes this disadvantage, and attempts to balance the scales as follows:

The burden of proof *shall be on the agency* to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1) (italics added). Any other rule would make the PRA a useless tool, incapable of discerning the lawfulness of agency actions.

In this case, the burden should have been on Pierce County to prove that its non-disclosure of requested e-mails was “in accordance with a statute.” Id. Yet the trial court imposed on the citizens an impossible burden – proving, without discovery, that non-exempt, public records existed on Pierce County’s computers before they were destroyed. Statement of Grounds for Direct Review, Appendix H (July 20, 2007 hearing transcript) at p. 27, line 11, to p. 28, line 7, and Appendix M (Sept. 7, 2007 hearing transcript) at p. 43, lines 6-10. Shifting the burden of proof to citizens, as the trial court did here, nullifies RCW 42.56.550(1) and makes it impossible to hold governments accountable for deleting e-mails that should be disclosed. Direct review is needed to uphold the PRA’s fundamental mandate, which is to require disclosure unless the *government* proves that a specific exemption applies. RCW 42.56.070(1).

C. News Reports Illustrate the Public’s Interest in E-mails.

Journalists at Washington newspapers and broadcast stations frequently use government e-mails in their reporting of news. Declaration of Michael Fancher (April 30, 2008), ¶2; Declaration of Katherine A. George (May 6, 2008), Exhibits A to L. E-mails sometimes provide the most accurate information about what is really happening in government. Fancher Dec., ¶2. Usually, e-mails are newsworthy because they reveal

information that is at odds with more widely disseminated public communications. Id. Government e-mails are useful when trying to determine such matters as: a) what government regulators knew, and when they knew it; b) who has exerted or attempted to exert influence on government decision-makers; and c) whether a government's internal statements are consistent with statements made directly to the public. George Dec., ¶2.

The Society of Environmental Journalists (SEJ), an international organization of more than 1,300 reporters, academicians and students, has an active First Amendment Task Force for the very reason that public records are essential to ferreting out the facts regarding regulation, protection or degradation of the natural environment. SEJ is interested in this case because its members, in Washington state and elsewhere, are alarmed by the prospect of routine destruction of e-mails removing public information from the public's reach.

E-mails can reveal how and why government decisions are made (or not made) – a matter at the heart of the PRA. *See* RCW 42.56.030 (“the people insist on remaining informed so that they may maintain control over” their governments). They can uncover scandals or illegal

activity by government employees. Fancher Dec., ¶¶ 4, 7; George Dec., Exhibits J and K.

In a particularly dramatic example of the importance of e-mails to public accountability, e-mails disclosed to The Bellingham Herald last year led to a criminal investigation of the mayor of Ferndale, Washington. George Dec., ¶3. In a May 30, 2007, story that was based on e-mails obtained through the Public Records Act, the Herald reported that then-Mayor Jerry Landcastle instructed the city staff to “make an exception” to land-use permitting rules for the benefit of one business. Id., Exhibit A. A criminal probe resulted from the revelations in that story. Id., Exhibit B.

In another example of government e-mails leading to formal investigations, the Seattle Post-Intelligencer reported in a January 19, 2007 story:

Thirty-two current and former Port of Seattle police officers – nearly a third of the department’s sworn force – have been caught exchanging or receiving racist, sexist and sexually explicit e-mails since the end of October, 2004, department records obtained by the Seattle P-I show.

Id., Exhibit C. If the e-mails had been destroyed, these disturbing practices might have continued, or escaped the scrutiny they deserved.

In a more recent example of e-mails figuring prominently in the news, Jim Brunner of The Seattle Times reported in an April 10, 2008 story:

E-mails obtained by lawyers for the city of Seattle show Sonics owners were talking enthusiastically last April about moving the franchise to Oklahoma City – despite telling the public and the NBA they were still interested in keeping the team there.

Id., Exhibit D. While the e-mails described in Mr. Brunner's story were obtained through legal discovery, rather than through the Public Records Act, they illustrate the potential for e-mails to highlight the difference between truth and propaganda. Also, because the e-mails were reported in the media, the public could better judge how elected officials were looking out for the public's interest. Fancher Dec., ¶6.

Also related to the Sonics, Chris McGann of the Seattle Post-Intelligencer reported an April 1, 2008 story:

OLYMPIA – Seattle's attempt to secure a tax package for Key Arena wasn't the wild, last-second shot at keeping the Sonics that leading lawmakers made it out to be, according to e-mails obtained through a public disclosure request.

Id., Exhibit E. The story shows that e-mails can illuminate inconsistency between a government's internal statements and its public statements.

E-mails can take citizens behind the walls of government power, and show them who is exerting influence there. For example, in a March 2, 2008 story, the Seattle Post-Intelligencer quoted an exchange of e-mails showing that a Port of Seattle consultant agreed to pay a contractor \$59,999 for port work without trying to document the contractor's costs. George Dec., Exhibit F. In an e-mail suggesting that cozy relations with a private contractor mattered more than protecting public money, the consultant said in part: "lets [sic] figure that out via tummy rub in lieu of you all documenting what is undocumentable." Id.

Similarly, in a January 2, 2008 story headlined "Big land deal, big questions," Jim Brunner and Lauren Vane of The Seattle Times reported that King County Executive Ron Sims skipped competitive bidding in negotiating a lucrative land deal with a politically well-connected developer. Id., Exhibit H. The story quoted e-mails obtained through the Public Records Act to show that concerns about the deal were raised internally, and ignored. Id. Disclosure of the e-mails helped the public evaluate the actions of county officials. Fancher Dec., ¶5.

On the flip side, e-mails can show that governments sometimes resist heavy-handed pressure, as in the case of Huskies football. Fancher Dec., ¶3. In a January 31, 2008 posting on the Seattle Times' news media

blog, Mike Fancher, the Times' Editor at Large, praised the University of Washington for disclosing about 1,000 e-mails which revealed intense pressure on the UW to fire its coach and athletic director. George Dec., Exhibit L. One booster had pledged \$100,000 in law-school scholarship money if UW President Mark Emmert would fire Coach Tyrone Willingham and another \$100,000 for firing athletic director Todd Turner. Id. See also Fancher Dec., ¶3.

E-mails can reveal relationships between public officials and private interests that might not otherwise come to light. For example, in a June 6, 2006 story, Jeffrey Mize of the Vancouver Columbian reported:

LA CENTER – Newly released e-mail messages reveal a pattern of two city council members working closely behind the scenes with the city's cardrooms to oppose the Cowlitz Tribe's proposed casino. Councilwoman Linda Tracy wrote in a Jan. 26 e-mail to Councilman Troy Van Dinter that the city and the cardrooms 'are ONE as far as I'm concerned.'

George Dec., Exhibit I.

The reports described above illustrate that government e-mails are a matter of high public interest. The news reports used e-mails to reveal the truth after the public was misled, and to increase the public's understanding of how decisions were made, and under what influences. These reports based on e-mails serve the core purpose of the PRA to fully

inform citizens about their governments. RCW 42.56.030. Thus, protecting public access to e-mails is a matter of urgent and broad public import, warranting direct review of this case. RAP 4.2(a)(4).

III. CONCLUSION

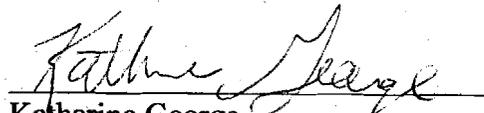
For the foregoing reasons, the Court should grant direct review.

Dated this 6th day of May, 2008.

Respectfully submitted,

LAW OFFICES OF CHARLOTTE
CASSADY

By:



Katherine George

WSBA No. 36288

Attorneys for Amici