
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

ENERGY POLICY ADVOCATES,
a Washington nonprofit corporation,

Appellant,

v.

ATTORNEY GENERAL'S OFFICE,
an agency of Washington State,

Appellee.

OPENING BRIEF OF APPELLANT ENERGY POLICY ADVOCATES

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I. Introduction

Appellant Energy Policy Advocates (hereinafter "EPA") filed a Public Records Act (hereinafter "PRA") request and eventually brought the suit below to shed light on the actions of one of Washington State's Constitutional Officers' and the Office's interactions with political and ideological activists who sought to use government toward their preferred ends. See generally CP at pp. 3-9. In matters brought under the Public Records Act, "[t]he 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). Disclosure is favored "even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550 (3). Yet the Office denied EPA's PRA request, and the Thurston County Superior Court upheld that denial in a cursory order that failed to address EPA's core arguments in favor of disclosure. This appeal follows.

In this case, the Superior Court's order permitting the Attorney General's Office (hereinafter "AGO") to evade disclosure of records contains no substantive evaluation of the merits of AGO's withholdings. Instead, the Court's denial of Plaintiff's entire claim hinges upon one conclusory sentence, in which the Court does not engage with the arguments of the parties or perform any substantive analysis of the records at issue: "the Court finds that all redactions may reasonably be characterized as 'discussion of litigation-related technical, factual, and regulatory issues,' 'analysis of risks of different litigation positions,' or revealing 'what information [an] attorney deemed particularly important'' related to reasonably anticipated litigation." See CP at p. 197, citing *Kittias Cnty. v. Allphin*, 190 Wn.2d 691, 706 (2018). The Court made no specific findings about the content of any record or portion thereof, and failed to address the Plaintiff's

arguments that any arguable privilege would have been waived, if indeed such a privilege had ever attached at all. See CP at pp. 58-59 (Plaintiff's Brief at p. 4-5).

This Court must reverse the decision of the Court below and remand for proper consideration and non-conclusory analysis of the records at issue and how any exemptions found in the Public Records Act apply to each discrete record, or portion thereof, that is at issue in this case. Alternatively, this Court should review the records *in camera* (which have been preserved under seal, see CP at p. 77 and pp. 79-163) and find that no lawful exemption applies to such records.

II. Assignments of Error

Appellant Energy Policy Advocates respectfully submits that the Superior Court erred as follows:

1. The Trial Court Failed to Articulate its Reasoning or the Basis for its Decision Dismissing the Case in its Entirety; and
2. The Trial Court Failed to Address When or How a Privilege Attached to any Discrete Record at Issue in this Case; and
3. The Trial Court Failed to Address Whether any Privilege was Waived.

III. Issues

A. Whether the Trial Court Adequately Explained the Basis for its Decision; and

B. Whether the Trial Court Erred as a Matter of Law in Determining that the Records at Issue are Exempt from Production Under the Public Records Act.

IV. Statement of Facts

This case arises out of a PRA request filed by Appellant EPA on May 6, 2020, seeking copies of all AGO correspondence dated during the spring of 2016 which correspondence

included individuals named Matt Pawa or Naomi Oreskes, or their email addresses. See generally Clerk's Papers (hereinafter "CP") at pp. 3-9.

A pretrial scheduling order dated March 13, 2020 permitted the parties to brief the issues, and Plaintiff/Appellant EPA filed its brief on May 26, 2020. See CP at p. 20-22 and pp. 55-62. The Court heard oral argument in this matter on June 19, 2020 and took the matter under advisement at that time. See Transcript of 6/19/2020 hearing at 27:24 *et seq*. The Court ruled on August 14, 2020, dismissing EPA's entire complaint in a three-page order that contained only one sentence of substantive legal analysis. See CP at pp. 196-198.[1]

Both at the trial court level and on appeal, this case has been presented in an unusual procedural posture. Pursuant to RCW42.56.550(3), the court below had available to it for *in camera* review the records that are at issue in this case. See CP at pp. 75-78. Similarly, the Defendant/Appellee AGO has had access to the records at issue in this case as the custodian of those records. Only the Plaintiff/Appellant EPA has been denied access to the records at issue, and thus is forced to "argue in the dark" regarding their specific contents. Because of this unusual posture, Appellant EPA's arguments are necessarily general in nature. Appellant EPA also suggests that the trial court's cursory order dismissing the complaint below without explaining the context or content of any redactions at issue is insufficiently specific to enable the Appellant to challenge discrete redactions held in particular records. Thus, EPA respectfully suggests that the interests of justice, including the statutory obligation to hold the AGO to its burden of proof, weigh in favor of this Court carefully scrutinizing the sealed records.

[1] The operative sentence appears on page 2 of the order (CP at 197), and states in its entirety: "Following this review, the Court finds that all redactions may reasonably be characterized as 'discussion of litigation-related technical, factual, and regulatory issues,' 'analysis of risks of different litigation positions,' or revealing 'what information [an] attorney deemed particularly important'' related to reasonably anticipated litigation."

V. Argument and Standard of Review

This Court must reverse the decision below, and it can do so for any of three separate reasons or for a combination or those reasons. First, the trial court failed to articulate the basis for its ruling, which alone is grounds for reversal.[2] Second, the trial court failed to apply the exemptions in the Washington PRA to any discrete record or portion of a record, and such an overbroad approach to addressing exemptions generally or from a considerable altitude led to fatal flaws in the application of PRA exemptions to the documents at issue in this case. Third, the trial court failed to address or analyze a pivotal issue in this case, which is whether any privilege that might have at one point attached to the records at issue was subsequently waived.

This Court must address "pure questions of law" *de novo*. *In re Pers. Restraint of Coats*, 173 Wash. 2d 123, 133, 267 P.3d 324, 329 (2011). To the extent that the trial court's ruling rests on mixed questions of law and fact, this Court must consider whether policy considerations favor *de novo* or deferential review, and review parts of a decision that are legal in nature "de novo, with deference given to the factual findings made by the trial court in the first instance, **where appropriate**." *In re Dependency of E.H.*, 191 Wash. 2d 872, 895, 427 P.3d 587, 597 (2018) (emphasis added). Lastly, insofar as the ruling below can be characterized as containing any factual findings at all, those factual findings must necessarily be reviewed to determine whether they are supported by "substantial evidence." *In re Welfare of A.W.*, 182 Wash. 2d 689, 711, 344 P.3d 1186, 1197 (2015). Under any of these standards, the decision below must be reversed.

[2] The Supreme Court has previously held, in a different context, that failure to analyze any statutorily-required required factor is grounds for reversal and remand. See *In re Marriage of Horner*, 151 Wash. 2d 884, 894, 93 P.3d 124, 130 (2004) ("consideration of all the factors is logical because they serve as a balancing test between many important and competing interests and circumstances…"). Although *Horner* involved an entirely different statute, there is no reason courts applying the PRA should not also analyze each of the statutory factors and factors of the common law tests the statute incorporates (such as the work product doctrine).

A) The Trial Court's Cursory Ruling is Devoid of Factual Findings Capable of Review and Therefore Must be Reversed.

Pursuant to RCW 42.56.550(1), the burden of proof is on the agency in a PRA case to prove that the records sought are exempt from production under the Act. Unfortunately, in this case there is no reasonable way to determine whether or how the defendant agency (AGO) might have met its burden under the statute, because the trial court made no specific findings of fact. The trial court's ruling is three pages long, but only one sentence of the ruling consists of legal analysis or reasoning (the remainder consists of a recitation of pleadings filed by the parties). CP at pp. 196-198. Because the entirety of the Plaintiff's claim was dismissed on the basis of that one sentence, however, and because the sentence fails to make anything but the most general factual assertions or to articulate the basis for the trial court's eventual holding, however, the judgment must be reversed.

It is well-established that "a trial court must make ultimate findings of fact on material and pivotal issues." *Schoonover v. Carpet World*, 91 Wash. 2d 173, 177, 588 P.2d 729, 732 (1978). "The purpose of findings on ultimate and decisive issues is to enable an appellate court to intelligently review relevant questions upon appeal, and only when it clearly appears what questions were decided by the trial court, and the manner in which they were decided, are the requirements met." *Id*., citing *Heikkinen v. Hansen*, 57 Wn.2d 840, 360 P.2d 147 (1961). A trial court's decision can be reversed, among other reasons, if an appellate Court finds that its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." See *State v. Jackson*, 195 Wn.2d 841, citing *State v. Turner*, 143 Wn.2d. 715, 724 (2001) and *State v. Blackwell*, 120 Wn.2d 822, 830 (1993). A necessary corollary to this Court's

ability to reverse a decision for being unreasonable or based upon untenable reasoning, however, is the proposition that trial courts must make plain the reasoning or grounds for their rulings.

Although it is ordinarily permissible for an appellate Court to "look to the oral decision of the trial court to eliminate speculation as to the premises upon which the trial court based its decision," see *Heikkinen, supra*, the trial court in this matter did not make any ruling on the record at the hearing (instead, the Court took the matter under advisement). See generally Transcript of 6/19/2020 hearing. As such, this Court can only look to the eventual written order dismissing the Plaintiff's complaint to determine the basis for the trial court's ruling.

Ordinarily, in the absence of adequate factual findings or analysis by a trial court, the appellate court should remand to allow such findings to be made or supplemented. See *Schoonover*, 91 Wn.2d at 178, 688 P.2d at 733. However, an appellate court also has the power to review the evidence and make findings of its own, especially where the evidence is "undisputed" or "overwhelming." *Id*. This Court must therefore either reverse this case outright on the basis that the evidence which is available for *in camera* review compels a judgment in EPA's favor, or remand this case to the trial court so that it can make particularized findings regarding the nature of each record or redaction at issue in this case. Such findings would necessarily include explanation of how any particular exemption which has been claimed from among the several exemptions in the PRA either applies or does not apply to the specific information the AGO seeks to withhold.

B) A Court Cannot Assess Privileges in the Abstract, but Instead Must Apply the Public Records Act to Discrete Documents.

As set forth above, the trial court's ruling in this matter for these purposes consisted largely of one operative sentence of legal conclusion that held that "all redactions" can be "reasonably characterized" as protected under the doctrines discussed in *Kittias Cnty*., 190

Wn.2d at 706 or *Soter v. Cowles Publishing Co*., 162 Wn.2d 716, 743 (2007). See CP at p. 197. But the one-sentence holding by the trial court in this matter cannot be squared with the holdings of those two cases or others discussing how the exemptions in the Public Records Act must be applied.

First, both the decisions in *Kittias Cnty*. and *Soter* specifically described the records at issue and how legal exemptions contained within or incorporated by the PRA applied to those records. In *Kittias Cnty*., for example, the Supreme Court held that "The e-mail chains all include one or more of the following elements: (1) discussion of litigation-related technical, factual, and regulatory issues; (2) draft declarations with edits and notes; and/or (3) analysis of the risks of different litigation positions in the Chem-Safe lawsuit." *Kittitas Cnty.*, 190 Wash. 2d 691, 706, 416 P.3d 1232, 1240 (2018). The Supreme Court further clarified that the emails were "regarding the NOVA litigation" and "were created by or for Kittitas County to use in the Chem-Safe litigation." *Id.* The Supreme Court also expressly recognized that exemptions are subject to waiver when it held in *Kittias Cnty*. that the records were not discoverable "unless the work product protection has been waived by Kittias County." *Id.* Similarly, in *Soter,* the Supreme Court spent several paragraphs specifically identifying the character of the records at issue and analyzing how such records were exempt from production under the PRA. *Id*., 162 Wn.2d at 746-747, 174 P.3d at 77.

In a stark contrast to *Kittias Cnty*. and *Soter*, the trial court below failed to identify what litigation was implicated by the records at issue. Because work product protection can only apply to records generated "in anticipation of litigation," *Soter*, 162 Wn.2d at 732, and cannot apply to records generated "in the ordinary course of business," *Morgan v. City of Federal Way*, 166 Wn.2d 747,754,213 P.3d 596 (2009), it is necessary to identify both the relevant litigation and

how the records at issue were generated "in anticipation of" that litigation. Absent such a particularized determination a court cannot rule on whether a record is exempt from production under the PRA. The trial court below failed to identify the litigation at issue or what anticipatory *indicia* is borne out by the records at issue, and thus the trial court erred by comparing its decision with no such analysis to the richly detailed rulings of the Supreme Court in *Kittias Cnty*. or *Soter*, and in citing to those opinions as support for its own.

C) The Trial Court Failed to Address any Possible Waivers of Privilege.

Assuming, *arguendo*, that the records at issue in this case were at one point protected by the Work Product Privilege, it does not necessarily follow that the records were exempt at the time the Plaintiff/Appellant made its PRA request or filed its complaint in the Thurston County Superior Court. A core argument raised by the Plaintiff in the trial court was that any applicable privilege may have been waived by sharing the records at issue outside the ambit of any reasonable attorney-client or attorney-agent relationship. See CP at pp. 59-60.

The Work Product Privilege, like all privileges, is subject to waiver. The Washington Supreme Court expressly adopted "the rule that a party waives its work product protection when it discloses work product documents to a third party in a manner creating a significant likelihood that an adversary will obtain the information." *Kittitas Cnty*., 190 Wn.2d at 705. Work Product Protection cannot be claimed if "the client, the client's lawyer, or another authorized agent of the client ... discloses the material to third persons in circumstances in, which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." Restatement (Third) of the Law Governing Lawyers§ 91(4) (Am. Law Inst. 2000).

Despite the Supreme Court's express ruling in a case cited by the trial court that waiver of Work Product Privilege will doom an agency's claim of Work Product or "Controversy"

exemption for those same records under the PRA, *Kittitas Cnty.*, 190 Wash. 2d 691, 706, 416 P.3d 1232, 1240 (2018), and even though the Plaintiff expressly raised the issue of waiver in its brief to the trial court, the trial court entirely failed to address the Plaintiff's waiver arguments. This failure to address Plaintiff's arguments relating to waiver is especially noteworthy in light of the agency's failure to introduce any evidence to counter the Plaintiff's claims relating to waiver.

The failure of the trial court to engage with or rule upon "material and pivotal issues" is itself grounds for reversal or remand. See *Schoonover*, 91 Wash. 2d at 177, 588 P.2d at 732. Because the trial court ruled only that Work Product Protection attached to the records at issue (even if it did so without necessary analysis), the trial court necessarily would have to confront the waiver issue that the Supreme Court itself recognized in *Kittias Cnty.* Failure to address that issue only heightens the appearance that the trial court failed to properly analyze the claims the Plaintiff raised.

VI. Conclusion

Although RCW 42.56.030 provides that it is the public policy of Washington State that the people "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know," the record in this case reflects that Appellant EPA has been denied its right to know how the AGO interacted with a pair of political activists lobbying in 2016 for a certain outcome and particular use of the AGO. In dismissing EPA's complaint, the trial court provided a mere one sentence of substantive legal analysis, failed to address how the exemptions in the PRA applied to any particular record EPA sought, and failed to engage at all with EPA's arguments that any applicable legal privilege that might hypothetically have attached to certain records would have been waived by sharing such records

with AGO's favored friends or others. This Court should either reverse the decision below outright, or alternatively vacate the decision and remand for the trial court to make sufficient findings of fact that will enable this matter to be properly reviewed on appeal.

Respectfully submitted this the 2nd day of December, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to an e-service agreement of the parties, I have this the 2nd day of December, 2020 served a true and correct copy of the foregoing by email addressed to:

1. Jennifer Steele at jennifer.steele@atg.wa.gov; and
2. Angelina Boiko at angelina.boiko@atg .wa.gov; and
3. The Attorney General's general e-service account at cprreader@atg.wa.gov.

I have also served a true and correct copy by filing the foregoing document with the electronic filing system.

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