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.

REPLY BRIEF OF APPELLANT ENERGY POLICY ADVOCATES

Matthew D. Hardin, WSBA# 53772
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com
Counsel for the Appellant

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I. Introduction

Appellant Energy Policy Advocates (hereinafter "EPA") filed a Public Records Act (hereinafter "PRA") request and brought the suit below to shed light on the actions of one of Washington State's Constitutional Office's and certain employees' interactions with political and ideological activists who sought to use government toward their preferred ends. See generally CP at pp. 3-9. Although the Attorney General's Office ("AGO") categorizes the records at issue as legal memoranda and asserts that the PRA's exemption for work product "squarely" applies to all withheld information, including several records withheld in their entirety, AGO's arguments elide its statutory burden and boil down to little more than the mere assertion – unvarnished by details or admissible evidence in the record that is accessible in the unsealed filings – that the documents at issue are work product. Such rote claims simply fail to meet AGO's statutory burden.

This Court's obligation is to hold the AGO to its burden. In a PRA suit, "[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). This Court must order disclosure "even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550 (3).

Although AGO attempts to use the *de novo* standard of review in this matter and the fact that the records at issue remain available to this Court for *in camera* review as a crabbed means of satisfying its burden, AGO's arguments in this Court remain as general and unavailing as they were in the trial court. Rather than engage with the specific arguments EPA has raised relating to

the propriety of the stated redactions and offering some showing to meet its burden to justify each redaction at issue in this case, AGO has again characterized memoranda in the broadest possible terms and attempted to justify wholesale withholdings. Rather than present evidence (or point to evidence that was before the trial Court) to prove that no waiver of any privilege occurred, AGO flips the statutory burden of proof to the requester by claiming EPA's concerns about waiver are speculative. Again, AGO has statutory burdens and it continues to avoid making any effort to satisfy them, impermissibly offering conclusory language and boilerplate in lieu of supporting facts.

This Court must reverse the decision of the Court below and remand for proper consideration and analysis of the records at issue. Such analysis will necessarily include an evaluation of how any exemption found in the Public Records Act applies to each discrete record or portion thereof that is at issue in this case and whether any of the documents at issue were shared in such a way that any otherwise applicable protection would have been waived. Although it is indisputable that this Court has the power to review the records *in camera*, this Court should decline the AGO's invitation to allow such *in camera* review to serve as a substitute for a developed factual record or for an appropriate justification and analysis of waiver issues that EPA properly raised and preserved before the trial Court.

II. Argument

Despite AGO's assertions, *de novo* review in this case does not obviate the need for factual findings based on substantial evidence. A close examination of the facts of this case, especially in light of the PRA's presumptions of disclosure and statutory burden of proof, compels reversal.

A) *De Novo* Review is no Substitute for a Reasoned Decision.

The Attorney General attempts to use the *de novo* review that is available in PRA cases as a means of evading its statutory burden of proof and the trial court's need to assess the facts needed to establish whether that burden has been met. But the Attorney General fundamentally misunderstands the nature of *de novo* review in a PRA case.

In a case brought under the PRA, *de novo* review "serves to negate the usual deference that courts give to an agency's discretion in interpreting the rules governing it. Thus, while [the appellate court] review[s] *de novo* all questions regarding the [defendant's] obligations under the P[R]A, [the appellate court] review[s] the trial court's findings of fact based on the testimonial record to determine if there is substantial evidence to support them." *Zink v. City of Mesa*, 140 Wash. App. 328, 337, 166 P.3d 738, 742 (2007), citing *Hearst Corp.* v. Hoppe, 90 Wn.2d 123, 129-30 and *Progressive Animal Welfare Soc'y*, 125 Wn.2d 243, 252-53.

In this case, the "testimony" at issue was presented by way of affidavits pursuant to RCW 42.56.550 (3). Although the lack of live testimony removes the trial court's usual advantage over an appellate court in making credibility determinations, *Zink*, 140 Wash. App. at 336, the fact that the testimony on which the trial court ruled was presented in writing rather than orally does not relieve the trial court of its obligation to rule based upon "substantial evidence." *Id*. at 328. In this case, there is no reasoned decision which would indicate that the trial Court ruled based upon such "substantial evidence," that it engaged with key arguments raised by the Appellant, or that the record supports the resulting judgment.

Specifically, the Appellant raised *Kittias Cnty.,* 190 Wn.2d 691, 706 (2018) and *Soter v. Cowles Publishing Co*., 162 Wn.2d 716, 743 (2007) before the trial court. While the trial court purported to have analyzed the multi-part tests for whether redactions and withholdings were

justified based upon those cases, CP at 197, both of those cases include extensive discussion of the nature of the withheld material that was at issue. Yet the trial court in this matter engaged in no such discussion, and made no attempt to explain how the *Kittias Cnty*. and *Soter* cases governed the redactions and withholdings in this case. Although *de novo* review allows this Court to review the records and redactions in this case without deference to an agency's interpretation of the PRA, *de novo* review does not supplant or eliminate this Court's obligation to ensure that the judgment in this matter was based upon substantial evidence.

In sum, AGO has simply based its claims of privilege on vague, conclusory and often boilerplate language, unjustifiably withholding documents in whole or part without tying them to policy or specific, identified litigation at all. Such "conclusory" declarations that fail to "provide concrete examples" are insufficient to justify redactions and withholdings under the PRA. *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen*., 179 Wash. App. 711, 722, 328 P.3d 905, 911 (2014).[1] Further, administrative inconvenience or difficulty does not excuse strict compliance with the Act. *Zink*, 140 Wash. App. at 337, 166 P.3d at 742. By failing to require the Ago to meet its burden by testimony or more specific affidavits, the trial court here allowed AGO to evade the "administrative inconvenience" of meeting its burden of proof.

B) The Record Does Not Support the Redactions and Withholdings at Issue.

Because the evidence in this case was received in the form of affidavits pursuant to RCW 42.56.550 (3), and because this Court has before it the records that were submitted for *in camera* review, the Attorney General correctly points out that this Court has the ability to review the

[1] The *Robbins* case dealt with the trade secrets exemption, but the same principle would apply to the "controversy" exemption cited by AGO. Just as a conclusory declaration that fails to provide concrete examples is insufficient to support the existence of a trade secret, a conclusory declaration without concrete examples is insufficient to demonstrate either the preliminary requirement that a "controversy" actually exists or that the materials related to the controversy were prepared in anticipation of litigation.

entire record that was available to the trial court. Such review, however, will reveal that the judgment below is insupportable and must be reversed.

As Energy Policy Advocates specifically pointed out before the trial court, the affidavits in this matter do not contain the degree of information which is required to tie the redactions and withholdings in this case to the privilege that the AGO claimed. Specifically, and on the basis of numerous documents in the public domain, the Appellant argued below that the records in this case reflected AGO's reaction to lobbying activities rather than legitimate anticipatory action in advance of litigation. See Transcript of 6/19/20 hearing at 5:24 *et seq*. The affidavits that were submitted are threadbare and conclusory, and fail to tie the withholdings at issue to any reasonably anticipated litigation. Nor has AGO tied the records in this case to any litigation that has transpired in the five years since the records were produced. Because the burden of proof is on the AGO in this matter, and because the record is so bereft of evidence which can support a judgment in AGO's favor, this Court must reverse.

C) The Record Contains No Evidence Relating to Waiver 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 Energy Policy Advocates made its PRA request or filed its complaint in the Thurston County Superior Court. A core argument raised by Energy Policy Advocates in the trial court and in its opening brief in this 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 and Opening brief at p. 8 et seq. Although AGO's brief attempts to dismiss EPA's argument as mere speculation, such rote dismissal of a core claim is insufficient to carry AGO's burden of proof.

There is sufficient information in the public domain about the extensive coordination by attorneys general on the issues raised in the records requested by Energy Policy Advocates, both with outside advocates and others, to require AGO to establish on the basis of admissible evidence that no sharing occurred. Unfortunately, if AGO has suvh evidence, it has chosen to keep that evidence to itself.

Regardless of the well-documented lobbying of state attorneys general by the tort attorney to join or assist his cause, nearly all of which is courtesy of other AGOs' public record releases, RCW 42.56.550 (1) reverses the ordinary burden of proof in civil matters by imposing the burden of proof on the agency in PRA cases. RCW 42.56.550 (3) provides that "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." Although AGO dismisses the Appellant's arguments that privilege may have been waived as mere speculation, it has never been the burden of a requester under the PRA to substantiate or prove why a statutory exemption does not apply (as, for example, a privilege may have been waived). Rather, it is the statutory burden of the AGO to prove that a statutory exemption applies, and that such exemption has not been waived through its own conduct.

The statutory scheme allows for an agency to satisfy its burden by way of affidavits, if the affidavits satisfy the burden. The affidavits in this case do nothing to assure this Court that no waiver of any privilege took place. This Court should hold AGO to its statutory burden of proof rather than permitting it to dismiss the claims of a requester as mere speculation.

VI. Conclusion

The PRA codifies 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." RCW 42.56.030. In this case, EPA has been denied its right to know how the AGO handled responded following lobbying from a pair of political activists pitching aggressive action by AGO. In dismissing EPA's complaint, the trial court provided a mere one sentence of substantive legal analysis about many pages and numerous documents, failed to address how the exemptions in the PRA applied to any particular record EPA sought or any record withheld in part or in full, and failed to engage at all with EPA's arguments that any applicable legal privilege that might hypothetically have attached to certain records, even if established, would have been waived by sharing such records with AGO's favored friends or others. Selective disclosure is not permissible in the public records context, and AGO declines to make the case that it did not so share the information at issue in this matter. This Court should reverse the decision below and compel AGO to carry its burden of proof.

Respectfully submitted this the 2nd day of March, 2021,

ENERGY POLICY ADVOCATES
By Counsel

/s/Matthew D. Hardin
Matthew D. Hardin, WSBA# 53772
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to an e-service agreement of the parties, I have this the 2nd day of March, 2021 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.

/s/Matthew D. Hardin
Matthew D. Hardin, WSBA #53772
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com

THE LAW OFFICE OF MATTHEW D. HARDIN

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