



## **CASE REPORT**

**PUBLIC RECORDS ACT - ADEQUATE SEARCHES - DISCOVERY.** Under the PRA, (1) discovery is available in the same manner as in other civil actions; (2) the Freedom of Information Act standards of reasonableness regarding adequate searches are adopted; and (3) a party may recover costs and fees based on a wrongful denial of a request, even if the party already has the record. *Neighborhood Alliance of Spokane County v. County of Spokane*, No. 84108-0, Washington Supreme Court (Sept. 29, 2011).

**I. Facts.** This case involved two separate public records requests, both aimed at uncovering suspected illegal hiring practices in Spokane County's Building and Planning Department (BPD). Prior to these requests, a seating chart that was printed from BPD employee Pam Knutsen's computer was anonymously distributed to Neighborhood Alliance of Spokane County. The seating chart showed cubicle arrangements of employees at the BPD, and it included "Ron and Steve" in a cubicle, neither of whom had been hired at that time. Along with the seating chart, a letter was sent to the Alliance, explaining that the positions assigned to "Ron and Steve" had not yet been posted, and alleged that other appointment positions had been filled in violation of county policy. Subsequently, the son of a County Commissioner and a former employee, respectively named Steve and Ron, were hired.

The Alliance sent its first PRA request seeking all records displaying current or proposed office space assignments for the BPD's planning officials. The County provided an undated seating chart, matching the one the Alliance had anonymously received. The second request, aimed at discovering when the "Ron & Steve" seating chart was created, asked for complete electronic file information logs for the undated seating chart. The County provided one document in response, a log showing a "date created" and "date modified" field. However, the "date created" field was later than the "date modified" field. It was eventually revealed that Knutsen's computer, which had evidently generated the seating charts, was replaced. When the files were copied from the old hard drive to a new hard drive, the date of copying became the date of creation, rather than retaining the original date of creation. The County did not attempt to recover any information from Knutsen's old computer hard drive, and eventually the old hard drive was erased. Upon filing the lawsuit, discovery issues immediately arose because the County refused to answer most requests for admission, and refused to answer any interrogatories and requests for production. The trial court eventually required the County to submit Knutsen to a written deposition.

**II. Applicable Law and Analysis.** The Supreme Court first held that discovery in a PRA case is the same as in any other civil action and is therefore governed only by relevancy considerations. Because the PRA statutes are silent regarding discovery and do not create any

special rules, the general civil rules governing discovery procedures apply. Given the recent *Yousoufian* case, which made agency culpability the focus in determining daily penalties under the PRA, the Court reasoned that discovery is relevant and permissible to uncover the reasons why documents are withheld, destroyed, or lost.

The Court also adopted the Freedom of Information Act (FOIA) standards of reasonableness regarding adequate searches. Under this approach, the focus is not whether responsive documents in fact exist, but whether the search itself was adequate. The search must be reasonably calculated to uncover all relevant documents, which is highly specific to each individual case. This means that agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search cannot be limited to one or more places if there are additional sources for the information requested. Thus, agencies must search those places or record systems where a document is reasonably likely to be found. Importantly, the Court stated that an inadequate search is a violation of the PRA. However, the Court stopped short of concluding that an independent cause of action exists when an agency conducts an inadequate search. Nevertheless, the Court found that inadequate searching is at least an aggravating factor to be considered in setting the daily penalty amount. Applying this standard, the Court found that the County's search was inadequate because it did not search Knutsen's old hard drive, where the record sought was likely to be located.

Finally, the Court held that a party may be entitled to recover costs and fees if the agency wrongfully fails to produce documents in response to a request, even if the plaintiff already has the responsive record. "Prevailing" party status is related to the legal question of whether the records should have been produced on request. Subsequent production does not affect the wrongfulness of the agency's initial action to withhold the records. Thus, subsequent production serves to stop the clock on daily penalties, rather than eliminating the remedial provisions of the PRA altogether.

**III. Conclusion.** Although the three holdings in this case appear at first glance to be straightforward, many questions remained unanswered. For example, a strong concurrence opinion written by Justice Madsen states that although discovery is appropriate in PRA cases, it should only occur after a summary judgment motion is heard regarding the adequacy of the agency's search. According to the concurrence, discovery only becomes appropriate and necessary if penalties are available, and therefore the motivation for an agency's actions becomes relevant only after the adequacy of the search is resolved.

However, several principles are clear from the opinion:

- At least after a search has been determined to be inadequate, discovery regarding an agency's motivations for failing to produce a record is appropriate.
- Cities should keep clear records of the searches performed to respond to PRA requests, who performed them, and the locations searched.
- Searches must be conducted in places or record systems reasonably likely to contain a responsive record, which could include old hard drives if they are still searchable. Leads on additional responsive records should be followed.

- If an adequate search is performed, but a responsive document was not located, the city may move to dismiss a lawsuit premised upon the failure to produce that record by providing evidence, in the form of declarations, of the adequacy of the search.
- At this time, there is no independent cause of action under the PRA for an inadequate search.
- If an adequate search is not conducted, and responsive documents are therefore not produced, the inadequacy of the search may be used as an aggravating factor in calculating the daily penalty amount.
- Destroying an electronic record contained on a surplussed hard drive while a request is pending may result in a violation of the PRA and can lead to imposition of penalties.

Please contact your city attorney with any further questions regarding the Public Records Act.