Court of Appeals no. 52826-6-II

DIVISION II
COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON

COWLITZ TRIBAL GAMING AUTHORITY,
APPELLANT/PLAINTIFF,

V.

CLARK COUNTY SHERIFF'S OFFICE, ET AL.,
RESPONDENT/DEFENDANTS.

ON APPEAL FROM THE CLARK COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT D. ANGUS LEE

D. Angus Lee
Angus Lee Law Firm, PLLC
Attorneys for Terry Grover
9208 NE HWY 99, STE 107277
Vancouver, WA 98665
Phone: 360-635-6464

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

A. INTRODUCTION

This matter arises out of a request for public records to the Clark County Sheriff's Office for certain video records. At the trial level the respondent's prevailed, but agreed to stay production of the records pending appeal.

Since then, the Appellant has provided the Respondent an opportunity to fully review the public records, and Respondent has accordingly withdrawn the public records request previously made to the Sheriff's Office. See motion to supplement the record and declaration and exhibit in support of motion.

Accordingly, this matter is moot.

B. ASSIGNMENT OF ERROR

Petitioner assigns error to the Superior Court's ruling. The assignment of error should not be considered because this case is now moot. Even if this Court were to consider Petitioner's assignment of error, the Superior Court ruled correctly.

C. STATEMENT OF THE CASE

Petitioner is challenging a denial of Petitioner's request for an order to enjoin production of records that it has already produced to Respondent, and regarding a public records request that has since been withdrawn. See motion to supplement the record and declaration and exhibit in support of motion.

D. ARGUMENT

Because the records were provided for inspection, and because the public records request has been withdrawn, the matter is moot. If the matter is not dismissed on mootness grounds, the Superior Court ruling should be upheld by this court for reasons argued in respondent's trial court memo. Copy attached as Appendix A to this brief.

Under Washington law, a "case is moot if a court can no longer provide effective relief." *In re Cross*, 99 Wn.2d 373, 377 (1983). That is the case here. This matter arises out of a public records request. Petitioner has provided Respondent an opportunity to fully review the records, and the request for records has been withdrawn.

If the Court grants the relief that Petitioner seeks and overturns the Order, it would have no practical effect on the rights of Petitioner. As a result, the Court can no longer provide effective relief to Petitioner and the case is moot. Because the case is moot, Petitioner's appeal should be dismissed.

If the Court does not dismiss the appeal on mootness grounds, it should affirm the decisions of the lower courts. Respondent incorporates by reference his briefing to the Superior Court, which is equally applicable to the arguments that Petitioner now makes to this Court. For the reasons

discussed therein, Petitioner's arguments are without merit and the Superior Court's Order should be affirmed.

E. CONCLUSION

For the reasons discussed herein, Petitioner's appeal should be dismissed on mootness grounds or, in the alternative, the Superior Court's Order should be affirmed.

Respectfully submitted this Wednesday, April 10, 19.

S// D. Angus Lee
D. Angus Lee, WSBA# 36473
Attorneys for Angus Lee
Angus Lee Law Firm, PLLC
9105A NE HWY 99 Suite 200
Vancouver, WA 98665
Phone: 360-635-6464
E-mail: Angus@AngusLeeLaw.com

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on Wednesday, April 10, 2019, this document and referenced supporting documents was/were delivered to the following person(s) in manner indicated:

Joseph Vance COWLITZ TRIBAL GAMING AUTHORITY	Email

S// D. Angus Lee
D. Angus Lee

APPENDIX A

HON. BERNARD VELJACIC

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

COWLITZ TRIBAL GAMING AUTHORITY, PLAINTIFF, vs. CLARK COUNTY SHERIFF'S OFFICE, AND D. ANGUS LEE, DEFENDANTS.	No. 18-2-06359-06 DEFENDANTS' HEARING MEMO

INTRODUCTION

Plaintiff seeks to bar production of public records by claiming three inapplicable exemptions. First, the Plaintiff asserts that the records are excluded under the Public Records Act (PRA) provision for records prepared to "respond to criminal terrorist acts." This exemption is not applicable in any way. Second, the plaintiff claims the records are exempt as investigation records. This is also inapplicable.

Most telling, is the that the Clark County Sheriff's Office has not claimed any exemption applies. If it were true that these records needed to be withheld to protect

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268

against terrorists, or to ensure effective law enforcement, or public safety, or an ongoing investigation, the Clark County Sheriff's Office would have stated so by now. It has not.

Lastly, Plaintiff is confused about the "other statute" exemption. Plaintiff's attempt to shoehorn a private agreement between Plaintiff and the Sheriff into a statute. The Washington State exemption for any other state "statute" is for … state statutes, not local agreements. It is simply preposterous to assert that the Sheriff's Office has authority to enter into a private agreement and thereby exempt records from the PRA. Where would such alleged authority end?

No exemption applies. Therefore the records must be released.

ARGUMENT

"[T]he PRA contains exemptions that protect certain information or records from disclosure." *Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 177 Wash. 2d 467, 486, 300 P.3d 799, 808 (2013). "The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies." *Id.* "In order to prevail in a challenge to the production of records under the PRA, a party must establish a specific exemption that bars production of the requested records." *Seattle Times Co. v. Serko*, 170 Wash. 2d 581, 591, 243 P.3d 919, 925 (2010).

"Courts should construe exemptions narrowly to allow the PRA's purpose of open government to prevail where possible." *Id.* "[T]he PRA reflects a strong public policy favoring the disclosure and production of information." *Id.*

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268

When, as here, a party is seeking to prevent disclosure of a public record, then that party must seek an injunction under RCW 42.56.540. *Id.*, at 487.

> In such a case, the party must prove (1) that the record in question specifically pertains to that party, (2) **that an exemption applies**, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.

Id. (*citing Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (emphasis added); *see also Serko*, at 591.

In this matter, Plaintiff claims three separate exemptions. As not one of the exemptions applies, there is no basis to withhold the records from production.

1. THE ANY OTHER STATUTE EXEMPTION DOES NOT APPLY.

The any other "statute" applies to statutes passed by the State of Washington, nothing more. As there are no "other" statutes applicable here, there is no exemption. Plaintiff cites generally to a case from nineteenth century, *Green v. Biddle*, 21 U.S. 1 (1823), in support of their argument that "an interstate compact is binding on its parties." However true that proposition may be, factually, there is no interstate compact in this matter. Neither Clark County, nor the Sheriff's Office are "states" which can enter into an "interstate compact."

Plaintiff then argues that a compact "between sovereigns" binds the parties. However, there are not two "soverigns" here. A sovereign "is the source of power in the state and of the law." The Wolters Kluwer Bouvier Law Dictionary, Desk Edition (2012). The soverign word is derived from the French soverain, meaning either above or excellent, and it initially connoted the person of the monarch, then the legal powers of the monarch,

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268
ANGUS LEE LAW FIRM, PLLC

and then the legal powers of the state. Id. Washington State is the power making the PRA law, and is not a party to the interlocal agreement. There is no agreement between soverigns and no interstate compact.

Plaintiff then cites to *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir.1991), for the proposition that "[h]aving entered into a contract, ***a participant state*** may not unilaterally change its terms." (emphasis added). Again, while *McComb* may be valid law, it says nothing relevant to this case, as the State of Washington is not a "participant state" as it relates to this matter. Plaintiff's finally cite to *The Law and Use of Interstate Compacts*.[1] But again, there is no interstate compact here, and the examples discussed in the cited section of *The Law and Use of Interstate Compacts*, deal with agreements between states.

If this Court were to accept Plaintiff's argument, and interpret a PRA exemption broadly (which it cannot do), what would stop a county from making agreements with other local municipalities to house their public records while also agreeing to not disclose them to requestors? The any other statute provision is included in the PRA to ensue that the PRA does not result in disclosure of records the State of Washington has specifically exempted by State statute, not so that local entities can create a contractual workaround to avoid the transperancy provided by the State of Washington in the PRA. The any other statute exemption does not apply in this case.

//

//

[1] Available here: https://www.csg.org/knowledgecenter/docs/ncic/LawAndUse.pdf

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268

ANGUS LEE LAW FIRM, PLLC

2. THE ONGOING INVESTIGATION EXEMPTION DOES NOT APPLY.

The exemption for investigative/law enforcement records does not apply, or the Sheriff's Office would be claiming the exemption. There has been no claim by the Sheriff's Office that there is an active or ongoing investigation, let alone that "the nondisclosure of [the records] is essential to effective law enforcement" under RCW 42.56.240.

"The application of the investigative records exemption requires that the records in question be compiled by law enforcement and that they be essential to effective law enforcement." *Seattle Times Co. v. Serko*, 170 Wash. 2d 581, 593, 243 P.3d 919, 926 (2010). "Records are essential to effective law enforcement if the investigation is leading toward an enforcement proceeding." *Id.*, at 593.

"[T]he decision as to what information may or may not compromise an open investigation is best left to law enforcement." *Id.*; *See also Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013) (criminal investigation materials were not categorically exempt from production under the effective law enforcement exemption because the police department had concluded its investigation); *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) (Department of Labor and Industries did not satisfy burden of proving the records were exempt because agency failed to establish the requested records were essential to effective law enforcement.).

Plaintiff cites to three cases dealing with requests for video, but each case deals with Department of Corrections video. "*Fishcer* and *Gronquist* clearly hold that ***prison surveillance*** videos are exempt from disclosure under the PRA." *Gaston v. Dep't of Corr.*,

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268
ANGUS LEE LAW FIRM, PLLC

No. 50338-7-II, 2018 Wash. App. LEXIS 1723, at *5 (Ct. App. July 24, 2018) (emphasis added). Of course, the case at bar does not deal with prisons or prisoners, and the PRA explicitly treats prisoners making a PRA request differently than all other requestors. See RCW 42.56.565.

The most analogous case is in fact *Jane Does v. King County*, 192 Wn. App. 10, 366 P.3d 936 (2015), holding that the PRA required disclosure of the surveillance footage on a college campus because the "investigative records" exemption did not apply as there was no showing as to how disclosure would have harmed future law enforcement efforts. With regards to the "security" exemption, there was also no showing that public disclosure would have had a substantial likelihood of threatening public safety. *Id.*

The investigation exemption simply does not apply, especially when the exemption is construed narrowly. It did not apply on college campus, it certainly does not apply in a casino.

3. THE EXEMPTION FOR RECORDS RELATED TO TERORIST THREATS TO THE GENERAL PUBLIC DOES NOT APPLY.

The nondisclosure of the records is not essential for protection against terrorist attacks, nor is it necessary to protect the general public. There is certainly not a "substantial likelihood of threatening public safety," as required for the exemption to apply. Accordingly, the terror threat protection exemption does not apply.

The government attempted to claim this exemption in *Jane Does*, as Plaintiff does here. The claimed exemption was denied.

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268
ANGUS LEE LAW FIRM, PLLC

> The University next contends that the trial court erred when it declined to apply the PRA's "security" exemption. We disagree.
>
> The "security" exemption exempts from disclosure the following public records:
>
> (1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population … and that manifest an extreme indifferent to human life, ***the public disclosure of which would have a substantial likelihood of threatening public safety***, consisting of:
>
> (a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans.
>
> RCW 42.56.420 (emphasis added).
>
> The University's burden was to show that public disclosure of the videos would have a substantial likelihood of threatening public safety. It failed to meet this burden. The University's argument that disclosure of the videos could enable future individuals to successfully evade its surveillance security system is altogether speculative.

Jane Does, at 28-29 (emphasis original). The government made the same arguments that Plaintiff makes here. Plaintiff's argument fails for the same reasons.

By comparison, the Court should consider an example of when this exemption was appropriate to apply. *See e.g, Nw. Gas Ass'n v. Utils. & Transp. Comm'n*, 141 Wash. App. 98, 101, 168 P.3d 443 (2007) (gas company's pipeline shapefile data fell under Wash. Rev. Code § 42.56.420(1), because the data in question was maintained to prevent, mitigate, or respond to criminal terrorist acts).

> [T]he requested shapefile data falls under the statutory security exemption, which, we repeat, expressly includes "portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to ***criminal terrorist acts***." RCW 42.56.420(1)

Id., at 120 (emphasis original). "The legislature's use of the conjunctive 'or' clearly

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268
ANGUS LEE LAW FIRM, PLLC

indicates its intent that 'maintaining' records to mitigate or to respond ***to terrorist acts*** is sufficient to qualify that information for the security exemption…". *Id.* (emphasis added).

It is more than a stretch for Plaintiff to assert that the release of a casino video "would have a substantial likelihood of threatening public safety," or that non-disclosure is needed to protect against a terror attack. Plaintiff provides no authority on point in support of this claimed exemption. Reading the exemption narrowly, it does not apply.

CONCLUSION

Plaintiff has claimed three exemptions. Not one of them applies. If any of these exemptions did apply, the Clark County Sheriff's Office would have affirmatively stated so already. Plaintiff has the burden to establish an exemption, and the Court is to interpret any claimed exemption narrowly in order to promote transparency. Plaintiff hopes this Court will apply and interpret exemptions broadly to ease the Plaintiff's burden. But this court must do the opposite and interpret the exemptions narrowly. Plaintiff therefore cannot establish that any exemption applies and the records must be disclosed. The Temporary Restraining Order should be lifted and the records released.

DATED this Tuesday, January 1, 19.

S// D. Angus Lee
D. Angus Lee, WSBA# 36473
Attorneys for D. Angus Lee
Angus Lee Law Firm, PLLC
9105A NE HWY 99 Suite 200
Vancouver, WA 98665
Phone: 360.635.6464 Fax: 888.509.8268
E-mail: Angus@AngusLeeLaw.com

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on Tuesday, January 1, 2019, this document was delivered to the following person(s) in manner indicated:

JOSEPH VANCE COWLITZ TRIBAL GAMING AUTHORITY	Email
BILL RICHARDSON CLARK COUNTY SHERIFF'S OFFICE	Email

S// D. Angus Lee
D. Angus Lee

9105A NE HWY 99, STE 200
Vancouver, WA 98665
(P) 360-635-6464 (F) 888-509-8268

ANGUS LEE LAW FIRM, PLLC

April 10, 2019 - 4:28 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52826-6
Appellate Court Case Title:	Cowlitz Tribal Gaming Authority, App v. Clark County Sheriff's Office, et al., Resps
Superior Court Case Number:	18-2-06359-4

The following documents have been uploaded:

- 528266_Briefs_20190410042742D2911193_9516.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief CTGA apr1019.pdf

A copy of the uploaded files will be sent to:

- Bill.Richardson@clark.wa.gov
- CntyPA.GeneralDelivery@clark.wa.gov
- heather.harmon@millernash.com
- joe.vance@millernash.com
- kathryn.rasmussen@millernash.com

Comments:

Sender Name: Derek Lee - Email: angus@angusleelaw.com
Address:
9105 NE HIGHWAY 99 STE 200
VANCOUVER, WA, 98665-8974
Phone: 360-635-6464

Note: The Filing Id is 20190410042742D2911193