

WASHINGTON CASE UPDATE

The Public Records Act: Violations, Exemptions and Per Page Penalties

case in point...

From the desk of Bruce R. Gilbert: When does a public body or agency violate the Public Records Act? Are records produced from a Department of Labor and Industry investigation categorically exempt from the Act? When a violation is found, does a court have discretion to impose a per page penalty? Find out how the Washington Supreme Court answered these questions in this week's case update.

Claims Pointer: In this 5-4 decision, the Washington Supreme Court held that the Public Records Act allowed the trial court to impose the penalty calculated on a per page basis, and, further, that the Department of Labor and Industry was not entitled to the investigative records exemption as it did not demonstrate that the records at issue were exempt from disclosure. This case provides a helpful overview of the Public Records Act and reveals the broad discretion given to the courts in imposing penalties where violations under the act are found. Furthermore, the practical impact from this decision is that public bodies or agencies subject to the PRA will likely be apprehensive to withhold records, particularly where they may face a large penalty.

Wade's East Side Gun Shop, Inc., et al. v. Dep't of Labor & Indus., et al., 89629-1, Supreme Court of the State of Washington (2016).

The Department of Labor and Industry (L&I) opened investigations into companies that employed workers at Wade's Eastside Gun Shop (Wade's) following a complaint of elevated levels of lead in the blood of two employees working on a remodel of Wade's. Thereafter, the Seattle Times (Times) requested access to all L&I records on lead exposure at Wade's. After six months, the request ended up in superior court. The trial court found that L&I failed to properly comply with Public Records Act (PRA) procedures. The court imposed a \$502,827.40 penalty for the PRA violations based on the number of pages of public records L&I wrongfully withheld and L&I's culpability during five separate time periods. The court also awarded the Times' attorney fees and costs, for a total judgment of \$546,509.26. L&I appealed.

The Washington Supreme Court granted direct review and affirmed the lower court's ruling, holding that the court did not abuse its broad discretion in determining what constitutes a record and imposing a per page penalty. The court also found that L&I could not take advantage of the categorical exemption for

investigative records since it did not make the proper showing.

The court provided an overview of the PRA in its analysis. According to the court, the PRA is a strongly worded mandate for the disclosure of public records and its purpose is to preserve the sovereignty of the people and accountability of public officials and institutions. To effectuate this purpose, the PRA is to be liberally construed and its exemptions are narrow. Thus, courts have broad discretion in determining a PRA penalty and nothing prohibits a per page penalty.

Regarding the per page penalty, the court concluded that a plain reading of the PRA supported the trial court's calculation of an appropriate penalty on a per page basis. Furthermore, a public record is defined in the PRA as any writing containing information relating to the conduct of government. According to the court, a single page fit within the definition of a "writing." The court also found that not only does the PRA afford great discretion to trial courts to determine appropriate penalties for a PRA violation, but, since enacting the PRA, the legislature has afforded the courts more—not less—discretion. Finally, the court discussed the changing and unpredictable nature of "public



Contact: Bruce Gilbert | www.smithfreed.com | email: Bgilbert@smithfreed.com

Ph: 206.576.7575 | Fax: 206.576.7580 | 705 Second Avenue, 17th Floor | Seattle | WA | 98104

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records” and indicated that it can be something other than a sheet of paper or a bound volume, such as metadata or text message transcripts. Therefore, the trial court’s determination that each withheld page constituted a record was a reasonable interpretation of the PRA and within the court’s discretion.

The court also reviewed and rejected L&I’s argument that it was categorically exempt from producing public records from its February 2013 response to the Times’ request through the date the last citation was issued in June 2013. To qualify for the exemption, L&I was required to show that the record was: (1) investigative in nature, (2) compiled by a law enforcement, penological, or investigative agency, and (3) essential to law enforcement or the protection of privacy. According to the Supreme Court, L&I investigations do not implicate the same concerns as ongoing and unsolved criminal investigations. L&I issues citations after investigating employers, who know they are being investigated. There is not the same risk of disclosing sensitive information that could impede an investigation or apprehension of a suspect. While the court indicated that their decision does not mean L&I can never claim the exemption, it found that because L&I failed to show that nondisclosure was essential to effective law enforcement, L&I’s refusal to disclose the requested documents constituted a violation of the PRA.

The practical impact of this case is that public bodies or agencies that are subject to the PRA will likely be gun shy to withhold records or argue that they do not have to produce records, particularly where there is the potential for a large monetary judgment against them. It is worth noting that the dissenting opinion disagreed with the unfettered discretion granted by the majority and took issue with the court essentially eliminating PRA penalty restrictions.

The Washington Supreme Court affirmed the lower court’s ruling and awarded costs and attorney fees to the Times on appeal.

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