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The Honorable G Helen Whitener

Date of Hearing: April 13, 2018

Time of Hearing: 9:00 AM

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ARTHUR C. BANKS, an individual,
TONEY MONTGOMERY, an individual,
WHITNEY BRADY an individual,

Plaintiffs,

v.

CITY OF TACOMA, a municipal
corporation,

Defendant.

No. 16-2-05416-7

**PLAINTIFFS’ REPLY IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

**A. TPD’s Search Was Inadequate At The Time It Was Conducted, As Is
Emphasized By The Number and Scope of the Public Records At Issue Here**

The City is correct that an important issue before the Court on the Motion for Partial Summary Judgment is whether the public records search by the Tacoma Police Department (“TPD”) was adequate. But resting on this point does not help the City. As Plaintiffs have extensively shown in our Opposition to Defendant’s Motion for Summary Judgment (“Pls.’ Opp’n”), TPD’s search was clearly inadequate. Pls.’ Opp’n at 2-12. TPD’s failure to even identify the many public records that are the subject of

1 Plaintiffs' Motion for Partial Summary Judgment ("Pls.' Mot.") further underscores the stark
2 inadequacy of the search. While it is true that a PRA search need not be perfectly successful to
3 be adequate, the failure of TPD's search to provide such a variety of directly responsive records
4 simply reaffirms the inadequacy of TPD's search and process.

5 An adequate search would easily have turned up all or nearly all of the records at issue in
6 this motion, but TPD, likely because of its defective search, did not produce these clearly
7 responsive records. This case is thus unlike the main case the City cites in its Response, *Kozol v.*
8 *Wash. State Dept. of Corrs.*, 192 Wn. App. 1, 366 P.3d 933, *review denied*, 185 Wn.2d 405, 379
9 P.3d 72 (2016). *See* Defendant's Response to Plaintiff's Motion for Partial Summary Judgment
10 at 2 ("Def.'s Resp."). In *Kozol*, the Department of Corrections (DOC) searched diligently and
11 found numerous records regarding prison grievances, but could not at first find records of one
12 designated grievance. However, the DOC later found the missing records and promptly provided
13 them. The search was held to be adequate in these circumstances. The multiple missing records
14 in the present case from several different categories of records tells a very different story of an
15 inadequate search that did not turn up multiple responsive records.

16 The only other PRA issue in *Kozol* was the requester's complaint that DOC did not
17 provide the reverse side of the grievance forms. The requester's complaint about this was
18 rejected because the DOC did not scan the reverse of all of the grievance forms, which contained
19 only boilerplate instructions, and so did not have those records available. Thus the record did not
20 exist *at the time the Department responded* and in any event was inconsequential, and so there
21 was no PRA violation. In contrast, the many records at issue here did exist at the time TPD
22 responded to the PRA request and were clearly responsive.

23 The City's submission includes statements that TPD employees have searched for some
24
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26

1 of the public records in response to Plaintiffs’ Motion for Partial Summary Judgment, could not
2 find the records now, and therefore concludes that the City cannot be sanctioned for failing to
3 produce a record that does not exist. This argument is flawed because, as is shown below, the
4 records did exist at the time TPD was responding to the PRA Request; that TPD no longer has
5 these documents in its possession years later is not proof that it did not have them in September
6 2015. TPD was required to conduct an adequate search for the records *at the time of the request*.
7 The fact that those records are not at TPD now is of no moment on the question of whether TPD
8 violated the PRA at the time TPD responded to Plaintiffs’ PRA request.
9

10 **B. Each of the Records Should Have Been Found and Produced.**¹

11 1. Exhibit 4 – Billing Spreadsheet

12 The City suggests that Exhibit 4—which TPD did not provide to Plaintiffs in response to
13 the PRA Request but was revealed through discovery in this case—does not represent a PRA
14 violation because Plaintiffs’ former counsel and TPD agreed that TPD could provide just the
15 2015 spreadsheet entries that involved actual use of a cell site simulator. However, even
16 assuming this oral agreement was reached, TPD still did not provide all the responsive records
17 that were revealed when Plaintiffs finally obtained Exhibit 4.
18

19 In its second and final disclosure of records on December 18, 2015, TPD provided a two-
20 page document entitled “2015 Spreadsheet.” It is attached as Exhibit 16 to the Reply Declaration
21 of John Midgley.² This document contains entries for just three dates in 2015, the last of which is
22
23
24

25 _____
26 ¹ The Exhibit numbers refer to the Exhibits attached to the Declaration of John Midgley,
previously filed with Plaintiffs’ Motion for Partial Summary Judgment.

² This number is consecutive to the exhibits submitted on the Motion for Partial Summary
Judgment.

1 6/27/15.³ These three do not appear to represent all of the uses of the cell site simulator in 2015
2 that are memorialized in Exhibit 4.

3 Detective Krause testified that the best way to determine from the spreadsheet whether
4 the cell site simulator has been deployed is if the words “capture” or “attempt capture” appear.
5 Krause Dep. 35:11-36:23. In Exhibit 4, the word “capture” appears *eleven* times in connection
6 with entries in 2015 before the date of TPD’s final PRA disclosure in mid-December of 2015,
7 which is when TPD sent Exhibit 16 to Plaintiffs. *See* Exhibit 4 attached to the Decl. of John
8 Midgley ISO Partial Summary Judgment, at Bates Christopher000300-Christopher000302.⁴

9
10 Exhibit 4 thus shows that it is extremely likely that Exhibit 16 did not disclose all of the
11 2015 uses of the cell site simulator up to the time of the disclosure in mid-December 2015.
12 Therefore, TPD did in fact withhold from Plaintiffs centrally important public records about the
13 cell site simulator that TPD possessed and that TPD provided to other PRA requesters. This
14 failure has nothing to do with the adequacy of TPD’s search for records, as TPD’s search
15 obviously turned up the spreadsheet. It is instead a straightforward, intentional withholding of
16 centrally relevant public records.
17
18

19 ³ As a printout of a spreadsheet, it appears the two pages of the Exhibit should be read side-to-
20 side, showing three rows of entries.

21 ⁴ These are the pages in the Exhibit 4 spreadsheet that contain the word “capture” as the printed
22 copy of the spreadsheet was provided to Plaintiffs. In order to read the full spreadsheet that is
23 represented in Exhibit 4 as the spreadsheet appeared in Excel, Exhibit 4 must be printed and
24 then the relevant pages lined up as follows: Christopher 292 then 293 below that, then 294
25 below that. Second column, placed directly to the right of the first three pages so that the
26 rows align: Christopher 296, then 297 below, then 298. Finally, last column again directly to
the right so the rows align: Christopher 300, then 301 below, then 302 below. Thus when
completed, the spreadsheet can be read in its entirety when the pages are lined up in this way:

292	296	300
293	297	301
294	298	302

1 2. Exhibit 5 – February 28, 2014 Email and letter from FBI

2 The City agrees that these records are responsive to Plaintiffs’ PRA request but suggests
3 that it did not have this material at the time of the PRA request. However, we know that this is
4 not true because, as detailed in the Reply Decl. of John Midgley, both the email and the letter
5 were provided to Plaintiffs *by the City in discovery in this case in June of 2016*. Since the City
6 had these records to provide in discovery in 2016, TPD must have had them in late 2015 when
7 dealing with Plaintiffs’ PRA request.

8 The letter from the FBI is an especially important public record in response to Plaintiffs’
9 Request, as it emphasizes the position of the federal government regarding release of information
10 about the cell site simulator and may have influenced TPD’s decisions about what to release in
11 response to Plaintiffs’ PRA request. The City has provided no reasonable excuse for TPD’s
12 failure to provide this clearly important and responsive public record in response to Plaintiffs’
13 PRA Request.

14 3. Exhibits 6-9 – Email Chain With FBI

15 Just as with Exhibit 5, the City overlooks the fact that it provided these documents to
16 Plaintiffs in discovery in this case in June of 2016, so TPD must have had them in 2015 when
17 TPD was processing Plaintiffs’ PRA Request. Reply Decl. of John Midgley. The City’s claim
18 that a public entity cannot be held liable for failing to produce a record it does not have is thus
19 irrelevant. Once again, TPD did have these records, yet failed to provide them even though they
20 are responsive and highly important records evidencing communications with the FBI about
21 what information would or should be released to the public about cell site simulators.
22

23 4. Exhibit 10 - Warrant Template

24 The warrant template is the form that is used to fill out TPD-initiated warrants that
25 authorize the use of cell site simulators. C. Shipp Dep. at 24:19 – 26:8. The City is simply wrong
26 to say that the template is “not specific to cell site simulators.” Def’s Resp. at 4. The warrant

1 template on the very first page is called “In the matter of application for an order authorizing
2 installation and use of a pen register, trap and trace device, and *cell site simulator device.*”
3 Exhibit 10 at Gregory 000107 (emphasis added). The nine-page Order template alone mentions
4 “cell site simulator” no less than ten times, and paragraph nine of the Order is an entire page
5 governing the use of a cell site simulator. Exhibit 10 at Gregory 000107-000115. That the
6 warrant template also authorizes the use of pen trap and trace does not reduce its specificity to
7 cell site simulators.
8

9 The City is equally mistaken to suggest that the template is not responsive to Plaintiffs’
10 PRA request. It is undoubtedly a record regarding TPD’s “use” of cell site simulators responsive
11 to PRA Request 1, as it is the document that TPD fills out and presents to the court for
12 authorization to use the device. And even though it is a template and not filled in, it obviously
13 meets the definition of a public record for use of the cell site simulator, as it “includes any
14 writing containing information relating to the conduct of government or the performance of any
15 governmental or proprietary function... *regardless of physical form or characteristics.*” RCW
16 42.56.010(3)(emphasis added). The template is also responsive to PRA Request 10, as a “warrant
17 . . . *associated with* those [warrant] applications.” (Emphasis added). Exhibit 10 is the start of
18 every cell site simulator warrant application – it is the very document from which the warrants
19 are generated for use of the cell site simulator. The template relates directly to the conduct of
20 TPD with respect to cell site simulators and is also responsive to the clear thrust of Request 10
21 regarding warrant documentation. Exhibit 10 is responsive to Plaintiffs’ PRA request and was
22 not provided until its existence was finally disclosed during discovery in this case.
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24

25 5. Exhibits 11-13 – Citizen Review Panel Minutes and Agenda

26 The City concedes these records are responsive to the PRA request and that TPD failed to

1 provide them to Plaintiffs, but suggests that the City should now be excused because TPD had no
2 reason to search for them. The City also appears to allege that Plaintiffs suffered no harm
3 because TPD provided them to other PRA requestors with the result that Plaintiffs had use of
4 them in depositions. But as detailed in the Declaration of TPD's Michael Smith, filed with Def.'s
5 Response, Michael Smith apparently knew to ask the City Manager's Office for documents
6 related to cell site simulators. Smith Decl. at ¶ 3. He simply failed to do that in response to
7 Plaintiffs' PRA Request. In addition, some records that were provided in response to Plaintiffs'
8 PRA Request referenced the Citizen Review Panel meetings, which should have led to some
9 inquiry by TPD regarding the Panel. However, Mr. Smith admits that this obvious search was not
10 done for Plaintiffs' PRA request.
11

12 The City's claim regarding notice that Plaintiffs provided about the existence of the
13 documents is also unavailing. When Plaintiffs came into possession of Exhibits 11-13 or when
14 the City became aware that it failed to provide these documents has no relevance on the City's
15 PRA liability—it was TPD's duty to provide them in response to the PRA Request and it failed
16 to do so. Degree of fault may be relevant later regarding PRA penalties, but not as to liability.
17

18 The first use of these records in this case was in the deposition of Jeffrey Shipp on
19 November 7, 2016. At that point, the City had full notice that plaintiffs had these records and that
20 TPD had not provided them. The City complains that Plaintiffs did not list these documents
21 among those Plaintiffs contended TPD did not provide in response to the PRA request until later
22 in the case, but Plaintiffs' use of them in the depositions was more than adequate notice that
23 Plaintiffs had them and would claim they were responsive. Again, the timing of use of these
24 records may be relevant to PRA penalty issues, but does not excuse TPD's failure to provide
25 them in the first place.
26

1 6. Exhibit 14 – Police Department Legal Directive

2 The City argues that Exhibit 14 is not responsive to Plaintiffs’ PRA Request, as it does
3 not reference cell site simulators. On further review, Plaintiffs agree that this record is not
4 responsive and we withdraw our request that the Court find a PRA violation as to this record.

5 7. Exhibit 15 – May 21, 2013 Invoice

6 The City can only claim inadvertence in TPD’s admitted failure to provide this record
7 that is responsive to the PRA Request. It is true that courts have excused the inadvertent failure
8 to provide one public record, but in the context of this case where the search was demonstrably
9 deficient and there is a pattern of responsive records being withheld, this failure should not be
10 excused.
11

12 **C. The Scruggs Affidavit Raises Questions About Missing Records.**

13 The City in its Def.’s Resp. at 6-7 claims that its proffer of the Affidavit of Captain
14 Scruggs forecloses the question of additional missing records. However, the Scruggs Affidavit at
15 ¶ 4 states that Captain Scruggs reviewed in connection with cell site simulators not only the
16 billing spreadsheet, some of which TPD provided, but also “monthly activity reports.” If those
17 reports reference cell site simulators or their use, they are clearly responsive to the PRA request.
18

19 To Plaintiffs’ counsel’s knowledge, neither TPD in response to the PRA Request nor the
20 City in response to discovery has ever identified or provided “monthly activity reports” that are
21 relevant to use of cell site simulators. Thus the Scruggs Affidavit raises rather than forecloses
22 questions about TPD records that were not provided.
23

24 **III. Conclusion**

25 For the foregoing reasons and those provided in Plaintiffs’ Motion and other submissions
26 regarding the PRA search in this case, this Court should find PRA liability as to all of the

1 documents at issue except Exhibit 14, and determine PRA penalties at a later time.

2 Respectfully submitted this 9th day of April, 2018.

3 By:

4 /s/John Midgley

5 John Midgley, WSBA #6511

6 Lisa Nowlin, WSBA #51512

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ARTHUR C. BANKS, an individual, TONEY
MONTGOMERY, an individual, WHITNEY
BRADY an individual,

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CITY OF TACOMA, a municipal corporation,

Defendant.

No. 16-2-05416-7

CERTIFICATE OF SERVICE

I, Kaya McRuer, am a legal assistant for the American Civil Liberties Union of Washington Foundation, 901 Fifth Avenue, Suite 630, Seattle, WA 98164. I hereby certify that on the date indicated below, I caused to be served via e-service through the LINX system and e-mail a true and correct copy of the *Plaintiffs' Reply In Support of Motion for Partial Summary Judgment* on the following:

Margaret A. Elofson
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of April, 2018 at Seattle, Washington.

Kaya McRuer, Legal Assistant