The Honorable G. Helen Whitener
Hearing date: May 24, 2018
9:00 A.M.

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 BRIEF IN SUPPORT OF PROPOSED ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND FOR PENALTIES, FEES, AND COSTS**

I. Introduction

In its effort to minimize PRA penalties, the City has only reinforced why there should be substantial penalties and that the Court should order a new search. At the same time the City claims it is attempting to clarify issues, it has created even more questions and confusion about what should have been identified and provided in response to Plaintiffs' PRA Request.

The City and the Tacoma Police Department ("TPD") have been anything but forthcoming about the records they maintain regarding cell site simulators. For example, the City recently provided an affidavit from Capt. Scruggs where he states that his review of the use of cell site simulators included documents he called "monthly activity reports." However, TPD did not identify, let alone produce any reports of this kind in

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response to the PRA request. Now the City states that monthly reports from the relevant time period have all been destroyed (Elofson Affidavit ¶ 6). As detailed below, this bolsters Plaintiffs' claims for substantial penalties and the need for a new search. Further evidence of TPD's secrecy can be found in the 30(b)(6) deposition, where Det. Chris Shipp testified that he intentionally does not mention cell site simulator use in any case reports, and that Detectives Jeffrey Shipp and Terry Krause had told him public disclosure of cell site simulators was undesirable. Midgley Decl., Ex. 1, C. Shipp Dep. 57:18-58:20.

The City concedes that transparency regarding TPD's use of cell site simulators has been of great public interest, but in light of all that was left out of TPD's search and disclosure the City is incorrect to claim that this interest has waned. And public interest will continue to remain high, as reasonable transparency regarding cell site simulators continues to be a problem.

Serious questions remain surrounding TPD's search and handling of the PRA request. Plaintiffs cannot determine the truth of what may be hidden from them, but we can and do ask for this Court to shed further light on TPD's activities, as required by the PRA. All of this should be taken into account in the Court's determination of PRA penalties and Plaintiffs' request for a further search for public records.

II. Substantial Penalties Are Justified

Even taking the City's formulation of aggravating and mitigating factors from *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010), at face value—which Plaintiffs do not—there are overriding reasons why substantial PRA penalties are well-justified in this case. One of the factors the City lists as from *Yousoufian* includes "negligent, reckless, wanton, bad faith, or intentional noncompliance." Defendant's Resp. to Pls.' Request for Penalties and Fees at 3 ("Def.'s Resp."). As to all of the public records that the Court has already ruled were withheld wrongfully, there was at the very least

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negligence, perhaps even recklessness, in what was and was not provided.

The City tries to rely heavily on the factor concerning good faith. However, the City does not deal with the entirety of the factor. To quote the City, this factor applies to "the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions." Def.'s Resp. at 2. Based on this more detailed explanation of what "good faith" actually entails, Plaintiffs do claim bad faith in two ways.

First, as we have repeatedly shown, there are serious concerns about TPD's response to the Plaintiffs' PRA request. For all of the reasons stated in our arguments regarding the need for a new search, we strongly question whether TPD bothered to search for monthly activity reports, warrants, data that the cell site simulator likely captured on the laptop, etc. The Court has already held that the search was inadequate, and we have shown further inadequacy in the form of failures to even identify, let alone produce, obviously responsive documents.

Second, as the City acknowledges, Plaintiffs do claim that the warrant template, Exhibit 10, was intentionally and wrongfully withheld. The City incorrectly characterizes the warrant template as some sort of "blank form." It is not a routine blank form; it is the draft that is used to actually write the warrants that justify the use of the cell site simulator as required by law. We do maintain that it was withheld intentionally and in bad faith.

The City further questions the ongoing public interest in the cell site simulator and how TPD is using it. As stated above, that interest remains high and should remain high. In fact, this case has brought to light much more information about the warrant process, including the release of the warrant template, the lack of oversight of the process within TPD, the failures in TPD's search, and other matters that remain of great public concern.

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A. The Court Should Impose a Penalty for TPD's Failure to Produce the Monthly Activity Reports

The City now states that the monthly activity reports discussed by Capt. Scruggs and Det. Jeffrey Shipp, which are part of TPD's very thin oversight mechanism for use of the cell site simulator, have been destroyed for the relevant time period. Def.'s Resp. at 17; Elofson Aff. on Penalties at ¶ 6. These records—as an integral part of Capt. Scruggs' limited review of cell site simulator use—would clearly have been responsive to Plaintiffs' PRA Request. Yet, they were not even identified as responsive, let alone provided to Plaintiffs. Now that these public records have been destroyed, Plaintiffs have been deprived of them within the meaning of the PRA.[1]

It is admittedly difficult to determine an appropriate PRA sanction for this deprivation of public records because they cannot be produced. The last release of public records relevant to this case was December 18, 2015. We request that the Court consider that at least 24 monthly reports before that time were responsive to Plaintiffs' PRA request and that the Court determine a reasonable number of days from December 18, 2015, that Plaintiffs in fairness have been deprived of those public records. We are not suggesting that the Court count from December 18, 2015, to today, but that the Court pick a reasonable time, perhaps the 192 days that Plaintiffs have shown they were deprived of a number of the documents the Court has already ruled on, to impose an appropriate sanction.

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[1] The City incorrectly characterizes the testimony of Det. Jeffrey Shipp as supporting an argument that the monthly activity reports were not responsive to the PRA request. Def.'s Resp. at 16-17. But this mischaracterizes Shipp's testimony, attached as Ex. 5 to the Elofson Aff. on Penalties, which confirms the existence of the monthly reports and simply says the monthly activity reports, just like the billing spreadsheet, documented all pen trap and trace requests. None of this explains why the monthly reports were not identified and, unless exempt, provided. Even if the monthly activity reports did not specifically list the uses of the cell site simulator—which cannot be determined given the destruction of the reports—they would be responsive because all pen trap and trace warrants authorize use of the cell site simulator. Ex. 2 to Elofson Aff. on Penalties, Krause Dep. 19:14-26:5.

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B. Penalties for Exhibits the Court Has Ruled Were Wrongfully Withheld

1. Billing Log (Ex 4)

The Court has ruled that this record should have been provided. The billing spreadsheet is of great importance in this PRA case because it is the only remaining way (due to the destruction of the monthly reports) that the public can determine approximately how often the cell site simulator has been used. The spreadsheet is, as the City concedes, confusing and very possibly not complete in any form, *see* Krause Dep. 35-36, but it is a vital record in this case. The Court should impose a substantial per-day penalty.

2. Various Emails and an Invoice (Exs. 5-9 & 15)

Contrary to the City's suggestions, Exhibits 5-9 are not peripheral to Plaintiffs' PRA request and certainly not to the public interest in this case. They document many contacts between the FBI and TPD about the cell site simulator. For example, the FBI letter in Exhibit 5 is an FBI directive to Michael Smith, TPD Legal Advisor, to withhold information from the public regarding the cell site simulator. These are not routine email exchanges but go to the heart of the public interest and the explicit policy underlying the PRA. Much more than a nominal penalty should be imposed for TPD's failures to produce these public records.

Nor should these records be lumped together as if they were one, and certainly not together with Exhibit 15, which is an invoice and therefore on a completely different topic. The Washington Supreme Court has specifically ruled that in its discretion, a trial court can order PRA penalties *per page,* let alone per document. *Wade's Eastside Gun Shop, Inc., v. Dep't. of Labor and Indus.*, 185 Wn.2d 270, 277-80, 372 P.3d 97 (2016). Plaintiffs do not request per page penalties, but substantial per document penalties are well justified on these exhibits that are of great importance to public transparency.

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3. The Warrant Template (Exhibit 10)

The City's attempts to show that this template is an unimportant "blank form" must fail. The use of the phrase "blank form" is misleading and an attempt to lessen its centrality to TPD's preparation of cell site simulator warrants. It is not blank form; it is a draft warrant. It is the document that is used as the foundation for preparing all of the cell site simulator warrants that Plaintiffs have not been granted access to despite their likely existence in emails in the Tech Unit. Det. Chris Shipp testified on behalf of the City in the 30(b)(6) deposition that this very document is opened in electronic form, filled in with the probable cause information, and then printed out to create the original of the actual warrant. C. Shipp Dep. 41:13-42:4. Exhibit 10 is thus a draft of the warrants and responsive, as we have repeatedly said, to two parts of Plaintiffs' PRA request: Documents "regarding use…of Cell Site Simulators" (request 1) and "applications for warrants" (request 10). The City's continuing insistence that this document is not responsive fully justifies the maximum penalty as requested.

4. Citizen Review Panel Minutes (Exhibits 11-13)

The City suggests that it should not be penalized for TPD's complete failure to provide these materials to Plaintiffs. The fact that the Plaintiffs obtained them from a source other than TPD does not excuse TPD from failing to provide them, particularly as they relate so centrally to the controversy surrounding the cell site simulator. The PRA requires disclosure of all records unless a specific exemption applies and there is no specific exemption for records obtained elsewhere. TPD Legal Advisor Michael Smith concedes in his Affidavit filed March 19, 2018, that TPD released to Plaintiffs emails regarding the review panel, and it is clear that these documents should have been provided.

It is true that Plaintiffs cannot pinpoint when they obtained these documents. We request

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substantial penalties based on the Court's assessment of a reasonable number of days for which Plaintiffs were deprived of these documents. Some substantial sanction is in order for failure to produce these obviously responsive public records.

III. This Court Has the Authority to Order that TPD Identify and Provide Additional Public Records

It is the City of Tacoma's burden in this case to show, "beyond material doubt," that its search for public records was adequate. *Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Though the City claims that it has searched for all responsive records, this claim is seriously called into doubt by evidence that several categories of documents exist that have not been searched. It is not that Plaintiffs "choose not to believe the City that it has done a thorough search for all existent records," Def.'s Resp. at 17, it is that the testimony of the City's own agents make such a belief impossible. These documents have not been identified, disclosed, or produced due to Defendant's inadequate search for responsive records. The Court has the authority to order that the City comply with the PRA, and should order the City to search for, identify, and where applicable, produce, further responsive documents in locations that have been identified as likely to contain responsive documents.

The Supreme Court of Washington has found that a trial court has "broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it." *Resident Action Council v. Seattle Hous. Auth*., 177 Wn.2d 417, 445, 327 P.3d 600 (2013) ("*RAC*") (internal citation omitted). In *RAC*, the trial court ordered a wide range of relief, including injunctive relief requiring that properly redacted records be produced electronically (rather than in paper format) and that the defendant publish procedures related to public records requests. *Id*. at 446-47. That *RAC* did not involve the exact relief Plaintiffs request does not lessen its relevancy to the case at hand; it clearly establishes that this Court has the

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power to order injunctive relief when necessary to ensure PRA compliance.[2]

Indeed, if the court in *RAC* had the authority to order injunctive relief regarding the *format* of the documents and for new agency procedures, surely this Court has the authority to order that the City remedy its inadequate search. It is of no consequence that the City has not identified the specific documents Plaintiffs are requesting – the City has an obligation under the PRA to search for the documents and the Court has the power to enforce the PRA. To hold otherwise would be nonsensical: a court could order an agency to produce documents that the agency had identified, but if the agency refused to identify documents, then the court could not order the agency to produce the documents.

"A party seeking an injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) actual and substantial injury as a result." *RAC*, 177 Wn.2d at 445-46. Though the City recites this standard in its Response, it makes no effort to show that Plaintiffs do not satisfy the requirements. Def.'s Resp. at 15. As in *RAC*, injunctive relief is appropriate here: Plaintiffs have "a clear right to appropriate production of requested documents," TPD "has refused to produce those documents," and Plaintiffs "remain[] without the public records [they] ha[ve] requested." *RAC*, 177 Wn.2d at 446.

Plaintiffs are not asking the Court to do anything new under the PRA. "On numerous occasions [the Supreme Court of Washington has] allowed detailed 'disclosure orders' in PRA cases to remedy an agency's failure to comply with the PRA." *Id.* (citing cases). The City

[2] The City cites to *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649 (2014) for the proposition that *RAC* is not analogous and "the trial court in that case did not grant an injunction under RCW 42.56.540." Def.'s Resp. at 14-15. *Belo Mgmt* is inapposite and only refers to *RAC* in a footnote discussing the appropriate standard of review. Further, Plaintiffs are not requesting an injunction under RCW 42.56.540, which deals with court protection of public records.

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acknowledges that the court in *RAC* had the power to order production of documents withheld by the agency and to order "the agency to comply with the law." Def.'s Resp. at 15. This is precisely what Plaintiffs are asking the Court to do here.

Plaintiffs, relying on the testimony of Defendant's own agents, have shown that several categories of documents almost certainly exist; Defendant simply needs to search for them. Plaintiffs ask the Court to enforce compliance with the PRA by ordering the City to identify and disclose (unless exempt) responsive records in the following categories of documents:

The Cell Site Simulator(s): In its Response, the City completely fails to discuss Plaintiffs' arguments for why the cell site simulator(s) and associated laptop likely have responsive records, which TPD has not adequately searched for. It is striking that, in a public records request for documents related to cell site simulators, the City is silent as to its failure to reasonably search the cell site simulator itself. The City does not dispute Plaintiffs' experts' conclusion that data is entered into, stored by, and created by, the cell site simulator every time it is used, nor does it dispute that manuals for cell simulators indicate that the software is designed to store data to database files that are easily accessible and exportable. *See* Plaintiffs' Brief in Support of Proposed Order at 6-7 ("Pls.' Brief"). The City has not done an adequate search on the cell site simulator(s) and associated laptop, and its silence on the matter suggests that it has no good explanation for its failure.

Emails: The City is also silent in its Response with regard to the testimony of multiple members of the Tech Unit that emails likely exist regarding cell site simulators that have not been searched for or provided. These include emails disclosing the use of cell site simulators to prosecutors, correspondence with telecommunications companies for information needed to operate the cell site simulator, and emails containing warrants from other jurisdictions

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authorizing the use of cell site simulators. *See* Pls.' Brief at 5-6.

Plaintiffs are not saying that these emails definitely exist. Plaintiffs are saying that members of TPD have testified that these emails are likely to exist, and because TPD has not searched for them, its search was and continues to be inadequate. The City fails to respond to Plaintiffs' argument that TPD failed to search the email accounts of all members of the very small Tech Unit and failed to search the email accounts of officers outside the Tech Unit who are likely to have responsive emails.

Warrants: Whether warrants are exempt or not[3] is of no moment here, as the PRA requires the City to search for and identify the documents. Only then does the City make an exemption determination. *RAC*, 177 Wash. 2d at 437 (identifying steps of PRA response). Detective Christopher Shipp testified in a 30(b)(6) deposition that warrants authorizing the use of cell site simulators were regularly emailed to telecommunications companies, both from the individual email accounts of officers in the Special Investigation Unit and from TPD email account(s) connected to communal printer(s). *See* Pls.' Brief at 5. TPD did not conduct a search of the email accounts of officers outside of the Tech Unit, though they are likely to contain copies of said warrants. Nor did TPD search the emails sent by the communal printer. TPD did not even bother to ask Ricoh about the emails until after summary judgment briefing was done.

South Sound 911: The City also failed to respond to Plaintiffs' argument that South Sound 911 likely has responsive documents that TPD admits it did not look for. "[A] vast majority of all of the documents that are the primary source material for an investigation are going to be at South Sound 911." Pls.' Opp'n, Ex. D, M. Smith Dep. 19:4-6. The City has not

[3] Plaintiffs have not opined on whether warrants would be exempt and the City is incorrect to state that it is "undisputed" that they would be exempt. Def.'s Resp. at 17.

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offered any further explanation beyond the conclusory statements by Michael Smith for why a search of the main platform used by TPD officers would not have any references to cell site simulators or pen, trap, and trace warrants authorizing cell site simulator use.

In sum, the City's efforts to show that a further search for records would be futile falls short. Tellingly, despite arguing in earlier briefing that monthly activity reports were reviewed as part of TPD's cell site simulator oversight, the City now claims that such reports are unrelated to cell site simulators and have since been destroyed. A new search for the other likely missing documents should be ordered so the same does not happen to responsive records that may not have been destroyed yet. The City's Response makes no effort to rebut Plaintiffs' arguments with regard to records in the cell site simulator and laptop, officers' emails regarding cell site simulators, and South Sound 911. The City even admits that it does not know if records of cell site simulator warrants are retained on the printer used to email them, but maintains that it does not need to search for them.

IV. Plaintiffs Are Entitled to Substantial Fees and Costs

Hourly rates: The hourly rates suggested by the City are inappropriate. The City's own submissions show that a Seattle attorney, who we know to be David Whedbee of MacDonald Hoague and Bayless, billed at $425 per hour in early 2017. Elofson Aff. on Penalties, Ex. 3. Mr. Whedbee was admitted to practice in 2005. Thus John Midgley, admitted to practice in 1976 and with substantial complex litigation experience, should be allowed an hourly rate much above the $410 per hour the City suggests. Other levels of experience set out in Plaintiffs' submissions should lead to the same result: The City suggests rates that are far too low.

Proposed Deductions of Hours: The City requests a reduction of Plaintiffs' attorneys' hours by half "to reflect an apportionment of hours spent on successful claims versus

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unsuccessful claims." Def.'s Resp. at 19. This request is misguided. Many of the hours spent by counsel for Plaintiffs were in discovery, which relate to the case as a whole and are not attributable to any specific claim. All of those hours were necessary to support Plaintiffs' successful claims and a reduction is therefore inappropriate on hours spent unrelated to Defendant's Motion for Summary Judgment (Plaintiffs' Motion for Partial Summary Judgment did not address redactions.) Further, it is inaccurate to characterize Defendant's Motion for Summary Judgment as only concerning two topics. Defendant's Motion for Summary Judgment, as well as Plaintiffs' Opposition, evince multiple distinct topics: redactions, adequacy of the search as it relates to TPD's failure to search certain location, and TPD's failure to provide specific documents that Plaintiffs later received. *See* Def.'s Mot. for Summ. J. at Sections III.B, C, & D. Any reduction should be limited to time spent responding to Defendant's Motion for Summary Judgment and specific redaction issues. The City concedes that this would be 10 hours for John Midgley and 10.9 hours for Lisa Nowlin – nowhere near the 50% the City requests.

There should be no further deduction of hours for duplication of effort. As explained in detail in Plaintiffs' submission on fees, both offices voluntarily left out many hours that could have been included precisely because of substantial duplication of effort that we concede, largely due to the change of counsel on this case in both firms. Plaintiffs have already severely discounted hours for duplication and further discounting is unnecessary.

Nor should the Court credit the City's claims about a number of particular expenditures of hours. It is not duplication of effort for two counsel to visit with the plaintiffs in this case. Client contact and keeping clients informed is obviously an important ethical duty and having more than one counsel present is eminently justifiable.

The Court also should not deduct the time Plaintiffs spent on providing expert testimony.

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The thrust of the Expert Report is clearly to uncover public records that were not identified or provided. The experts' opinion is directed at our continuing request for a further search because the City has not convincingly refuted the likelihood that additional records do exist. Indeed, as discussed above, the City failed to even respond to Plaintiffs' showing – which relied on the Expert Report – that any search by TPD of the cell site simulator was woefully inadequate. The work by the experts relates in no way to a claim on which the City prevailed, but rather it goes to the adequacy of the search, an issue on which Plaintiffs prevailed.

Costs: There is no justification for reducing costs by an arbitrary amount as suggested by the City. The cost bill sets out costs that were all necessary to start and conduct the litigation and the City does not even try to say which costs it thinks were incurred unnecessarily or that were exclusively connected to any claim on which Plaintiffs did not prevail. The Court should award costs as requested.

V. Conclusion

For the foregoing reasons, and the reasons given in connection with Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, Plaintiffs' Reply in support of Motion for Partial Summary Judgment, and Plaintiffs' Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs, Plaintiffs request that the Court:

- Enter an order detailing its summary judgment rulings;
- Order TPD to conduct an adequate further search for public records responsive to the PRA request; and
- Award penalties, fees, and costs as requested.

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Respectfully Submitted this 22nd day of May 2018.

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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, Plaintiffs, v. 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 LINX e-service system and by e-mail a true and correct copy of the ***Plaintiffs' Reply Brief in support of Proposed Order on Cross Motions for Summary Judgment and for Penalties, Fees, and Costs, Reply Declaration of John Midgley in support of Penalties, and the exhibit attached thereto,*** and this ***Certificate of Service*** on the following:

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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 22nd day of May 2018 at Seattle, Washington.

Kaya McRuer
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