IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHAD A. PIERCE, Appellant, v. CITY OF DES MOINES, Respondent.	)	No. 64217-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 8, 2011

Leach, J. — To be a prevailing party in an action brought under the Public Records Act (PRA or Act),[1] a litigant need not show that the legal action was necessary to obtain public records or was causally related to their release. Because the superior court's contrary conclusion in this case was its sole basis for dismissing Chad Pierce's PRA claim against the city of Des Moines (City) and because the City's alternative bases for dismissal are either not properly before us or are not adequately briefed, we reverse and remand for further proceedings.

FACTS

In April 2008, Pierce requested public records from the city of Des Moines. On April 17, the City's agent responded by letter, stating, "We

[1] Ch. 42.56 RCW.

anticipate our review to identify responsive documents will take some time . . . . If you do not receive a complete response within two weeks, please do not hesitate to contact my office."

On April 29, 2008, the City received a second records request from Pierce. More than five business days later, on May 10, 2008, the City's agent first responded to this request, stating in part,

> I had been working on other public disclosure requests that had come in previous to yours, but want to assure you I have requested the . . . records from archives and once they are received, I will identify responsive documents and provide an appropriate response as soon as possible. If you do not receive a complete response within two weeks, please do not hesitate to contact my office.

According to Pierce, his subsequent letters, phone calls, and other inquiries regarding the records received no response.[2]

In February 2009, Pierce presented a "Tort Claim" for damages to the City. The claim alleged damages under the PRA, including attorney fees and penalties. Pierce did not file a lawsuit or commence any legal action against the City at that time.

Several weeks later, the City produced nonexempt records and an exemption log for various withheld records.

On June 17, 2009, Pierce filed a "Motion to Show Cause as to Why Sanctions Should Not be Imposed" in superior court. The motion sought

[2] We note that Pierce has been incarcerated throughout these proceedings.

sanctions "pursuant to RCW 42.56.550 for failing to turn over public requested records in a reasonable amount of time, which violated the above statutorial [sic] requirements." According to Pierce, the clerk's office added the word "Complaint" to his motion so that the title read "Complaint / Motion to show cause."

Pierce mailed the motion to the Des Moines City Attorney and noted a hearing for June 26, 2009. The city attorney received the motion and notice of the hearing date. Believing the City had not been properly served, the city attorney did not appear at the hearing.

On June 26, 2009, the superior court issued an order requiring the City to appear and show cause why judgment should not be entered for its failure to produce the requested records. The City then made a limited appearance for the purpose of asserting lack of jurisdiction, insufficiency of service and process, and failure to state a claim upon which relief could be granted.

Following a second show cause hearing, the City filed a motion to dismiss. It argued that Pierce did not properly initiate an action under the PRA, failed to properly serve the City, and failed to state a claim for relief. As to the latter argument, the City maintained that because Pierce received the requested records before filing his motion, he could not show that the motion caused their release or was necessary to obtain them. In his response, Pierce argued, among other things, that certain records declared exempt by the City were not in

fact exempt.

On August 17, 2009, the court entered an "Order on Civil Motion" dismissing Pierce's claim:

> The Court finds 1) that the Public Records Act allows judicial review by motion; 2) that a tort claim is not a requirement for a person to bring a motion for judicial review; 3) that filing such a claim does not trigger remedies under RCW 42.56.550; 4) that under the holding of the Court of Appeals in Daines v. Spokane County, 111 Wn. App. 342, 44 P.3d 909 (2002) and Evergreen Freedom Foundation v. Locke, 127 Wn. App. 243, 110 P.3d 858 (2005) the plaintiff cannot be a "prevailing party" nor his motion be one that could "reasonably be regarded as necessary" to obtain the records because the records were provided prior to filing of the motion; 5) the Court does not need to decide the issues of jurisdiction or service.

Pierce appeals.

DECISION

Pierce first contends the superior court erred in dismissing his PRA claim on the ground that he could not be a prevailing party under the Act. We agree.[3]

The PRA unequivocally requires agencies to respond promptly to a public record request.[4] To enforce this requirement, the Act provides that any person "who prevails" in a judicial action to inspect records or to receive a response to a record request within a reasonable time is entitled to fees, costs, and penalties.[5]

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[3] Our review is de novo. Mechling v. City of Monroe, 152 Wn. App. 830, 841, 222 P.3d 808 (2009), review denied, 169 Wn.2d 1007, 236 P.3d 206 (2010); City of Federal Way v. Koenig, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009).

[4] Yousoufian v. Office of Ron Simms, 168 Wn.2d 444, 465, 229 P.3d 735 (2010); RCW 42.56.520 ("Responses to requests for public records shall be made promptly.").

Citing Daines v. Spokane County[6] and Evergreen Freedom Foundation v. Locke,[7] the superior court ruled that Pierce could not be a "prevailing party" under the Act because the records were provided before he filed his motion. Therefore his action was not necessary to obtain the records. Daines and Evergreen relied on Coalition on Government Spying v. King County Department of Public Safety[8] for the proposition that a party can be a prevailing party under the PRA only if their legal action was necessary to obtain the records and had a causative effect on disclosure.[9] But in Spokane Research & Defense Fund v. City of Spokane,[10] decided after Daines and Evergreen, our Supreme Court stated that it had never adopted this test and declined to do so in that case. Moreover, a review of the court's decision indicates that prevailing party status turns on the wrongfulness of the agency's action, not on whether legal action was necessary or causally related to disclosure.

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[5] RCW 42.56.550(4); Yousoufian, 168 Wn.2d at 465 (penalties are mandatory). We note that effective July 22, 2011, the Act will no longer require a minimum penalty of $5 per day. Substitute H.B. 1899, at 2, 62d Leg. Reg. Sess. (Wash. 2011). Further, a court shall not award penalties under the Act "to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." Substitute S.B. 5025, at 1, 62d Leg. Reg. Sess. (Wash. 2011). We express no opinion as to the application of these legislative amendments to this case on remand.

[6] 111 Wn. App. 342, 44 P.3d 909 (2002).

[7] 127 Wn. App. 243, 110 P.3d 858 (2005).

[8] 59 Wn. App. 856, 801 P.2d 1009 (1990).

[9] Daines, 111 Wn. App. at 347-48; Evergreen, 127 Wn. App. at 253.

[10] 155 Wn.2d 89, 103 n.10, 117 P.3d 1117 (2005).

In Spokane Research, investigative reporter Tim Connor obtained some, but not all, of the records he sought in an action under the predecessor to the current PRA. He subsequently intervened in Spokane Research's action for disclosure of the same records, seeking fees, costs, and penalties for the wrongful withholding of documents. The trial court and Division Three of this court held that he was not entitled to fees, costs, and penalties because his legal action did not cause the withheld records' disclosure; rather, their disclosure resulted from unrelated litigation involving the city of Spokane and other parties.

The Supreme Court reversed, holding that if the requested documents were improperly withheld between the date of request and disclosure, then Connor was entitled to sanctions for this period.[11] The court noted that the PRA nowhere conditions "prevailing party" status on causing disclosure. Rather, that status

> relates to the legal question of whether the records should have been disclosed on request. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit.[12]

Here, Pierce alleges that the City violated the PRA by not timely complying with its response and disclosure requirements.[13] Under Spokane

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[11] Spokane Research, 155 Wn. 2d at 102-04.

[12] Spokane Research, 155 Wn.2d at 103-04.

[13] When the City received each of Pierce's records requests, RCW 42.56.520 required that the City, within five business days, either (1) provide the

Research, Pierce can be a "prevailing party" entitled to fees and penalties if he demonstrates a wrongful delay by the City between his request and the City's disclosure. The superior court erred in concluding that Pierce could not be a "prevailing party."

The City argues, however, that the superior court's decision can be upheld on an alternative ground. Specifically, it contends, as it did below, that the court lacked jurisdiction because the matter was not properly commenced by service of a summons and complaint. We decline to reach this contention for two reasons.

First, the superior court concluded "that the Public Records Act allows judicial review by motion." The court thus appears to have rejected the City's contention that review must be initiated by a summons and complaint.[14] The City, however, has not cross-appealed that portion of the court's ruling. Second,

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requested records, (2) acknowledge receipt of the request and provide a reasonable estimate when it would respond, or (3) deny the request and provide a written explanation for this action. The PRA requires that records be provided "promptly" but does not establish a time limit for providing requested records. RCW 42.56.520. Although the City did not respond to Pierce's second request within five business days, Pierce does not complain about this. He claims only that the City did not provide the requested records within a reasonable time. Therefore, resolution of Pierce's claim requires a determination whether the City provided the requested records within a reasonable time. If the City failed to comply with RCW 42.56.520, Pierce is entitled to relief under RCW 42.56.550(4). Smith v. Okanogan County, 100 Wn. App. 7, 13, 994 P.2d 857 (2000).

[14] We note that in at least one published decision, a PRA action was apparently commenced by a motion for an order to show cause. Livingston v. Cedeno,164 Wn.2d 46, 50, 186 P.3d 1055 (2008).

the City's briefing regarding the initiation and service of claims under RCW 42.56.550 fails to adequately address the language of the statute, a related administrative regulation,[15] or the Supreme Court's decision in Spokane Research.[16]

Given this disposition, we need not reach Pierce's arguments relating to his tort claim and his challenges to record exemptions claimed by the City.

Reversed and remanded for proceedings consistent with this opinion.[17]

Leach, J.

WE CONCUR:

Dwyer, C. J.

Becker, J.

[15] WAC 44-14-08004.

[16] 155 Wn.2d at 104-05.

[17] On remand, the trial court may find the statutory factors for estimating the time needed to respond to a records request instructive: the need to clarify the intent of the request, the need to locate and assemble the information requested, the need to notify third persons or agencies affected by the request, and the need to determine whether any of the information requested is exempt and whether a denial should be made as to all or part of the request. RCW 42.56.520. The court may also consider the number of records requested, other records requests pending with the City, and the staffing and funding available to the City that can be devoted to records requests, taking into account the City's other obligations. See generally Wash. State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws § 5.3(1)(b), at 12-13 (2006).