

# THE SUPREME COURT OF WASHINGTON

NEIGHBORHOOD ALLIANCE OF )  
SPOKANE COUNTY, a non-profit corporation, )

Petitioner, )

v. )

COUNTY OF SPOKANE, a political )  
subdivision of the State of Washington, )

Respondent. )  
\_\_\_\_\_ )

NO. 84108-0

## ORDER

C/A NO. 27184-6-III

FILED  
bph E

Department II of the Court, composed of Chief Justice Madsen and Justices Alexander, Chambers, Fairhurst and Stephens, considered at its June 1, 2010, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted.

DATED at Olympia, Washington this 2nd day of June, 2010.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

587/60

EVANS, CRAVEN & LACKIE, P.S.

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY,  
a non-profit corporation,

Petitioner,

v.

COUNTY OF SPOKANE,  
a political subdivision of the State of Washington,

Respondent.

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PETITION FOR REVIEW

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CENTER FOR JUSTICE

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## A. IDENTITY OF PETITIONER

Plaintiff Neighborhood Alliance of Spokane County (“Alliance”) requests this Court to accept review of the decision terminating review by the Court of Appeals, Division III, designated in Part B of this petition.

## B. DECISION BELOW

The Alliance seeks review of the decision issued by the Court of Appeals, Division III, in *Neighborhood Alliance of Spokane County v. County of Spokane*, filed August 11, 2009. Relying on federal law, the decision found that plaintiffs suing under the Washington State Public Records Act<sup>1</sup> (“PRA”) do not have the same access to the state’s civil rules governing discovery as other civil litigants and that such plaintiffs may prevail only upon a showing that suit caused disclosure. Both of these rulings contradict recent Supreme Court precedent and unduly narrow the PRA in contravention to legislative mandate.

A copy of the decision is in the Appendix at pages one to ten. The decision was originally published at 151 Wn. App. 1043, *not reported* in P.3d , 2009 WL 2456857 (2009). The Alliance timely filed a motion for reconsideration and Spokane County (“County”) timely filed a motion to publish. On December 15, 2009, the Court of Appeals denied the motion

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<sup>1</sup> In 2005, the legislature recodified and renamed the Public Disclosure Act, chapter 42.17 RCW. This case arose prior to recodification. Although all cites herein will be to the prior code, the Alliance utilizes the new title, the “Public Records Act.”

for reconsideration and granted the motion for publication. A copy of the order denying the Alliance's motion for reconsideration and granting the County's motion for publication is in the Appendix at pages 11 to 12.

### **C. ISSUES PRESENTED FOR REVIEW**

1. Whether a plaintiff in a PRA action is entitled to the same scope of discovery allowed other civil plaintiffs under Washington's civil discovery rules, and
2. Whether a plaintiff is a prevailing party under the PRA where the defendant agency wrongfully withheld documents at the time of request but released the same prior to suit in response to a different public records request.

### **D. STATEMENT OF THE CASE**

The Alliance is a nonprofit, community-based organization that emphasizes "government accountability, especially in land use and planning issues." CP 91. On May 16, 2005, the organization filed a public records request in an effort to uncover what appeared to be illegal hiring practices in Spokane County's Building and Planning Department ("BPD"). CP 51-52, 90-93, 101-102, 341-349. The request was twofold. "Item 1" requested the complete electronic log of an undated seating chart showing the seating arrangement of BPD employees with their first names placed in their respective cubicles. CP 51-52. The chart was generated by Pam Knutsen, a BPD assistant director, on or about February 16, 2005. CP 60, 283-284. The chart included the names of two employees in one

cubicle, “Ron and Steve,” neither of whom appeared to be employees on the date the chart was created. CP 90-103, 257-275. However, “Ron” Hand and “Steve” Harris were subsequently hired about a month later. *Id.* “Item 2” requested existing records showing the full names of the employees on the chart. CP 51-52.

The chart, sent to the Alliance in March 2005, was of interest to the Alliance because it appeared a decision had been made to hire these two men before their job openings had been posted as required by law. CP 90-103, 257-275. Moreover, Steve Harris was the third son of then County Commissioner Phil Harris to be hired by the County. *Id.*

The County responded on June 6, 2005 with one document as to Item 1 and no documents as to Item 2. CP 60-65. Finding the response inadequate, the Alliance filed suit on May 6, 2006. CP 32-37. Soon after filing, the Alliance tendered written discovery to the County and attempted to depose Pam Knudsen, who not only generated the undated seating chart, but was also responsible for responding to the request. CP 104-105, 149-188. The discovery covered issues of liability and penalties and included questions regarding the County’s search procedures, the identity of staff responsible for responding to public records requests, their training and experience, motivation, potential destruction of records and the identities of persons who might have relevant information regarding

these issues. CP 149-188, 195-209. The County answered only seven of twenty-six requests for admissions, refused to respond to the request for interrogatories and production, and refused to make Ms. Knutsen or any other employees available for oral deposition. CP 104-105, 149-188. Subsequently the County filed for summary judgment on November 16, 2006. CP 105.

In order to avoid defending against summary judgment without discovery, the Alliance filed a motion to compel and for continuance of the motion for summary judgment. (CP 74-123) It also asked the County for a brief continuance to allow the trial court time to rule on discovery. CP 190-194. The County refused maintaining it was the Alliance's burden to present credible evidence by affidavit to defeat summary judgment and only then could it request discovery. CP 354-355. As such, the County continued to resist discovery throughout the case. CP 77-78, 104-105, 354-355, 383-384, 422-423, 425-485, 609-612.

At hearing on December 5, 2006, the trial court deferred ruling on all motions but entered a stipulated order for a written CR 32 deposition of Ms. Knutsen limited to two issues – whether responsive documents existed and the search processes utilized. RP 19–25, Dec. 5, 2006. Even with a court order, setting a date and agreeing on the scope of the questions required another ten months. CP 384, 385-86, 421-423. The

deposition was finally taken on October 12, 2007, and Ms. Knutsen answered only 18 of 53 questions. CP 424-485. Four months later, the County tendered answers to five more. CP 608-612.

In April and May 2008, the Alliance filed a cross motion for summary judgment. CP 219-240. At hearing on May 13, 2008, the parties agreed to argue their respective summary judgment motions first and reach discovery issues later, if necessary. Finding there had been ample time for discovery, the trial court granted summary judgment on all issues to the County and denied the Alliance's motion to compel. CP 620, 622, RP at 33, May 13, 2008. The Alliance timely appealed. CP 658-664.

On appeal, Division III appropriately reversed as to Item 1 by finding the County failed to conduct an adequate search for the complete electronic information log. *Neighborhood Alliance*, 151 Wn. App. at 9. The court also entered an order on remand for a determination of attorney fees and costs against the County and costs on appeal related to this issue. *Neighborhood Alliance*, 151 Wn. App. at 13.

As to Item 2, the court, in reliance on its earlier decision in *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002), adopted the federal "prevailing party" doctrine applicable in public records cases brought under the Freedom of Information Act ("FOIA") in affirming summary judgment for the County. *Neighborhood Alliance* 151 Wn. App.

at 10-11. The court found the County “correctly argue[d] there is no cause of action under the PRA to enforce the redisclosure of records known by the Alliance to already be in its possession” and affirmed based on “documents provided to the Alliance under a separate request.” *Id.* at 10, 12. These were three e-mails regarding the provision of logistical support to Ron Hand and Steve Harris’ cubicles provided by the County to the Alliance on or about November 14, 2005, in response to another request. *Id.* at 10; CP 493, 517, 529, 530. The Alliance had argued the e-mails would have been responsive to Item 2 of the May 2005 request and were thus unlawfully withheld from the time of the June 6, 2005 response until their release in November. *Neighborhood Alliance*, 151 Wn. App. at 10; CP 228, 239, 651, Bf. Pet’r. at 28, *Neighborhood Alliance v. Spokane County*, No. 271846 (Oct. 24, 2008); Pet’r Mot. for Recons., *supra* at 17 (Aug. 26, 2009).

Once more, the court relied on federal law. Adopting standards applicable to discovery under FOIA, the court rejected the Alliance’s argument that public records plaintiffs have the same right to discovery as other civil litigants under the civil rules. *Neighborhood Alliance*, 151 Wn. App. at 11-12. Under FOIA, discovery in public records cases is generally not allowed as federal courts decide these on summary judgment *without discovery*. *Id.* at 12 (citations omitted) (emphasis added). Moreover,

“[w]hen discovery is permitted, it is ‘sparingly granted’” and limited to the “scope of the agency’s search and its indexing and classification procedures.” *Id.* (citations omitted). Applying this standard to the case at bar, Division III found the Alliance’s discovery overreaching.

## E. ARGUMENT

### **The Court should grant review for the following reasons:**

Division III’s decision conflicts with binding State Supreme Court precedent in two important ways. First, in 2005, this Court rejected the premise that public records cases are special proceedings to which the civil rules do not apply. *Spokane Research & Defense Fund*, 155 Wn. 2d 89, 104-105, 117 P.3d 1117 (2005). And second, the Court also rejected the prevailing party doctrine from FOIA and found instead that under the state PRA, “prevailing” relates to whether documents were wrongfully withheld at the time of request and nowhere does it require a showing that suit caused release. *Id.* at 103-104.

1. The decision is contrary to this Court’s ruling in *Spokane Research* wherein the Court held the civil rules apply to public records cases.
  - a. *The civil rules, including discovery, apply to PRA cases.*

Division III applied the wrong standard in finding the Alliance’s discovery overreaching. Rejecting the Alliance’s argument that the state civil discovery rules govern cases under the state PRA, the court relied

instead on cases construing FOIA under which discovery is severely restricted. In so ruling, Division III essentially found that public records cases are somehow unique and outside the normal civil rules.

This Court soundly rejected this argument five years ago in *Spokane Research*. There, the City of Spokane argued and Division III agreed that PRA cases are special proceedings and plaintiffs may not utilize the normal civil procedures of summary judgment and intervention, but instead are limited to the statutory show cause procedures of RCW 42.17.340. *Id.* at 104. *Spokane Research*, 155 Wn. 2d at 97 citing *Spokane Research & Defense Fund v. City of Spokane*, 121 Wn. App. 584, 586, 89 P.3d 319 (2004). Finding no statutory or legislative intent to so limit the right of public records plaintiffs, this Court reversed and confirmed the application of the civil rules and procedures to PRA cases. *Spokane Research*, 155 Wn. 2d at 104-105. As the Court explained:

The civil rules “govern the procedure in the superior court in all suits of a civil nature ... with the exceptions stated in rule 81.” *CR 1*. There is only one form of a civil action. *CR 2*. *CR 81* states the civil rules govern all civil proceedings “[e]xcept where inconsistent with rules or statutes applicable to special proceedings.” *CR 81*. Special proceedings are detailed in the statutes and include garnishment, *Zesbaugh, Inc. v. Gen. Steel Fabricating, Inc.*, 95 Wash.2d 600, 603, 627 P.2d 1321 (1981), unlawful detainer, *Canterwood Place L.P. v. Thande*, 106 Wn. App. 844, 847, 25 P.3d 495 (2001), and sexually violent predator proceedings, *In re Detention of Aguilar*, 77 Wn. App. 596, 600, 892 P.2d 1091 (1995).

All of these proceedings are statutorily defined, whereas actions under the PRA are not. The statute simply does not define a special proceeding exclusive of all others. When a statute is silent on a particular issue, the civil rules govern the procedure. *King County Water Dist. v. City of Renton*, 88 Wn. App. 214, 227, 944 P.2d 1067 (1997). Thus, normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PRA. . . .

*Id.* at 104-105.

Just as there is nothing in the PRA that prevents the use of summary judgment and intervention, there is nothing that prevents access to normal civil discovery. Although the PRA does allow cases to be heard on affidavit alone, it is not mandatory. *Id.* at 104. If the Legislature had intended to circumscribe discovery in PRA cases, “it could easily have said so,” and “its failure to do so is an eloquent expression of intent.” *Grabicki v. Dept. of Retirement Systems*, 81 Wn. App. 745, 755 916 P.2d 452 (1996).

Moreover, the following Washington cases, going back almost twenty years, support the proposition that pre-trial discovery applies to PRA cases: *Coalition on Govt. Spying v. King County Dept. of Public Safety* (“COGS”), 59 Wn. App. 856, 860, 801 P.2d 1009 (1990) abrogated on other grounds by *Spokane Research & Defense Fund*, 155 Wn. 2d 89, 117 P.3d 1117 (2005) (Plaintiff “conducted further discovery” after filing PRA action and preliminary proceedings); *Brouillet v. Cowles Publ. Co.*,

114 Wn. 2d 788, 791 P.2d 526 (1990) (In petition for declaratory judgment upholding non-release under PRA, court denied request for oral examination where school system failed to take depositions or tender affidavits of its own to show need for oral examination); *Progressive Animal Welfare Soc. v. University of Washington ("PAWS")*, 125 Wn.2d 243, 884 P.2d 592 (1994) (pre-trial discovery request for letters deemed appropriate where they disclosed the University's express refusal to comply with PRA requests); *Concerned Ratepayers v. PUC No. 1*, 138 Wn. 2d 950, 956, 983 P.2d 635 (1999) (trial court's findings relied on depositions of witnesses); *Bellevue John Does 1-11 v. Bellevue School District # 405*, 129 Wn. App. 832, 120 P.3d 616 (2005), *rev. granted in part* by 158 Wn. 2d 1024, 149 P.3d 376 (2007), and *rev'd in part* by 64 Wn.2d 199, 189 P.3d 139 (pre-trial discovery utilized in action seeking release of names of teachers accused of misconduct); *Parmelee v. Clarke*, 148 Wn. App. 748, 753, 201 P.3d 1022 (2008) (plaintiff submitted deposition testimony from DOC staff in attempt to establish that any DOC employee was proper recipient of PRA request and hence request appropriately filed).

- b. *Division III's narrow interpretation of discovery under the PRA is contrary to legislative intent.*

The PRA is a “ ‘strongly worded mandate for broad disclosure of public records.’ ” *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997) quoting *PAWS*, 125 Wn.2d at 251. Its purpose is to keep public officials and institutions accountable to the people, *O'Connor v. Wash. State Dept. of Soc. and Health Services*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). To that end, the Act must be “liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030.

Washington courts must give effect to the legislative purpose as expressed in the statute and thus construe the PRA broadly. *Spokane Research*, 155 Wn. 2d at 100. The state’s civil discovery rules themselves are consistent with this legislative mandate. These rules are to be given a “broad and liberal construction.” *McGugart v. Brumback*, 77 Wn. 2d 441, 444, 463 P.2d 140 (1969) citing *Moore v. Keeseey*, 26 Wn. 2d 31, 173 P.2d 130 (1946); *Hickman v. Taylor*, 329 U.S. 495 (1947). See also *O'Connor* 143 Wn.2d at 907 (“The civil rules do not conflict with the Public Records Act.”) To that end, they allow for broad discovery into the subject matter of a claim with no express limit but relevancy. See *Bushman v. New Holland Divison of Sperry Rand Corp.*, 83 Wn. 2d 429, 435, 518 P.2d

1078 (1974) (only limitation is relevancy to subject matter involved and not to the precise issues framed by the pleadings).

Unlike FOIA, the subject matter of a state public records action is not simply the existence or nonexistence of relevant documents and the procedures utilized to find them. Rather, because the state act provides for mandatory penalties, the “agency’s decision not to release records, and the grounds for that decision are precisely the subject matter of a suit brought under the Public Records Act.” *PAWS*, 125 Wn. 2d at 270, n.17 (1994) *citing* RCW 42.17.340. Further, under the PRA, agencies must “timely comply with the mandates of the PRA” and “provide for the fullest assistance to inquirers and the most timely possible action on requests for information.” *Spokane Research*, 155 Wn. 2d at 100. Hence appropriate topics for discovery under the PRA include 1) the identity of persons with relevant information, including those responsible for responding to a request and their training and supervision, 2) the agency’s ability to track and retrieve records, 3) the potential destruction of records after a request was made, 4) the motivations behind the agency’s response, 5) the reasonableness of the agency’s explanations for failure to provide documents or untimely response, (5) the agency’s level of culpability in failing to follow the mandates of the PRA and (6) its good or bad faith.

Discovery under the civil rules is liberal, even when cases are decided on summary judgment, not only to allow courts to decide cases on their merits, but also to ensure litigants access to information necessary to effectively pursue their claim. *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). *See also Doe v. Puget Sound Blood Ctr.*, 117 Wn. 2d 772, 781-82, 819 P.2d 370 (1991) (constitutional right of access to courts furthered by broad right of access to discovery necessary to effectively pursue claim). And, contrary to the County's position, these rules expressly provide for discovery *prior* to a ruling on summary judgment. CR 56(c) (judgment shall be rendered if pleadings, depositions, answers to interrogatories, and admissions on file show no genuine issue of material fact). There is simply nothing in the PRA inconsistent with the applicability of these broad rules to public records cases and nothing which precludes a trial court's exercise of its discretion therein.

If the PRA is liberally construed to promote full disclosure and accountability for illegal non-disclosure, especially where disclosure implicates illegal practices, then civil discovery is imperative. Carving out an exception in PRA cases that limits the scope of discovery below that afforded other civil litigants or prevents discovery necessary to adequately process a claim runs contrary to legislative mandate. It is inappropriate to

read into the statute a limitation the legislature did not impose and this court has expressly disapproved. Such a narrowing is inconsistent with legislative imperative and Washington case law.

2. The decision is contrary to this Court's ruling in *Spokane Research* in which the Court rejected the "prevailing party" doctrine under FOIA.

Division III relied on its prior ruling in *Daines* in affirming summary judgment for the County as to Item 2. *Neighborhood Alliance*, 151 Wn. App. at 10-11. And *Daines* in turn relied on *Coalition on Government Spying* ("COGS") for the proposition that PRA plaintiffs cannot prevail where they have documents in hand responsive to the request at the time of suit. *Daines*, 111 Wn. App. at 347-48. Rather, "[t]o trigger the remedial provisions of the PRA, the action must be one that could 'reasonably be regarded as necessary' to obtain the records." *Id.*

The *COGS* court borrowed the "prevailing party" doctrine from FOIA which allows fees and costs to a party who "substantially prevails." *Spokane Research*, 155 Wn. 2d at 104 n. 10. Under FOIA, to substantially prevail, the plaintiff must prove his action was reasonably necessary to obtain the information and that the action had a causative effect on the release." *Id. citing COGS*, 59 Wn. App. at 863 *citing Miller v. U.S. Dept. of State*, 779 F.3d 1378, 1389 (8<sup>th</sup> Cir. 1985).

The prevailing party doctrine as enunciated by *COGS* and *Daines* is no longer good law in Washington. As this Court explained in *Spokane Research*, while the “COGS court adopted this standard for the PDA, we never have, and decline to do so. Our statute says nothing about ‘substantially prevailing’ and differs from the federal scheme at several important points, notably fees and penalties.” *Spokane Research*, 155 Wn. 2d 104 n.10 (citation omitted). Rather, “‘prevailing’ [under the state act] relates to the legal question of whether the records should have been disclosed on request.” *Id.* at 103. “[N]owhere in the PDA is prevailing party status conditioned on causing disclosure.” *Id.* Moreover, “[s]ubsequent 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.” *Id.*

Although it is true that in *Spokane Research*, the documents sought were disclosed after the plaintiff filed suit, albeit for unrelated reasons, while here the documents were disclosed prior to suit, this is a distinction without merit. *Id.* at 103. Untimely release is itself a violation of the PRA. RCW 42.17.320. *See also* RCW 42.17.290 (agency to provide fullest assistance and most timely possible action). As such, this Court made

clear that “the harm occurs when the record is withheld.” *Id.* at 14, n.10. To hold that litigants cannot sue where an agency fails to release documents in a prompt manner would allow agencies to violate the PRA with impunity by simply withholding until a plaintiff threatens suit or until release is no longer timely - perhaps after an election or passage of controversial legislation – exactly the behavior the Court’s ruling in *Spokane Research* sought to address.

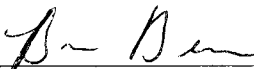
Division III erred in applying the federal “prevailing party” doctrine to the Alliance based on its possession of three e-mails responsive to Item 2 prior to suit and affirming summary judgment to the County on that basis. *Neighborhood Alliance*, 151 Wn. App. at 12. Here, as in *Spokane Research*, the County failed to disclose responsive documents at the time of request. And, as in *Spokane Research*, the fact that the Alliance’s suit was not the cause of disclosure is immaterial. By withholding these e-mails from June 6, 2005 through November 14, 2005, the County violated the PRA and summary judgment was appropriate for the Alliance on Item 2.

#### **F. Conclusion**

For the reasons set forth above, the Alliance requests this Court to do the following: 1) accept review to reinforce its earlier ruling regarding the right of public records plaintiffs to utilize the state civil rules and

procedures, including those applicable to discovery, and to expressly overturn *Daines* to the extent it adopted the prevailing party doctrine under FOIA in state public records cases; 2) find summary judgment for the Alliance as to Item 2 based on the County's wrongful withholding of documents responsive to its May 16, 2005 request; 3) remand with an order for discovery as to any remaining issues, including penalties; 4) remand with an order for an award of attorney's fees, costs and penalties pursuant to former RCW 42.17.340, to be determined by the trial court, and 5) enter an Order granting the Alliance reasonable attorneys fees and expenses on appeal as allowed by RAP 18.1.

DATED this 11<sup>th</sup> day of January 2010.

  
\_\_\_\_\_  
Bonne Beavers, WSBA # 32765  
Breean Beggs, WSBA # 20795