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Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

RANDY BRAAKSMA,)	NO. 09-2-01929-4
)	
Plaintiff,)	COURT'S MEMORANDUM
vs.)	OF OPINION AND ORDER
)	DECIDING MOTIONS
CITY OF VANCOUVER, a Washington)	
municipal corporation,)	
)	[Clerk's Action Required]
Defendant,)	

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THIS MATTER came on regularly before the undersigned Judge of the above-entitled Court on June 19, 2009, and July 10, 2009, for consideration of the following motions:

1. Defendant City of Vancouver's Motion to Strike Paragraphs 3.2 and 3.3 from Complaint, filed May 29, 2009. This motion was heard and decided on June 19, 2009. An order denying the motion was entered on June 19, 2009.

2. Defendant City of Vancouver's Motion for Leave to File Under Seal Supplemental Affidavit of Terry Weiner for *In Camera* Review of Public Record, filed May 29, 2009. This motion was heard and decided on June 19, 2009. An order granting the motion was entered on June 19, 2009.

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3. Defendant City of Vancouver's Motion to Dismiss Plaintiff as Real Party in Interest and/or Issue Order Finding Compliance With Public Records Act, filed May 29, 2009.

4. Plaintiff's Motion for Statutory Penalties and Fees re Human Resources Department Records, filed July 2, 2009.

5. Plaintiff's Motion for Statutory Penalties and Fees re Procurement Department Records, filed July 2, 2009.

The court has considered the records and files herein, the formal pleadings, the written materials submitted in support of and in opposition to the various motions, and the oral arguments of the parties. The court has also reviewed *in camera* the supplemental affidavit of Terry M. Weiner, accompanied by several hundred pages of documents filed under seal, separated by blue sheets bearing the identifier "billing records (unredacted)", and "No. 1, No. 2, No. 3, and No. 4". The court is fully advised in the premises of the motion.

With regard to the motions, the court makes the following findings:

FINDINGS

1. On December 17, 2008, Attorney Gregory D. Ferguson, acting on behalf of plaintiff Randy Braaksma, served defendant City of Vancouver with a public records request for:

All records and fee billings/invoices relating to any investigations into city personnel matters or employee complaints (discrimination, retaliation, whistle blower, etc.) by Karen Saul, including but not limited to those evidencing the nature of the investigation, scope of work, witnesses to be interviewed or other related instructions.

Karen Saul is an attorney admitted in Washington and Oregon, employed by the Portland law firm of Farleigh Wada Witt.

2. On December 23, 2008, Assistant City Attorney Terry Weiner acknowledged the City's receipt of Ferguson's public records request. Because of holiday leave schedules and weather conditions, Weiner indicated that the City would need until January 31, 2009, to respond to Ferguson's public records request. On January 29, 2009, Weiner notified Ferguson that the response was ready.

3. On January 29, 2009, the City produced 57 pages of Saul's billing statements, and identified these billing statements as the only non-exempt records responsive to the public records request. The billing statements were heavily redacted, and omitted most information, except the dates work was performed, the amount of time spent, and the dollar amount charged for each task. The letter indicated that the City was gathering additional documents responsive to the request, including supporting documents and interview transcripts which correlated to the billing records provided. Weiner asserted that most of the records would be exempt as work product or attorney-client privileged material, and that a privilege log would be provided once the records were assembled.

4. On February 18, 2009, Ferguson's office wrote to the City, challenging the redactions to the Saul billings. On February 27, 2009, the City supplemented its privilege log to reflect all remaining records that were claimed to be responsive to the December 18th request, but which the City claimed were exempt from disclosure under the Public Records Act. The bases asserted for exemption were either attorney-client privilege or work product.

5. On March 11, 2009, Weiner again wrote to Ferguson, and provided updated copies of the Saul billing records provided on January 29, 2009. Many of the redactions included in the January 29th submission had been removed. Weiner indicated in his letter that "the

updating records reflect deletions of prior redactions which upon review were determined not to be within the scope of statutory exemptions previously claimed.”

6. On March 16, 2009, Ferguson wrote to Weiner, challenging the lawfulness of the City’s claimed exemptions which justified the remaining redactions in the billing statements. The letter also challenged the breadth of the exemptions claimed by the City with regard to remaining materials. The City did not respond further to Ferguson’s letter, and did not produce any additional documents prior to the filing of the Complaint, which is the subject of these proceedings.

7. On May 1, 2009, Randy Braaksma filed this Complaint for Disclosure of Public Records through his attorney, Gregory D. Ferguson. The City asserted that Braaksma was not the real party in interest, as the complaint did not expressly state that Ferguson’s earlier request was made solely on behalf of Braaksma. The City further claimed that public disclosure complaints may be maintained only by the individual who makes the initial public records request, and that appellate decisions ruling to the contrary were distinguishable, or improperly decided. The City filed a motion on May 29, 2009, asking that Braaksma’s complaint be dismissed, or that Ferguson be substituted as the plaintiff, as real party in interest.

8. On May 29, 2009, defendant City of Vancouver moved the court “to find that the City fully complied with Washington’s Public Records Act, Chapter 42.56 RCW.” The motion was not based upon the pleadings, as the City of Vancouver had not filed any pleadings in this matter. Although the motion was grounded upon three filed affidavits, it was not properly noted as a motion for summary judgment, in terms of either timeliness or procedure. The asserted basis for the motion was RCW 42.56.550, which allows a superior

court to order a public agency to show cause why it has refused to allow the inspection of specific records. Although an order to show cause under this section is to be issued upon the motion of any person having been denied an opportunity to view the record, the City claimed that a motion by the aggrieved party, and an order to show cause by the court, was unnecessary.

9. In support of the motion, the City asserted that the documents were properly withheld, and redactions to the billing statements were properly made, based upon the attorney-client privilege or work product. The City further asserted that the December 17 request was overbroad, “thus excusing the City from any argument of noncompliance with respect to non-billing records.”

10. On June 19, 2009, the court heard argument on the City’s motions. The court denied the City’s motion to strike, and orally denied the City’s motion to dismiss, or substitution of the real party in interest. The court found that the materials in the file demonstrated that Ferguson had filed the public records request of December 17, 2008, on behalf of Braaksma. The court granted the request to file records for *in camera* review, and reserved its decision on the remaining motion of the City until after this review was completed.

11. On June 22, 2009, Ferguson and Assistant City Attorney Dan Lloyd spoke by telephone concerning the records lodged with the court for *in camera* review. Ferguson advised Lloyd that these records, as disclosed in the privilege log, did not appear to include procurement orders and letters of engagement related to Saul’s employment. Lloyd advised Ferguson that the City did not interpret the December 17 request to include purchase orders and letters of engagement.

12. In response to the June 22, 2009, telephone conversation, the City provided Braaksma with 14 additional records from City procurement services. The City also disclosed two emails from the human resources department, which together constituted a letter of engagement. Braaksma contends that these documents fell within the scope of his December 17, 2008, request. The City asserts that the documents were not within the scope of that request, and were first requested on June 22, 2009. The City also contends that Braaksma waived his challenge to the failure to provide these documents, by not specifically arguing against the City's "show cause" motion. The documents were provided on June 26, 2009. Based upon the production of these documents, the plaintiff filed motions for statutory penalties, and asked that costs and attorney's fees be reserved for later determination.

Based upon the foregoing Findings, the court makes the following decisions:

DECISION

1. The court has jurisdiction over the subject matter of this proceeding, and the parties hereto.

2. Plaintiff Randy Braaksma is the real party in interest with regard to the December 17, 2008, records request. With regard to that request, Gregory D. Ferguson was acting as his agent.

3. The December 17, 2008, public records request is neither vague nor overbroad. The request identifies "with reasonable clarity those documents that are desired, . . ." . *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004). The records to be produced relate to the investigations of a particular individual (Karen Saul) and are to be limited to certain types of "investigations". This was not a request for "all records" or "all records related to

investigations”. The December 17th request was definite and requested a specific set of documents.

4. The City correctly determined that the documents filed under seal with this court were either attorney work product or subject to the attorney-client privilege and exempt from disclosure. This ruling includes the redactions made to the second set of Saul billing records. With regard to these records and documents, the City has complied with the Public Records Act.

5. The City improperly withheld portions of the Saul billing records from January 29, 2009 through March 11, 2009, by excessively redacting those documents. The City recognized the improper nature of the redactions, by providing a revised set of Saul billing records on March 11, 2009. The City’s error with regard to withholding the information on these documents was negligent.

6. The human resources emails produced on June 26, 2009, fell within the scope of the December 17, 2008, request for public records. The City improperly withheld these emails from the plaintiff from January 29, 2009 through June 26, 2009. This wrongful withholding of two documents, in violation of the Public Records Act, was inadvertent.

7. The procurement department records produced on June 26, 2009, fell within the scope of the December 17, 2008, request for public records. The City improperly withheld these records from the plaintiff from January 29, 2009 through June 26, 2009. This wrongful withholding of fourteen documents, in violation of the Public Records Act, was negligent.

8. There is no evidence to suggest that any nondisclosure, or delay in disclosure, of any of the information was based upon the City’s perception that Braaksma was a “litigation risk”. There is no evidence to support a finding of bad faith on the part of the City.

9. An appropriate penalty for withholding the public records disclosed on June 26, 2009, and for excessively redacting the Saul billing records, is \$25.00 per day from January 29, 2009, through March 11, 2009.

10. An appropriate penalty for withholding the public records disclosed on June 26, 2009, after the Saul billing records were correctly redacted, is \$15.00 per day. The period of this penalty shall run from March 12, 2009, through the date the complaint for disclosure of public records was filed, May 1, 2009.

11. Since the City properly redacted and withheld exempt materials under the Public Records Act, it would be improper to allow public access to those exempt records which were reviewed *in camera* by the court.

Based upon the foregoing findings and decisions, and the court being fully advised, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant City of Vancouver's motion to dismiss plaintiff Randy Braaksma, or to substitute Gregory Ferguson, as real party in interest, filed May 29, 2009, is denied.

2. Defendant City of Vancouver's motion for order finding compliance with Public Records Act, filed May 29, 2009, is granted in part and denied in part, consistent with the rulings above.

3. Plaintiff's motions for statutory penalties re human resources department records, and for statutory penalties re procurement department records, filed July 2, 2009, are granted.

4. Defendant City of Vancouver is ordered to pay plaintiff Randy Braaksma a penalty of \$1,025.00, representing a daily penalty of \$25.00 from January 29, 2009, through March 11, 2009. In addition, defendant is ordered to pay plaintiff a penalty of \$765.00,


representing a daily penalty of \$15.00 from March 12, 2009, through May 1, 2009. The total statutory penalty ordered is \$1,790.00.

5. A determination of costs and attorney's fees, as requested by plaintiff, is reserved for later hearing.

6. Pursuant to GR 15(c)(5), the Clerk is directed to preserve the Supplemental Affidavit of Terry Weiner, lodged with the court for *in camera* review on June 19, 2009, and all attachments thereto, under seal. The Clerk shall substitute a filler sheet for the removed supplemental affidavit. The Clerk is directed to deny access to the supplemental affidavit filed in this case, and all attachments thereto, in accordance with GR 15, unless allowed by express order of the court.

7. This matter is scheduled for presentation of judgment, based upon the court's order, and for further review, on Friday, November 13, 2009, at 9:00 a.m. The Clerk shall note the matter on the Department 9 civil motion docket. A copy of this order shall be mailed to each counsel, as notice of the court's rulings, and the hearing date and time.

DATED this 4th day of November, 2009.


Judge Robert A. Lewis