WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

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A brief summary of legal developments relevant to Washington public school districts from the previous calendar month.

Ninth Circuit Court of Appeals

Freedom of Information Act

Transgender Law Center v. Immigration and Customs Enforcement
No. 20-17416 (5/12/22)

The Ninth Circuit Court of Appeals held that the adequacy of an agency's search in response to a Freedom of Information Act (FOIA) request—the standard Washington courts have adopted to assess the adequacy of an agency's search under Washington's Public Records Act—must be determined under the "beyond material doubt" burden of proof. In early 2019, Transgender Law Center (TLC) submitted two FOIA requests seeking records related to the detention of a transgender woman who had died in federal custody while seeking asylum. The first records request was directed at the U.S. Immigration & Customs Enforcement (ICE), and the second was directed to the Department of Homeland Security (DHS). Several months following the requests, neither agency had produced any records. TLC filed a lawsuit in district court seeking injunctive relief compelling the agencies to conduct adequate searches and to produce the relevant records. The lawsuit itself prompted ICE and DHS to begin disclosing records, but the agencies refused to disclose the mortality and morbidity review or the root cause analysis. DHS also informed TLC that video surveillance footage of the asylum-seeker while in custody had disappeared, despite having received letters requiring its preservation. The agencies filed a motion for summary judgment in TLC's FOIA lawsuit, arguing that their records production was "adequate." The district court agreed that the agencies had "conducted an adequate search," and granted their motion for summary judgment. The Ninth Circuit Court of Appeals reversed, holding that the appropriate standard in assessing an agency's search under FOIA is whether its search was "reasonably calculated to uncover all relevant documents." Consistent with other circuit courts, the Court further adopted the "beyond material doubt" standard to determine whether the government met its burden of proof to show its search was reasonably calculated to uncover all relevant documents. Applying this standard, the Court held that ICE and DHS had not met their burden of proof because they overlooked materials specifically identified by TLC, and had also failed to follow leads that had emerged during the course of their search. As a result, the Court reversed summary judgment in favor of the agencies, and remanded to the district court for further proceedings.

Washington Court of Appeals

Public Records Act

Smith v. Golik
No. 55531-0-II (5/17/22) (unpublished)

The Washington Court of Appeals held that a writ of mandamus—a remedy that compels performance of a governmental duty—is not the proper mechanism to enforce the Public Records Act (PRA). John Smith submitted a PRA request to the Clark County Prosecuting Attorney's Office, seeking records related to a cell phone recording used as evidence against him in a previous criminal trial. A few weeks later, Smith filed a "Petition for Emergency Writ of Mandamus" in superior court, requesting that the County Prosecuting Attorney, Anthony Golik, be ordered to provide him the "actual" cell phone recording pursuant to the PRA. Golik filed a motion to dismiss, arguing in part that a writ of mandamus was not a proper remedy to enforce a public records request. The superior court granted Golik's motion, dismissing Smith's petition for writ of mandamus to enforce his PRA claim. The Court of Appeals affirmed, reasoning that a writ of mandamus may only be issued when there is not a speedy, adequate remedy in the ordinary course of law. Because the PRA affords Smith the remedy to have his alleged PRA violations addressed, the Court held that a writ of mandamus was not appropriate, and it affirmed dismissal of his petition.

Public Records Act

Energy Policy Advocates v. Washington Attorney General's Office
No. 55173-0-II (5/17/22) (unpublished)

The Washington Court of Appeals held that the Washington State Attorney General's Office (AGO) properly withheld certain electronic correspondence with outside agencies as attorney work product in response to a Public Records Act (PRA) request. Energy Policy Advocates (Advocates) sent a public records request to the AGO, seeking its electronic correspondence records with various individuals, including emails to a former official with the Environmental Protection Agency (EPA) and an attorney for the New York Environmental Protection Bureau (EPB). The AGO produced more than 700 pages of responsive records, but withheld a PowerPoint presentation and common interest agreement, claiming they were exempt from disclosure as work product. The AGO also produced a heavily redacted e-mail between itself and the former EPA official because it detailed various strategies that could be used in potential litigation. The Advocates filed a PRA lawsuit, arguing that the withheld records were not exempt from disclosure as work product and should have been disclosed. The superior court conducted an in camera review of the three disputed documents, and it concluded that the documents included information related to prospective or anticipated litigation and were properly withheld. The Court of Appeals affirmed, rejecting the Advocates argument that the AGO had waived privilege by sharing the communications with the EPA and EPB. The Court held that the common interest doctrine allows multiple parties to share confidential communications pertaining to common litigation claims or defenses without losing privilege. Because the PowerPoint, common interest agreement, and redacted email all detailed various strategies for potential litigation, the Court held that the common interest doctrine applied, and the parties had not waived work product privilege by sharing those documents amongst each other. As a result, the Court held the records were properly withheld and affirmed dismissal of the Advocates PRA lawsuit.

Whistleblower Protection

Reeves v. Mason County
No. 385485-III (5/17/22)

The Washington Court of Appeals held that an employee who prevailed in a whistleblower retaliation claim before the Office of Administrative Hearings (OAH) could bring a standalone suit to seek recovery of related fees and costs under Chapter 49.48 RCW, the statutory scheme that governs payment of wages due employees. In 2014, Tammy Reeves, a correctional officer with the Mason County Sheriff's Office, submitted a complaint to her human resources manager alleging governmental wrongdoing. Later that year, Reeves was denied a promotion, and she believed the denial was due to her complaint. Reeves filed a complaint with the Mason County Prosecuting Attorney's Office, alleging wrongful denial of a promotion in violation of the Local Government Whistleblower Protection Act (LGWPA), Chapter 42.41 RCW. The County referred Reeve's complaint to OAH for an evidentiary hearing, and in March 2015, Administrative Law Judge (ALJ) Jeffrey Friedman entered an order concluding that Mason County had retaliated against Reeves. ALJ Friedman awarded Reeves attorney fees and costs in the amount of $32,745.03 pursuant to the LGWPA, which grants the ALJ discretion to award costs and attorney's fees to the prevailing party. The award was appealed to the superior court and remanded multiple times. On the second remand, ALJ Johnette Sullivan entered an order concluding that Mason County had retaliated against Reeves in violation of the LGWPA, but she held that she lacked authority to award reasonable attorney fees to Reeves for costs incurred during judicial review by the superior court and during remand. Several months later, Reeves filed a separate lawsuit in superior court seeking to recover the attorney fees and costs she had incurred in her whistleblower retaliation suit under Chapter 49.48 RCW. The superior court awarded Reeves reasonable attorney fees and costs totaling $161,415. The Court of Appeals affirmed, rejecting the County's argument that collateral estoppel and res judicata barred Reeves's separate action in superior court for recovery of reasonable attorney fees and costs because she could have appealed ALJ Sullivan's ruling denying in part her fees and costs. The Court held that the Washington Legislature has evidenced a strong public policy in favor of payment of wages due employees, which includes RCW 49.48.030, a statute that authorizes an award of attorney fees to incentivize aggrieved employees to assert their statutory rights. Construing that statute liberally to advance the legislature's intent to protect employee wages and assure payment, the Court held that the strong public policy allowing employees owed wages supported allowing Reeves to bring an independent lawsuit to recover attorney fees related to a separate whistleblower retaliation claim, and it affirmed the superior court's award of fees and costs.

Public Records Act

Haney v. Washington Department of Corrections
No. 37852-7-III (5/19/22) (unpublished)

The Washington Court of Appeals reversed dismissal of an inmate's Public Records Act (PRA) lawsuit, holding that the one-year statute of limitation period began to run on the date the Department of Corrections provided the records to the inmate's designated third-party, not on the date it informed him that the responsive records were ready to be produced. In 2018, inmate Derrick Haney requested records related to his recent classification review hearing. On February 15, the Department informed Haney by letter that it had identified 42 pages of records responsive to his request, and it asked him to inform the Department if he wished to have the records mailed to a third party on his behalf. The letter further informed Haney that if it did not receive a response within 30 days, then it would close his request. On March 2,

Haney notified the Department by letter that he wished for the records to be emailed to his mother, Sandy League. The Department notified Haney by letter dated March 7 that it had emailed the responsive records to League and that the request was now closed. Haney filed a summons and complaint in superior court on February 21, 2019, alleging that the Department had violated the PRA in responding to his request. The Department filed a motion to show cause, arguing that the statute of limitations barred Haney's complaint because he did not file his lawsuit until more than a year after the February 15, 2018 letter which had informed him that the records were available. The superior court concluded that the Department's initial February 15 letter constituted the agency's final, definitive response triggering the one-year statute of limitations, and dismissed the complaint as time-barred. The Court of Appeals reversed, holding that the February 15 letter did not constitute a final, definitive response to Haney's request given that the letter merely informed Haney that the records were ready and prompted him to choose a method of production. Therefore, the Court held that the letter contemplated future action, and the final or definitive action triggering the statute of limitations occurred on March 7, when the Department emailed the records to League at Haney's instruction.

Public Records Act

Denney v. City of Richland
No. 36720-7-III (5/31/22)

The Washington Court of Appeals held that the City of Richland properly withheld two investigation reports as attorney work product in response to a Public Records Act (PRA) request. County employee Christopher Denney made a discrimination and harassment complaint and the City commenced an investigation of the complaint consistent with its nondiscrimination policy. The County included the City Attorney, Heather Kintzley, in the investigation. Through communications with Mr. Denny, Ms. Kintzley concluded Mr. Denney was preparing for litigation against the City. Ms. Kintzley engaged an outside firm to continue the investigation. Mr. Denney filed a second discrimination complaint during the first investigation. Ms. Kintzley hired an attorney to conduct the second investigation. Mr. Denney requested the first investigation report under the PRA, and the City withheld it as attorney work product. Mr. Denney filed a lawsuit under the PRA, arguing that the final report had been wrongfully withheld. Mr. Denney then requested the second investigation report, which the City also withheld as attorney work product. Mr. Denney amended his PRA complaint to include the second report. Mr. Denney and the City filed cross motions for summary judgment. The superior court conducted an in camera review of the two disputed documents and concluded that the reports were exempt from disclosure as attorney work product. On appeal, Mr. Denney contended that the reports were created in accordance with the City's policy and therefore could not be attorney work product. The Court of Appeals affirmed, reasoning that the fact that a document has both a litigation and nonlitigation purpose does not mean the document fails to qualify for work product protection. The Court used a two-step analysis to determine whether the dual-purpose reports were properly withheld as work product. The first step applies the "because of" test, which asks whether the document was both subjectively and objectively created because of anticipated litigation. The creator must have subjectively anticipated litigation and such subjective anticipation must be objectively reasonable. The second step is to determine whether the record would have been prepared in substantially the same form had there not been anticipated litigation. The Court held that the City Attorney subjectively anticipated litigation when she directed preparation of the reports and that this anticipation was objectively reasonable. It further held that the

reports were unique compared to other reports prepared under City policies since unlike with many other City complaint investigations, the City Attorney and third-party investigators were involved and since the substance of the reports focused on the merits of Mr. Denney's claims. As a result, the Court held the records were properly withheld and affirmed dismissal of the lawsuit.

Public Records Act

Kilduff v. San Juan County
No. 82711-1-I (5/31/22) (*unpublished*)

The Washington Court of Appeals held that San Juan County satisfied a Public Records Act (PRA) request when it provided a requested file as the file existed at the time of the request. County employee Chris Laws conducted a code enforcement investigation of the designation of a local wetland. During his investigation, he filed an improper governmental action (IGA) complaint with County Prosecutor Randall Gaylord, alleging improper employee conduct related to the wetland designation. A PRA request was subsequently made for the code enforcement investigation file of the wetlands. While responding to the request, County employees realized Laws had included his personal items related to the IGA complaint in the code enforcement file, and the personal items were subsequently removed from the file. Then, Edward Kilduff made a PRA request for the code enforcement investigation file and documents relating to the IGA investigation. Kilduff had a phone conversation with Gaylord in which Gaylord understood that Kilduff agreed to modify his request regarding the IGA complaint. The County then produced responsive records to Kilduff. Kilduff filed a suit under the PRA, alleging the County had failed to conduct a reasonable search and silently withheld records without an exemption. After the case moved through the appellate courts on other grounds, Kilduff requested the trial court recuse itself, which the trial court denied. The trial court further held that Kilduff had been provided the responsive records and that based on witness testimony, Kilduff's PRA request had been modified during his phone conversation with Gaylord. On appeal, the Court of Appeals held that it would defer to the trial court's findings of fact, despite Kilduff's argument that the evidence should be reviewed de novo. The Court further affirmed that the County had fulfilled Kilduff's request for the code enforcement investigation file as it provided the file as it existed at the time of the request, because Laws's personal documents had been removed from the file prior to Kilduff making his request, and thus were not responsive. The Court also held that there was substantial evidence to support that Kilduff had modified his PRA request for the IGA report orally over the phone. Finally, the Court held that the superior court did not err by not recusing itself as Kilduff failed to show any bias on the part of the judge by not letting Kilduff re-present evidence on remand and by excluding irrelevant evidence at hearing. As a result, the Court affirmed dismissal.

PERC

Refusal to Bargain

Spokane County
Decision 13510 (5/12/22)

A PERC Examiner held that Spokane County committed a refusal to bargain unfair labor practice (ULP) as a matter of law when it conditioned its willingness to bargain on agreement that the sessions be open to the public. In December 2018, the Spokane County Board of County Commissioners passed a resolution declaring County policy that all collective bargaining negotiations be open to the public, including that all bargaining proposals be posted to the County website within two business days. Around that time, the collective bargaining agreements (CBAs) with six separate bargaining units expired. The County and union engaged in numerous mediation

sessions with a PERC mediator over ground rules for the bargains, including whether the sessions would be open to the public, but did not reach any agreement. The parties attempted to schedule a substantive bargain in October 2020, at which point, the County issued a Notice of Open Meeting inviting the public to the bargaining session. The union did not attend the bargaining session and instead, filed ULPs. Over the next several months, the parties emailed back and forth regarding how they would proceed with respect to the resolution and impact of the Lincoln County decision, in which the Court of Appeals held that a party cannot precondition its willingness to bargain on agreement that the sessions be closed or open because that is a nonmandatory "ground rule" subject of bargaining. Applying Lincoln County, the PERC Examiner held that the union was entitled to summary judgment on its ULPs because there was no dispute that the County had preconditioned its willingness to meet on the union's acquiescence to the ground rule that the bargaining sessions be open. However, the Examiner rejected the union's request for the extraordinary remedies of requiring the County to participate in binding interest arbitration and provide retroactive wage increases, reasoning that such remedies went beyond the remedies imposed in the Lincoln County case. As a result, the Examiner ordered the standard remedy of ordering the County to cease and desist from refusing to meet and negotiate with the union and to bargain in good faith without conditioning bargaining on agreement to nonmandatory subjects.

Refusal to Bargain

King County
Decision 13514 (5/19/22)

A PERC Examiner held that King County did not commit an unfair labor practice (ULP) when it failed to provide documents the union believed should have existed in response to the union's information requests related to two pending grievances. In 2018, the County made several staffing changes which impacted staff supervised by members of a bargaining unit of Public Health Administrative Support Supervisors. As a result, the union filed a grievance on behalf of supervisor Raye DeWolfe-Molesky regarding the changes and resulting workload. Sometime later, a County supervisor issued a written reprimand to DeWolfe-Molesky for "inappropriate email communications," which the union also grieved. The union sent a seven-part information request letter to the employer, seeking documents related to both grievances, including emails, data, and other documents related to the staffing reorganization, as well as emails, case files, and other documents regarding the written reprimand of DeWolfe-Molesky. Although the County provided the union more than 900 pages of documents in response, the union believed that there were more documents that should have been produced. At hearing, witnesses for the union testified that they believed that the County had delayed production and failed to produce relevant, responsive information. DeWolfe-Molesky also testified that he believed additional, unidentified documents should have existed. However, the union failed to present evidence of which documents it received and when; of how the documents received by the date of the complaint compared to the request itself; and of the existence of any withheld responsive documents. The Examiner held that the union's "broad-brush testimony" that there was "something missing" was insufficient to support its theory, and that to meet its burden, the union needed to provide more specificity about what was specifically missing from the employer's response and some evidence that "something" existed. For example, the Examiner stated that to the extent the employee alleged she independently possessed documents that the County wrongfully failed to produce in response to the information request, such documents were not presented as evidence at hearing. Because the

union did not produce any such evidence, the Examiner held that it did not meet its burden of proof and dismissed the union's ULP complaint.

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Update Editors

Liz Robertson
elizabeth@pfrwa.com

Jay Schulkin
jay@pfrwa.com

PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Chase Bonwell
Macaulay Dukes
Tevon Edwards
Cliff Foster

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