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Administrative Law

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Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter and encourage your feedback. This edition includes summaries of recent administrative law cases, and John Gray, an administrative law judge with the Office of Administrative Hearings, discusses the process of offering evidence in adjudicative proceedings.

Please forward our newsletter to your colleagues and encourage them to join the section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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Upcoming Board Meeting and CLE on Marijuana Regulation

Members of the Administrative Law Section are invited to meet the Section's Board of Trustees at a reception on June 12, from 4-6 p.m., at Alderbrook Resort in Union, Washington, on the Hood Canal.

The reception follows a mini-CLE from 2-4 p.m. on the subject of local government regulation of marijuana. Registration is $10 for Section members and law students; $35 for nonmembers. Be sure to let your nonmember colleagues know that they can join the section for $25 and immediately be eligible for the reduced registration fee.

The next day, the members of the Section's Board of Trustees will meet to plan the Section's work for the coming fiscal year. The meeting's topics will include the Section's budget, newsletter, CLEs, diversity and outreach, and the Homan Award. All are welcome to attend the meeting.

If you have ideas and don't want to give up a Saturday in June to talk about them, please send your thoughts to Katy Hatfield by June 5. She can be reached at KatyK1@atg.wa.gov.

Please let Katy know if you would be interested in working on one of the Section's committees: CLE, Diversity and Outreach, Newsletter, Publications and Practice Manual, Public Service, and Legislative.

Accepting Nominations for the Frank Homan Award

The Frank Homan Award is given to an individual who has made a demonstrated contribution to the improvement or application of administrative law. Only section members can nominate someone, but a nominee does not have to be an attorney or a section member.

Nominations can be made until **July 31, 2015**, by sending an email to graymr2@dshs.wa.gov. Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing law in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974, and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993.

He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent of the creation of a central hearings panel and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise, and is well remembered for his sense of humor, his command

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Accepting Nominations for the Frank Homan Award *continued*

of the English language, and his writing style—including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

Prior Recipients
2013 — Alan D. Copsey
2011 — Larry A. Weiser
2010 — Jeffrey Goltz
2008 — Kristal Wiitala
2007 — C. Dean Little
2006 — William R. Andersen
2005 — Bob Wallis

Recipients have been involved in administrative law in many different roles. Larry Weiser and Bill Andersen taught many of us about administrative law. Bob Wallis and Kristal Wiitala have been involved in our publications and in helping with amendments to the statutes that govern our practice.

If you have a teacher, mentor, or person you admire in their service to administrative practice, please consider nominating him or her for this honor.

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law. **Click here to join!**

The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

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Introducing Evidence on the Record in Administrative Hearings

by John Gray

Editor's Note: John Gray serves as an administrative law judge with the Office of Administrative Hearings ("OAH"). Here, John discusses how to offer evidence in an administrative hearing ("adjudicative proceeding"), which differs in several respects from offering evidence in superior or district court proceedings.

SCOPE:

The scope of this article is exclusively on adjudicative proceedings conducted by the OAH. Hearings conducted by agencies other than OAH are outside the scope of this article. The author assumes the reader is already familiar with the basic law regarding adjudicative proceedings, governed by Part IV of the Administrative Procedure Act ("APA"), ch. 34.05 RCW.

APPLICABLE LAW:

The topic of offering evidence in an administrative hearing is not directly discussed in the APA. The statute governing evidence in an adjudicative proceeding is RCW 34.05.452. The Washington Rules of Evidence ("ER") do not govern in administrative proceedings, except to the extent allowed by RCW 34.05.452(2) ("If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings."). The model rules of procedure, adopted by the Office of Administrative Hearings, are found at ch. 10-08 WAC. Of course, the reader should also check the administrative rules of procedure adopted by the administrative agency involved in the hearing.

Prehearing Orders:

Sometimes a case will have a prehearing conference order(s) ("PHCO"). RCW 34.05.431 and WAC 10-08-130. PHCO govern the conduct of the case, identifying the issues and establishing deadlines for the identification and submission of witness lists and exhibits; sometimes, the PHCO will also contain discovery deadlines if the ALJ allows discovery. A PHCO requiring the submission of proposed exhibits in advance of the hearing may or may not contain language similar to that found in ER 904. However, WAC 10-08-040(2)(c) provides: "Where practicable, the presiding officer may order: . . .(c) that the authenticity of all documents submitted in advance in a proceeding in which such submission is required be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection."

By identifying the witnesses and exhibits before the hearing, opposing parties learn what to expect at the hearing and how to prepare for it. It may even lead to settlement discussions. But even if the case does not settle, the parties may plan how to prepare their own cases for the hearing. Note that the requirement to identify witnesses for the hearing includes both expert and non-expert witnesses, as opposed to trials in superior court (CR 26(b)(5)(A)(1)) and district court (CRLJ 26(b)(E)) that require identification only of experts whom the party plans to call as expert witnesses.

At the Hearing, With or Without a PHCO:

With or without a PHCO, ALJs make a practice of instructing one party to mark his or her exhibits with numbers and the other party to mark exhibits with letters. This reduces the opportunity for confusion of the exhibits. If there are more than two parties in the proceeding, then some additional markings are possible; e.g., using a party's name or initials followed by -1 or -A. Another good practice is to mark multi-page exhibits with the page number within the exhibit. For example, if a proposed exhibit number 5 (or E, as the case may be) has a total of seven pages, the pages may be marked as 5-1 of 7, 5-2 of 7, and so on, or E-1 of 7, E-2 of 7, and so on.

At the hearing, the ALJ will call the hearing to order and, after identifying basic information (docket number, name of the case, the parties, counsel, date and time of the hearing, and so on) may ask the parties if there are any prehearing matters they wish to raise and then move to the proposed exhibits for the hearing. This task is often easier if the PHCO required the filing and exchange of exhibits prior to the hearing on the merits.

In this regard, the procedure at an adjudicative proceeding differs from trials in superior or district courts. In adjudicative proceedings, the exhibits are usually offered all at one time. This practice differs from the courts where exhibits are usually offered at the time the appropriate witness is available to authenticate the exhibit (if necessary) or if the exhibit comes within the scope of that witness's examination. As a practice tip for both adjudicative proceedings and for trials, the reader is encouraged to review the checklists provided in the most recent edition of Karl Tegland's *Courtroom Handbook on Washington Evidence* (Thompson Reuters).

To offer the exhibits, the party simply says, "Your Honor, (name of the party) offers what have been marked as Exhibits (e.g., 1-20, or A-T) as our exhibits in this case."

The ALJ will usually ask a party to identify his or her exhibits. Counsel or the party should be prepared to provide a short description of an exhibit, its author, and the number of pages, and state whether counsel or the party plans to call the author of the exhibit as a witness.

If the exhibit is a business record, and if authenticity is an issue, counsel or the party may wish to include that

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Introducing Evidence on the Record in Administrative Hearings *continued*

information in the brief description. When counsel questions the witness (or if the party represents himself or herself), be sure to cover the points required in RCW 5.45.020.

After offering the proposed exhibits, the ALJ will ask questions to be sure that both the ALJ and the parties have identical copies of proposed exhibits, and ask if any party has any objections to the proposed exhibits. After ruling on the objections, the ALJ will announce on the record the numbered or lettered exhibits that are admitted and those that are excluded. Exhibits may be excluded (a) by the ALJ sustaining an objection to an exhibit's admission or (b) by the ALJ sua sponte. See RCW 34.05.452(1). The ALJ will keep excluded exhibits with the file. The rules do not expressly address this practice, which is similar to judicial practice, but it is implied in the statutes and rules addressing the ALJ's authority. See, e.g., RCW 34.05.449(1) and (2); WAC 10-08-200(6).

If a party objects to an exhibit, the ALJ may rule then and there whether the objection is sustained or overruled. As contemplated by the statutes and rules cited, the proponent of an exhibit that is excluded by the ALJ may make an offer of proof. The APA does not expressly require an offer of proof comparable to ER 103(a)(2), but the practitioner would be prudent to make such an offer for the reasons cited in *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991): "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

Another way the ALJ may deal with the objection is to reserve judgment and to instruct the proponent to offer the exhibit at an appropriate time during the hearing, such as when a witness plans to refer to the proposed exhibit. Some agencies expressly allow this. See, e.g., WAC 230-17-100(1) (Gambling Commission). The ALJ may also ask the parties to sign a list of the admitted exhibits in order to reduce confusion whether a document was admitted or excluded.

The ALJ will repeat this process with each party that offers exhibits. After all the exhibits have been addressed, the ALJ will move the hearing along to the next step.

Frequently Cited Administrative Rules Regarding Exhibits:

The OAH caseload most frequently consists of appeals involving the Department of Social and Health Services ("DSHS"), the Health Care Authority ("HCA"), and the Employment Security Department ("ESD"). The applicable administrative rules for these three agencies, as they relate to the authority of the ALJ and offering exhibits, are:

DSHS:

WAC 388-020-0215(2)(d) and (e) (what is the authority of the ALJ? The ALJ may rule on an offer of proof made to admit evidence and admit relevant evidence);

WAC 388-02-0390 (what is evidence?);

WAC 388-02-0400 (what evidence may the parties present during the hearing?);

WAC 388-02-0415 (what are proposed exhibits?);

WAC 388-02-0420 (do the parties mark and number their proposed exhibits?);

WAC 388-02-0425 (who decides whether to admit proposed exhibits into the record?);

WAC 388-02-0430 (what may a party do if they disagree with an exhibit?); and

WAC 388-02-0435 (when should an ALJ receive proposed exhibits for a telephone hearing?).

HCA:

WAC 182-16-010 (appeals—purpose and scope);

WAC 182-16-081 (prehearing conferences; note especially (4)(d)).

ESD:

WAC 192-04-010 (adoption of ch. 10-08 WAC).

Administrative Law Section Listserv

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserv can send an email to the Listserv. You can request to receive the Listserv messages in a daily digest format by contacting the list administrator below.

Sending Messages: To send a message to everyone currently subscribed to this list, address your message to administrative-law-section@list.wsba.org. The Listserver will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the Listserv.

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Worthington v. WestNET: Interlocal Agreements and the PRA

by Jeffrey Litwak and Ramsey Ramerman

In *Worthington v. WestNET*, 182 Wn.2d 500, 341 P.3d 995 (2015), the Washington Supreme Court concluded that a multijurisdictional drug task force created pursuant to the Interlocal Cooperation Act, Chapter 39.34 RCW, could be sued for violating the Public Records Act ("PRA") even though the agreement contained a disclaimer that the task force was not a separate legal entity. The Court held that agencies could not be allowed to frustrate the purpose of the PRA by entering into an interlocal agreement, and therefore the issue of whether the interlocal entity could be sued for violating the PRA would turn on whether the purposes of the PRA would be frustrated if the PRA did not apply.

What makes this case interesting is the interplay between the PRA and the Interlocal Cooperation Act. The PRA, of course, applies liberally to all Washington agencies. The Interlocal Cooperation Act, in contrast, allows government parties to create an interlocal agreement without creating a separate governmental agency. RCW 39.34.040(1). It also provides, however, that agencies cannot create an interlocal entity that would "relieve any public agency of any obligation or responsibility imposed upon it by law(.)" RCW 39.34.030(5).

Worthington made his original request to WestNET, which did not respond. Instead, the Kitsap County Sheriff's Office responded. Dissatisfied, Worthington sued WestNET under the PRA, serving Kitsap County. Kitsap County moved for dismissal under 12(b)(6), arguing that WestNET was not an entity subject to suit under the PRA and that the terms of the interlocal agreement specified WestNET was not a separate legal entity. Worthington argued that WestNET was the functional equivalent of a government agency.

The Court's analysis focused on whether the purposes and obligations of the PRA would be frustrated by the creation of the interlocal agreement. The Court first considered applying the factors in *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149 (1999), which courts have used to determine whether the PRA applies to a particular organization that does not otherwise meet the definition of "agency." The Court concluded that the *Telford* factors themselves had limited applicability, but that the *Telford* line of cases demonstrated that the courts should engage in a "practical analysis" to determine if the PRA applies to an interlocal entity.

For example, the Court noted, "it is conceivable that despite its own terms, WestNET operates independently, maintains its own records, and effectively exists as a separate government agency." The Court then listed several factors that the trial court could have considered: whether WestNET maintains a separate office; where the task force records are kept; whether WestNET has a designated custodian of the records; how interested persons could request records, including whether a person would need to request records from all of the parties to the task force. The Court speculated that it would be appropriate to require an interlocal entity to comply with PRA requests if the records of the interlocal entity were maintained in such a way that it would otherwise be so impractical or cumbersome for a person to obtain records that the purpose of the PRA would be frustrated. Discovery, the Court noted, was needed to answer these questions, and thus dismissal was improper.

In contrast to the majority's focus on the interplay between the PRA and the Interlocal Cooperation Act, the dissent focused on the civil procedure issue of whether Worthington could properly sue a nonentity, which the Interlocal Cooperation Act expressly authorizes. In short, the dissent concluded that WestNET did not have legal capacity to be a defendant and that legal capacity should not depend on the statutory claim that a plaintiff makes.

The significance of this case will depend on how broadly or narrowly it is read by future courts. On one extreme, this case could be seen simply as a case of statutory construction of RCW 39.34.030(5) (prohibiting agencies from using interlocal agreements to avoid other statutory obligations). In this narrow reading, the case merely requires trial courts to address questions of fact regarding whether the PRA would be frustrated.

At the other extreme, the case could be read as adopting a new rule of statutory interpretation making any statutory term malleable when necessary to avoid frustrating the purposes of the PRA.

The most likely result, however, will be something in between these extremes, so that when faced with an ambiguous statute, the Court will default to an interpretation of the statute that will support rather than frustrate the purposes of the PRA.

A few additional points are worth considering.

First, the Court's statement that discovery was necessary should not be interpreted as a blanket ruling that discovery will be necessary in all cases. Rather, the Court's ruling shows that the issue of whether the PRA applies will be a mixed fact/legal issue, making it unamenable to a motion to dismiss. But like any other fact issue, if the uncontested facts show that one party to an interlocal agreement has taken legal responsibility for producing records relating to the agreement and to the parties' activities pursuant to the agreement, and that obtaining those records is no more burdensome than obtaining other records, then discovery might not be needed.

Second, anyone drafting or administering an interlocal agreement must now take the issue of public disclosure into account. Best practice in drafting an interlocal agreement now includes addressing the factors that the majority

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Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Gabe Verdugo at gabeverdugo@gmail.com.

Case Summaries – Washington Supreme Court

***City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014)**

In a 5-4 decision, the Washington Supreme Court held that a Public Records Act requestor is entitled to attorney fees if an agency fails to provide an adequate explanation for redacting or withholding records, regardless of whether the records were properly redacted or withheld. Koenig requested records from the City of Lakewood related to three police officers. The City redacted driver's license numbers from the records, stating that the numbers were redacted due to several listed statutes. Koenig questioned the City's reliance on the listed statutes and asked the City to explain which exemption it claimed applied to the driver's license numbers. The City refused to provide further explanation given what the City stated was the self-evident nature of redacting an individual's driver's license number. On appeal, Koenig argued that he was entitled to attorney fees because the City violated the Public Records Act by failing to explain adequately why the driver's license numbers were exempt, even though Koenig did not appeal the superior court's ruling that the numbers were exempt from disclosure. The Supreme Court agreed with Koenig, holding that he was entitled to attorney fees because the City's explanatory statement was inadequate in that it failed either to cite a specific exemption or to provide any explanation as to how the cited statutory exemptions applied to the driver's license numbers in the specific records produced. Agencies violate the Public Records Act if they withhold or redact requested documents without providing a specific exemption and a brief explanation as to why the exemption applies. The Court indicated that a case-by-case analysis will be required to determine what qualifies as an adequate explanatory statement, and the analysis will depend on both the nature of the exemption and the nature of the document or information.

Katy Hatfield

***Worthington v. WestNET*: Interlocal Agreements and the PRA**
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suggested: focusing on the location, custody, and means of requesting the documents and seeking redress. Best practices specifically for interlocal nonentities would include not uniquely using any particular office space and paying careful attention to ensuring that only the parties to the agreement or perhaps only one party to the agreement is the actual custodian of records.

Finally, special problems arise when the interlocal agreement is between entities in different states, such as between Clarkston, Washington, and Lewiston, Idaho, or between Stevenson, Washington, and Cascade Locks, Oregon. This situation raises questions such as whether the agreement can specify the out-of-state party as the custodian of all documents relating to the agreement; whether doing so could extend Washington's PRA to the out-of-state custodian, whether the other state's public records law applies, and how a court should handle conflicts between the two states' disclosure laws.

***Ass'n of Wash. Spirits and Wine Distributors v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 340 P.3d 849 (2015)**

The Association of Washington Spirits and Wine Distributors sought to challenge the Board's decision to exempt distillers who distribute their own manufactured spirits from contributing to a shortfall of $104.7 million in licensing fees imposed on persons holding spirits distributor licenses. Since Initiative 1183 was passed, allowing private retailers to sell alcohol, a licensing fee has been imposed. That license fee was divided into two parts (1) a 10 percent fee added to all sales by spirits distributor licensees; and (2) a shortfall fee to be equitably assessed against all persons holding spirit distributor licenses. The dispute in this case came down to whether distillers must contribute to the shortfall fee.

The Board, through rulemaking, determined that distillers must pay the percentage fee but not the shortfall fee. The Association sought a declaratory judgment pursuant to RCW 34.05.570(2)(c) that the rule promulgated by the Board was invalid. The trial court upheld the Board's rule, and the Supreme Court granted direct review. On review, the Association argued that distillers who distribute their spirits to retailers are acting as "spirits distributor licensees" and thus are subject to the shortfall fee. The Association relied on a statute and on the argument asserted by the Board in a previous case where it said that distillers who choose to distribute their product are subject to the 10 percent distributor fee. Thus, because the Board applied the 10 percent fee to distillers, it must apply the shortfall fee to distillers.

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Case Summaries – Washington Supreme Court *continued*

However, the Court held that the propriety of one WAC does not depend on the propriety of a separate regulation. Further, it did not require agency expertise and interpretation when the WAC at issue was unambiguous. The Court also held that distillers and distributors are subject to separate statutory requirements and that distillers that distribute their own product do not become distributors.

The Association further argued that the rule was arbitrary and capricious. The Court noted that the scope of review for arbitrary and capricious actions imposes a heavy burden. Because the WAC closely tracked the language of the statute it implements and because the Association only argued that the two provisions were "logically inconsistent," the Association did not demonstrate that the Board's actions were arbitrary and capricious.

Stephen Manning

Case Summaries – Washington Court of Appeals

***Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925, 335 P.3d 1004 (2014)**

This case involves an appeal of a superior court's order dismissing Mike Hobbs's Public Records Act ("PRA") claim against the State Auditor's Office ("Auditor"). On November 28, 2011, Hobbs filed a PRA request for public records relating to the Auditor's investigation of a whistleblower complaint. The request included a large amount of technical information related to records and record retention. The Auditor responded on December 2, 2011, stating that it could provide the records in installments beginning on December 16, 2011. Hobbs was unresponsive in scheduling inspection of the records, so the Auditor made the first installment available on December 21, 2011. In response, Hobbs filed a suit against the Auditor for alleged PRA violations on December 23, 2011.

Over the next several weeks, the Auditor provided a revised version of the first installment and informed Hobbs that the next installment would be ready on January 13, 2012. On January 6, 2012, the Auditor sent Hobbs another correspondence explaining that if Hobbs had any issues regarding mistakes in how the Auditor had been processing the request, to contact the Auditor. After a technical issue was resolved, the Auditor sent final remaining emails requested by Hobbs on March 1, 2012.

In response to Hobbs's initial suit, the superior court agreed with the Auditor that Hobbs had no cause of action with respect to certain installments because the Auditor still was in the process of responding to Hobbs's public records request and thus had not denied Hobbs any records. In its final order, the superior court ruled that the Auditor's initial response complied with the PRA requirement to provide a response within five days and that the Auditor had continued to comply with the PRA through its ongoing communications with Hobbs regarding the records request.

On appeal, the court refused to reverse the lower court and held that under the PRA, a requestor may initiate a lawsuit to compel compliance with the PRA only *after* the agency has engaged in some final action denying access to a record. In a related claim, Hobbs argued that once the agency had violated the PRA, the violation existed as a basis for penalties and costs from the time of the alleged violation until it is cured, even prior to final agency action. The court disagreed and essentially permitted the agency to have "do-overs," holding that when an agency actively is making reasonable efforts to respond fully to a public records request, it is allowed to cure alleged PRA violations voluntarily prior to its final response. The court also noted that agencies are not held to self-imposed deadlines, and that the PRA's statutorily imposed five-day response provision requires that agencies provide a response to a request within five days with a reasonable estimate of time to produce the first installment, rather than a response that includes an estimate of how long the agency will need to fully respond to the request.

Scott Hilgenberg

***Magdalene Pal v. Dep't Soc. & Health Servs.*, ___ Wn. App. ___, 342 P.3d 1190 (2015)**

An Adult Health Care Provider sought to challenge a finding of the DSHS that she had neglected a vulnerable adult in her care. However, her request for a hearing was dismissed by the Administrative Law Judge because she faxed the request after 5 p.m. on the 30th day and failed to mail the request on the same day.

The court found that while the hearing request was untimely under the WACs, the DSHS notice did not reasonably apprise her of the deadline and thus violated due process. The court also held that because the Office of Administrative Hearings ("OAH") actually received the faxed request, violation of the mailing requirement did not prevent the OAH from exercising jurisdiction. The court reversed the dismissal of the request for hearing.

Lisa Malpass

***Arthur West v. Christine Gregoire, Governor of the State of Wash.*, 184 Wn. App. 164, 336 P.3d 110 (2014)**

The Court of Appeals affirmed the trial court's dismissal, following show cause proceedings under former RCW 42.56.550 (2005), of Arthur West's ("Plaintiff") complaint alleging that then Governor Christine Gregoire violated the Public Records Act ("PRA"), chapter 42 RCW. In his complaint, Plaintiff alleged that Gregoire improperly withheld numerous records under a claim of executive privilege and unreasonably delayed in producing records. In the show

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Case Summaries – Washington Court of Appeals *continued*

cause proceedings, however, Plaintiff argued only that executive privilege was not a PRA exemption and did not argue PRA claims based on Gregoire's alleged delay in responding to his request or any other grounds.

The court noted that whether a requestor in a PRA action abandons claims by failing to argue them at the show cause hearing is a matter of first impression. Analogizing to summary judgment and trial proceedings, the court held that Plaintiff was required to address all the claims he wanted to pursue against Gregoire in the show cause proceedings that he initiated because the show cause hearing under former RCW 42.56.550(1) is, in effect, a PRA claimant's trial. Because Plaintiff did not mention any claims not involving executive privilege in his briefs or at oral argument, the court deemed Plaintiff to have abandoned those claims. Justifying its holding, the court explained that requiring a PRA claimant to address all PRA claims during show cause proceedings promotes the orderly administration of PRA requests, avoids piecemeal litigation, and is consistent with the purposes of the PRA. The court clarified, however, that its holding should not be interpreted as preventing a PRA claimant or an agency from requesting that the trial court address multiple claims in separate show cause proceedings, or preventing a trial court from conducting separate proceedings for different claims.

Turning to Plaintiff's executive privilege arguments, the court applied the three-part test from *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013), to hold that executive privilege precluded disclosure because Plaintiff failed to submit any evidence that he had a particularized need for the records requested.

Tania Culbertson

***Klinkert v. Wash. State Criminal Justice Training Comm'n*, ___ Wn. App. ___, 342 P.3d 1198 (2015)**

A Washington police officer must have a certification from the Washington Criminal Justice Training Commission ("Commission") as a condition of employment. If an officer is fired for disqualifying conduct, the Commission may revoke the officer's certification. Washington law enforcement agencies must notify the Commission when an officer is fired and must provide the Commission with investigation files documenting officer misconduct. The legislature made "investigation files of the Commission compiled in carrying out the responsibilities of the commission" exempt from public disclosure. RCW 43.101.400(1)(c).

Klinkert submitted a public records request to the Commission seeking documents related to a particular sheriff's deputy and the incident that led to the deputy's termination. The Commission responded by denying the request and providing an exemption log. The log indicated that two documents were being withheld: a one-page notice of termination and a 713-page investigation file that would be used to determine whether the deputy also should lose his certification. The log explained that the investigation file was exempt under RCW 43.101.400(1). Klinkert insisted that the documents in the file had to be further itemized, but the Commission declined.

More than one year later, Klinkert filed a public records lawsuit. He argued that the exemption log was insufficient to trigger the one-year statute of limitations under the reasoning of *Rental Housing Association v. Des Moines*, 165 Wn.2d 525 (2009). The Court of Appeals disagreed. The exemption log's explanation was sufficient for Klinkert and the courts to evaluate the exemption. Thus, Klinkert's suit was time barred and the trial court had properly dismissed.

Rebecca Glasgow

***City of Fife v. Hicks*, ___ Wn. App. ___, 345 P.3d 1 (2015)**

The City of Fife ("City") redacted identifying information from an investigative report pertaining to allegations of various types of misconduct by high-ranking city police officials. Hicks, a police officer for the City, submitted a chapter 42.41 RCW whistleblower complaint alleging racial discrimination, misappropriation of public funds, gender discrimination, and improper romantic workplace relationships committed by his superiors. The City hired an outside entity to investigate the allegations. The investigation concluded with a finding that the allegations were "not sustained" or "unfounded." Hicks then submitted a public records request to obtain all relevant documents and recordings from the investigation, and the City responded by sending redacted versions of the requested materials in installments over the course of four months.

The City sued Hicks in superior court for declaratory and injunctive relief, and Hicks filed a counterclaim alleging that the City had violated the PRA by failing to provide the requested information. The superior court determined that the City had violated the PRA due to (1) its improper redaction of information identifying the witnesses and officers involved and (2) the length of time the City took to disclose the information.

On appeal, the City needed to show that the redactions fit under one of two exemptions to the PRA. First, the City claimed that the redactions were proper under the RCW 42.56.240(1) exemption for specific investigative records, which aims to protect "the integrity of law enforcement investigations." Although the City established that its investigation was both investigative in nature and was compiled by a law enforcement agency, the court determined that the redactions were neither "essential to law enforcement" nor "essential to the protection of a person's right to privacy" as required by the PRA exemption.

In its finding that the redactions were not essential, the court reasoned that the City's reliance on a single officer's

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Case Summaries – Washington Court of Appeals *continued*

opinion testimony was not sufficient when compared to analogous cases in which courts found redactions to be essential to law enforcement. In its finding that there was no violation of privacy, the court reasoned that the public has a legitimate concern in the knowledge of the conduct of high-ranking city officials, and that some of the information discovered during the City's investigation corroborated Hick's claims of misconduct.

Next, having determined that the redactions did not violate any person's right to privacy under RCW 42.56.050, the court similarly found that the redactions did not fit into the RCW 42.56.230(3) exception for violations of privacy.

Finally, having determined that the City violated the PRA, the court affirmed the lower court's ruling awarding Hicks reasonable costs and attorney's fees under RCW 42.56.550(4), and upheld the decision to hold the City liable for a monetary penalty pursuant to RCW 42.56.550(4) for its delay in producing the requested information.

Matthew Dick

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