

No. 31692-7-II

(Thurston County Superior Court No. 04-2-00246-7)

IN THE COURT OF APPEALS, DIVISION TWO FOR
THE STATE OF WASHINGTON

THE EVERGREEN FREEDOM FOUNDATION, a Washington
Non-Profit Corporation,

Appellants,

vs.

GARY LOCKE, in his official capacity as Governor of
the State of Washington, and the WASHINGTON
STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT, a state agency,

Respondents.

MOTION TO SUPPLEMENT THE RECORD

RICHARD M. STEPHENS, WSBA No. 21776
DIANA KIRCHHEIM, WSBA No. 29791
Attorneys for Appellants

GROEN STEPHENS & KLINGE LLP
2101 112th Avenue N.E., Suite 110
Bellevue, WA 98004-2944

Telephone: (425) 453-6206

I.

IDENTITY OF MOVING PARTY

Appellant, Evergreen Freedom Foundation (EFF), is the moving party.

II.

STATEMENTS OF RELIEF SOUGHT

Pursuant to RAP 9.11(a), Appellant moves to supplement the record with portions of Exhibit F to the Boeing Agreement that were recently produced by the State to EFF. The Boeing Agreement is the public record at issue in the underlying Public Records Act (PRA) lawsuit. Specifically, Appellant seeks to supplement the record with Port of Everett Resolution No. 801 dated December 19, 2003 and Snohomish County Ordinance 03-158 dated January 14, 2004. Appellant also seeks to supplement the record with a document entitled "Project Olympus Master Agreement Action and Timing Checklist" which shows when DCTED received this resolution and ordinance.

III.

FACTS RELEVANT TO MOTION

One of the issues on appeal is whether the trial court erred in not awarding Appellants' attorney fees and penalties under the PRA. EFF argued below that it was entitled to attorney fees and penalties under the

PRA because the filing of the underlying lawsuit prompted the State to comply with the PRA by handing over specific documents after the filing of the lawsuit.

Below, the State argued under oath that it did not have documents responsive to EFF's request for Exhibit F of the Boeing Agreement. CP 1345, CP 1360, CP 1286-1287. On July 15, 2004, EFF acquired documents responsive to this request. Specifically, EFF acquired two ordinances adopted pursuant to Exhibit F of the Agreement. *Id.* First, Snohomish County Ordinance 03-158 was approved on January 14, 2004, and mailed to the State on **January 20, 2004**. *See* Exhibit A, attached hereto. The transmittal of this Ordinance to the State specifically states, this "ordinance should be attached as part of Exhibit F of the Agreement." *Id.* Second, Port of Everett Resolution No. 801 dated December 19, 2003 was adopted pursuant to Exhibit F of the Agreement. *See* Exhibit B, attached hereto.

On August 18, 2004 EFF received another public record showing that the State did in fact have possession of the two ordinances referenced above at least by February 27, 2004, the date of the show cause hearing. The public record is entitled the "Project Olympus Master Agreement Action and Timing Checklist" (checklist) and is dated February 27, 2004. *See* Exhibit C, attached hereto. The checklist shows the progress of

implementing the Boeing Agreement. *Id.* Page 4 of the checklist references Exhibit F of the Agreement (Section 10.2 of the Agreement). *Id.* The checklist states the “7E7 PMO [project management office] has received Port and SnoCo’s [Snohomish county] resolutions.” *Id.* Although the State repeatedly told EFF and the Court under oath that it would supply these documents to EFF once they received them (CP 1286), these promises were not kept. These documents make clear that as of February 27, 2004, DCTED had these resolutions but it not provide them until July 15, 2004.

IV.

ARGUMENT

THE COURT SHOULD ADMIT THE ADDITIONAL EVIDENCE PURSUANT TO RAP 9.11(A)

Pursuant to RAP 9.11(a), additional evidence on review may be considered if the party establishes the following: (1) additional proof of facts is needed to fairly resolve the issues on review; (2) the additional evidence would probably change the decision being reviewed; (3) it is equitable to excuse a party's failure to present the evidence to the trial court; (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive; (5) the appellate court's remedy of granting a new trial is inadequate or unnecessarily

expensive; and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 78-79, 17 P.3d 1178 (2001). Usually, all six factors must be satisfied before new evidence is admissible under RAP 9.11(a). *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 702, 683 P.2d 215 (1984). However, the court may waive the requirements of the rule pursuant to RAP 1.2 and RAP 18.8 to serve the ends of justice. *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 640, 762 P.2d 1141 (1988). Here, all six factors have been met.

First, the additional evidence is needed to resolve the issue on review. The evidence establishes that the State did not turn over documents that had been requested when it in fact possessed them. The State testified under oath below that it did not have these documents in its possession because they had not been created. CP 1345, CP 1360, CP 1286-1287. This new evidence establishes this was not true. The 7E7 office possessed these two ordinances as of February 27, 2004.

Second, the additional evidence being sought is likely to change the result of this case because the State's untruthful stance on its possession of these documents reflects the State's bad faith in producing records in this case. It also shows how the State took from February 27, 2004 until July 15, 2004 to disclose these records, contrary to the

promptness requirements of the PRA.

Third, equity cannot punish EFF for failure to offer this evidence of the State's false statements to the trial court. EFF only recently learned (after the appeal was filed) of the existence of these documents and the fact that the State possessed them at the time of the show cause hearing. The State repeatedly promised EFF it would provide requested documents once it received them.

Fourth, the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive. The existence of these ordinances as of February 27, 2004 cannot be disputed. Post-judgment motions in the trial court at this point in time make little sense. Fifth and on a similar note, the appellate court's remedy of granting a new trial, solely on this issue, is inadequate or unnecessarily expensive.

Finally, it would be inequitable to decide the case solely on the evidence already taken in the trial court. The State should not be able to state under oath that certain documents do not exist when it had possession of these documents.

Because of each of the standards in RAP 9.11(a) are met, the Court should grant the motion to take the additional evidence.

IV.

CONCLUSION

Appellants respectfully request that the additional evidence attached to the Declaration of Jason Mercier consisting of the "Project Olympus Master Agreement Action and Timing Checklist," Port of Everett Resolution No. 801 dated December 19, 2003, and Snohomish County Ordinance 03-158 dated January 14, 2004 be considered in this case.

RESPECTFULLY SUBMITTED this 23rd day of August, 2003.

GROEN STEPHENS & KLINGE LLP

By:

Richard M. Stephens, WSBA #21776
Diana M. Kirchheim, WSBA #29791

DECLARATION OF JASON MERCIER

I, Jason Mercier, declare as follows:

1. I am employed by Appellant, the Evergreen Freedom Foundation (EFF). I make this declaration on my personal knowledge and belief, and am competent to testify to the matters stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of Snohomish County Ordinance 03-158 that was produced to EFF on July 15, 2004 in response to a public records request I made to the 7E7 Project Office.

3. Attached hereto as Exhibit B is a true and correct copy of Port of Everett Resolution No. 801 dated December 19, 2003 that was produced to me on July 15, 2004 in response to my public records request I made to the 7E7 Project Office.

4. Attached hereto as Exhibit C is a true and correct copy of a document I received from the 7E7 Project Office on August 18, 2004 entitled "Project Olympus Master Agreement Action and Timing Checklist."

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and was executed by me this 23rd day of August, 2004 at Olympia, Washington.

Jason Mercier