

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

WASHINGTON POLICY CENTER, a
Washington nonprofit corporation,

Plaintiff,

vs.

CITY OF SEATTLE,

Defendant.

No.

**COMPLAINT FOR VIOLATIONS OF
THE PUBLIC RECORDS ACT**

Plaintiff Washington Policy Center (WPC), a Washington nonprofit corporation, by and through its attorney, William John Crittenden, brings this Complaint against the City of Seattle, and in support thereof avers the following:

I. JURISDICTION

1.1 This court has jurisdiction pursuant to RCW 42.56.550(1).

II. FACTS

2.1 On or about August 25, 2017, WPC, through its director Jason Mercier, made a request for public records to the City of Seattle pursuant to the Public Records Act, Chap. 42.56 RCW (PRA).

1 2.2. The WPC request sought records relating to the proposed adoption of an income
2 tax. WPC did not request any person’s personal communications.

3 2.3 The City acknowledged the WPC request and assigned it reference number
4 C017217-082517.

5 2.4 On or about January 30, 2018, the City produced its seventh (7th) installment of
6 records as PDF files. This installment included approximately twenty-three (23) pages of
7 redacted records of communications between Councilmember Sally Bagshaw and her husband,
8 Brad Bagshaw. These records were dated between February 23, 2017, and May 23, 2017.

9 2.5 The records from the 7th installment indicate that Councilmember Bagshaw
10 communicated with Brad Bagshaw using her personal “Gmail” account, rather than her official
11 City email account, to discuss the income tax proposal with her husband Brad Bagshaw.
12

13 2.6 On information and belief Brad Bagshaw at all times relevant was neither an
14 employee or officer of the City of Seattle nor an actively licensed member of the Washington
15 State Bar Association.

16 2.7 With the 7th installment of records the City produced an exemption log that
17 stated that the communications between Councilmember Bagshaw and her husband were
18 redacted as “Spousal Privileged Communication” pursuant to “RCW 42.56.070(1) and RCW
19 5.60.060(1).” The explanation stated “Records reflect communication between spouses during
20 marriage.”
21

22 2.8 By email dated January 31, 2018, Mr. Mercier questioned the City’s redactions
23 as follows:

24 I am questioning the claim that RCW 5.60.060(1), the spousal privilege, can
25 justify withholding the public records in Installment 7 part C. Councilwoman
26 Bagshaw’s emails are related to the income tax ordinance – a matter of city
business. She is not being asked to testify against a spouse and the

1 communications would not be personal in nature if they were related to Seattle's
2 income tax. Please reconsider the privilege claim.

3 2.9 The City responded by letter dated February 15, 2018, reaffirming the City's
4 claims of "spousal privilege" as follows:

5 Regarding the spousal privilege exemption, I uphold all redactions. Spousal
6 privilege applies to any communication between spouses made in confidence
7 and can concern any topic including city business. RCW 5.60.060(1).

8 2.10 On or about March 2, 2018, the City produced its eighth (8th) installment of
9 records as a PDF file. This installment included a fully-redacted copy of a memorandum dated
10 November 10, 2014, from City Attorney Kent Meyer to Councilmember Nick Licata.

11 2.11 The 8th installment also included email records indicating that attorney Knoll
12 Lowney was in possession of that memorandum no later than February 19, 2015, when he
13 emailed the memorandum to Lisa MacLean at Moxie Media. On information and belief Ms.
14 MacLean is neither an attorney nor an employee or officer of the City of Seattle.

15 2.12 Additional email records in the 8th installment indicated that Ms. MacLean
16 forwarded the memorandum to John Burbank the same day (February 19, 2015). On
17 information and belief Mr. Burbank is the Executive Director of the Economic Policy Institute,
18 and neither an attorney nor an employee or officer of the City of Seattle.

19 2.13 Additional email records in the 8th installment indicated that on February 21,
20 2015, Mr. Burbank forwarded the memorandum to MacLean, Lowney and Emma Tupper. On
21 information and belief Ms. Tupper is a principal officer of Moxie Media, and neither an
22 attorney nor an employee or officer of the City of Seattle.

23 2.14 Additional email records in the 8th installment indicated that on February 24,
24 2015, Mr. Burbank forwarded the memorandum (and email thread) to Greg Wong, an attorney
25 at Pacifica Law Group. The same day Mr. Wong sent the memorandum (and email thread) to
26

1 Mr. Burbank and attorney Paul Lawrence at Pacifica Law Group. Later the same day Mr.
2 Burbank forwarded the memorandum (and email thread) to Wong and Lawrence.

3 2.15 Additional email records in the 8th installment indicated that on April 7, 2017,
4 Mr. Burbank forwarded the memorandum (and email thread) to Newell Aldritch, a legislative
5 assistant to Councilmember Lisa Herbold. Mr. Burbank stated in his email to Newell:

6 Here are my thoughts about that old memo. I have no idea how I got it!

7 2.16 By email dated May 15, 2018, Mr. Mercier responded to the City with additional
8 questions about why the November 10, 2014 memorandum would be privileged:

9 After further review of the dates and recipients of the emails in Installment 8 of
10 my prior records request (let me know if you want me to send PDF), I have
11 additional questions about the assertion that the November 10, 2014 memo from
12 Kent Meyer is privileged.

13 Long before the common interest agreement was discussed, the 2014 memo was
14 received by Knoll Lowney no later than February 18, 2015, when he scanned it
15 and sent it to Lisa MacLean at Moxie Media. What was the confidential
16 relationship between the City, Lowney and Moxie Media in 2015?

17 Similarly, Lisa MacLean and Moxie Media also received the 2014 memo from
18 Knoll Lowney in February 2015. Is the memo still privileged after the disclosure
19 to nonlawyers such as MacLean/Moxie/Tupper?

20 2.17 By email dated May 18, 2018, the City responded as follows:

21 Thank you for your message. In response, the November 10, 2014 memo from
22 Kent Meyer is a communication covered by the attorney-client privilege. The
23 council never waived the privilege. An individual councilmember cannot waive
24 the attorney-client privilege. The fact that Knoll Lowney somehow acquired the
25 memorandum did not result in the waiver of the privilege. We regard the
26 document in our possession to be privileged and have redacted it accordingly. I
have copied our Public Disclosure Officer and Analyst who can assist you
further if needed.

27 2.18 On our about June 21, 2018, Mr. Mercier sent a letter to the City, objecting to
28 the City's inadequate investigation of its attorney-client privilege claims as follows:

1 It does not appear that you have made any relevant inquiries to determine how
2 or why Lowney acquired the 2014 memo and subsequently shared it with other
3 third parties.

4 Whether or not the disclosure of the 2014 memo to Knoll Lowney and/or his
5 subsequent disclosures to other parties resulted in a waiver of the attorney-client
6 privilege depends on (i) how and why Lowney received it in the first place, and
7 (ii) why he disclosed it to other parties in 2015. It is necessary to answer both of
8 these questions to actually determine whether or not the memo remains
9 privileged.

10 Per case law:

- 11 ○ There is no legal basis for the assertion that it does not matter how or
12 why Lowney acquired the 2014 memo.
- 13 ○ An assertion of privilege does not establish that it is in fact privileged
14 when it is an undisputed fact that the document was released to other
15 parties.

16 Please investigate the basis for your privilege claim as it pertains to the release
17 of the memo to Lowney and others and provide a proper explanation as required
18 by RCW 42.56.210(3) or provide a copy of the unredacted shared memo. The
19 burden to document a claim of privilege and exemptions under RCW
20 42.56.210(3) may not be shifted to the requestor. We are prepared to consider
21 legal action for failure to either produce the record or properly explain why it's
22 still exempt after being disclosed to third parties.

23 2.19 Mr. Mercier's email dated June 21, 2018, was received by the City no later than
24 June 27, 2018.

25 2.20 As of the date of this Complaint the City has not responded further to WPC's
26 inquiries or produced unredacted copies of the requested records.

27 **III. CLAIM FOR PUBLIC RECORDS**

28 3.1 Defendant City of Seattle is an agency subject to the provisions of the PRA.

29 3.2 The City's claim of spousal privilege in the communications between
30 Councilmember Bagshaw and her husband is invalid because Councilmember Bagshaw had no
31 expectation of privacy in a public record discussing City business.

1 3.3 As set forth above the City failed to perform a reasonable investigation into
2 whether the November 10, 2014 memorandum from Kent Meyer had remained privileged.

3 3.4 As set forth above the City violated RCW 42.56.210(3) by failing to provide an
4 adequate explanation of its assertion that the November 10, 2014 memorandum had remained
5 privileged.

6 3.5 On information and belief any attorney-client privilege with respect to the
7 November 10, 2014 memorandum has been waived, and that record is not exempt under the
8 PRA.
9

10 **IV. PRAYER FOR RELIEF**

11 4.1 Plaintiff asks this Court to:

12 a. rule that the records at issue are not exempt under the PRA;

13 b. order the City to produce unredacted copies of those records;

14 c. rule that the City violated the PRA by failing to investigate its claim of privilege
15 with respect to the November 10, 2014 memorandum.

16 d. rule that the City violated RCW 42.56.210(3) by failing to provide an adequate
17 explanation of its attorney-client privilege exemption claim;

18 4.2 Plaintiff asks the Court to award the plaintiff statutory penalties, in a per diem
19 amount to be determined by the Court, for each day that requested records were improperly
20 withheld by Defendant pursuant to RCW 42.56.550(4).


21 4.3 Plaintiff asks the Court to award the plaintiff attorney fees and costs pursuant to
22 RCW 42.56.550(4).

23 ///

24 ///
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

By: 
William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
12345 Lake City Way NE 306
Seattle, Washington 98125-5401
(206) 361-5972
bill@billcrittenden.com