12-31-2013

Hymas v. Meridian Police Dept. Appellant's Brief Dckt. 41156

IN THE SUPREME COURT OF THE STATE OF IDAHO

GRETCHEN HYMAS, BREANNA HALOWELL and TRAVIS FORBUSH. Petitioners-Appellants, vs. THE MERIDIAN POLICE DEPARTMENT, Respondent.	Supreme Court Docket No. 41156-2013 Ada County Docket No. CV OC 2012-23460

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District County of Ada
The Honorable Melissa Moody
District Judge Presiding

Eric R. Clark
Clark & Associates, Attorneys
P.O. Box 2504
Eagle, ID 83616

For Appellants

William L. M. Nary
Emily Kane
City of Meridian,
Office of the City Attorney
33 E. Broadway Ave.
Meridian, ID 83642

For Respondent

I. TABLE OF CONTENTS.

II. CASES AND AUTHORITIES

Cases:

Statues/Rules:

III. STATEMENT OF THE CASE.

(i) The nature of the case.

This case involves the wrongful denial by the Meridian Police Department of a valid public records request.

(ii) The course of the proceedings in the hearing below and the disposition.

On December 6, 2012, Appellants' counsel ("Clark") sent a Public Records Request to the Meridian Police Department ("MPD"). (R. p. 8.)

On December 21, the Meridian Police Department denied Clark's public records request and refused to provide a single document from the file. (R. p. 9.)

> Your request for the above noted report is denied pursuant to Idaho State Code 9-335(1)(a), as this case is still under investigation with the Meridian Police Department. Disclosure of said record would interfere with enforcement proceedings.

On December 26, 2012 the Appellants filed a Verified Petition to Compel Disclosure of Public Records. (R. pp. 4-10.)

On February 12, 2013, Judge Moody entered an Order to Show Cause Pursuant to Idaho Code § 9-344, and set the show cause hearing for February 27, 2013. (R. pp. 19-21.)

On February 25, 2013, counsel for the MPD mailed a copy of the redacted file to the Petitioner's counsel.

On February 27, 2012, the Court conducted the show cause hearing.

On March 15, 2013, the Court issued its Order Denying Motion for Attorney's fees and Costs. (R. pp. 347–381.)

The Appellants then filed a Motion for Reconsideration, which was heard on April 29, 2013. (Apr. 29, 2013 hearing Tr., p. 1 to p. 28.)

On May 14, 2013, the Court then issued an *Order Denying Petitioners' Motion for Reconsideration.*[1]

(iii) Statement of the facts.

In the early morning hours of November 10, 2012, 18 year old Private First Class, McQuen Forbush, United States Marine Corps, died from carbon monoxide poisoning in an apartment at the Sagecrest Apartment Complex in Meridian, Idaho. McQuen's girlfriend was severely injured but survived.

Due to the suspicious nature of this death, the Meridian Police Department conducted an investigation and restricted access to this apartment as a "crime scene."

Meridian Police Detective James Miller testified via affidavit filed February 25, 2013 that he "concluded" his investigation on February 21, 2013. (R. p. 23.) Miller also attached an unredacted copy of the MPD report as it existed on December 21, 2012, the date that the MPD denied Clark's request. (Miller Affidavit Exhibit A was provided under seal and is in the record as Appeal Exhibit A.)

The MPD also filed an affidavit of City Attorney William Nary on February 25, 2013. Mr. Nary testified he mailed a redacted copy of the MPD file to Clark on February 25, 2013. (Because Clark's copy was not filed under seal, it is in the Clerk's record at pp. 28-373. Mr. Nary also included an unredacted copy of the entire MPD file as Exhibit C. Nary Affidavit Exhibit C is in the record as Appeal Exhibit C.)

At the Order to Show Cause hearing on February 27, 2013, the Petitioners contended, notwithstanding the MPD's 11th-hour disclosure of the file, the MPD's refusal to provide any records in December 2012 and until February 25, 2013 was frivolous and unjustified.

[1] This Order is in the Clerk's Record on Appeal according to Supreme Court Order Granting Appellants' Second Motion to Augment the Record, entered December 16, 2013.

Accordingly, Appellants contended at the hearing the MPD must have established a lawful basis for denying the Public Records Request in the first place and then for refusing to release the file for over 60 days.

During the Order to Show Cause hearing, the MPD presented the testimony of Detective James Miller and City Attorney Terry Derden. (February 27, 2013, Hearing Tr., p. 20 to p. 61.)

Detective Miller, MPD's lead detective, testified the MPD never had a suspect. (Feb. 27, 2013, Hearing Tr., p. 27, L. 20–22.)

During this hearing Judge Moody inquired as to what issues remained for decision considering the MPD had disclosed the file; "All right, would you agree that we are only here today to decide whether the exemption articulated by the city was appropriate?" (Feb. 27, 2013, hearing Tr., p. 13, L. 14-16.) Ultimately the Court confirmed the MPD was required to establish at the hearing that its denial of the Petitioners' Public Records Request was justified. (Feb. 27, 2013, hearing Tr., p. 13, L. 17 to p. 14, L. 19.) Following the presentation of testimony of Detective Miller and Attorney Derden, during closing remarks, the Court again reiterated her understanding of the issue presented.

5. THE COURT: The question, just so you know,
6. Mr. Clark, where I'm coming from, I view the
7. question that I am being asked to decide whether
8. the denial of the December 6th public records
9. request was done consistent with Idaho Code
10. 9335-1(a). That is the question that I'm being
11. asked to do.
12. MR. CLARK: I understand.

(Feb. 27, 2013, hearing Tr., p. 72, L. 5–12.)

At the conclusion of the hearing the Petitioners' Counsel asked the Court to review the file as delivered to the Court and make an "independent assessment" to determine whether any of

the documents in the MPD file "should be exempt." The Court responded, "I think that's fair." (Feb. 27, 2013, hearing Tr., p. 78, L. 1–12.)

The Appellants timely filed their Appeal and upon receipt of the Clerk's Record determined that the Clerk had not included a copy of the MPD File. The Clerk, although the Appellants had requested the MPD file as part of the Notice of Appeal, had refused to include the file as it had been submitted to the District Court attached to an Affidavit. The Appellants had not requested the Affidavit as part of the Clerk's Record, so the Clerk contended he could not include the MPD File.

The Appellants then timely filed a motion before the District Court to include both the Affidavits of Detective Miller and City Attorney William Nary, with accompanying copies of the MPD file. (R. pp. 413–415.)

The Respondent filed a Non-Objection to the Appellants' Motion and the Court entered an *Order Granting Petitioners' Motion To Supplement The Clerk's Record And For Order Authorizing Sealed Documents To Be Included In Clerk's Record.* (R. pp. 416–417.)

The Respondent then filed a *Motion For Order Directing Petitioners to Return Sealed Records to the Court.*[2] The Court conducted a hearing on that Motion on October 28, 2013. (Oct. 28, 2013, Hearing Transcript, pp. 1–17.) The Court also entered an *Order Clarifying Record on Appeal* on October 29, 2013.)[3]

During the October 28, 2013 hearing, Judge Moody stated she had not reviewed a single document in the MPD file. (Oct. 28, 2013, Hearing Transcript, p. 7. L. 21 to p. 9, L. 13.) and (Court's Order Clarifying Record on Appeal, p. 2.).

---

[2] The Respondent has not appealed the denial of this motion.

[3] This Order is in the Clerk's Record on Appeal according to Supreme Court Order Granting Appellant's Motion to Augment the Record, entered December 3, 2013.

IV. ISSUES PRESENTED ON APPEAL

1. Whether the Trial Court erred when she denied the Petitioners' request for attorney fees and costs, notwithstanding the Respondent had failed to establish at the show cause hearing just how the disclosure of the requested records would have interfered with its investigation?

2. Whether the Appellants are entitled to attorney fees on appeal?

V. ARGUMENT

The Trial Court abused its discretion when it refused to award attorney fees and costs to the Appellants after the Respondent failed to establish at the show cause hearing that a single document in its investigation file was exempt from disclosure to the Appellants.

The Petitioners are the parents of McQuen Forbush who was killed on November 10, 2012, and Breanna Halowell, who was poisoned by carbon monoxide. They filed this action because the Meridian Police Department refused to provide *any* information about its investigation, although the MPD had "cordoned off" the Apartment as a "crime scene" and refuse access to anyone until January 7, 2013, or nearly 2 months after McQuen was killed.

The MPD refused to disclose critical information such as the model number and manufacturer of the water heater or any information related to what testing the MPD had performed in the apartment. Not only did the MPD refuse to produce this obviously non-exempt information, the MPD impaired the Petitioners' investigation by denying them access to the apartment.

The Petitioners bring this appeal because they dispute the Trial Court's finding; "Disclosure of the Meridian Police Department's records from an open criminal investigation would have interfered with enforcement proceedings." (R. p. 380.) The Petitioners dispute this finding as the Trial Court revealed in a subsequent hearing that she had not even reviewed the MPD's records. (Nov. 29, 2013, Hearing Tr., p. 7, L. 21 to p. 9, L. 13.)

The Trial Court concluded the disclosure issue was "moot" because the MPD had released its entire file two days before the show cause hearing. However, at the show cause hearing the Petitioners contended the MPD still had the burden to establish its refusal to produce the requested public records complied with the Public Records law when the request was made. In other words, the Petitioners contended the MPD still had to show the disclosure at the time of the denial would have "interfered with enforcement proceedings." If the MPD failed, the Petitioners contended they were entitled to costs and attorney fees according to I.C. § 9-344. The Court, in its written order concluded that a law enforcement agency as the ultimate authority to "categorically" deny a public records request it its investigation is ongoing, apparently without having to establish the disclosure would somehow interfere with that investigation.

> Petitioners ask this Court to examine whether the Meridian Police Department's asserted exemption was appropriate in the first place. The Court finds that it was. It was appropriate because the Meridian Police Department would have been justified in categorically denying all public records requests pertaining to an ongoing criminal investigation. The mere acknowledgment that a criminal investigation is taking place can sometimes be enough to jeopardize enforcement proceedings. (R. p. 379.)

The Trial Court then reasoned that neither party prevailed in the case and refused to award costs or attorney fees.

Petitioners believe the Trial Court erred when it concluded all a police agency has to do is claim the investigation is ongoing to *categorically* deny a public records request. The Petitioners contend the MPD failed to establish at the show cause hearing that a single document in its file was exempt from disclosure. Having failed in its burden, the Petitioners' assert the MPD's denial of the Petitioners' Public Records Request was therefore frivolous and without foundation.

A. Judge Moody's decision that I.C. § 9-335 applies to "categorically" exempt all records in a police agency investigatory file is not consistent with appropriate legal standards.

While the Trial Court concluded a police agency may categorically deny a public records request without having to show to the Court how the disclosure would interfere with enforcement proceedings, that conclusion is without support in either Idaho's Public Records Law or in Idaho case law. Accordingly, the Appellants contend the Trial Court abused its discretion when it so ruled.

> When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason.

Shore v. Peterson, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009).

The Trial Court concluded that all a law enforcement agency has to do to refuse to disclose records is to contend–not prove, the disclosure would "interfere with enforcement proceedings."

> 9-335. EXEMPTIONS FROM DISCLOSURE -- CONFIDENTIALITY. (1) Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, <u>but such exemption from disclosure applies only to the extent that the production of such records would</u>:
> (a) Interfere with enforcement proceedings;.... (Underline added.)

While I.C. § 9-335, provides for exemptions to public disclosure, this section must be considered in light of the other sections of Idaho's Public Records Law.

First, there is a *presumption* that all records generated by a public agency are *public* records. I.C. § 9-338.

> 9-338. Public records -- Right to examine. (1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

If an agency refuses to disclose presumptively public information, then, clearly the legislature requires judicial intervention and review of the records the public agency refuses to disclose.

> (4) Whenever it is made to appear by verified petition to the district court of the county where the records or some part thereof are situated that certain investigative records are being improperly withheld from a member of the public, **the court shall order the officer or person charged with withholding the records to disclose the investigative record or show cause why he should not do so. The court shall decide the case after examining the record in camera, papers filed by the parties, and such oral argument and additional evidence as the court may allow.**
> If the court finds that the public official's decision to refuse disclosure is not justified, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court. The court may, in its discretion, award costs and fees to the prevailing party.

I.C. § 9-335(4). (Emphasis added).

Then, a public agency has a duty to separate exempt and non-exempt records. I.C. § 9-341.

> 9-341. EXEMPT AND NONEXEMPT PUBLIC RECORDS TO BE SEPARATED. **If any public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure**, the public agency or independent public body corporate and politic shall, upon receipt of a request for disclosure, separate the exempt and nonexempt material and make the nonexempt material available for examination, **provided that a denial of a request to copy nonexempt material in a public record shall not be based upon the fact that such nonexempt material is contained in the same public record as the exempt material.**

There is also the Supreme Court's decision in *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1212, (2002), where the Supreme Court confirmed there is a presumption a public record is

public, and that exemptions preventing disclosure should be construed *narrowly*, not expansively.

> Under I.C. § 9-338, reproduced above, there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute. This Court narrowly construes exemptions [Idaho Code § 9-335] to the disclosure presumption. *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). **The statutory scheme for disclosure of public records, and this Court's interpretation thereof, clearly envisions that, in responding to an order to show cause, the agency bears the burden of persuasion and must "show cause," or prove, that the documents fit within one of the narrowly-construed exemptions.**

Bolger v. Lance, 137 Idaho 792, 798, 53 P.3d 1212, 1216 (2002). (Emphasis added).

Finally, there is no statue or case law support to establish a public entity somehow "cures" a wrongfully denied public records request by subsequently disclosing those records after suit has been filed.

Contrary to Judge Moody's ruling, there simply is no statutory or case law to establish that all a police agency has to do is *assert* the the disclosure of the records would interfere with its investigation. Accordingly, the Trial Court erred when it ruled the MPD was justified in denying the Petitioners' Public Records Request. As the MPD failed to establish at the show cause hearing this it was justified in withholding a single record from its file, the Trial Court should have awarded costs and attorney fees to the Petitioners.

B. Judge Moody did not reach her decision by an exercise of reason.

The Appellants also contend Judge Moody did not properly apply her discretion because her decision was not based on an exercise of reason. With all due respect, it would seem that when presented with determining whether a police agency had properly refused to disclose public records, the reviewing Court should actually look at the records? That certainly is what the Appellants asked the Court to do on February 27, 2013, and the Court responded, "I think

that's fair." However, later in the proceedings Judge Moody disclosed that she had not reviewed a single document because she had applied a *categorical* exemption to the disclosure. The Court reasoned there was no need for her to review the documents, notwithstanding the issue addressed at the show cause hearing in February 2013, was "whether the exemption articulated by the city was appropriate?" (Feb. 27, 2013, hearing Tr., p. 13, L. 14-16.)

There is no dispute that the Petitioners filed an appropriate Public Records Request on December 6, 2012, (R. p. 8.), and that the MPD "categorically" denied that request and refused to release a single document in the report until well after the Petitioners filed for relief with the District Court. The Petitioners now argue, as they did to the District Court, that it is the MPD's burden to prove that every public document withheld after December 6, 2012, was exempt from disclosure. If the documents were not exempt, and not disclosed, then the non-disclosure was frivolous and without foundation. The Petitioners were therefore entitled to recover their costs and attorney fees.

C. Judge Moody's decision regarding who was or was not the prevailing party was premised on the Court's erroneous ruling the MPD file was exempt.

The abuse of discretion standard also applies to a review of decision regarding the determination of a "prevailing party."

> A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard.

Eighteen Mile Ranch v. Nord Excavating, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005), citing *Burns v. Baldwin,* 138 Idaho 480, 486-87, 65 P.3d 502, 508-09 (2003).

The "legal standard" applicable to evaluating the prevailing party issue is contained in Rule 54(d)(1)(B), IRCP.

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion *consider the final judgment or result of the action in relation to the relief sought by the respective parties.* The trial court in its sound discretion may determine that a party to an

> action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. (Emphasis added)

Interpreting, Rule 54(d)(1)(B), IRCP, this Court has established an "overall view" standard for lower courts to apply when evaluating the prevailing party issue. "In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch v. Nord Excavating*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). (Emphasis added)

The Petitioners will concede that if the MPD had proven the disclosure of any of the records in its file would have "interfered with enforcement proceedings," then they would have been entitled to refuse to disclose the particular documents. However, that is not what the Court concluded. Although never having looked at a single record in the MPD file, the Court applied a categorical exemption. In other words, the Court ruled if there is an on-going investigation, the records are exempt, regardless of the content of the records. As argued above, however, that decision does not track with Idaho's Public Records Law.

Notwithstanding the 11th–hour disclosure of the MPD file, if the MPD could not prove that its refusal to deliver even a single document was justified, then its refusal to comply with the Public Records Request was frivolous. Accordingly, the MPD could not avoid liability for costs and attorney fees simply by delivering a file two days before the show cause hearing that they had wrongfully withheld to that point. The Trial Court must review the file and make a determination as to whether the disclosure of any of the records would have interfered with enforcement proceedings. If the Trial Court determines the documents should have been

disclosed, then the non-disclosure would have been frivolous. As that clearly did not happen in this case, the Trial Court abused her discretion when she ruled neither party had prevailed.

D. The Petitioners are entitled to attorney fees on Appeal.

The Petitioners are entitled to attorney fees on appeal according to I.C. § 12-117.

> 12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, **including on appeal,** shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

The MPD is a "law enforcement agency" as defined in I.C. § 9-337, and accordingly is an agency of the political subdivision of the City of Meridian.

> (7) "Law enforcement agency" means any state or **local agency** given law enforcement powers or which has authority to investigate, enforce, prosecute or punish violations of state or federal criminal statutes, ordinances or regulations.
>
> (8) "Local agency" means a county, city, school district, municipal corporation, district, public health district, **political subdivision, or any agency thereof**, or any committee of a local agency, or any combination thereof.

I.C. § 9-337. (Emphasis added)

On appeal the Appellate Court may award attorney fees to the prevailing party according to I.C. § 12-117 "if it [the Appellate Court] finds that the non-prevailing party acted without a reasonable basis in fact or law." *Rule Steel Tanks, Inc., v. Idaho Department of Labor*, Doc. No. 40344, p. 9, (Dec. 18, 2012).

The Respondent failed to make a record below that any of its file documents were exempt, and therefore, its denial of the Appellants' Public Records Request was frivolous and without foundation. As there is no record establishing the Respondent had a legitimate basis to withhold these documents, nothing will change on appeal.

VI. CONCLUSION

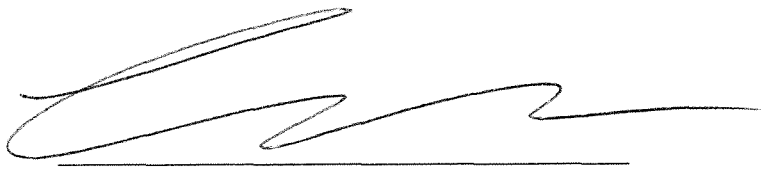
The Appellants filed suit to compel the disclosure of the Meridian Police Department file concerning the death of McQuen Forbush, and after initially refusing to produce the file, two days before the order to show cause hearing, the MPD produced the report. The Appellants obtained exactly the relief sought in their Petition.

Then, the MPD failed to establish at the show-cause hearing on February 27, 2013 that a single record in its now-disclosed file had been exempt when it denied the Petitioners' Public Records Request in December 2012. The MPD's denial of the Appellants' Public Records Request was therefore frivolous and without foundation.

Accordingly, the Appellants respectfully request this Court reverse the Trial Court and enter an order directing the Trial Court, on remand, to grant the Appellants' request for costs and attorney fees. The Appellants also respectfully request this Court grant their request for costs and attorney fees on appeal.

RESPECTFULLY SUBMITTED this 31st day of December, 2013.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark, For the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of December, 2013, I served the foregoing, by having two true and complete copies delivered via hand delivery to:

William Nary
Emily Kane
Meridian City Attorneys
1401 E. Watertower Ave.
Meridian, Idaho 83642

Eric R. Clark