



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

UNPUBLISHED OPINION

The ACLU appeals the trial court's order granting summary judgment for the city of Seattle (City) and ruling that lists of issues that the City and the Seattle Police Officers Guild (Guild) exchanged while negotiating a labor contract were exempt from disclosure under the Public Records Act (Act).¹ The trial court concluded that the lists contained predecisional opinions or recommendations expressed as part of the deliberative process and were therefore exempt from disclosure under the "deliberative process" provision of the Act. Because the issues lists did not contain raw factual data or final decisions, but expressed opinions and recommendations about the issues to be addressed during negotiations, and these issues formed the basis for City policy decisions concerning the police department, they were exempt from disclosure under the deliberative process exemption. Accordingly, we affirm.

FACTS

The Guild is a private labor union representing Seattle police officers. In November 2002, the Guild and the City began negotiations to renew the labor contract for City police officers. The contract governs the working relationship between the City and its police officers and establishes the terms of employment, including wages, health care, and other benefits.

To negotiate this contract, the City and the Guild agreed to use a form of collective bargaining called "interest-based bargaining" (IBB). In contrast to traditional position-based bargaining, where parties have concrete positions, IBB focuses on issues to encourage both sides to seek solutions jointly to meet each other's needs and satisfy mutual interests. Rather than moving from position to counter-position to a compromise settlement, negotiators in an IBB process attempt to identify each party's interests and needs before developing specific solutions. Thus, the first step in this process requires each party to identify and clarify issues lists, which include the items each party would like to be addressed during negotiations. The parties then exchange the lists, and they become the agenda for the rest of the negotiation process.

As part of this IBB process, the City and the Guild exchanged lists of issues they sought to address during negotiations of a new labor contract. The ACLU requested copies of both lists under the Act, but the City refused to disclose the lists under the "deliberative process" exemption of the Act. The ACLU sued to force disclosure and moved for an order for the City to show cause.



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

In response to the motion, the City submitted declarations of labor leaders, city negotiators, and city executives stating that the bargaining process required confidentiality to allow the flow of candid information and good-faith bargaining. They stated that disclosure would undermine the process and the authority of the negotiators and would politicize the process. The ACLU contended that the lists were not intra-agency records and were final decisions about the parties' priorities for negotiation. Without reviewing the lists, the trial court ruled in favor of the City and concluded that they were exempt from the Act because they were part of the deliberative process. The court also ruled that the Open Public Meetings Act (OPMA)² protected the documents from disclosure.

The ACLU appealed, and we remanded for the trial court to conduct an in camera review of the documents to determine whether they were exempt from disclosure under the Act.³ We explained that without seeing the lists, we were unable to determine whether they qualified as "'predecisional opinions or recommendations of subordinates expressed as part of a deliberative process'" and were therefore protected from disclosure under the "'deliberative process'" exemption.⁴ Recognizing that "[r]esolving this question turns on how the lists were generated and their function in the context of the decision-making process," we remanded to the trial court for "more information about the lists, such as what they actually contain, how they were generated, and who generated them."⁵

But we also concluded that reviewing the lists was not necessary to resolve the other issues raised by the parties and "in the interest of judicial economy," we addressed the remaining issues.⁶ First, relying on the plain language of the statutory exemption, we rejected the ACLU's argument that the issues lists do not fall under the deliberative process exemption because they were not intra-agency records and were not prepared by a government agency or subordinate.⁷ We also held that the City established that disclosure would be injurious to the deliberative or consultative function and inhibit the negotiation process.⁸ Finally, we rejected the City's argument that the OPMA protects written documents from disclosure.⁹ The ACLU did not seek further review of this decision, which was issued in May 2004.¹⁰

The case was remanded to the trial court and in 2008, the City provided the lists for the trial court to review in camera. The lists consisted of three pages and identified issues that each side wished to negotiate. The issues were listed by topic only, without any other information. After reviewing the lists, the trial court ruled that they were exempt from disclosure because they contained opinions and recommendations and granted summary judgment for the City. The ACLU appealed directly to the Washington State Supreme Court, but the court denied direct review and transferred the case to this court.

DISCUSSION

The Public Records Act requires public agencies to disclose all public records upon request, unless the record is exempt from disclosure by statute.¹¹ Under the deliberative process exemption of the Act, the following documents are exempt from disclosure: "[p]reliminary drafts, notes,



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended."¹² The purpose of this exemption is to protect the "give and take" of deliberations that are necessary to agency decision-making and to formulate agency policy.¹³ The Act's disclosure requirements are to be liberally construed, and any exemptions are to be narrowly construed.¹⁴

To withhold records from disclosure under this exemption, an agency must show (1) that the records contain "predecisional opinions or recommendations... expressed as part of a deliberative process," (2) that disclosure would be injurious to the deliberative process, and (3) that disclosure would inhibit the flow of recommendations, observations, and opinions.¹⁵ Raw factual data underlying a decision is generally not exempt from disclosure.¹⁶ Nor are subjective evaluations exempt if they are treated as raw factual data and are not subject to further deliberation and consideration.¹⁷ We review de novo a trial court's decision about whether documents or records fall under an exemption to the Act.¹⁸

The ACLU assigns error to both the trial court's first order entered on July 25, 2003, and the trial court's order on remand entered on March 14, 2008. The ACLU argues that the trial court erred in its 2003 order by concluding that the lists contained predecisional opinions and recommendations expressed as part of a deliberative process, that disclosure of the lists would be injurious to the deliberative function of the collective bargaining process, that disclosure would inhibit the flow of recommendations, observations and opinions exchanged during the collective bargaining process, and that the lists contained preliminary policy recommendations of the City. The ACLU also argues that the trial court erred in its 2008 order by ruling that the lists were records containing opinions or recommended policies, and by following on remand our holdings in the first appeal (ACLU-I) that disclosure of the lists would injure the City's deliberative process and inhibit the free flow of opinions and recommendations within the City.

I. Law of the Case

The City contends that the ACLU's challenges to the trial court's 2003 order that were already addressed in ACLU-I are barred by the law of the case doctrine and are not subject to review in this appeal. Thus, the City asserts the only issue properly before us is the subject of the remand ordered in ACLU-I, i.e., whether the issues lists contain predecisional opinions or recommendations expressed as part of the deliberative process. The ACLU contends that the law of the case doctrine should not apply because there was a substantial change in the evidence since the first appeal was decided and our opinion in the first appeal conflicts with established precedent.

Generally, the law of the case doctrine prevents a court from reconsidering the same legal issue already determined as part of a previous appeal.¹⁹ Thus, questions determined on appeal will not again be considered on a subsequent appeal "if there is no substantial change in the evidence at a second determination of the cause."²⁰



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

Appellate courts have discretion to apply the law of the case doctrine, and RAP 2.5(c)(2) provides two exceptions to its application: (1) where its earlier decision is clearly erroneous and the erroneous decision would work a manifest injustice to one party or (2) there has been an intervening change in the controlling precedent between the initial and later appeals.²¹

As discussed above, the issues we decided in the first appeal here were: (1) whether the deliberative process exemption applies to only intra-agency records or documents prepared by a government agency or subordinates,²² (2) whether disclosure of the issues lists would be injurious to the deliberative or consultative function and inhibit the negotiation process,²³ and (3) whether the OPMA protects written materials from disclosure.²⁴ The ACLU did not seek further review of this decision. It is therefore a final order on those issues unless the ACLU can demonstrate a "substantial change in the evidence" or that one of the exceptions to the law of the case doctrine applies.

The ACLU asserts that there was a substantial change in the evidence because the trial court had not yet reviewed the documents at the time of the first appellate decision and once they were produced, they were different from the City's characterization of them in the first appeal. But our opinion in ACLU-I was clear that the only issue for which the trial court needed to review the documents was whether they contained opinions and recommendations expressed as part of the deliberative process.²⁵ Our holdings on the other issues did not turn on the factual nature of the issues lists that the ACLU claims has substantially changed.

Rather, we held as a matter of law that documents protected from disclosure under the deliberative process exemption are not limited to intra-agency documents or those prepared by government agencies or their subordinates.²⁶ We also held that the City established that disclosing this type of list would be injurious to the deliberative function and would inhibit the negotiation process. We based this conclusion on the evidence the City submitted, which included declarations discussing the importance of confidentiality in the collective bargaining process and how mere disclosure of tentative issues lists could negatively affect the process of reaching agreement through negotiation.²⁷ Thus, we held that the City demonstrated the injurious effect of disclosing "issues lists" in general without having to view the specific lists here.

The ACLU has not demonstrated that the actual evidence viewed by the trial court on remand requires a different conclusion. As discussed above, the issues lists in fact contain each party's priorities and proposed issues to be addressed during negotiation.²⁸ In ACLU-I, we concluded that the City's evidence demonstrated that prematurely publicizing proposals of parties engaged in this bargaining process would disrupt and politicize the proposals.²⁹ We also noted the concerns expressed by public employee unions that issues on the lists would be taken out of context and distorted by the media, preventing full and frank discussions between the parties during negotiations.³⁰ As we explained: "Public scrutiny of contract issues discussed prior to completing negotiations might be misconstrued, and disclosure would hinder a vital part of the bargaining process-the free exchange of views, opinions, and proposals."³¹



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

The same would be true of prematurely disclosing the actual issues lists exchanged here.

Nor has the ACLU established that an exception to the law of the case doctrine applies. Our holdings in ACLU-I are consistent with the case law, and the ACLU has identified no intervening change in the controlling precedent since it was decided. The ACLU contends that our holding that the deliberative process exemption extends beyond intra-agency documents conflicts with case law requiring the exemption to be narrowly construed. But the plain language of the statutory exemption includes "[p]reliminary drafts, notes, recommendations, and intra-agency memorandums" that contain opinions or recommendations.³² Thus, we correctly concluded that only the term "memorandums" is qualified by the term "inter-agency," and properly applied the exemption to include other preliminary drafts, notes, and recommendations. In so holding, we did not expand the exemption and contravene the legislative mandate that it be narrowly construed, as the ACLU claims.

³³

The ACLU also contends that our opinion in ACLU-I misconstrued Progressive Animal Welfare Society (PAWS) v. University of Washington,³⁴ and that in fact it stands for the proposition that the exemption can only include non-agency entities when they are acting as consultants or neutral advisors. The ACLU asserts that because the City and the Guild had separate and distinct responsibilities and interests and the Guild was pursuing its own interests in the labor contract negotiations, the Guild was not acting in a consulting or advisory capacity to the City, but as an outside adversary. Thus, the ACLU contends, their negotiations as adversaries cannot be considered an internal government deliberative process and the issues lists prepared for these negotiations are not protected from disclosure under the deliberative process exemption.

But PAWS does not support the proposition for which the ACLU cites it. It does not hold that "when an agency deliberates with outside consultants in the same manner that it would consult with internal employees, the communication may be viewed as internal," or that the exemption can include non-agency entities "only when they are acting as consultants or neutral advisors," as the ACLU asserts.³⁵ Rather, PAWS held simply that confidential evaluations prepared by outside peer reviewers that provided candid feedback and suggestions for scientists applying for grants were exempt from disclosure under the deliberative process exemption because they "fostered a quintessentially deliberative process" involved in the grant award decisions.³⁶ Thus, the focus in PAWS was on the function or purpose of the records, not who prepared them, as the ACLU suggests. The court held that those records were exempt from disclosure because they were part of the "deliberative process," i.e., they were part of an ongoing process leading up to the funding decisions of the agency.³⁷

The ACLU appears to derive this requirement that the document be prepared by neutral consultants or advisors from federal case law interpreting a similar exemption under the Freedom of Information Act (FOIA),³⁸ citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*,³⁹ *Madison County v. U.S. Dep't of Justice*,⁴⁰ *M/A-Com Informational Systems, Inc. v. U.S. Dep't of Health & Human*



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

Services,⁴¹ Mead Data Central, Inc. v. U.S. Dep't of Air Force.⁴² But the exemption under the federal FOIA statute is limited to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁴³

Thus, in those cases, determining whether the exemption applied turned on who created the documents. Under the limited FOIA exemption, the court concluded that those who communicate with the agency in a consultative or advisory capacity may be viewed as communicating internally within the agency and fall within the agency exemption.⁴⁴

By contrast, the Washington exemption is not limited to documents created by agency subordinates, consultants or advisors, but includes any "[p]reliminary drafts, notes, recommendations" which are part of the deliberative process. In fact, in ACLU-I, we specifically rejected the ACLU's argument that exempt documents must be prepared by agency "subordinates," recognizing that "when strictly applied, the FOIA test is narrower than the Washington exemption, which does not require that the documents be created by 'subordinates.'"⁴⁵ We also recognized that while courts have stated that the exemption applies to predecisional opinions of subordinates, "no court has held that the exemption is limited to documents written by subordinates."⁴⁶ Likewise, no court has held that the Washington exemption is limited to documents created by entities acting in a consultative or advisory capacity to an agency.

The ACLU also asserts that in ACLU-I we erroneously considered whether the disclosure would injure the negotiating process instead of considering whether it would injure the City's deliberative process. But this distorts the court's opinion. We recognized that the negotiation process here necessarily affects the deliberative process. As we explained, "[t]he negotiations themselves are an integral part of a deliberative process that culminates in the policies the City decides to adopt concerning the police department," and "[t]he lists are only a starting point for a complex and delicate policy-making process."⁴⁷ Thus, we concluded, "If the negotiations are negatively impacted, then so would be the City's deliberative policy-making process."⁴⁸

The ACLU fails to show that our decision in ACLU-I was clearly erroneous nor does it cite any intervening change in the controlling precedent. We therefore apply the law of the case and decline to review any challenges to the trial court's 2003 order that were already addressed in ACLU-I, i.e., whether the deliberative process exemption applies only to intra-agency communications or those prepared by agency subordinates and whether the City demonstrated the injurious effect of disclosure. Consequently, the only two issues that remain for our review are whether the issues lists contained predecisional opinions and policy recommendations and whether applying the exemption to the issues lists creates a "collective bargaining" exemption not intended by the legislature.

II. The Issues Lists and The Deliberative Process Exemption

The ACLU argues that the issues lists were not "predecisional" opinions or recommendations, but



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

were final policy decisions about what would be discussed during bargaining. Citing PAWS, the ACLU contends that the exemption should not apply to the issues lists because any "opinions" they express do not pertain to the formulation of policy. Rather, it argues, the lists do not reveal any position or opinion on the issues identified, and they were actually carefully structured to avoid revealing any internal opinions or tentative recommendations.

The record supports the City's position that the very inclusion or exclusion of items on the lists expresses policy opinions and priorities. Deposition testimony about the interest-based bargaining process the parties used demonstrates the importance of the issues lists in the process, how they reflect the opinions and recommendations of the parties, and how they contribute to the settlement process. Indeed, IBB is often called "[i]ssues [b]argaining" because the issues are so important to the negotiating process. The deposition testimony of a city negotiator also explains that while the items on the lists may be stated briefly, they contain more than raw factual data and reflect the negotiators' opinions and recommendations for the agenda of the entire bargaining process, including each party's primary focus and areas of common interest. As the trial court found: "[T]hese [lists] are not a laundry list.... [A]lthough they weren't to express ultimate opinions on what they wanted the new contract to contain, they were certainly to express opinions as to what they wanted to discuss."

Nor are the issues lists "final decisions," as the ACLU characterizes them. As discussed above, the record is clear that while they were the issues the parties recommended be addressed during negotiations, they were only the first step in the process toward reaching a final agreement. As the trial court concluded, they were not final decisions, but "pre-decisional opinions on what the parties tentatively wanted to discuss."

The record also supports the City's argument that these issues lists are part of the City's deliberative process in making policy decisions. According to a declaration of the City's director of labor relations, the labor contract the City ultimately adopts governs the working relationship between the City and its police officers, has a significant impact on the City's budget, and serves as a benchmark for negotiations with other unions representing the majority of City employees. The issues addressed during negotiations later form the basis for the City's policy decisions relating to the operation of the police department, the budget, and negotiations with other public employee unions. They are therefore part of the City's deliberative process.

The ACLU further contends that by applying the deliberative process exemption to exclude issues lists from disclosure, this court will judicially create a collective bargaining exemption under the Act which is contrary to the legislature's intent. The ACLU argues that the lack of a specific statutory exemption for documents produced before collective bargaining signifies that this is a policy choice our Legislature has made and should not be upset by this court. It notes that bills seeking to amend the Act to exempt documents related to collective bargaining have been introduced but not been passed, "indicat[ing] that the Legislature correctly believes that the current deliberative process exemption does not include records such as the issues lists sought by the ACLU in this case."



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

But the City is not advocating a "collective bargaining" exemption; rather, it is simply relying on evidence of the collective bargaining process it engaged in here to demonstrate that it was part of the deliberative process involved in policy-making related to operation of its police department. Thus, the ACLU's concerns about creating a "collective bargaining" exemption are unfounded. As the City points out, by affirming the trial court, we would not create a "collective bargaining" exemption any more than the court in PAWS created a "grant application" exception when it held that evaluations generated during the application review process were exempt from disclosure.

Finally, because the City prevails on appeal, we deny the ACLU's request for attorney fees and costs under the Act.

We affirm.

1. Chapter 42.56 RCW.
2. Chapter 42.30 RCW.
3. ACLU v. City of Seattle, 121 Wn. App. 544, 549-50, 89 P.3d 295 (2004) (ACLU-I).
4. Id. (quoting Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash., 125 Wn.2d 243, 256, 884 P.2d 592 (1994)).
5. Id. at 550.
6. Id.
7. Id. at 550-51.
8. Id. at 553.
9. Id. at 555.
10. Later in December 2004, the Guild and the City presented their proposed final contract to the City Council and gave the ACLU the issues lists.
11. RCW 42.56.070(1).
12. RCW 42.56.280.
13. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); PAWS, 125 Wn.2d at 256.
14. RCW 42.56.030.



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

15. PAWS, 125 Wn.2d at 256.

16. Id.

17. Id. at 243.

18. Id. at 252.

19. Lian v. Stalick, 115 Wn. App. 590, 598-99, 62 P.3d 933 (2003); see also RAP 2.5(c)(2) (This court "may" apply as law of the case a prior appellate court decision "where justice would best be served.").

20. Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting Adamson v. Traylor, 66 Wn.2d 338, 402 P.2d 499 (1965)); State v. Clark, 143 Wn.2d 731, 745, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001).

21. Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

22. 121 Wn. App. at 550-51.

23. Id. at 553.

24. Id. at 554-55.

25. Id. at 550.

26. Id. at 550-51.

27. Id. at 553.

28. Indeed the trial court found that "[t]hese lists appear to be exactly what the City characterized them in the representations before the Court of Appeals, a wish list or tentative agenda, or issues the parties wished to resolve."

29. 121 Wn. App. at 553.

30. Id. at 553 n.20.

31. Id.

32. RCW 42.56.280.

33. Indeed, in a recent opinion, we declined to apply the deliberative process exemption, specifically recognizing that ACLU-I did not expand the deliberative process exemption. As we explained, "The trial court's ruling clearly indicates



American Civil Liberties Union of Washington v. City of Seattle

151 Wash.App. 1016 (2009) | Cited 0 times | Court of Appeals of Washington | July 20, 2009

that it viewed the deliberative process exemption as having been extended by this court in that case. But, the trial court misread ACLU in finding the deliberative process exemption applicable here." West v. Port of Olympia, 146 Wn. App. 108, 117, 192 P.3d 926 (2008), review denied, 165 Wn.2d 1050 (2009).

34. 125 Wn.2d 243, 256, 884 P.2d 592 (1994).

35. (Emphasis omitted.)

36. Id. at 257.

37. See 121 Wn. App. at 552 (quoting PAWS, 125 Wn.2d at 257).

38. 5 U.S.C.A. § 552(b)(5).

39. 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed. 2d 87 (2001).

40. 641 F.2d 1036 (1st Cir. 1981).

41. 656 F. Supp. 691 (D.D.C. 1986).

42. 566 F.2d 242 (D.C. Cir. 1977).

43. 5 U.S.C.A. § 552(b)(5).

44. See Klamath, 532 U.S. at 12 ("consultants whose communications have typically been held exempt have not been communicating with the [g]overnment in their own interest," and "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency'"); Madison, 641 F.2d at 1040 (communications between attorneys representing a Native American tribe and the Department of Justice were not "intra-agency"); M/A-Com, 656 F. Supp. at 692 (papers exchanged between counsel for the Department of Health and Human Services and a government contractor that was "an outside adverse party," were not exempt from disclosure); Mead, 566 F.2d at 258 (information about the deliberative or negotiating process outside an agency, between itself and an outside party, is not part of agency deliberative process).

45. 121 Wn. App. at 552 n.18. This court noted that the term "subordinate" does not appear in the statute and that the statute does not otherwise require or suggest that exempt documents must be prepared by subordinates. Id. at 552.

46. Id. at 552 n.18.

47. Id. at 553.

48. Id.

