

NEWS RELEASE

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State's stance in Hanford suit flouts open-government principles

Yakima Superior Court landmark decision barred agencies from using records in court case when the agencies had failed to index or disclose them under Washington's Public Records Act

AG's Office is now attacking decision that follows the AG's own interpretation and Model Rules requiring indexing and disclosure of records

State agencies should not be able to declare they don't have public documents sought by citizens or groups, and then seek to rely on the records when they face a legal challenge. State law forbids it.

Yet that is precisely what the state Health and Ecology Departments, backed by the state Attorney General's Office, are attempting to do in a court battle over plans to cover closed waste disposal trenches at the commercial radioactive waste landfill on the Hanford Nuclear Reservation.

In a Sept. 24 ruling with important open-government implications, Yakima County Superior Court Judge James Lust ruled that the two state agencies cannot use in their legal defense records they previously failed to disclose in an index in response to a legitimate public records request.

The agencies are asking the judge to reconsider his ruling on October 15.

Washington Coalition for Open Government President Toby Nixon pointed out that the state's Public Records Act clearly requires that public agencies maintain an index of records they rely upon for formal decisions. The law says agencies must disclose the index if they intend to rely upon or cite the records in subsequent court defenses.

Nixon noted that the Attorney General's own Model Rules for implementing the Public Records Act reinforce that requirement, stating:

“An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6)/42.56.070(6). An agency should post its index on its web site.” WAC 44-14-03003.

Open government advocates hailed the decision as the first known case involving this section of the Public Records Act where agencies sought to rely in court on records which they had failed to index. The Attorney General's Office is moving for reconsideration of the Order in Yakima County Superior Court on October 15.

"The Attorney General's Office should not be seeking to overturn an open government decision that directly follows the Attorney General's own interpretation of the law and the AG's Model Rules for the Public Records Act," said Nixon. "Agencies and the Attorney General have a higher duty on behalf of open government which is undermined by attacking rulings that follow the AG's own interpretation of our Public Records Act."

Yakima Superior Court Judge James Lust's landmark decision on September 24 came in a case brought by the Yakama Nation and Hanford watchdog group Heart of America Northwest over the agencies' failure to investigate the contamination from the commercial radioactive waste dump at Hanford. The citizens' group had requested each Department provide its index of the administrative record for their decisions, as they are required to maintain by the Public Records Act, and to disclose the existence of what records were being relied upon. Both departments responded that they did not have an index of records for their decisions.

After the Yakama Nation and Heart of America Northwest filed suit under the State Administrative Procedures Act (APA) and State Environmental Policy Act (SEPA), the agencies told the Court that they needed five times longer than provided under the APA to produce the administrative record each agency relied upon in issuing their decisions because they had to search the files of former employees and wanted to include electronic files which "were saved in their original electronic formats, via software that neither the undersigned's offices, nor health, now possess." (quoting the declaration of Asst. Attorney General Dorothy H. Jaffe at Paragraph 14, Page 3.)

The Yakama Nation and Heart of America Northwest objected that records so old that a search of former employee files was needed, or which could not be read with agencies' software could not possibly have been "relied upon" by the decision makers. The plaintiffs argued that the agencies were now seeking to create a record which did not exist when they made the decisions or when they were asked to disclose what records they relied upon – in violation of the Public Records Act.

Judge Lust ordered that the agencies could not include in the administrative record for their court defense records which they had failed to disclose or index pursuant to the Public Records Act (RCW 42.56.070(6)).

"Disclosure of public records is essential for our government agencies to be accountable," said Toby Nixon, president of the Washington Coalition for Open Government. "Our Public Records Act incorporates the important principle that agencies can not cite records in subsequent court defense of decisions which they failed to index and disclose to the public and news media."

The requirement for agencies to maintain indexes for their decisions is not only essential for open government and accountability, Nixon said, it is also recognized as a practice which

increases the efficiency of agencies, discourages litigation and reduces the costs of government.

The Washington Coalition for Open Government is the State's leading advocate for protecting and strengthening Washington's Public Records, Open meetings and other open government laws.

For further information:

The case is Confederated Tribes and Bands of the Yakama Nation; and, Heart of America Northwest Research Center vs. Washington State Department of Health; and, Washington State Department of Ecology; Yakima County Superior Court No. 10-2-01759-2. Information on the case is available from Gerry Pollet, counsel for Heart of America Northwest, (206) 382-1014; gerry@hoanw.org; or, Tom Zeilman, Yakima, counsel for the Yakama Nation, (509) 494-7256, tzeilman@qwestoffice.net.

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