IN THE SUPREME COURT OF THE STATE OF VERMONT

REED DOYLE
Appellant

v.

CITY OF BURLINGTON POLICE DEPARTMENT
Appellee

Supreme Court Docket No. 2018-342

Appeal
from the

Vermont Superior Court, Civil Division, Washington Unit

Docket Number S15-1-18 Wncv

BRIEF OF THE AMICUS CURIAE JIM CONDOS SECRETARY OF STATE OF THE STATE OF VERMONT

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

RULES AND STATUTES

CASE LAW

III. ISSUE PRESENTED

By construing 1 V.S.A. § 316 so as to expand beyond its clear, concise and literal language, the categories of fees a custodian of public records is empowered to charge a records requester - from payment for *providing* an actual *copy* of the record to payment for merely *inspecting* it - the trial court committed reversible error.

IV. INTEREST OF THE AMICUS CURIAE

Jim Condos is Vermont's Secretary of State. In that capacity, this Court's rules permit him to file an *amicus* brief without further request or permission. V.R.A.P. 29.

Secretary Condos has an interest in the outcome of this litigation that, had such permission to file been necessary, would probably have induced the court to grant it to him. This case concerns the means of access by which Vermont public records are made available to the public.

As Secretary of State, Mr. Condos establishes the actual cost of providing a public record. 1 V.S.A. § 316(d). He also administers both the Statewide Records and Information Management Program and the state archives. 3 V.S.A. §117. His office is a major, if not the most prolific

responder to requests for public access to records of Vermont government. Further, the Secretary of State's office is statutorily charged with the responsibility of providing municipal public agencies and members of the public with information and advice regarding the requirements of the Public Records Act ("PRA"). See 1 V.S.A. § 318(g).

The Secretary of State's office begins any discussion about public records with the premise that these records are the cornerstone of government transparency and belong to the people of Vermont, not to the government. But in the case at bar, the Appellee has taken the position that charging requesters for inspecting documents reduces the number and scope of search requests to which it must respond, that this is a laudable goal and that it is imposing charges for, inter alia, this very purpose. [PC 43 (stating Appellee's view that "The ability to collect fees is necessary to limit burdensome public records requests").]

Mr. Condos wants to apprise this Court that, as Secretary of State, he adamantly challenges the validity of this goal and Appellee's pursuit of it. He posits that the trial court's view of the municipal enactment authority conferred by 1 V.S.A. §§ 315 et seq, (the PRA) is over expansive. That over-

inclusiveness, he maintains, violates the express "free and open examination" statutory language and the policy enshrined in Vermont Constitution Ch.1, Art. 6 that underlies it.

V. THE STANDARD OF REVIEW

The subject matter of this case invokes more than the usual collection of doctrines of statutory interpretation (some of which are discussed further below). It also includes the following principles:

1) "That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." Vt. Const. Ch. I, Art. 6 .

2) "It is the policy of this subchapter to provide for ***free*** and open ***examination of records*** consistent with Chapter I, Article 6 of the Vermont Constitution" [*Emphasis supplied.*] 1 V.S.A. § 315.

3. Doubts in construction of access to public document claims should be resolved in favor of disclosure because the PRA represents a strong policy in favoring access to public records. WESCO v. Sorrell, 2004 VT 102, 177 Vt. 287, 291, 865 A.2d 350 (2004). See also Clement v. Graham, 78 Vt. 290 (1906), especially 316-317 and 330-331.

4. Thus in construing municipal enactments, this court resolves against the municipality any fair, reasonable, substantial doubt concerning a municipality's authority to act. In re Ball Mountain Dam Hydroelectric Project, 154 Vt. 189, 192, 576 A.2d 124, 126 (1990); Robes v. Town of Hartford, 161 Vt. 187, 190, 636 A.2d 342

(1993) and see Valcour v. Village of Morrisville, 104 Vt. 119, 129-130, 158 A. 83 (1932).

VI. ARGUMENT

A. Principles promoting transparency, governmental accountability and limiting municipal government authority favor public access to public records. Each of the preceding four principles provides a separate and independent justification for reversal of the trial court's decision and the grant of Judgment in Appellant's favor forbidding charging requesters to inspect.

B. The PRA provisions which enable state subdivisions to establish and collect charges for public records access do not extend to inspection requests. Read literally, they extend the power to charge fees power only to contexts in which a person requests to receive an actual copy of a record. V.S.A. §§ 316 et seq. On the issue of charging for inspections as well they are silent.

Those subsections provide, in pertinent part, as follows:

§ 315. Statement of policy, short title

(a) It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution....

§ 316. Access to public records and documents

(a) Any person may inspect or copy any public record of a public agency, as follows....

(2) For any agency, board, committee, department, instrumentality, commission, or authority of a political subdivision of the state, a person may inspect a public record during customary business hours.

(b) If copying equipment maintained for use by a public agency is used by the agency to copy the public record or document requested, the agency may charge and collect from the person requesting the copy the actual cost of providing the copy. The agency may also charge and collect from the person making the request, the costs associated with mailing or transmitting the record by facsimile or other electronic means. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

(c) Unless otherwise provided by law, in the following instances an agency may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record: (1) the time directly involved in complying with the request exceeds 30 minutes; (2) the agency agrees to create a public record; or (3) the agency agrees to provide the public record in a nonstandard format and the time directly involved in complying with the request exceeds 30 minutes. The agency may require that requests subject to staff time charges under this subsection be made in writing and that all charges be paid, in whole or in part, prior to delivery of the copies. Upon request, the agency shall provide an estimate of the charge....

C. Determinative Factors In the PRA's Literal Language

- The literal language of the only portions of the enabling PRA statutory language conferring authority upon state subdivisions to assess charges for access to public documents makes no mention of any charging for "inspection" of public records.
- The literal language of those sections of the enabling act which describe the purpose of the enabling authority conferred is short, concise and unambiguous. It expressly uses the word "free" to describe the "examination" to which the requester is to be provided access:

> "It is the policy of this subchapter to provide for ***free*** and open ***examination of records*** consistent with Chapter I, Article 6 of the Vermont Constitution." [*Emphasis supplied.*] 1 V.S.A. § 315.

- The literal language of § 316 recognizes a distinction in authorizations between charging for "providing" "copies" of a public record and charging to "inspect" it. So, while the statutory language expressly authorizes utilization of both these two

categories of disclosure, it is only for providing copies that § 316 expressly authorizes the responder to charge.

D. The Trial Court's "Requester Pays for Inspection" Rationale

Comment is warranted about the trial court's rationale for enabling the Appellee to charge for public document inspection. It did recognize that the literal language of the PRA creates a dichotomy between charging for providing copies and charging for inspection. But the court predicated its result on its conclusion that for purposes of assessing charges, the differences between these two methods of disclosure are not significant enough to justify treating them differently, given the current state of technology. That conflation was error.

Significantly, the decision on appeal also expressly acknowledges that the interpretation we take here, namely that the PRA authorizes charging for copies but not for inspections, is a reasonable legislative decision. [See the trial court's Decision on Plaintiff's Motion for Judgment on the Pleadings, at pp. 4-5.][PC at 6-7.]

Judge Crawford agrees. See his opinion in another case presenting

this same issue. Vermont State Employees Ass'n v. Vermont Agency of Natural Resources, Nos. 517-7-10 Wncv, 518-7-10 Wncv, 2011 WL 121649 (Vt. Super. Ct. January 6, 2011).

E. Some of the General Rules Governing Statutory Construction that Support Appellant's Contrary Position.

A number of more commonly applied rules of statutory construction support Appellant's interpretation of the PRA and/or challenge Appellee's interpretation. For example:

- In construing a provision of the PRA, the first step in the analysis is to look to the statute's language. WESCO, supra, 177 Vt. at 292-293.

- The Court construes and enforces the statute according to its express terms and meaning where they are clear and unambiguous. Swett v, Haigs, Inc., 164 Vt. 1, 5, 663 A.2d 930 (1995); Tarrant v. Dept. of Taxes, 169 Vt. 189, 197, 733 A.2d 733 (1999).

- When the statute's language is clear, legislative intent must be obtained from the statute itself and the Court must enforce the statute according to its obvious terms. In Re G.F., 142 Vt 273, 279-280, 455 A.2d 805 (1982).

- The Court's inquiry proceeds no further than the plain language of the statute when that resolves the conflict. Nichols v. Hoffman,

2010 VT 36 ¶ 7, 188 Vt. 1,¶ 7, 998 A.2d 1040; Town of Killington v. State, 172 Vt. 182, 188, 776 A.2d 395 (2001).

- The plain meaning of the legislation should be conclusive except in rare cases in which literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. In Re Stolz, 315 F.3d 80 (2d Cir. 2002); WESCO, supra, 177 Vt at 292-293.

  So when the statutory language is clear and its meaning unambiguous, the Court will not look behind the statute in an effort to determine whether contrary legislative intent exists. Cavanaugh v. Abbott Laboratories, 145 Vt. 516, 530, 496 A.2d 154 (1985).

- The rules of statutory construction authorizing resort to external factors are triggered when the literal meaning of the statute is absurd or unreasonable such that an ambiguity exists. State v. Reynolds, 109 Vt. 308, 310-311, 1 A.2d 730 (1938).

- This "Absurd Results Doctrine" applies only where a plain reading of the statutory language would produce a result *demonstrably* at odds with *any* conceivable legislative purpose. In Re Hodgdon, 2011 VT 19, ¶ 11, 189 Vt. 265, 274, 19 A.3rd 598. Judicial Watch, Inc. v. State, 2005 VT 108, ¶ 16, 179 Vt. 214, 222, ¶ 16, 892 A.2d 191.

F. **The Polity Pays by Reasonable Legislative Policy Choice**

As a matter of policy, the Legislature chose to allocate the cost entailed in inspecting public records to the polity at large rather than to

the individual person seeking information. Judge Crawford wrote, "As taxpayers and members of the community, we all benefit from these inquiries because government behaves best in an open, public setting." VSEA, supra. [Op. At p. 4.]

Secretary Condos endorses and supports that policy choice. He believes the literal language of the PRA expresses an intent to and does in fact promote the rational policy choice enshrined in Ch. I, Art. 6 of the Vermont Constitution. The Secretary's contention that this legislative choice is a reasonable one is, as noted above, corroborated by Judge Crawford's ruling in Vermont State Employees Ass'n, supra, and in the trial court's opinion in the case at Bar.

The language of the PRA reflects it's policy choice clearly and unambiguously. See VSEA, supra. [Op. at p. 4-5.] The case law does contemplate that when it is clear and unambiguous, the Court will construe and enforce a statute in accordance with is express terms and meaning. Swett, supra, 164 Vt. at 5; Tarrant, supra, 169 Vt. at 197; WESCO, 177 Vt. at 292-293.

Yes, an exception to this rule does allow consideration of other interpretations where application of the literal one leads to absurd results. Reynolds, supra, 109 Vt. at 310-311. But this "absurdity" exception does not apply unless a plain reading of the statutory language would produce a result *demonstrably* at odds with *any* conceivable purpose. See Judicial Watch, Inc., supra, 179 Vt. at 222, ¶ 16.

The statutory construction sought here is not eligible for the absurdity exception. The trial court ruled that "there are two potentially reasonable interpretations of the inclusion of the term 'copy' in this [PRA] provision." [See the trial court opinion at pp. 4-5; PC 6-7.] But it acknowledges application of the PRA in accordance with its express terms and meaning is one of these two "reasonable" interpretations.

So the trial court's own conclusion that the Appellant's literal construction of the PRA is "reasonable" qualifies the latter as one which promotes a "conceivable legislative purpose." Indeed, its acknowledgment that the literal words of the statute making public record inspection free of charge constitutes a reasonable policy choice

undermines a foundation of the trial court's opinion. This is so whether or not charging for inspections is deemed to be "more" reasonable. What remains is the duty to enforce the statute according to its obvious terms, without reference to extrinsic matters.

Notably, the Secretary cannot agree with the proposition that the alternative construction adopted by the trial court and/or the policy underlying it are reasonable ones. That construction creates precisely the type of barrier to access to public records that VT. Const. Ch. I, Art. 6 and 1 V.S.A. § 315 forbid. This barrier serves to cloud the transparencies in Vermont government that the Secretary has worked hard to promote and preserve. It also denies and disparages access to Vermont government based on the requester's economic station.

Further, public agencies will be emboldened by this decision to levy additional charges for inspection. They will then have less incentive either to engage in better records and information management practices or adopt available technology to make public records access more convenient.

The "pay for inspection" policy choice applied by the trial court is rendered even more unreasonable by the factor that the press is a member of the public being burdened by the appellee's cost barrier. The press is the public. Pricing the press out the public records about them will render transactions of government more invisible, further diminishing accountability.

The Secretary will continue to work to reduce barriers to free and open examination of Vermont public records. See 1 V.S.A. §§ 315, et seq. He contests the lower court's construction of the PRA expanding the authority of the records custodian to charge not only for copying public records, but also for merely inspecting them.

Therefore, the Secretary contends that the trial court erred by:

1. concluding the PRA authorizes subdivisions of this State to charge and collect fees for allowing inspection of their public records;

2. Failure to apply the appropriate standards of statutory construction;

3. failing to adopt as its interpretation of the enabling provision

of the PRA, that policy choice embodied in the literal statutory language which even the lower court acknowledges to be a reasonable one; and,

4. resorting to extrinsic matters rather than confining its interpretation to the concise literal language of the enabling statute;

5. concluding that, as contained in the PRA, provisions authorizing the record provider to charge the requester for disclosure of public records, the terms "provide copies" and "inspection" are synonymous; and,

6. supplanting the Legislature's concisely expressed chosen PRA policy which the trial court acknowledges is a reasonable one, with a contrary policy choice the judge deems to be more reasonable.

VII. CONCLUSION

Applying these strictures, this matter is narrow and simple. In summary, the literal language of the statute enabling Appellee to assess a requester charges for its production of public records includes the authority to charge for copies and omits the authority to charge for inspection. Its language does so clearly, concisely, expressly and

unambiguously. The resulting distinction is a policy choice effectuated by the Legislature's language.

Both the decision below and a trial court decision by Judge Crawford in another case acknowledge that an interpretation applying this dichotomy between copies and inspection is a reasonable one. So, denying authorization to charge the requester costs for inspection is not an absurd result. The reasonableness of the statute and its lack of ambiguity render it improper for this Court to search beyond the literal wording of the PRA for a different construction of the statute. Accordingly, Appellee has not been authorized to charge for the inspection of public documents.

Wherefore, Vermont Secretary of State Jim Condos, as an Amicus Curiae, respectfully requests that this honorable Court reverse the judgment of the lower court and, without remand, enter a judgment in favor of and as requested by the Appellant Doyle.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals ~~2,937~~ 3,035 words, excluding the Statement of Issues, Table of Contents, Table of authorities, signature blocks, and these certificates as permitted by V.R.A.P. 32(a)(7)(C). I have relied upon the word processor used to produce this brief, and Windows 8 to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court via E-mail was scanned for viruses using Avast Premier and that no viruses were detected.

Dated at Montpelier, Vermont this 17th day of January, 2019.

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Certificate of Service

The undersigned co-counsel for Amicus Curiae Jim Condos, Secretary of State of the State of Vermont, hereby certifies that on the 17th day of January, 2019, I sent, by regular mail and electronic mail, a copy of Secretary Condos' Amicus Curiae Brief to the counsel for the Appellant and the Appellee at the following addresses:

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