



King County
Metropolitan King County Council
Law, Justice, Health and Human Services Committee

STAFF REPORT

Agenda Item:	12	Name:	Nick Wagner
Proposed No.:	2011-B0143	Date:	30 Aug 2011
Invited:	John Starbard, Director, Department of Development and Environmental Services Jina Kim, Deputy Prosecuting Attorney, Prosecuting Attorney's Office		

SUBJECT

Recent Public Records Litigation

SUMMARY

King County recently agreed to pay \$125,000 in settlement of a lawsuit against the County for alleged violation of the state Public Records Act, RCW Chapter 42.56, by the county's Department of Development and Environmental Services (DDES). The committee has invited DDES Director John Starbard, who was not the director at the time of the events on which the lawsuit was based, and Jina Kim, the Deputy Prosecuting Attorney who represented the County in the litigation, to brief the committee on the lawsuit and related matters.

BACKGROUND

An extensive revision of the county public records ordinance, KCC Chapter 2.12, was reported out of this committee and adopted by the Council in 2009 (Ordinance 16679, adopted on 12 October 2009). The revisions included the following changes, among many others:

- County agencies were required to develop and use a standard disclosure request form, which must contain certain minimum elements. The purpose was to make it easier to submit a records request and to make sure the public records officer has the information necessary for processing the request. (Ordinance 16679 § 21)
- The code was amended to require that, when records are withheld in whole or in part as being exempt from disclosure, the response not only identify the legal basis for the claimed exemption, but also explain briefly how the exemption applies to the record or portion withheld, including enough

information for a requestor to make a threshold determination of whether the exemption is proper. (Ordinance 16679 § 22.E)

Since adopting Ordinance 16679, the committee has held follow-up briefings on county agencies' implementation of the changes in the ordinance.

THE LITIGATION

In the litigation that is the subject of today's briefing, the plaintiffs claimed that DDES improperly redacted part of an anonymous complaint letter to DDES before providing it to the plaintiffs. It is council staff's understanding that the reason for the redactions was DDES's concern that the redacted information might be used to identify the person who sent the letter, which state law protects under certain circumstances.¹

At some point after redacting portions of the original letter, DDES misplaced the original letter and for some time thereafter was unable to produce it for inspection by the court in the ensuing litigation. Eventually, however, the original letter was located.

Two newspaper articles about the settlement are attached to this staff report.

ATTACHMENTS

Page

- 1. "King County to pay \$125,000 to settle public records case," *Seattle Times*, 8 Aug. 20113
- 2. "A lawsuit over a letter spotlights a tough land use dispute," 17 Aug. 2011, *Vashon-Maury Island Beachcomber*.....7

¹ RCW 42.56.240(2) provides in part: "Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern."

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King County to pay \$125,000 to settle public records case

by BOB YOUNG

Originally published August 8, 2011 at 8:22 PM | Page modified August 9, 2011 at 8:17 PM

King County will pay a \$125,000 settlement to a Vashon Island couple who alleged county officials improperly withheld public records including a letter they say was probably written by the wife of a county employee, an environmental regulator.

The county will "certainly learn a lesson from this regarding how seriously to take public records," said David Vogel, attorney for Bill and Susan Tobin, a Vashon couple who battled the county for six years after the letter alleged they had illegally remodeled their home.

The deal, signed by the Tobins last week, notes the agreement is a "compromise and is not to be construed as an admission of liability" by the county.

But John Starbard, director of the agency embroiled in the controversy, said the settlement is a "huge lesson" about properly handling public records. However, Starbard suggested penalties for violations of the state records law may be too steep.

Is the letter that sparked the lawsuit, he asked, "really worth \$125,000 worth of the public's money?"

At the center of the strange case is an anonymous letter a county employee, Greg Wessel, said he received about improper building on the Tobins' property. After hiring handwriting analysts, the Tobins suspected Wessel's wife wrote the letter.

The dispute dates back to 2005, when the Tobins were trying to close a deal to sell their Vashon house. On April 19, they were visited by Wessel, who worked for the county's Department of Development and Environmental Services (DDES).

According to the facts laid out in a decision by the county hearing examiner in 2007, Wessel said he had received an anonymous complaint that the Tobins had remodeled their house without proper permits.

Anxious about their impending sale, the Tobins allowed Wessel to inspect their property. Wessel then told the Tobins he'd have to refer the case to enforcement officers as a likely code violation.

A subsequent county order said the Tobins had to obtain permits or demolish non-permitted construction. The Tobins appealed and asked to see the anonymous complaint.

The county gave them a copy with parts blacked out, "without any justification," Vogel said. The Tobins

asked to see the original complaint and were told by the county it was missing.

They became suspicious, Vogel said, because their house was not visible from the road and they didn't think their neighbors would have complained.

Susan Tobin decided to check Wessel's handwriting through real-estate records available to the public. She found records that Wessel and his wife had both signed.

"Margaret Wessel's handwriting was remarkably similar" to the anonymous complaint, Vogel said. The Tobins then hired two experts who agreed but said more evidence was needed.

Meanwhile, the hearing examiner ruled for the Tobins in a decision that entirely dismissed the county compliance order. "Mr. Wessel gained unreasonable entry into the Tobin property and conducted a warrantless search by using an impermissible ruse," Hearing Examiner Peter Donahue wrote.

The Tobins sued the county, claiming it violated the state's open-records law. That case was scheduled for trial Aug. 22. But the two parties agreed to a settlement July 28, according to Vogel.

The Tobins accepted the deal, he said, because "they wanted to get on with their lives" and a judge might have ruled against them.

The Tobins still live on the island, as do the Wessels.

Greg Wessel, an environmental scientist for the county, could not be reached for comment.

In an interview, Bill Tobin admitted he had built without proper permits. "I don't really have an excuse," said Tobin, an attorney.

Starbard, the DDES director, said he doesn't know if Wessel's wife wrote the anonymous letter. But its author "did the right thing," he said — even if it was Wessel's wife.

"Whoever wrote the letter is a citizen, a resident of Vashon and certainly has the right to express what was allegedly a violation of law," Starbard said. "Does the spouse of a county employee give up certain rights? I don't think so."

Is it a conflict of interest for a county employee to handle a complaint by the employee's spouse? "If that happened, that's not ideal," Starbard said.

Wessel continues working on the island, Starbard said, because "it's been reported to me he does excellent work and is well suited to it."

One last note: The county contacted the Tobins in June to say it had found the original complaint letter. It was in the files of a retired supervisor. Jina Kim, a county attorney who worked on the case, could not explain why it hadn't been found before.

Bob Young: 206-464-2174 or byoung@seattletimes.com

Original URL:

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A lawsuit over a letter spotlights a tough land use dispute

By [LESLIE BROWN](#)

Vashon-Maury Island Beachcomber Editor

Aug 17 2011

King County agreed to pay a Vashon couple \$125,000 for its failure to provide a document in a long-simmering dispute over the status of the couple's rustic beach house, an un-permitted, hand-built structure on Vashon's west side.

After mediation last month, Bill and Susan Tobin agreed to accept the settlement in their lawsuit against the county's Department of Development and Environmental Services for its failure to comply with the Public Records Act. The couple had sought \$360,000 in damages plus attorney fees in a suit that was pending before Snohomish County Superior Court.

Bill Tobin, a lawyer, said he was satisfied with the outcome.

"I feel good about it," he said. "Anything in the six figures is noteworthy, and it's enough that it should cause the agency to take note."

The head of DDES, for his part, said the legal case underscores the need to ensure county staff track their documents carefully. The one at the center of this dispute — an anonymous complaint about their house that the Tobins had received a redacted copy of — was found a couple of months before the case was scheduled for trial in an unoccupied office of a former DDES employee.

“I’ve reminded the staff of the great importance of being good stewards of the public’s documents and told them the magnitude of this settlement,” said John Starbard, who helms DDES. “We really need to be scrupulous about our record-keeping.”

But the complex dispute has also taken a charged and personal twist on Vashon because of the way it has thrust two well-known Vashon couples into the public arena — the Tobins and Greg and Margaret Wessel — and because of accusations the Tobins have made about the Wessels’ alleged role in Vashon’s real estate market.

The Tobins, who recently created a blog dedicated to their DDES dispute, contend Greg Wessel, an environmental scientist at DDES, used a ruse — an anonymous complaint the Tobins say was penned by his wife — to walk onto their property in 2005 and turn them into DDES’s enforcement staff for their un-permitted home, an event that happened weeks before they were to close on a deal to sell the property.

The Tobins, in the course of their dispute, hired a forensic expert to examine the handwritten complaint that prompted Wessel’s visit. That expert, according to a document posted on the Tobins’ blog, said she believes it’s “highly probable” Margaret Wessel wrote the anonymous note.

The accusation and the fact that it’s now posted on a blog anger the Wessels, a quiet but high-profile Vashon couple. In preparation for going to court, DDES had the Washington State Patrol’s crime lab analyze Margaret Wessel’s handwriting as well, a report that concluded there are some similarities but not enough to make “definitive conclusions.”

Asked if she wrote the anonymous complaint, Margaret Wessel said she hadn’t, adding that in the course of the six-year dispute no one has asked her that question.

“No one has spoken to me and no one has asked me. ... It’s all been behind my back,” she said.

“I’m concerned and offended that the Tobins continue to make claims that call into question my ethics and personal integrity,” she

added. "I'm a professional person with my own career. My reputation is very dear to me. I don't like having these accusations out there on the Internet."

Greg Wessel, the former curator of Two Wall Gallery on Vashon, said he, too, is angry about the accusations the Tobins have leveled against him and his wife.

"It would be an understatement to say that I'm upset. ... It's quite disturbing. Very upsetting," he said.

Told of the Wessels' dismay, Bill Tobin responded, "Well, tough. After six years of what these people put us through, I have no sympathy."

At issue is a house that Bill Tobin built slowly over the course of several years on a private, wooded parcel on Sunset Road on Vashon's west side. He and Susan Tobin lived there for 13 years but decided to sell in 2005 because the steep walk into the home was becoming difficult.

According to the Tobins, it was a remarkable spot — with 128 feet of waterfront, exposed beams, wood floors and paned glass windows — a "summer camp in a most beautiful setting," they said in a promotional piece they posted on the Internet.

Bill Tobin, however, built the house in what is now considered a critical area on a hazardous slope without a permit. His septic system was also un-permitted, as was the hand-dug well. Susan Tobin said they opted not to get permits because there was a different mindset on Vashon in the 1970s and 80s, when Bill Tobin built the structure.

"Vashon was different back then. It was completely lax," she said.

In April 2005, the couple had found a buyer for their home and were slated to close when they got a call from their real estate agent that an anonymous letter had been sent to DDES's Wessel. As a result, Tobin called Wessel, and he came out.

According to Wessel, he told Tobin he'd have to apply for a permit. "We saw that there were some challenges, but we were prepared to work with them and were just waiting for an application," he said. A

few days later, Wessel turned the Tobins over to DDES's code enforcement division.

Sheryl Lux, assistant superintendent of code enforcement, said she also told the Tobins to begin the permitting process. "I don't think at any time we said he couldn't get a permit. I did tell him he'd have to go through the permitting process to see," she said.

But Bill Tobin disputes that, saying that he was told by a DDES employee — now retired — that he wouldn't be able to permit the structure and that it would have to be torn down. Tobin, as a result, said he began a lengthy process to try to get it permitted through what he called a "limited building permit" on the advice of a Vashon building professional he was working with.

"There was a way to do this would have worked for us and it appeared to us and the people who were advising us that this was a viable way to do it," he said.

Lux, however, said she's never heard of a limited building permit. "As far as I know, we've never had such a permit."

The Tobins' buyer, meanwhile, had walked away from the sale, and the Tobins — now facing a notice of land-use violation from the county — appealed the code enforcement action, saying that Greg Wessel had used a ruse and taken advantage of them to get onto the property. As part of their appeal, they said, they also sought the original, unredacted letter that tipped the county off to their house, a letter that by then they believed had been written by Margaret Wessel. DDES, however, could not find the original.

A King County Hearing Examiner sided with the Tobins, dismissing the county's action without prejudice — meaning the county could bring the case again — in large part because of the missing document. "The loss of the document violates the public trust in a governmental agency, particularly one with a regulatory enforcement function with the authority to impose penalties," Hearing Examiner Peter Donahue wrote in his February 2007 decision.

But the hearing examiner stressed his dismissal was without prejudice, "since the charges (against the Tobins) involve serious

allegations, and the public interest and welfare advocate that code enforcement be conducted when in order.”

The Tobins put their property — still lacking permits — on the market again in 2007, and the county brought another code violation against them, this time due to several other complaints it received. Ultimately, the Tobins sold the property as “raw land” to a California couple for \$260,000. The deal that fell through in 2005 would have fetched \$340,000, Bill Tobin said.

Bill Tobin feels certain Margaret Wessel wrote the letter that triggered the county’s action, noting that no one on Sunset Road — where he owned property for 20 years — would have turned him in.

“I knew everybody. ... We’ve had parties together and helped each other out. It’s a very friendly and collegial neighborhood,” said Tobin, who now lives in a modest home off of Vashon Highway. “We know who wrote it, and it wasn’t anybody on our road.”

But Fred Albert, a magazine editor who has lived on Sunset Road for 17 years and who knows and likes Bill Tobin, said he was surprised to read a quote by Tobin to that effect in an article about the legal settlement in *The Seattle Times*.

“I don’t know why he thinks that (nobody would turn him in), since it’s happened a number of times on this street. ... It’s really quite common in this neighborhood,” Albert said.

Bill Tobin, meanwhile, contends that this isn’t the only time Greg Wessel has interfered in a real estate deal. He sought another anonymous complaint — but also never received it — from the same time period involving Wessel’s role at a different property on Vashon.

“He was using the real estate market to do code enforcement,” Tobin said. “He was going to houses that were on the market and looking for and apparently finding code violations and reporting them.”

Wessel says that’s patently not true, noting that it’s a rumor that has dogged him since he moved to the Island in 2004. “There have

been a couple of real estate agents who have passed on their complaints to me,” he said, adding, “We do not have relationships with real estate agents who cause us to file complaints. ... We do not go out searching for complaints.”

Starbard, the head of DDES, who was brought to the agency last year to help reform it, said he supports Wessel. “Greg is an employee in good standing,” he said.

As a coda to this complex case, the house Bill Tobin built — which by then the California couple was renting out in violation of county code — burned to the ground on Jan. 11, 2009. According to the King County Sheriff’s Office, it was listed as an accidental fire.

Vashon-Maury Island Beachcomber Editor Leslie Brown can be reached at editor@vashonbeachcomber.com or 206-463-9195.

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