How Did We Get Here From There - Part II

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As discussed in the April 30 posting, Initiative I-276 consisted of 45 sections, of which Sections 25-34 concerned the Public Records portion. This initiative was taken to the Washington State Supreme Court in Fritz vs Gorton. The lawsuit was brought by some elected officials who did not want their personal finances exposed and lobbyists, both professional and advocate.

In Fritz vs Gorton (2), protection against frivolous or abusive lawsuits was considered sufficient as the Defendant could sue for his costs and attorneys' fees upon a finding of lack of reasonable cause and the Plaintiff first had to notify the Attorney General and give him time to address the violation before proceeding. However, this section applied only to the Campaign Finance portion of the Initiative, not the Public Records portion. However, in a dissent, Judge C. J. Hale noted:

> *Section 40(4), I think, not only seeks to transfer a major judicial power to the executive branch but goes one degree further and seeks to vest it in individuals not elected by the people, that is, any person who wishes to maintain an action for his private benefit.*

Now this was for Section 40(4) which applied to Campaign Finance, not the Public Records portion. Even with the intermediate steps of an independent commission and the Attorney General weighing in before the lawsuit, the court still referred to this action as a "bounty hunter" provision.

The Public Records portion of the Initiative was to be enforced by citizens filing civil suits in Superior Court. There was no intermediate administrative or state review. It was mitigated only by the discretion of the Superior Court on whether or not to award penalties. Costs and reasonable attorney fees were available for the Plaintiff, but not for the Defendant. Attorney costs were in addition to any penalty, unlike the Campaign Finance portion where the plaintiff only received half of the penalty and attorney costs above that amount.

In Fritz vs Gorton, the Court also noted:

> *But, Initiative 276 is not without the possibility of some real problems which may ultimately produce negative rather than affirmative results insofar as the best interests of the public are concerned. Hence, the well-intentioned motives of the proponents and of those who voted for Initiative 276 may prove to be self-defeating. In other words, improvement in the quality of government may not be enhanced, but could be seriously discounted or diminished despite the well-intentioned purposes and desires of those who supported and approved Initiative 276. Obviously we are not speaking of certainties or even of probabilities but possibilities.*

Again, this comment was made in reference to the Campaign Finance portion of the Initiative. The case revolved around Sections, 18, 24, and 40 with no evaluation of the same questions made for the Public Records sections of the initiative.

So, 40 years later, how have things worked out?

The Public Disclosure Commission was created by this Initiative and has effectively enforced campaign financing since the passage of the Initiative. It has received national awards for its competence and is routinely used by organizations and citizens.

The Public Records Act has been modified several times with the following results.

The Act started out with any violation being worthy of a lawsuit. However, the Superior Court had the discretion on whether or not to award penalties. Reasonable attorney fees were still included, so there was still financial incentive to pursue a lawsuit. Again, the cost recovery protections for the Defendant in campaign financing lawsuits did not apply to Public Records. So, the "bounty hunter" took a chance on getting a "reward", but did not face any retribution should he lose.

In 1995, the Legislature amended the Act to **require** penalties. So now, the "bounty hunter" had a solid chance for a "reward". All he had to do was find some "mere imperfection" (2) in the Agency's response as there was no consideration of whether the agency action was intentional, a clerical error, or a difference in interpretation of the statue. Subsequent legislation in 2010 moved the minimum reward to zero dollars per day, but it remains to be seen if that will have any substantive effect as the reward potential is still there and attorney fees remain.

In 2004, the Washington Supreme Court ruled that a request for "all records" was overbroad. The Legislature then amended the Act to declare that there was no such thing as an overbroad request. Now, the "bounty hunter" not only could collect a "reward" for the "crime", but by flooding an agency with large requests, for which the Agency had to respond with no "mere imperfections", could create the "crime". This was a real win-win for "bounty hunters".

Now, a single person can come into an agency and demand thousands of documents scattered throughout the agency's files and costing the local taxpayers thousands of dollars in labor costs. If the agency were to provide a single person thousands of dollars in labor costs for free, that would be a gross violation of gifting of public funds. However, under RCW 42.56, it is a requirement.

The summation is that a section of Initiative 276 that got little attention (Public Records) at the time has now ballooned into a massive hit on the public treasury of multiple agencies. The main portion of Initiative 276 that got all of the attention (Campaign Financing) has been handled in an efficient administrative way with the Courts available should they be needed.

A simple solution that could be implemented immediately would be to simply remove the profit motive for lawsuits. This has been done for incarcerated persons (see the previous posts on Jesse Harkcom) but with restrictions on its use. The legislature has given judges the ability to make zero dollar awards, but the promise of "millions of dollars" is still there (for those not currently incarcerated) and plaintiffs and their attorneys still make money off of the Act, just like Judge Hale noted.

Superior Court Judges make decisions all the time that affect people's finances, their families, and their freedom. If a Judge is deemed capable of determining if a person intently committed a felony, certainly they can be deemed capable of determining if a redacted sentence in a document should be handled by a corrected release or by large attorney fees or if a continuing flood of requests is an overly onerous burden on the local taxpayers.

References:

…1 Fritz v Gorton 83 Wn.2d 275, 517 P.2d 911 (see Library page)

…2 Amicus Curaie Attorney General O"Neill v Shoreline (available upon request)