NO. 45756-3-II

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

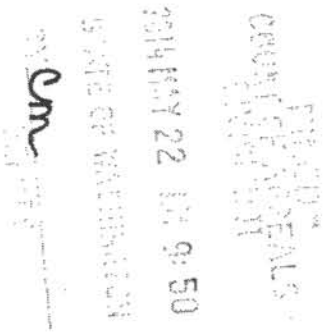
MIKE BELENSKI,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.



BRIEF OF RESPONDENT JEFFERSON COUNTY

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I. INTRODUCTION

This case presents the question of whether records that are automatically created by the County's firewall software and are deleted after a minimal period without any connection to any governmental conduct or action, and which are not reviewed, evaluated and have no nexus to governmental decision-making are "public records" as defined by the Public Records Act. Absent a connection to actual conduct by governmental actors, RCW 42.56.010(3) requires more than mere possession of electronic data to be a "public record". The definition of "public record" requires that the records be connected to the "conduct of government" or the "performance of a governmental function", a vital and necessary element which is lacking for the category of data requested by Appellant Michael Belenski in this matter: internet data automatically generated by the County's firewall program.

Despite its best efforts to satisfy Belenski's curiosity about the County's automatically generated internet logs, Respondent could not provide access to the data sought by Mr. Belenski in the format he demanded. Despite frequent contact with Mr. Belenski, (including a face to face meeting and an offer to allow him to review the data in person), Jefferson County discovered, after dozens of hours of staff time had been expended, that it was not technologically feasible to produce copies of its

internet access logs based on the technology it held. Although the requested records are not "public records" as that term is defined in the Public Records Act, the County subsequently, in the spirit of "fullest assistance", spent thousands of dollars on upgraded software attempting to provide access to records which reflected compiled information extracted from the County's firewall program which automatically logs every contact between a County-owned PC and the World Wide Web. Despite the County's offer to allow review of this data, Mr. Belenski remained unsatisfied, demanding an electronic copy of the data, although generation of such an electronic copy was not and is not technically feasible.

After 10 months of silence, other than a separate August 30, 2012 request relating to Chris Grant,[1] Mr. Belenski sued the County over his multiple requests, including requests that were responded to more than two years earlier. The trial court correctly determined the County's responses did not violate the Public Records Act. Mr. Belenski prevailed only on a minor issue concerning the County's explanation of an exemption, for which Mr. Belenski was awarded $434.99 in costs. He now appeals that victory, arguing that the trial Court should have ruled for him based upon allegations that are not part of his original Complaint.

[1] This request became known as Request #5 during the proceedings in the trial court.

II. STATEMENT OF THE CASE

A. THE NATURE OF THE COUNTY'S COMPUTER SYSTEM AND ELECTRONIC RECORDS

1. The County's Firewall Program Automatically Collects Data about Contacts between the County's Computers and the Internet to Provide Security.

Jefferson County has an extensive network of servers, hard drives, hardware and software, the end users of which are the County employees who typically have a personal computer (PC) at their desk or work station. There are over 300 County PCs in service at any particular time. CP 363, ¶33. To protect this infrastructure (and the data and records stored there) the County's Information Services Department has installed and maintains a powerful firewall to keep out viruses, spam emails, malware and other electronic evils. The County's firewall software is known as SonicWall CFS and it autonomously creates a log for each contact between a County PC and the World Wide Web or "WWW." CP 361, ¶16, 17.

Contacts with the WWW occur in one of three ways: automatically, intentionally or unintentionally. Unbeknownst to the typical County employee, some software utilized by the County must regularly contact the WWW to perform its functions. Other contacts are intentional, i.e., when the user intentionally visits a certain website. For example, the program would log whenever a deputy prosecuting attorney

researches the text of a statute (at http://apps.leg.wa.gov/rcw/default). Finally, the system will log any active contacts embedded on a website visited by a user, although an employee might think they have contacted a single web site. In truth, the user may have been in contact with numerous additional web links embedded in the visited site but hidden from the employee and visible only to the SonicWall software which methodically logs the contact. CP 363, 364, ¶34-37.

All of these web contacts are compiled or logged by a software program compatible with SonicWall known as VIEWPOINT. The record of these contacts is known as an "Internet Access Log" or "IAL". CP 361, ¶14-16. The IAL in its native or raw format is also referred to by the applicable software as the "Syslog," or system log. The ability to generate the Syslog is inherent and embedded within the SonicWall software, meaning Jefferson County neither sought to have this information generated, nor did it pay extra for it. CP 361, ¶18. Between September 2010 and January 2012, there were at least 304 million internet contacts recorded by the County's firewall software. CP 68.

The ViewPoint program retains Syslog data based on a setting within the software. The default setting is to retain 15 days worth of

Syslog data, each day deleting the oldest Syslogs.[2] CP 363, ¶32. Because of Mr. Belenski's requests, the County revised this setting and currently retains 13 months of Syslog records, each day deleting the oldest record.

The Syslogs simultaneously provide both too much information and too little. They provide too much information primarily because of their comprehensiveness. A sample printout of the Syslog for fifteen (15) seconds consumes 17 single-spaced pages if printed out. A printout of one day's Syslogs would consume more than 1,600 letter-sized pages. CP 362, ¶28, ¶29, CP 129.

Crucial to this litigation is the distinction between Internet Access Logs (aka the Syslogs) and Internet Access Audit Logs ("Audit Logs"), terms which Mr. Belenski incorrectly treats as synonymous. They are not. The Syslogs or IAL, as described above, reflect the automatic notation by software inherent in the County's firewall of every internet contact, a collecting of data points neither reviewed, directed nor requested by the County. CP 361, ¶14-18. They have not been used for any governmental purpose by Jefferson County. CP 62.

Conversely, an Audit Log would only exist (and the County would have to retain it per County Policy #17-98) if a department head needed to

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[2] The oldest PRA request listed in the Complaint, Request #1 in the trial court, asked for the IAL from February 1, 2010 to September 27, 2010. CP 211. Request #3 asked for the IAL for January 1, 2011 to November 1, 2011.

determine if one of their employees was abusing their internet privileges and conducted an audit of their internet activity. CP 151-152 (Policy 17-98, p. 8-9). Upon the request of the department head, Information Services would presumably take the **affirmative step** to generate an Audit Log so that the employee's internet usage patterns could be examined. However, during the relevant time, the County did not conduct such audits or request creation of an Audit Log. CP 362, ¶27, CP 62.

There is no evidence in the record of the County using Syslogs or Audit Logs to decide what web sites to block, despite Belenski's purely speculative arguments that such a statement must be true. Brief at 21. Instead, the County in part relies on algorithms made part of its firewall software (SonicWall CFS) which categorize and automatically block websites that are objectionable or inappropriate, based on locally configured policy settings. CP 38.

In addition to the firewall program, Information Services has blocked certain common web sites that are inappropriate for employees to visit, such as Facebook, MySpace, etc. This list was generated by the County several years prior to the period for which Mr. Belenski requested data. (CP 33, 39) The existence of such a list of blocked websites does not support the logical leap made by Mr. Belenski that the Syslog data must have been relied upon to make those decisions.

2. The County faces technical challenges in extraction and production of Syslogs from the Firewall.

The County attempted to provide access to the information sought by Belenski but encountered multiple technical issues with producing the 304 million Syslogs in their native format. These issues were described in detail by the Information Services Manager, David Shambley, who acquired updated software known as WebSpy to assist in responding. See CP 129-135; 365-373. Ultimately, the County produced a report from the WebSpy program on a CD to provide the information sought by Mr. Belenski. CP 372. This was a "work around" of the technical and security issues which the County believed both solved the problems and fulfilled the request. CP 366, ¶50; CP 372, ¶91-93.

This "work around" was developed after a meeting of the parties in January 2012 where they discussed the infeasibility of backing up every record generated by County officials and difficulties in producing the Syslog data. These difficulties were exacerbated by a hard drive failure in April 2011 and difficulties in extracting information from the firewall program that would still need to be redacted, at the cost of dozens of hours of staff time. CP 370. Moreover, the production would also generate security concerns. Use of the upgraded WebSpy program to provide responsive statistical information was discussed as a means to serve the

goal of providing a prompt response to a requester seeking this information. CP 372.

3. Belenski's Requests Generate Legitimate Security Concerns.

Because the Syslog data is embedded in the County's firewall program, Belenski's requests generated legitimate security concerns. The County's Internet Services Manager testified that production of the Syslog data would also produce sensitive security information generated by the operation of the firewall program. The IAL also creates the possibility of security breaches by listing the IP address of the County's firewall. CP 364, ¶40; CP 365 ¶45. For example, the County expressed concern that hackers could penetrate the Jefferson County system with disclosure of this information. CP 129. The Syslog data would also create the possibility that internal networks and medical information could be made vulnerable to hacking if the IP or "url" was exposed. CP 365, 366, ¶47, 48. Conversely, the requested Syslogs generally omit other information. For example they do not always record express information about which County employee is contacting the web. CP 337. Nor does every Syslog record the name of the web site contacted. CP 364, ¶41, 42.

The primary security concern was that if the public were provided with user identifications for County employees and if the information was

released to the public, then a bad actor could potentially hack the PC of that employee. CP 367-68, ¶60. Data gathered by the Syslogs would include the Internet Protocol address or "IP address" for the County's firewall, the time of the contact, and the IP address of the receiving PC as well as other data. Access to this raw data in the firewall program can compromise the security of the County's computer system. CP 365. The County's IS Manager testified the disclosure of the Syslogs in their raw or native format could lead to security breaches. *Id.* The logs identify the County's internal networking infrastructure and might also contain network communication information that identifies servers and/or computers which are calling back to their command or control hardware or software. *Id.* This command or control hardware or software could be internal to the County, or at A) a bank or B) the Sheriff's Office. *Id.*

B. BELENSKI REQUESTS INFORMATION CONCERNING INTERNET USAGE AND THE COUNTY MAKES EFFORTS TO RESPOND.

Belenski made five records requests. The following chronology describes the relevant events:

1. Request #1: Internet Access Logs from February 1, 2010 to September 27, 2010.

Date	Event	Citation
Sept. 27, 2010	**Request #1** is made. It is a PRA request for the IAL from Feb. 1, 2010 to September 27, 2010.	CP 211

Oct. 4, 2010	Clerk to BoCC Delaney responds to Request #1, states "No responsive records."	CP 214

2. Request #2: Certificates of Destruction for IALs from February 2010 to September 27, 2010.

October 7, 2010	**Request #2** seeks "Certificates of Destruction" for the items not provided in response to Request #1, i.e. the IAL.	CP 216
October 11, 2010	Office of the Clerk to the BoCC responds to Request #2 and states "County [has] no responsive documents."	CP 218
April 2011	1. "A catastrophic hard-drive failure which impacted Viewpoint Archives software" occurs. 2. When this software was reestablished in June 2011 it was set to the default position of saving the daily Syslogs for only 15 days rather than for 1 day or 365 days. 3. The daily Syslogs are the IAL in their "native" electronic format.	1. CP 378 2. CP 378 3. CP 361, ¶14, 15
June 2011	The Viewpoint software is reconfigured by IS employee Todd Oberlander who resets Syslog retention to its default setting of 15 days.	CP, 373, ¶99 CP 378
June 22, 2011	County pays $847.86 to renew WebSpy maintenance agreement for one year.	CP 381

3. Request #3: IALs from January 1, 2011 to November 2, 2011.

Nov. 3, 2011	**Request #3** is made requesting inspection of IALs for the period between January 1, 2011 and November 2, 2011.	CP 221

Nov. 4, 2011	As a result of Request #3, IS staff accesses Viewpoint, causing Shambley to learn of the April 2011 hard-drive failure, and the reconfiguration of Viewpoint that saves the IAL for only 15 days.	CP 377, 378, 379
Nov. 4 to Nov. 10, 2011	To preserve IALs during the request process, IS staff installs Viewpoint on a dedicated server and resets the archive retention setting for 13 months for Syslog data.	CP 378, 379 CP 363, ¶31
Dec. 7, 2011	Belenski amends Request #3 to ask for an "electronic copy of original records" instead of inspection. **(Request #3A)**	CP 226
Dec. 8, 2011	IS Manager Shambley sends a memo to Belenski in response to Request #3A to explain the County's efforts to respond. The memo informs Belenski of the following: 1. County staff spent some 70 hours using software known as the ViewPoint module in Sonicwall "to search and retrieve all available Syslogs, including searching archives and bad Syslogs." 2. County has installed a new server dedicated to collecting Internet Web traffic via Sonicwall. 3. IS is generating daily backups and retaining them in a zip file or files. 4. The archiving period is now 13 months. 5. Good solid data for the IAL is ONLY available from November 10, 2011 forward, data from other sporadic dates can and will be provided.	CP 377-380 1. CP 373, ¶96 to ¶99, inclusive 2. CP 379 3. CP 363, ¶31 4. CP 363, ¶30, ¶32 5. CP 379 6. CP 364, 365, ¶41, ¶42, ¶43 7. CP 380 8. CP 380 9. CP 380

	6. The format of the Syslogs is not easily readable. 7. An average size of the SysLog .upd file for one day contains 3.5Mb to 4.8Mb of data, (nearly the space available on a DVD). 8. If the Syslog for a typical single day is transported to WORD and Calibri 10 point font is used, the document is 1,642 pages in length. 9. Release of the Syslog in its native format cannot occur until there is redaction of certain information relating to A) the county's computer network topology, B) medical info exempt per HIPAA, C) intelligence essential to effective law enforcement which is exempt per the PRA.	
December 8, 2011	Belenski is offered the ability to INSPECT the available Syslogs "in their entirety" at the Court House. ***Belenski never accepted this offer.***	CP 379, bottom
Dec. 12, 2011	In an e-mail to IS Mgr. Shambley Belenski states he has been "through Jefferson County's claims of a hard drive failure before" and asks "[d]oes Jefferson County not back up their electronic records?"	CP 240

4. Request #4: Every Electronic Record for which Jefferson County does not generate a backup.

Dec. 19, 2011	The County receives **Request #4**-a PRA request for "electronic copies of every electronic record for which Jefferson County Information Services does not generate a backup."	CP 239

Dec. 19, 2011	In the same e-mail that includes **Request #4.** Belenski explains why he wants to see the IAL, basically to discover if any County employees are wasting their work hours surfing the web, viewing web sites for pleasure or entertainment rather than work-related reasons. Belenski's e-mail recounts a March 2011 conversation with DPA Alvarez in which he was informed that the logs were not used by the County for any purpose, were not "public records" as defined by the PRA and had no retention value.	CP 238, 3RD full paragraph; CP 631
Dec. 20, 2011	IS Manager Shambley responds to **Request #4** stating the request is not a request for "identifiable" Public Records as is required by RCW 42.56.080.	CP 237
Dec. 21, 2011	County purchases the "WebSpy Vantage Ultimate Upgrade (500 users)" in order to be able to compile the statistics Belenski is interested in. Cost = $2,903.49.	CP 385
Jan. 3, 2012	Belenski & his computer adviser Tom Thiersch meet at the County's IS Department with IS Manager Shambley and IS employee David Winegar for some 2.5 hours.	CP 369, 370, ¶69 to ¶78.
Jan. 19, 2012	The IS Department provides Belenski with a DVD that aggregates the IAL for each PC, thereby providing him with what he wants, i.e., seven ways to measure how the PC of any individual County employee has interacted with the internet.	CP371, 372, ¶88 to 92.

5. Request #5: Records concerning former County Employee Chris Grant

August 30, 2012	Belenski makes **Request #5** to the Board of County Commissioners (BoCC) seeking, inter alia, all records with contact information for former IS employee Chris Grant.	CP 249
September 7, 2012	Belenski receives a response to **Request #5** from the Clerk to the BoCC, including an exemption log (allegedly deficient for absence of a "brief explanation") and the partially redacted records.	CP 250, 252, 254
November 19, 2012	After 10 months of silence, i.e., the absence of any comment from Plaintiff regarding the County's response to Request #3A and 11 months after the County responded to Request #4, this PRA lawsuit is filed and served upon Jefferson County contending, in part, that the explanation of the redactions in response to Request #5 is inadequate. This is the first notice that County has concerning any deficiency in its "brief explanation" in its Response to Request #5.	CP 191
November 26, 2012	Belenski receives amended Exemption Logs for Request #5, with a distinct column for "brief explanation."	CP 657, 658

C. PROCEDURAL HISTORY

Jefferson County promptly filed a motion for Summary Judgment pursuant to CR 56. Mr. Belenski objected pursuant to CR 56(f) to allow completion of responses to his discovery requests. After submission of at least three briefs by all parties, on May 15, 2013 the trial court entered a

Memorandum Opinion finding the County was entitled to Summary Judgment with respect to Mr. Belenski's claims concerning Requests #1, #2, #3 and #4. The Court denied without prejudice Summary Judgment with respect to Request #5 pending *in camera* review of the documents withheld by the County. CP 290-301.

On July 10, 2013, Mr. Belenski moved for revision of the Court's memorandum opinion dismissing claims concerning Requests 1-4. CP 5. Treating the motion as seeking reconsideration, the court ordered the County to file a response, which it did. CP 518. Thereafter, the Court denied the motion with respect to Requests 1-4. CP 288.

The Court requested *in camera* review of the records relevant to Request #5. CP 300. An Order memorializing the Court's decision granting summary judgment to the County on Requests 1-4 was entered on September 17, 2013. CP 278-281. The unredacted records from the Board of County Commissioner's response to Request #5 were lodged under seal with the trial court. CP 282-287. After hearing oral argument and conducting an *in camera* review of the documents, the trial court issued a second Memorandum Opinion finding the County was entitled to Summary Judgment with respect to withholding and redacting the documents responsive to Request #5. However, the Court found that the Plaintiff was entitled to recover his costs because the initial Exemption

Logs failed to include an adequate "brief explanation" as required by RCW 42.56.210(3). The court below ruled the revised Exemption Logs provided shortly after the lawsuit was filed satisfied that statute. CP 275-77. On November 22, 2013, the trial court entered an Order dismissing the plaintiff's claims on Requests #1, #2, #3, and #4 and reflecting Mr. Belenski's partial success on Request #5. The court awarded Mr. Belenski $434.99, as his costs incurred in the matter. CP 270-73.

On December 2, 2013, Mr. Belenski filed a second motion for reconsideration based on "newly discovered evidence". CP 442. The Court ruled that this material could have been obtained and presented prior to the summary judgment motion and therefore denied the second motion for reconsideration on December 6, 2013. CP 268. It is these orders below, as well as other interim orders below that Belenski now appeals.

III. LEGAL ARGUMENT

A. AUTOMATICALLY GENERATED COMPUTER LOGS ROUTINELY DISCARDED BY FIREWALL SOFTWARE THAT DOES NOT RELATE TO ANY CONDUCT OR GOVERNMENT DECISION-MAKING IS NOT A "PUBLIC RECORD" AS DEFINED BY RCW 42.56.010(3)

In both the September 27, 2010 PRA request (Request #1) and the November 2, 2011 PRA request (Request #3/#3A) Mr. Belenski asked for "internet access logs", that is the Syslogs that are automatically generated

by the Viewpoint program. The Syslogs are not a "public record" as that term is defined in RCW 42.56.010(3).

The term "public record" has a three-part statutory definition found at RCW 42.56.010(3). Thus, "[a] 'public record,' subject to disclosure under the Act includes [1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." See ***Confederated Tribes of Chehalis Reservation v. Johnson***, 135 Wn.2d 734, 746, 958 P.2d 260, 265 (1998).[3]

1. The Syslog data does not relate to the conduct of government or bear any nexus to governmental decision-making (Prong #2)

Belenski assigns error to the trial court's ruling that the IAL failed to satisfy the second element of the statutory definition. The trial court correctly ruled the IAL do not satisfy the second element of the definition of "public record" because they bear no nexus to governmental decision-making and do not relate to governmental conduct.[4] This requirement that

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[3] For the rest of this Memo of Authorities the County will use the phrase "Public Record" with initial capitals to refer to a record that satisfies the statutory definition of a Public Record as found at RCW 42.56.010(2). A record or record series may or may not be a "Public Record."

[4] The County's initial memorandum (CP 659-691) made this argument, stating "The IAL, at all times relevant to this PRA Complaint, had no relevance to the County's conduct,

there must be a nexus between the record in question and some governmental decisional process or conduct in order for that record to be a "Public Record" subject to the PRA arises from the express text of the second element as explained in ***Concerned Ratepayers Ass'n v. P.U.D. #1 of Clark County, WA***, 138 Wn.2d 950, 983 P.2d 635 (1999). Our Supreme Court offered this analysis:

> Rather, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary function, but is also a relevant factor in the agency's action. *See* RCW 42.17.020(36); *Yacobellis v. City of Bellingham,* 55 Wn.App. 706, 711, 780 P.2d 272 (1989). That is, certain data may still be relevant and an important consideration in an agency's decision-making process even if it is not a part of the agency's final work product. Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act.

Concerned Ratepayers Ass'n., 138 Wn.2d at 960-961.[5]

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performance or decision-making process and thus were never used or needed by the County." CP 673. The remainder of page 15 of that brief also discusses this topic.

[5] Belenski cites only the Court of Appeals opinion that was reversed by the Supreme Court. The Supreme Court determined that turbine specifications that were actually reviewed, evaluated and relied upon by an agency to approve a contract bid were Public Records despite the fact that they were not possessed by the agency.

In 2007, Division Two applied this same doctrine in ***Dragonslayer v. Washington State Gambling Com'n***., 139 Wn. App. 433 (2007) to reverse and remand a trial court decision that the financial records of a privately-owned card room held by the State Gambling Commission were "Public Records." The Court required more than a regulatory requirement to provide the records and possession by the agency. Although the disputed records were required by state regulations governing gambling to be provided to the Gambling Commission, they were not "Public Records" simply based on conclusory statements that the state commission used those financial records. This Court remanded for further fact-finding into how the documents related to governmental decision-making by governmental actors, holding:

> "The legislative intent of the PDA is to require public access to information concerning the government's conduct. The trial court here made almost no factual findings as to how the financial statements were related to the government's conduct, or the Commission's decision-making process. The court found from Day's statement that "the requested records relate to the regulatory functions of the Gambling Commission." CP at 125. However, Day's statement is conclusory and gives no detail on how the financial statements aid in "monitoring compliance with state gambling laws and regulations." CP at 83. The financial statements, like the document in *Concerned Ratepayers,* were prepared by a private, non-public agency and contain information regarding a private, non-public entity. Additional factual findings as to how the Commission uses these statements are necessary to

> determine whether they are related to a public function. These findings should be based on specific determinations of the Commission's use, rather than general assertions that the financial statements are used. We remand for further evidence and a determination by the trial court of whether the financial statements meet the test's second prong and are related to the government's conduct."

Id., at 445-46 (emphasis added).

When the "related to the government's conduct" test is applied to the Syslog data automatically created by the County's firewall software, it becomes clear that this data does not meet the second prong of the three-part statutory definition of a "public record." Simply because a County-owned software program automatically churns these logs out (and just as quickly discards the oldest log without any human review or action) is not enough to satisfy this element of the definition. Information Services Director Shambley testifies that while serving in that role he has not been asked for the SysLog by any supervisor from any County department, nor has the County used the Syslog data to create an Audit Log to investigate alleged internet abuse by a County employee during the relevant time period. CP 362, ¶27.

Faced with established case law which states there must be a relationship between the record and governmental conduct in order to satisfy the second element, case law based on the phrase "relating to"

being expressly included in the text of the definition, Mr. Belenski strains to reach the unsupported and opposite conclusion. By doing so, Belenski renders meaningless the phrase "relating to" found within RCW 42.56.010(3), thus flying in the face of longstanding precedents requiring courts to interpret statutes so as to give meaning to every word of a statute, e.g., ***Whatcom County v. City of Bellingham***, 128 Wn. 2d 537, 546, 909 P.2d 1303 (1996). ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.")

Conversely, Mr. Belenski argues that the IAL relate to the conduct of government because of the information (statistics) one could compile from them. He contends that one could extract how much time is spent on the internet, what information is being reviewed on the internet and, in general, how are the resources of the County being utilized. Brief at 13. But close examination proves this argument to also be specious and speculative.

First, it is undisputed that the County has not attempted to rely on the requested Syslog data in the manner that Belenski suggests that it could. CP 62. Secondly, the Syslog data which lists a web site contact does not explain why the contact occurred and neither proves nor disproves that the contact related to governmental conduct, i.e., was in

furtherance of a governmental purpose.[6] Reasonable de minimis personal use of computers is allowed so long as it is reasonable and done during employee breaks. Thus, learning from the Syslog data that a Deputy Prosecutor examined Google maps or that another Deputy Prosecutor looked at the web site of a private law firm only informs the reader as to what happened and does not inform the reader why that contact occurred or whether that contact with the Web was related to governmental conduct.[7]

All of the cases considering the definition of a "public record" have two elements in common: First the records involved were intentionally and knowingly created or obtained by or for a government actor. Secondly, and critically in this case, the records were purposefully applied to a governmental end, either by memorializing government conduct or providing a foundation for decision-making by governmental actors. ***Concerned Ratepayers***, 138 Wn.2d at 959 (document is a Public

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[6] Nor would it necessarily show that a County employee is wasting time, which was Belenski's expressly stated reason for seeking the IAL. CP 238. For example, an employee might go to a retailer's web site at lunch time, as they are permitted to do, minimize that screen when they resume working and then only close the retailer's web site an hour later when they return to the web to find something else. Is that proof they wasted an hour?

The fact of an internet contact with a retailer does not demonstrate anything. If the employee went to the retailer's web site, it could be for personal reasons or a valid purpose such as to assist in a governmental purchase. A listing of web contacts is not automatically informative.

[7] Such information may also be exempt as it reveals work product, the attorney's mental impressions and thought processes and materials he is gathering or reviewing in handling County litigation.

Record if applied to a goverment purpose or instrumental to governmental end). Only in this way would a record satisfy the second prong of the statutory definition and "relate" to the "conduct of government" or the "performance" of a governmental or proprietary function.

Even where the Courts have broadly interpreted this second prong of the statutory definition of "public record", the Courts have only found records to be "public records" where these common characteristics are present. For example, employment verification requests in ***Dawson v. Daly***, 120 Wn. 2d 782, 780 (1993) ("Verification requests are not within the scope of the act and are not subject to disclosure") and commissioner's notes in ***Yacobellis v. City of Bellingham***, 55 Wn. App. 706, 712, 780 P.2d 272 (1989) were held not to be public records.[8] In both cases, the documents were determined not to "relate" to governmental functions and governmental decisions.

In ***Oliver v. Harborview Medical Center,*** 94 Wn.2d 559, 566, 618 P.2d 76 (1980), the court held that medical records of a patient treated at a public hospital were Public Records. The court reasoned that the records contained information of a public nature, "*i.e.,* administration of health

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[8] ***Yacobellis*** also held that other writings prepared by government, such as rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation "obviously would not be public records". ***Yacobellis***, 55 Wn.App. at 714. Belenski cannot reconcile the language in ***Yacobellis*** that records such as these do not satisfy the definitional statute with his argument that the mere possession of the IALs without any connection to governmental action is sufficient.

care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which ... relate to the performance of a governmental or proprietary function." *Id.*

Next in ***Yakima Newspapers, Inc. v. City of Yakima,*** 77 Wn.App. 319, 324, 890 P.2d 544 (1995), Division 3 held that a settlement agreement containing information about the City's termination of an employee was a Public Record because termination is a proprietary function of government. *See also* ***Limstrom v. Ladenburg***, 85 Wn.App. 524, 529, 933 P.2d 1055 (1997), *rev'd,* 136 Wn.2d 595, 963 P.2d 869 (1998) (criminal investigation files held by prosecutor and prosecutor's personnel files were public records).

In this case, the automatically created data in the firewall software was not volitionally created by any governmental actor, nor was it ever evaluated, reviewed, considered or even known by any governmental actor. The purpose of the Public Records Act is to allow full access to records concerning the "conduct" of those who hold public positions, not to permit speculative conjecture about government based on data logs automatically produced by a software program. The position advocated by Belenski would require access to raw data to subject public employees to scrutiny without the critical step of having that data evaluated, reviewed and found to be relevant to actual conduct of governmental actors.

This data at issue is raw, voluminous and untethered to actual governmental conduct and governmental decision-making. It is distinct from data which a County actually uses to audit or evaluate performance of employees, as was the case in ***Tiberino v. Spokane County,*** 103 Wn. App. 680, 13 P.3d 1104 (2000). There, Spokane County evaluated, reviewed and relied upon personal e-mail sent contrary to its computer use policy as the basis for an employment decision. In so doing, these records formed the basis for a governmental decision and therefore qualified as "Public Records".

Like the emails in ***Tiberino***, if the County conducts audits of employee internet use and evaluates Syslog data in the process, the data reviewed, evaluated and relied upon by the County would have a nexus to a governmental decision. In such a context, it would be a Public Record. However, the unrebutted testimony in this case is that the County does nothing with the Syslog data created by its software and does not create Audit logs of this type. As such, the raw firewall data is unrelated to any governmental conduct and is not a "public record".

Belenski relies on dicta in ***O'Neill v. City of Shoreline***, 170 Wn.2d 138, 240 P.3d 1149 (2010) to contend that "virtually any record" is a Public Record. Brief at 14. ***O'Neill*** decided that metadata which is embedded in an electronic public record is subject to disclosure upon

request under the Public Records Act. That case is factually distinguishable. In ***O'Neill***, the metadata was held to be an inseparable part of a Public Record.

> We agree with the Supreme Court of Arizona that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure. There is no doubt here that the relevant e-mail itself is a public record

O'Neill, 170 Wn. 2d at 147-48.

O'Neill relied upon ***Lake v. City of Phoenix***, 222 Ariz. 547, 218 P.3d 1004 (2009), an Arizona Supreme Court decision interpreting a statute with a similar definitional approach to public records. In ***Lake***, the Arizona Court cautioned against the approach now advocated by Belenski, stating:

> The public records law, however, does not mandate disclosure of every document held by a public entity. Only documents with a "substantial nexus" to government activities qualify as public records, and the nature and purpose of a document determine whether it is a public record. *Id.* at 4 ¶ 10, 156 P.3d at 421; *see also Salt River Pima–Maricopa Indian Cmty. v. Rogers,* 168 Ariz. 531, 541, 815 P.2d 900, 910 (1991) (noting that the public does not have the right to access private records that are unrelated to the government agency's activities)

Lake, 222 Ariz.at 549, 218 P.3d at 1006 (emphasis added).

Numerous other states have cited and followed the test used by Arizona in ***Lake***. See also ***Pulaski Cty. v. Arkansas Democrat-Gazette,***

Inc., 260 S.W.3d 718, 725 (2007) (remanded to determine whether e-mail reflect a "substantial nexus with Pulaski County's activities"); ***Denver Publishing Co. v. Board of County Commissioners of County of Arapahoe***, 121 P.3d 190 (Colo.2005) ("To be a 'public record', an e-mail message must be for use in the performance of public functions or involve the receipt and expenditure of public funds. The simple possession, creation, or receipt of an e-mail record by a public official or employee is not dispositive as to whether the record is a 'public record'"); ***State v. City of Clearwater***, 863 So.2d 149 (Fla.2003) (e-mails must have been prepared "in connection with official agency business"); ***Schill v. Wisconsin Rapids Sch. Dist.,*** 786 N.W.2d 177, 205 (Wis. 2010) (a connection to government business is needed to classify the document as a public record.)

Finally, the only court to have considered whether digital records of internet activity are "public records" has ruled they are not. *See,* ***Brennan v. Giles County Board of Education***, 2005 WL 1996625 (Tennessee Court of Appeals, Aug. 18, 2005), appeal denied (Dec 19, 2005). In *Brennan*, the court upheld a lower court determination that the requested documents did not meet the definition of "public record" under Tennessee law. It was insufficient that the records were made during business hours on government owned computers and were retained by the

school district. The Tennessee court rejected the contention, similar to Belenski's contention, that all records stored on government computers to document internet activity are public records. A copy of this decision was presented to the trial court.[9] CP 536.

The case law underpinning ***O'Neill*** supports the result reached by the trial court here, which specifically found no connection or nexus between the requested Syslog data and any governmental action or conduct. Such a nexus is required by RCW 42.56.010(3). The language cited by Belenski from ***O'Neill*** presumes such a relationship exists. ***O'Neill*** does not relieve him from showing such a connection to make the threshold showing that the requested logs are in fact "public records".[10]

Belenski urges the court to expand what is defined as a "public record" based on technological developments. The PRA definition of a "public record" was drafted in 1972 prior to the development of the Internet and the advent of modern computers. See Laws of 1973 ch,1, § 2 (Initiative Measure No. 276, approved November 7, 1972), formerly

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[9] The Tennessee Court of Appeals Rule 12 permits citation to unpublished intermediate appellate opinions where a copy is provided to the Court and counsel.

[10] The issue in ***O'Neill*** was whether metadata that is embedded in electronic records is subject to public disclosure. The County here does not contend that the Syslogs could never be public records, but that there is no connection to any government "conduct" when they are not associated with any governmental decision-making. If the county audited specific use of computers for the purpose of making an employment decision, the logs relied upon would be public records, as was the case in ***Tiberino*** where purely personal e-mails were held to be public records because they were used in an employment decision..

RCW 42.17.020. The Court should allow the Legislature to consider such an extension, not create one based solely on technological advances. As stated in ***Howell Ed. Ass'n, MEA/NEA v. Howell Bd. of Ed.***, 789 N.W.2d 495, 502 (Mich. App. 2010):

> Now, instead of physical mailboxes, we have e-mail. However, the nature of the technology is such that even after the e-mail letter has been "removed from the mailbox" by its recipient, a digital copy of it remains, possibly in perpetuity. This effect is due solely to a change in the technology being used and, absent some showing that the retention of personal e-mail has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA. We do not suggest that a change in technology cannot be a part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.

Howell Ed. Ass'n, MEA/NEA v. Howell Bd. of Ed., 789 N.W.2d at 501.

The Court should affirm the trial court's determination that the records automatically generated by the County's software and which are, in the words of Judge Wood "virtually ignored" by County officials are not related to the conduct of government and are not "public records" under RCW 42.56.010(3). CP 292.

2. Automatically produced Internet logs do not satisfy prong 3 of the statutory definition as records "prepared, owned, used or retained" by the County.

Because the IAL are not prepared, owned, used or retained by the County such records do not therefore satisfy the third element of the

statutory definition. A recent PRA case which turns on the third element of the definition of a Public Record is ***West v. Thurston County,*** 168 Wn. App. 162, 275 P.3d 1200 (2012). Specifically ***West*** turned on whether the record in question is/was prepared, owned, used or retained by the local agency, Thurston County.

In ***West,*** the PRA request was for billing invoices from outside attorneys who were defending Thurston County in a lengthy wrongful termination case. Thurston County was part of the Washington Counties Risk Pool, a joint self-insurance liability pool. Pursuant to the joint self-insurance liability policy, the Risk Pool controlled the claim, hired and paid the attorneys, made all litigation decisions and had the authority to settle the case. Thurston County had responsibility to reimburse the Risk Pool for certain of the attorney's fees the Risk Pool had paid, but this responsibility ended when the fees added up to the County's deductible, which was $250,000. The outside lawyers ended up billing $1.9 million in their defense of Thurston County.

West made a PRA request of the County for all the attorney's bills, i.e., the bills for $1.9 million. The County only had the bills for which it bore reimbursement responsibility. The outside attorney's bills in excess of $250,000 were NOT prepared by the County, were NOT owned by the County since the Risk Pool paid them, were NOT used by the County to

make accounting or litigation decisions and were NOT retained by the County. Thus, Division Two ruled the bills of the outside counsel in excess of $250,000 were not the County's Public Records.

To include as a "public record" information automatically generated by the computer system that the County might retain or could use, where the County did not actually apply that data to any governmental purpose sweeps more broadly than the definition set forth in the PRA. One appellate court answered that precise question with a pragmatic, fact-based approach applicable here:

> 'Moreover, we find the public/private distinction simply begs the question. In theory, every document either prepared or handled by someone in a governmental capacity is within the public domain. If the term public record is to mean anything it must be more than who handles it. Instead, the issue of access to records should be determined by the role the documents play in our system of government and the legal process."

Cowles Pub. Co. v. Murphy 96 Wn.2d 584, 587, 637 P.2d 966 (1981) (search warrants and related affidavits are not Public Records because there is a common-law right to inspect or copy them from the court's records.) ***Cowles Pub. Co***. goes on to state "[a] Judge's notes in conference are not public simply because the individual is an elected official." ***Id.,*** at 587. In addition, "personal notes, as well as telephone messages and daily appointment calendars are not public records," in part,

"because they are generally created solely for the individual's convenience or to refresh the writer's memory, ..., are not circulated or intended for distribution within agency channels, are not under agency control and may be discarded at the writer's sole discretion." ***Yacobellis v. City of Bellingham***, 55 Wn. App. 706, 712, 780 P.2d 272 (1989) (questionnaires are Public Records).[11]

Regarding the Syslog data, Jefferson County is situated in a position similar to that of Thurston County in the ***West*** case. The Syslog data, at all times relevant to this PRA Complaint, had no relevance to the County's conduct, performance or decision-making process and thus were never used or needed by anyone at the County. Information Services Manager Shambley has never been asked to provide Syslog data to anyone at the County. CP 361, 362. ¶19, ¶25 to ¶27.

Pursuant to ***Cowles Pub. Co.***, simply because the logs were, in a technical sense, being automatically "prepared" by a self-executing, non-divisible software in the possession of the County and "owned" by the County because the data was and is being stored temporarily on County servers is not dispositive of whether the logs are a Public Record.

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[11] Similarly, reporters' notes or recordings (audio or video) made by a reporter of a government meeting are undoubtedly "writings" and they undoubtedly reflect or concern the "conduct of government," but would NOT be Public Records because they fail to meet the third prong of the three-part test for Public Records, they are not prepared, owned, used or retained by the agency.

The Syslogs were never considered "public records" by the County. This is indicated by the response of BoCC Clerk Delaney dated October 4, 2010 ("no responsive documents"), CP 214, and was relayed specifically to Belenski in his March 2011 conversation with Mr. Alvarez. CP 238, 631. It is also consistent with the fact that at the time of Request #3, the County had its software set at the default setting which caused the software to collect such data for only 15 days. CP 367, ¶56, ¶57. The County chose to leave the software in its default position and took NO AFFIRMATIVE ACTION to retain the Syslogs.[12] The Syslog data was not retained for more than 15 days because that data was not a "public record" that needed to be retained to document governmental actions. Thus, as fast as the County was collecting the Syslog data it was equally fast in deleting same. The County had no use for the Syslog data because in its native format it was both voluminous and non-informative.[13] CP 362, ¶26 to ¶29. At the time of Request #3 was the Syslog data:

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[12] The County is now using version 7.0 of Viewpoint, which allows the operator to set the "save data" rule in increments of months. Because the IAL have been the subject of a PRA request and thus, on the chance they are in fact Public Records cannot be destroyed per RCW 42.56.100, the County has set the "save data" rule at 13 months, or longer than the one year retention required under the Secretary of State's Record Retention regulations. CP 363, ¶30 to ¶32.

[13] In a similar vein, the County has the ability to create a list of all local calls made from each of its 290 or so landlines, but does not do so because there is no per-call cost to the County for these local calls and thus no reason for Central Services to bill the individual County departments to pay for the local calls. The same is true of the call log a facsimile machine is able to create. CP 361, ¶21, ¶22.

- Prepared by the County? No, it was automatically created by the firewall software program;

- Owned by the County? No, the data was automatically deleted after 15 days, akin to residential recycling;

- Used by the County? No, the Syslog data is too voluminous and non-informative to be useful and was never examined or audited by the County; and

- Retained by the County; No, the data was deleted after 15 days, the default retention period in the software.

In sum, the mere fact that the County might collect the Syslog data or that it had the ability to collect or evaluate such data is not sufficient to convert a record whose retention is entirely OPTIONAL into a Public Record whose retention would therefore be mandatory. Logically, then, because the Syslog data has not been extracted, reviewed, analyzed, relied upon, in whole or in part, for any action or governmental purpose by Jefferson County, the Syslogs have had ZERO impact on the conduct of Jefferson County government. The transitory nature of system logs (hence the shorthand name SysLogs) is also recognized by federal courts, who do not require this type of electronically stored information to be kept or produced in litigation. CP 585. [14]

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[14] The Court is directed to the "Model Protocol for Discovery of Electronically Stored Information in Civil Litigation" for the U.S. District Court for the Western District of Washington @ Section II.C.2(f) on page 4, where the Protocol states "absent a showing of good cause by the requesting party, the following categories of Electronically Stored Information need not be preserved: (f) Server, system or network logs." CP 588.

Belenski's briefing and self-serving Declarations provide only speculation that the County has used the Syslogs to determine which web sites should be blocked so that a County employee sitting at their County-provided PC is prevented from contacting that blocked web site. Belenski is forced to go back as much as almost 10 years, citing irrelevant memos from Central Services (the parent County department for Information Services) and eight year old lists of blocked web sites as his "evidence" that review of the requested logs helped the County decide which sites to block. Brief at 20-22; CP 31-37. None of those records either mention the Syslogs or describe any reliance on the Syslog as part of the process used to determine which sites to block. That Belenski has jumped to a convenient conclusion NOT supported by the very records he relies upon suggests this Court should ignore this argument.

B. BELENSKI MUST DEMONSTRATE THAT THE REQUESTED RECORDS ARE "PUBLIC RECORDS" UNDER THE ACT.

The question of whether the Syslogs are a "public record" is a threshold question for the Court's determination. ***Confederated Tribes of Chehalis Reservation v. Johnson***, 135 Wn.2d 734, 746, 958 P.2d 260, 265 (1998); ***Tiberino v. Spokane Cnty.,*** 103 Wn. App. 680, 687, 13 P.3d 1104, 1108 (2000). Belenski is incorrect when he argues that the County bears the burden of proof to show the requested Syslogs are not "public

records." (Opening Brief 11, 24). Such an assertion was squarely rejected by this Court in 2007:

> In a proceeding brought under [RCW 42.56.540,] the party seeking to prevent disclosure, here Dragonslayer and MT & M, has the burden to prove that the public record should not be disclosed. *Spokane Police Guild [v. Liquor Control Board],* 112 Wn.2d [20] at 35, 769 P.2d 283 [(1989)]. However, this burden of proof only applies when a party seeks to disclose a public record. Therefore, the initial inquiry is whether the financial statements meet the definition of "public record."

Dragonslayer, Inc. v. Washington State Gambling Com'n 139 Wn. App. 433, 441 (2007) (emphasis added). The burden does not shift to the County until after the "threshold" determination that the record is a "Public Record" has been made. Once the threshold inquiry of whether a document is a "Public Record" is met, then the burden to prove that an exemption applies shifts to the party seeking to prevent disclosure. ***Dragonslayer,*** 139 Wn.App. at 441.

C. IN ANY EVENT, THE COUNTY FULFILLED BELENSKI'S REQUEST FOR SYSLOG DATA.

Even if the Syslogs are "public records", the County satisfied its obligations under the Public Records Act by offering access to the Syslogs and by securing software to provide reports containing the information sought by Mr. Belenski. In response to his requests, the County is obligated to "make available for public inspection and copying all public

records". RCW 42.56.070(1). Such records must be "available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person." RCW 42.56.080. Because the Court may affirm on any grounds supported by the record, ***Gronquist v. Department of Corrections***, 177 Wn. App. 389, 396, 313 P.3d 416, 420 (2013) *review denied*, 180 Wn.2d 1004, 321 P.3d 1207 (2014), the court may affirm the Trial Court by holding that the County fulfilled its obligation when it offered to allow access to the available Syslogs in their native format and when it provided the requested information via reports generated by the upgraded WebSpy software.

Here, the County fulfilled this obligation in two ways. First, the County offered Mr. Belenski access to all the available Syslogs in its response on December 8, 2011. CP 379. Belenski never responded or took the County up on this offer. Additionally, as discussed by the parties in December 2011 and during their January 3, 2012 meeting, the County informed Mr. Belenski it had obtained upgraded WebSpy software to extract reports from the Syslog data to address Mr. Belenski's information requests. CP 369-372; 385. These were provided to him on a DVD on January 19, 2012. CP 372. Thereafter, the County considered these requests fulfilled. *Id.* That a declarant for Mr. Belenski asserts it was feasible to make an electronic copy of the internet access logs has no legal

significance because the County is held to the standard of reasonableness, not perfection with respect to PRA searches. ***Neighborhood Alliance v. County of Spokane***, 172 Wn.2d 702, 720, 261 P.3d 119, 128 (2011).

D. REQUEST #4 DOES NOT SEEK IDENTIFIABLE RECORDS

In Request #4 Belenski sought "electronic copies of every electronic record for which Jefferson County does not generate a backup." CP 239. The Court properly determined that this is not a request for identifiable public records, as required by RCW 42.56.070, and is not a valid request. Hence, the County did not violate the PRA when it responded to Belenski that this request does not seek identifiable records.

Under the PRA, a requester must seek "identifiable public records". ***Bonamy v. City of Seattle***, 92 Wn.App. 403, 960 P.2d 447 (1998). An agency need not respond to requests for information and does not violate the PRA by failing to respond to requests that do not provide a reasonable description of the specific records requested. The Act does not require agencies to research or explain public records, but only to make those records accessible to the public. ***Smith v. Okanogan Cnty.***, 100 Wn. App. 7, 12, 994 P.2d 857, 862 (2000); ***Bonamy***, 92 Wn.App. 403, 960 P.2d 447 (1998).

When the County informed Belenski it was unable to identify records by whether or not Information Services backed them up because the County never bifurcated its records in that manner (CP 237), Belenski doubled-down and insisted his false distinction between records backed up and those not backed up was sufficiently precise to allow the County to search its records for responsive records. CP 236. Belenski refused to clarify this request, expressly putting the burden back on the County to figure out what he was seeking, writing in a December 20, 2011 e-mail to IS Manager Shambley that he has "provided enough information that a Information Services employee would be reasonably expected to identify or locate it, and provide an electronic copy of it." CP 236.

That December 2011 e-mail wrongly attempted to shift the burden to the County to identify what records Belenski wanted in Request #4. "The PRA does not 'require public agencies to be mind readers.'" ***Levy v. Snohomish Cnty.***, 167 Wn.App. 94, 98, 272 P.3d 874, 876 (2012), ***quoting Bonamy v. City of Seattle***, 92 Wn.App. at 409,[15] (county reasonably sought clarification when requester wanted to see a document "my defense attorney showed me eight years ago" because the county

[15] ***Bonamy*** explains further: "An important distinction must be drawn between a request for information about public records and a request for the records themselves. The act does not require agencies to research or explain public records, but only to make those records accessible to the public. Nor does the act require public agencies to be mind readers." ***Id.***, 93 Wn.App. at 409.

could not know what defense attorney did or did not show the requester eight years previously.) Similarly, in ***Smith v. Okanogan Cty.***, Smith's assertion that "the County should have helped him properly identify the records he wanted" was expressly rejected by Division III as beyond the duty imposed on local governments under the Public Records Act. ***Smith,*** 100 Wn.App. at 15, n. 3.

In reality, Request #4 was a request for <u>information</u> about what the County had NOT DONE because it was a request for the electronic records the County had not backed up. In its essence, Belenski was asking the informational question "are there records that Information Services does not back up?" Request #4 was analogous to asking a person for a list of books you haven't read or a list of movies you haven't seen.

This was not a request by which the County could reasonably determine if a record was responsive by examining the record. Instead, it would be required to conduct research to answer Mr. Belenski's information request before it could determine if a record is responsive. "The [PRA] does not require agencies to research or explain public records, but only to make those records accessible to the public." ***Smith supra,*** 100 Wn.App. at 12, (citing ***Bonamy, supra,*** 92 Wn.App. at 409; ***Gronquist, supra,*** 177 Wn. App. at 401.

There is nothing in the statute that requires an agency to conduct the type of research needed to respond to this request. WAC 44-14-04002, citing ***Limstrom***, 136 Wn.2d at 604, n.3 (Act does not require 'an agency to go outside its own records and resources to try to identify or locate the record requested'); ***Bonamy***, 92 Wn. App. at 409 (act 'does not require agencies to research or explain public records, but only to make those records accessible to the public'). It is the requester's obligation to identify the requested record with sufficient particularity that allows the agency to determine whether it is requested. Here, the agency must necessarily conduct research to determine whether a record is responsive. For example, for any specific record, the County cannot determine if it is responsive after it is located. Nor could Mr. Belenski determine whether any specific record is responsive if the County were to bring one to him because reaching that decision would require additional information about every electronic record in the possession of the county. That is beyond the county's obligation.

In accordance with ***Bonamy, Levy*** and ***Smith,*** Request #4 was not a request for an "identifiable" public record as RCW 42.56.080 requires because the County does not organize its records by those which are backed up and those which are not. As a result, it does not have the ability to determine which records are responsive or not. The County's response

to Request #4 complied with the PRA and the County was properly granted Summary Judgment with respect to Request #4.

E. THE COURT PROPERLY UPHELD THE COUNTY'S APPLICATION OF EXEMPTIONS APPLICABLE TO EMPLOYMENT RECORDS FOR CHRIS GRANT.

Belenski has taken the unusual route of challenging as erroneous a ruling from the trial court below which was favorable to him, a ruling which awarded him $434.99 in costs. CP 270-273. He received those costs, costs associated with the filing of the lawsuit and arguing the motions in a neighboring county, because the judge below determined that only by filing the lawsuit did Belenski obtain what he was always entitled to: two Exemption Logs, each containing an adequate "brief explanation" as required by RCW 42.56.210(3). CP 273. Respondent Jefferson County did NOT cross-appeal on this issue.

The Trial Court reviewed the County's personnel documents concerning Mr. Grant *in camera* and held that the County properly applied the exemptions. In response, Belenski raises new arguments, including an assertion that the court failed to make findings that the information violated personal privacy or vital government interests. Brief at 33. Belenski did not make this argument below (or in his Verified Complaint) and cannot now raise this issue, which was never brought to Judge Wood's attention.

What Belenski did argue before the trial court (despite its absence in his Verified Complaint) is that the exemption in RCW 42.56.250(2) should not apply to Mr. Grant's records because he was not an applicant or an employee at the time of the request. This was properly rejected by the Trial Court because any employee must necessarily have been an "applicant". Likewise the court correctly applied RCW 42.56.250 to the employment records of Mr. Grant, even though he had recently resigned and was an "ex-employee" at the time of the request. Belenski cites no authority that the employee exemptions cease to apply upon termination of the employee's employment relationship. Such a result is contrary to ***Seattle Firefighters Union Local No. 27 v. Hollister***, 48 Wn.App. 129, 134, 737 P.2d 1302, 1305 (1987) where the Court held:

> The legislative intent to protect the privacy rights of public employees would, however, logically lead to the conclusion that the employee's exemption does not terminate upon retirement. Therefore, even though the individuals who are the subject of these records have retired, they are still protected by the public employee exemption of RCW 42.17.310(1)(b).

To challenge his only success at the trial court Belenski has gone far astray from any allegation found in his Verified Complaint regarding his request for records relating to Chris Grant, a former County employee, what came to be known as Request #5. CP 198, 199. By way of example only, Belenski now argues that A) the statutory exemptions listed on the

disputed Exemption Logs do not apply to what was exempted and B) the records deemed entirely exempt by the County and the trial court were, at most partially exempt from production to him. (Opening Brief 30-32).

Despite their absence from the Verified Complaint, Belenski has argued these theories in various briefs submitted below. In response, the County has never argued the merits of these "not raised in the Complaint" allegations except to point out that they were not found in the Verified Complaint. CP 625.[16] However, "a party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." ***Dewey v. Tacoma School Dist. No. 10,*** 95 Wn.App. 18, 27, 974 P.2d 847 (1999) (Dewey never alleged a First Amendment violation in his complaint and despite so arguing in his briefs and oral argument that issue was not tried by implication and would not suffice to overturn the school district's successful motion to dismiss.) See also ***Molloy v. City of Bellevue***, 71 Wn.App. 382, 385-386, 859 P.2d 613 (1993) (rejecting plaintiff's "veiled attempt" to amend his complaint by raising a theory of wrongful termination in response to summary judgment motion).

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[16] The County made different arguments about Request #5 on two other occasions and never argued the merits of the allegations Belenski has attempted to insert into this litigation via his briefing. See CP 508, 509, 597, 598.

Moreover, Mr. Belenski relies upon information that he failed to present to the trial court until his second motion for reconsideration in December 2013. See Opening Brief at 34: CP 415, 443-445. These were belatedly obtained by Belenski's later request to the County Auditor and Assessor on November 21, 2013, after the issue was already argued on November 1, 2013 and the Court had issued its memorandum decision on November 11, 2013. The Court properly denied reconsideration because Belenski should have presented this information during the briefing of the matter and he failed to proceed with reasonable diligence as required by CR 59(a)(4). CP 268. Belenski fails to demonstrate any error in this decision or that it was an abuse of discretion. ***Drake v. Smersh***, 122 Wn.App. 147, 151, 89 P.3d 726 (2004).[17]

The belated allegation that a "screen shot" record was "silently withheld" is unsupported by fact or law. That record was expressly described in the exemption log given to Belenski as required by ***PAWS v. University of Washington***, 125 Wn. 2d 243, 884 P.2d 592 (1994), CP 254, and was reviewed by Judge Wood, as Belenski concedes. Brief at 32. It was not silently withheld. Mr. Belenski speculates that the County wanted

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[17] Even if allowed to present the new evidence, it was obtained from different county offices from where Belenski directed Request #5. His original request was directed to the Board of County Commissioners and sought employment records. CP 249. The County did not err in responding from the BoCC rather than other County offices. See ***Koenig v. Pierce County***, 151 Wn.App. 221, 233-34, 211 P.3d 423 (2009) (records from Sheriff need not be provided where request sent to Prosecutor).

to hinder him from contacting Grant and prevent him from finding out Grant's contact information to prevent him from telling what he knew about the request for Syslog data. Brief at 35. This specious argument ignores that Belenski had the opportunity to seek discovery in this matter, which delayed the original hearing of the County's summary judgment motion. Given the availability of discovery, the County could not have hoped to hamper Belenski's efforts or hide the ball in the fashion imagined by Belenski.

Because Belenski cannot now present any theory for relief that was never asserted in his Verified Complaint this Court should affirm the trial court's ruling on Request #5. He has already won on this issue and the County did not cross-appeal with respect to Request #5.

F. BELENSKI'S CLAIMS FOR THE FIRST AND SECOND REQUESTS WERE UNTIMELY UNDER THE PRA'S STATUTE OF LIMITATIONS.

Allegations of PRA violations arising from Requests #1 and #2 became untimely on October 11, 2011, more than 13 months before the Verified Complaint was filed. The controlling precedent in this context is ***Bartz v. State Dept. of Corrections Public Disclosure Unit***, 173 Wn. App. 522 (2013), *review denied*, 177 Wn.2d 1024 (2013). In ***Bartz*** this Division ruled that when a public agency provides a single response, even where that single response was not a "last installment" and was not

accompanied by an exemption log, the one-year Statute of Limitations found in RCW 42.56.550(6) applies to a PRA lawsuit challenging the lawfulness of that single response.

Both the trial court and Division Two applied the one-year Statute of Limitations found in RCW 42.56.550(6) and found the lawsuit filed 14 months after the agency's response to be time-barred. Presiding Judge Hunt provided the following reasoning:

> Bartz filed his claim more than one year, but less than two years, after DOC's last disclosure under PDU–8623. Thus, we must decide whether (1) Bartz's action was time-barred because DOC triggered the one-year statute of limitations, RCW 42.56 .550(6), with its production of one installment of documents; or (2) Bartz's action was not time-barred because there is no statute of limitations that applies to a PRA action based on an agency's production of a single installment. Following our reasoning in *Johnson,* we reject the second alternative because it would be an absurd result to conclude that the legislature intended no statute of limitations for PRA actions involving the production of a single volume of documents. *Johnson,* 164 Wn.App. at 777, 265 P.3d 216; *see also Cannon v. Dep't of Licensing,* 147 Wn.2d 41, 57, 50 P.3d 627 (2002) ("This court will avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences.") It would also be absurd to conclude that the legislature intended to create a more lenient statute of limitations for one category of PRA requests in light of its 2005 deliberate and significant shortening of the time for filing a claim from five years, under the old Public Disclosure Act, to one year, under the PRA."

Bartz, at 536-37.

On September 27, 2010 Belenski requested "inspection of the [IAL] from February 1, 2010 to September 27, 2010." CP 211. The County later called this Request #1. The County's sole response to Request #1 dated October 4, 2010 (CP 214) of "no responsive records" may have spurred Request #2, which was an email time-stamped outside business hours on October 7, 2010. This request asked for the Certificates of Destruction for the 2010 IAL sought in Request #1 and the Records Retention schedule for IAL. CP 216. The County fully responded to Request #2 on October 11, 2010 by sending Belenski a single email with one attachment. CP 218.

As a result of the single unified responses to both Requests #1 and #2, Belenski had only one year to bring his lawsuit alleging that those responses did not comply with the PRA. He failed to do so. Instead, Belenski waited more than two years before filing suit on November 19, 2012. Any allegations relating to Requests #1 and #2 are time-barred by the one-year statute of limitations stated in RCW 42.56.550(6) as interpreted by ***Bartz***.

Alternatively, these requests (Requests #1 and 2) are barred by RCW 4.16.030's two year statute of limitations. The Court may affirm the trial court on any ground that the record supports. ***Johnson v. State Dep't***

of Corr., 164 Wn. App. 769, 779, 265 P.3d 216, 220 (2011) (affirming dismissal because it was untimely under both RCW 42.56.550(6) and RCW 4.16.030.)

IV. CONCLUSION

Based upon the analysis found in this Brief this Court should affirm all of the decisions rendered below by the trial court.

DATED this 21st day of May, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

MIKE BELENSKI, Appellant, v. JEFFERSON COUNTY, Respondent.	**COURT OF APPEALS** **NO. 45756-3-II** **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on May 21, 2014, I caused to be filed via UPS Overnight Mail from Tumwater, Washington, with the Clerk of the Court of Appeals, Division II, Brief of Respondent Jefferson County and this Certificate of Service. On this same date, via UPS Overnight Mail and electronic mail, I served the foregoing documents on Appellant Pro Se at the following address:

Mike Belenski
P.O. Box 1132
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Dated this 21st day of May, 2014 at Tumwater, Washington.

LAW, LYMAN, DANIEL,
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