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No. 71425-2-I

IN THE COURT OF APPEALS, DIVISION ONE

ANNE BLOCK,

Appellant,

v.

CITY OF GOLD BAR,

Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent City of Gold Bar ("City" or "agency") does not care for the requestor Anne Block, as the briefing here and below illustrate. The venom in its ink and arguments is not disguised. There are not enough pages in this Reply Brief, or hours in the day, to defend against the misstatements made about Appellant Anne Block or the mischaracterization of her actions. But such should not be required, as the PRA and its application has no bearing on the identity of the requestor, and this Court has a duty to apply the law fairly to each and every litigant coming before it, to look at the facts of the specific case, and to realize the decisions reached will impact the interpretation of the law for all future agencies and requestors. The positions the agency urges here would unravel the Public Records Act ("PRA") and ignore forty years of PRA precedent. The agency is wrong. Ms. Block is right. No amount of mud-slinging should change that.

II. LEGAL AUTHORITY AND ARGUMENT

A. Standard of Review and Burden of Proof

The City argues that the requestor bears the burden of proof in a Public Record Act ("PRA") case when the requestor files a summary judgment motion, and that an agency only bears the burden of proof when a requestor proceeds through a show cause hearing. Resp. Brief at 12-13.

This novel theory is contradicted by a decade of binding case law as well as the PRA itself, as will be explained below. Numerous PRA cases have been decided on summary judgment motions and cross-summary judgment motions, as this one was here, and the agency at all times bore the burden of proving that all responsive records had been identified, that all non-exempt records had been produced, that for any records not produced an exemption applied, and that an adequate exemption log had been provided. See, for example, cases below. Respondent may misconstrue the law by focusing on non-PRA summary judgment cases, but under the PRA the law is clear. An agency does not avoid its clear statutory burdens under the PRA simply because the parties proceed through a summary judgment rather than a "show cause" hearing, whether the requestor bring the summary judgment hearing, the agency does, or like there the matter is heard on cross motions.

For example, **Neighborhood Alliance v. County of Spokane**, 172 Wn.2d 702, 261 P.3d 119 (2011), was a PRA case decided on cross motions for summary judgment, like here. The State Supreme Court clearly stated in its analysis:

> Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. RCW 42.56.070(1). **The burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the**

> **document itself and explain how the specific exemption applies in its response to the request**. RCW 42.56.550(1); *Sanders v. State,* 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010).

172 Wn.2d at 714 (emphasis added). **Koenig v. Thurston County**, 175 Wn.2d 837, 287 P.3d 523 (2012), was also decided on a summary judgment motion, this one brought by the requestor. The State Supreme Court clearly stated "The agency claiming the exemption bears the burden of proving that the documents requested fall within the scope of the exemption." 175 Wn.2d at 842.

Gendler v. Batiste, 174 Wn.2d 244, 252, 274 P.3d 346 (2012), was another PRA case decided on a summary judgment motion. On appeal, the State Supreme Court held "If there is any dispute over the government agency's obligation to disclose public records, the burden of proof is 'on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.'" 174 Wn.2d at 252 (quoting RCW 42.56.550(1)). **Freedom Foundation v. Gregoire**, 178 Wn.2d 686, 310 P.3d 1252 (2013), decided on summary judgment by the trial court and appealed to the State Supreme Court, held "Under the PRA, the agency bears the burden of showing that records fall within a statutorily specified exemption." 178 Wn.2d at 694. In **Soter v.**

Cowles Publishing, 162 Wn.2d 716, 174 P.3d 60 (2007), on review of a grant of summary judgment on an exemption claim for attorney client privilege and work product, the State Supreme Court held "Agencies bear the burden of establishing that a particular disclosure exemption applies." 162 Wn.2d at 731.

In **West v. Department of Licensing**, __ Wn. App. __, 331 P.3d 72 (Div. I, 2014), this Court, in a review of a PRA case decided on summary judgment, held that "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." 331 P.3d at 74. In **Mechling v. Monroe**, 152 Wn. App. 830, 222 P.3d 808 (Div. I, 2009), this Court reviewing a summary judgment grant related to the adequacy of an exemption log and exemption based on attorney client privilege, held "A governmental agency withholding a public record bears the burden of establishing that 'refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records'" and "The party asserting attorney-client privilege has the burden of showing that the privilege exists and the requested documents contain privileged communications." 152 Wn. App. at 842, 852..

Division Three in **Andrews v. Washington State Patrol**, — P.3d —, 2014 WL 4627656, (Wash. App. Ct. Div. III, Sept. 16, 2014), on appeal of a ruling on cross motions for summary judgment in a PRA case regarding the reasonableness of the estimate for the time for production, held "Summary judgment is appropriate if reasonable persons could reach only one conclusion from the evidence presented. In an action to enforce the PRA, the burden of proof is on the agency to show that the agency's estimated response time was reasonable." **Id.** at *3 (citing RCW 42.56.550(2)). In **Haines-Marchel v. State Department of Corrections**, — P.3d —, 2014 WL 4627661 (Wash. App. Ct. Div. II, Sept. 16, 2014), Division Three reviewed another PRA case decided on cross motions for summary judgment holding "The burden of proof shall be on the agency to establish that refusal to permit inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." **Id.** at *2.

In **Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120 (2010), a review of a ruling on cross motions for summary judgment, the State Supreme Court made clear the agency bore the burden of proving cited exemptions applied and that its exemption identification and explanation was sufficient, discussing summary judgment "questions of fact" matters

only as to the factual claim the requestor had narrowed his request. 169 Wn.2d at 844-858.

The above are just a sampling. The City at all times bore the burden of proof that it had complied with the PRA, regardless of the fact both parties here presented the issue in a summary judgment hearing rather than calling it a "show cause" proceeding solely by affidavits.[1] All agency action is reviewed de novo. RCW 42.56.550(3); **Neighborhood Alliance,** 172 Wn.2d at 715. The trial court's decision to grant and deny the summary judgment motions is similarly reviewed de novo. **Neighborhood Alliance,** 172 Wn.2d at 715. As will be explained below, the City failed to meet its burden and summary judgment should have been denied to the City and granted to Block.

B. An Agency is Not Afforded a "Presumption of Good Faith" in a PRA Case.

The City further argues that courts should afford a "presumption" of "good faith" to all declarations of an agency at least as to the issue of a reasonable search. This is taken from dicta in **Forbes v. Gold Bar**, 171 Wn. App. 857, 867 n.11, 288 P.3d 384 (Div. I, 2012), where a panel of

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[1] See also RCW 42.56.550(1); **Progressive Animal Welfare Society v. University of Washington ("PAWS II")**, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("The agency bears the burden of proving that refusing to disclose" records is in accord with the PRA); **Zink v. City of Mesa**, 140 Wn. App. 328, 334, 166 P.3d 738 (2007) ("When a record request is subject to the P[R]A, the burden of proof is on the agency to establish the applicability of a specific exemption.")

this Court mistakenly relied upon federal FOIA caselaw wholly at odds on this point with the PRA. Such deference was specifically not presumed by the State Supreme Court in **Neighborhood Alliance**, where the Court required agencies in trying to prove the reasonableness of their search efforts to provide "reasonably detailed, nonconclusory affidavits submitted in good faith" documenting "the search terms and the type of search performed, and they should establish all places likely to contain responsive materials were searched." **Neighborhood Alliance**, 172 Wn.2d at 721. The State Supreme Court did not declare a presumption for "good faith" in all agency submissions. Rather the State Supreme Court specifically recognized that agencies may be motivated to hide the truth to avoid PRA liability, requiring discovery to get the truth:

> [T]he agency's motivation for failing to disclose or for withholding documents is relevant in a PRA action....An agency that sought clarification of a confusing request and in all respects timely complied but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld known records and **then lied in its response** to avoid embarrassment. Discovery is required to differentiate between these situations.

172 Wn.2d at 717-18 (emphasis added). Just as agencies continue to bear the burden of proving they complied with the PRA in all respects, agencies further are afforded no deference or "good faith" presumption when their actions and declarations are evaluated.

C. Block Established a Right to Summary Judgment and a Rejection of Summary Judgment to the Agency.

The City admits Block made a PRA request for identifiable records. The City admits, or at least does not and cannot deny, that the records at issue—those the City identified as well as those the City did not—were "public records" under the PRA. The City cannot deny that the records it identified and withheld, as well as those it did not identify but which Block obtained later, existed at the time of Block's PRA requests at issue here and existed when the agency erroneously told Block all responsive records had been identified or provided in February 2009. The City further does not and cannot dispute what it said, and did not say, in its withholding explanations. The logs are in the Court's hands, as are the records lodged for in camera review.

The City, not Block, bore the burden of proving all records not produced were exempt, that those records were adequately identified on an adequate exemption log, and that it performed an adequate search to determine if any further records existed. The City failed to meet its burden on all counts.

Sixty-six pages of emails were intentionally withheld in their entirety, 29 pages of records were produced in redacted form, and several responsive records were not identified or produced by the City at all in

response to Block's December 2008 and February 2009 PRA requests and then were either produced later in response to other PRA requests or have still not been identified or produced by the City but Block proved their existence because she obtained the records from other sources. See, e.g., CP 444-47, 449, 455-58, 462-67, 468-72, 479-80, 568, 572-74. The City takes issue with a few pages of such records—reading the requests too narrowly rather than broadly as the PRA requires, but the City cannot deny some of those after-produced records and after-obtained records are clearly responsive records the City did not produce in February 2009 when it said no other records existed and it closed Block's requests.

The City, nonetheless, seeks to avoid PRA liability claiming the lack of identification or production was not a "withholding" because, it claims, the only issue is whether or not its search for records was "reasonable" when it said no further records existed. And it argues its explanations, despite binding precedent to the contrary, should be deemed good enough and not probed further. The City's arguments should be rejected.

1. Silently Withheld and Not Identified Records.

An agency that does not produce a responsive non-exempt record does not avoid PRA liability by showing its original search was "reasonable" when faced with evidence from the requestor that a non-

exempt record in fact existed that was not produced. That record was not identified. It was not disclosed. An exemption for it was not provided on a withholding log. It was silently withheld. The **Neighborhood Alliance** case supports this result. The State Supreme Court stated:

> An agency that sought clarification of a confusing request and in all respects timely complied but mistakenly overlooked a responsive document should be sanctioned less severely than an agency that intentionally withheld known records and then lied in its response to avoid embarrassment.

172 Wn.2d at 717-18. The Court recognized the agency that performed the reasonable search but "mistakenly" overlooked a record would still be sanctioned. A "reasonable search"—when evidence was presented showing records did exist and were not produced—does not immunize the agency for the PRA violation of not producing that record or identifying it.

Block proved she (1) made a PRA request for identifiable public records, (2) that public records responsive to that request existed at the time of her request, (3) that those records were not produced to Block when the City told her all records had been provided. The City did not prove, and has not argued, that those records were exempt. They instead admit the records were not produced but claim a reasonable search was conducted that allegedly failed to uncover them. This should have led to a

denial of the agency's summary judgment and granting of Block's motion as to this issue alone.

The City's references to **BIAW v. McCarthy**, 152 Wn. App. 720, 218 P.3d 196 (2009), or **West v. DNR**, 163 Wn. App. 235, 258 P.3d 78 (Div. II, 2011), does not change this fact. **BIAW** case dealt with a claim other records may exist, and specifically did not address whether the PRA was violated when the requestor presented records obtained from other sources or the agency itself. 152 Wn. App. at 741. The **West** case dealt with records that had been deleted due to a server change more than year before the records had been requested (163 Wn. App. at 244), rather than here, where the City claims its technology was inadequate but does not claim, and cannot claim, records were destroyed before they were requested.

Here, the City tries to excuse its failure to identify and produce responsive records to Block citing a winter storm and inadequate technology, the latter of which was a situation created by the City. These excuses cannot support a finding for the City. The Supreme Court has held, "**It has long been recognized that administrative inconvenience or difficulty does not excuse strict compliance with public disclosure obligations**." **Gendler**, 174 Wn.2d at 252 (emphasis added). The City took three years to produce some additional responsive records to Block—

silently providing them in response to a later request—after it told her no further records existed, and it has never provided some responsive records; Block only learned of their existence when she obtained them from other agencies. See Brief of App. pp. 9-15.

The fact that Block obtained records from other sources, or from the City in connection with later PRA requests, does not immunize the City's failure to produce the records originally. "The fact that the requesting party possesses the documents does not relieve any agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties." **Haines-Marchel v. State Department of Corrections**, —P.3d —, 2014 WL 46277661, *9 (finding PRA violation by agency where requestor obtained from another source less redacted version of records; "we must remand for entry of an order directing the Department to disclose it to [Plaintiff]").

2. Inadequate Exemption Citation and Explanation.

The City admits the PRA requires a detailed exemption log and explanation of how exemptions to the records withheld or redacted, and criticizes the withholding logs in the **Sanders** case as being obviously inadequate since they failed to cite, to a Supreme Court Justice, the controversy at issue to explain the work product exemption. Yet the City

argues Block, who is a licensed attorney, should be deemed to know what was meant, but was not stated, in the City's logs. An agency must provide an explanation of each record withheld, blanket explanations for entire categories are insufficient, and there is no support for finding a lawyer requestor deserves a lesser explanation than any other member of the public (nor does the **Sanders** case dealing with a Supreme Court Justice support such a claim). RCW 42.56.210(3); **Residential Housing Ass'n v. City of Des Moines**, 165 Wn.2d 525, 539, 199 P.3d 393 (2009) ("**RHA**"); **Sanders**, 169 Wn.2d 827. The trial court in its ruling further did not state which of the exemptions it found applied stating they were exempt as attorney client privilege "and/or" work product. CP 29.

3. The City Did Not Prove All Withheld Records or Portions of Records Were Exempt.

The City withheld 66 pages of records in their entirety based on a claim that they were privileged as attorney client privilege "and" work product. CP 534-538. The City produced 29 pages of heavily-redacted records also based on this same attorney client privilege "and" work product exemption claim, without explanation. CP 448, 453, 475-78, 481-86, 488-512, 539-44. Block was not required to prove the absence of privilege. The City had to prove the exemptions applied. Rarely will every portion of a record be exempt, particularly in the context of attorney-client

privilege or work product. Header information in an email, for example, would contain non-exempt information such as the date and time and sender and recipients. Nonetheless, the trial court granted summary judgment to the City despite its withholding in their entirety 66 pages of records based attorney client privilege and/or work product. At a minimum, redacted copies should have been ordered produced to Block.

The PRA exemptions for work product and attorney client privilege are narrow. An agency may not redact records simply because an attorney was involved in creating the record or in carrying out the ordinary business of the agency. **See Hangartner v. Seattle**, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); see also GR 24(a) ("The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person training in the law.").

The 29 pages of heavily-redacted records produced by the City were records responsive to Block's request for records related to the City's efforts to respond to her December 2008 PRA Request. They constitute records, including communications copied to or sent by lawyers working for the City related to the search and gathering of records responsive to Block's request, a task typically assigned to a non-lawyer and not typically deemed "legal" work. In March 2012, Block's attorney deposed the City

Clerk Laura Kelly. Block's attorney asked the City Clerk a series of questions about the redacted emails, specifically including the emails exchanged between December 12, 2008, and January 23, 2009, regarding Block's PRA request for records relating to Karl Majerle. CP 455, 584-89. Block was unable to obtain significant information about whether Mayor Hill had retrieved or produced her emails in response to Block's PRA request because the City broadly asserted that the redacted contents of the emails was privileged. CP 587-89. The City claims that the attorney-client privilege is not limited to legal advice and took the position that communications relating to the City's efforts to identify, gather, and produce responsive records are also privileged if that work is done by attorneys or if such communications are sent to or from attorneys. The City's argument (and the trial court's ruling) applies the attorney-client privilege exemption far too broadly, and would allow an agency to withhold the very records that show whether or not a reasonably adequate search was actually made. The City did not prove the exemptions applied to each portion of a record withheld.

4. Adequacy of Search Not Shown by Agency.

Finally, the City did not establish a reasonable search under **Neighborhood Alliance.** Block's discovery was obstructed by the agency's claim all records related to the adequacy of the search could be

shielded by attorney client privilege or work product, and that its records officer could not discuss the specifics of the search. See Brief of App. at 35-38; CP 455, 584-89. The question of whether or not the search was reasonable and whether or not additional responsive records exist or existed should have been reserved, according to **Neighborhood Alliance**, until discovery could be conducted as to the actions taken by the agency without obstruction based on alleged privilege. This required a denial of the City's motion for summary judgment until the adequacy of the search could be explored. It is undisputed that the City did not identify or produce a single email recovered by Mayor Hill from her emails even though it is undisputed that Hill used her personal email account for City business, including the Majerle matter. Emails from others within the City or the attorneys' offices were provided, but the only information offered was a belatedly-produced email from Hill in response to a request for her emails stating the records would be in paper files attorney Lawrence possessed (with no evidence Hill ever provided such emails to Lawrence). In other words, the only information offered shows Hill told her City to go ask Lawrence for records and did not provide those records herself. The City's belated tortured interpretation of the meaning of that message could not have supported summary judgment for the City.

The **West v. DNR** case cited by the City involved detailed declarations from expert witnesses showing how emails had been deleted a year before they had been sought. **West**, 163 Wn. App. at 240. The **BIAW** case cited by the City also involved a declaration from a computer expert. **BIAW**, 152 Wn. App. at 729-30. Here, the City offered self-serving, conclusory, and inadmissible declarations, relying largely on Mayor Hill who has no technical expertise, to explain the scope of its search and its allegations why more records should not be presumed to exist. Hill's Declaration made clear she had no computer training and technical expertise and was not competent to make the required showing. **Davies v. Holy Family Hosp.**, 144 Wn. App. 483, 493, 183 P.3d 283 (2009) ("affidavits made in support of, or in opposition to, a motion for summary judgment must … affirmatively show that the affiant is competent to testify to the matters there." (citing CR 56(e)).

So while Block need not show the City's search was "reasonable" to prevail on her motion for partial summary judgment, the City did not demonstrate its search was reasonable to uncover all responsive records as the place most likely to contain the responsive records – Mayor Hill's email accounts – were not searched until many months after Mayor Hill had resigned and many months after its response to Block.

D. The PRA Must be Construed Broadly in Favor of Disclosure

The Supreme Court of Washington interprets the PRA as "'a strongly worded mandate for broad disclosure of public records.'" **Amren v. City of Kalama**, 131 Wn.2d 25, 31, 929 P.2d 389 (1997) (quoting **PAWS II**, 125 Wn.2d at 251). Additionally, the reviewing court is to liberally construe the PRA's disclosure provisions, and interpret exemptions narrowly. The PRA's instructions to a court on the interpretation of the Act are unusually strong:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030; **PAWS II**, 125 Wn.2d at 260 ("[the Legislature took] the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly."); WAC 44-14-01003 ("The [PRA] emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records."). Strict compliance with the disclosure provisions of the PRA is required—substantial compliance is insufficient. **See Zink**, 140 Wn. App. at 340

(holding trial court erred when it concluded substantial compliance with PRA was sufficient).

Block proved her entitlement to partial summary judgment. Applying the PRA as mandated above, necessarily means the City did not prove its case. Reviewing the issue de novo, as this Court must, requires a reversal of the grant of summary judgment to the City and a grant of partial summary judgment to Block as sought.

III. CONCLUSION

For the reasons set forth above, Block respectfully requests that this Court reverse the trial court's grant of the City's Motion for Summary Judgment and denial of Block's Motion for Partial Summary Judgment, award her attorneys fees and costs on appeal and below and remand for a determination of statutory penalties.

RESPECTFULLY SUBMITTED this 25th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 25, 2014, I delivered a copy of the foregoing Brief of Appellant by U.S. Mail to the following:

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