No. 92220-9

SUPREME COURT OF THE STATE OF WASHINGTON

No. 71425-2-I

IN THE COURT OF APPEALS, DIVISION ONE

ANNE BLOCK,

Appellant/Petitioner,

v.

CITY OF GOLD BAR,

Respondent

BLOCK'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Anne Block was the Plaintiff in the trial court and the Appellant in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

The Division One Court of Appeals issued an unpublished opinion on June 22, 2015, and granted a Motion to Publish by the Washington State Attorney General's Office on August 12, 2015. The Opinion and Order Granting the Motion to Publish are attached hereto as **Appendices A and B**. The Opinion upheld the trial court's grant of summary judgment to the City of Gold Bar ("City") on this Public Record Act ("PRA") case and denial of partial summary judgment to the requestor, and denied the requestor fees, costs and penalties.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether Division One erred in shifting the burden of proof to the requestor on all issues?

2. Whether Division One erred in upholding the grant of summary judgment to the City and denial of partial summary judgment to Block and erred in refusing to award fees and costs to Block and remanding for a determination as to penalties?

3. Whether Division One erred in equating the City's claim of a "reasonable search" as the only required element for a showing an adequate response?

4. Whether Division One erred in finding that the City's exemption log for the 2/27/09 productions did not violate RCW 42.56.210(3) and **Sanders v.**

State by not providing a clear explanation of the records withheld, the alleged exemptions, and a brief explanation of how the exemptions apply to the withheld records?

5. Whether Division One erred in finding the City did not violate the PRA by not providing all responsive records to Block on February 27, 2009, failing to identify the records not produced, and failing to perform an adequate search?

6. Whether Division One erred in finding that the City did not violate the PRA by withholding 66 pages of records in their entirety, including header information, which no court ever reviewed, based on alleged attorney client privilege and work product privilege?

7. Whether Division One erred in finding the City did not violate the PRA by providing 29 pages of significantly redacted records based on claims of attorney client privilege and work product privilege and, for some records, a "draft" exemption?

IV. STATEMENT OF THE CASE

Block incorporates herein her Brief of Appellant, pages 1-17, setting forth the detailed factual history and record. Block made two PRA requests to the City of Gold Bar, one for records related to the investigation and termination of employee Karl Majerle theft and sabotaging the City's water system, and the other for records related to the City's efforts to respond to that first request. See **App. C** hereto, Brief of Appellant, at 1-17. Both requests included a request for emails on public or private email accounts. Gold Bar Mayor Crystal Hill did not have a City email address and used her personal and a non-government employment email extensively for City business. **Id**. Despite Mayor Hill's extensive use of email, the records produced by the City included only 10 pages of scanned

email messages relating to Majerle, four of which were identical copies of the same email dated 9/18/08, from Mayor Hill to City Clerk Laura Kelly, produced from Kelly's copy. CP 453, 524-533. The emails were dated from 9/18/08-10/15/08. CP 453, 524-533. None of the emails were contemporaneous with the Majerle incident in June 2008. CP 453, 524-533. The City withheld from the first request 66 pages of emails and other records in their entirety. CP 534-38. These records were identified in a privilege log provided on 2/27/09, stating the City was withholding the records in their entirety as "Exempt under Attorney Client Privilege/work product RCW 5.60.060(2)(a) and Hangartner v. City of Seattle 151, [sic] Wn.2d 439 (2004) and Exempt-RCW 42.56.290 and under Washington case law, notably *Harris v. Drake*, 116 Wn App. [sic] 261, aff'd 1252 Wn.2d 480." This same statement, typographical errors and all, was repeated for each of the entirely-withheld records in the log. CP 535-38 (italics in original). The log did not reveal the subject of any of the records or explain the alleged controversy at issue for purposes of RCW 42.56.290 or explain how the two cases cited applied to the records. Both privileges (attorney client privilege as well as work product) were cited for every one of the withheld records, including records that purported to be notes of an attorney and had not been communicated to anyone. See CP 537-538 (descriptions for withheld documents 679-710 and 717-722). The City never lodged these records with

the Court for an in camera review even when it filed a summary judgment motion asking the Court to hold the records were privileged.

The City also redacted 29 pages of redacted emails in response to request two based on identical exemption log language, only adding a "drafts" exemption with no explanation for a few additional documents. See **App. C** at 8; CP 448, 453, 475-78, 481-86, 488-512, 539-44. The 29 pages of redacted records were dated from 12/12/08-2/13/09. CP 453, 539-44. The email records should illustrate what efforts, if any, were made by Mayor Hill or the City to retrieve and produce records responsive to the 1st PRA request dated 12/8/08-12/9/08 particularly whether any attempt was made to obtain and preserve Hill's emails at that time. See sealed unredacted versions of records attached to CP 34, docket 38, (See Index to Clerk's Papers Vol. I p. 2 "Exhibit to Follow Under Separate Cover"). The City refused to answer discovery regarding the contents of these records or its steps to search for and produce records and specifically instructed witnesses not to answer questions on these subjects during depositions taken by Block in this case.

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 12/12/08 and 1/23/09 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 as the Kelly transcript shows:

> Q. Do these emails address – the redacted portions of these emails address the question of whether or not Crystal Hill had responsive records?
>
> MR. MYERS (City's attorney): I'm going to object on the grounds that the content of the redactions is withheld as attorney-client privilege and it's inappropriate to ask for the content of the privileged materials, and instruct the witness not to answer...
>
> Q. Does anything in these emails address whether or not Crystal Hill had actually provided records to you and Cheryl Beyer [for review]?
>
> MY MYERS: I'm going to object... [and] instruct the witness not to answer.
> Q. Do these redactions address whether or not the City has completed the process of searching for responsive records?
>
> MR. MYERS: Same objection. Same instruction.
>
> Q. Do these redactions address whether or not the City has finished the process of reviewing the documents that it has obtained?
> MR. MYERS: Same objection. Same instruction.

CP 587-89.

The 2/27/09 production was the City's sole production for the December 2008 and February 2009 PRA Requests at issue in this lawsuit. The City claimed it had produced all non-exempt responsive records on that date and closed Block's request. In the 2/27/09 production, the City did not identify or produce a number of records that were responsive to Block's two requests for records at issue in this appeal. See, e.g., CP 444-47, 449, 455-58, 462-67, 468-72, 479-80, 568, 572-74. Some of the records produced by the City on

2/27/09 were incomplete, and other responsive records were not mentioned or identified at all and were obtained by Block later from other sources. **Id.** Some additional responsive records were produced by the City in November 2009, 2010, 2011 and 2012 in response to different requests for records. CP 444-47, 449, 455-58, 465, 468-69, 471-72, 479-80, 568, 572-74.

Block filed a motion for partial summary judgment on 7/9/13, seeking a finding that the City violated the PRA by failing to produce responsive records, failing to produce redacted copies of records that the City asserted were exempt as privileged or work product, and failing to explain how exemptions applied to redacted or withheld records as required by RCW 42.56.210(3). CP 590-613. The City also moved for Summary Judgment argued it had made a reasonable search for records and that it was Block's burden to prove the agency had violated the PRA, all the while refusing to provide discovery as to specifics of what it did to search and identify records on the basis of alleged privilege. Thirty-five pages of redacted records were reviewed in camera. CP 34 (sealed exhibit sent to Appellate Court under separate cover). On 10/2/13 the trial court granted the City's motion for summary judgment and denied Block's motion for partial summary judgment. CP 29. Its sole findings regarding withheld or redacted records related to the 35 pages it reviewed in camera and ignored the 66 pages of entirely-withheld records and all the records Block identified that had never been produced by the City or were produced after the City claimed all records had been

produced. The entirety of its findings for the summary judgment decisions stated as follows:

> 2.1. [A]l of the documents qualified as either work product and/or attorney-client privilege and the exemption logs correctly reflected the applicable exemptions.
> 2.2. The records reviewed in camera are all protected by either or both the work product or attorney-client privilege. Some of the records contain information regarding the search for records responsive to Block's PRRs, but in the context of attorney communications.

CP 29 (10/2/13 Order.) The record made clear that the trial court had improperly shifted the burden to Block in this PRA case, as the City had urged, in a manner that even Division One agrees was error. See Opinion at 4. Nonetheless, Division One also improperly shifted the burden to Block in its Opinion and upheld the grant of summary judgment to the City, the denial of partial summary judgment to Block, and denied Block any fees, costs or penalties in the matter. This Petition follows.

V. ARGUMENT

Review should be granted pursuant to RAP 13.4(b)(1)-(2) and (4). The decision is in conflict with decisions of the Supreme Court (RAP 13.4(b)(1))), another decision of the Court of Appeals (RAP 13.4(b)(2)), and the petition further involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

Division One recognized that the trial court improperly applied CR 56 to the summary judgment motions of the parties, but its Opinion shows

Division One also improperly shifted the burden to the requestor demanding that Block introduce evidence disputing a search was reasonable or that records were exempt or the log inadequate. The Division One Opinion confuses separate doctrines under the PRA and holds that a "reasonable search" claim by an agency is akin to a "get out of jail free" card immunizing an agency from any liability for failing to produce responsive records or any obligation to produce them when they are discovered. It further ignores the agency's duty to provide a an adequate response and exemption citation and to not withhold portions of records that are not exempt. Its decision conflicts with decisions of the Supreme Court, its own decisions, and effectively disables the PRA.

This Court has recognized that under the PRA a requestor is entitled to two separate things. The first is an adequate response. The second is production of all non-exempt responsive records. Block here got neither, and future requestors could similarly be denied if this Opinion becomes the play book and test for agency compliance, which it appear highly likely it will be if not reviewed by this Court.

A. Inadequate Exemption Log and Explanation.

Block was entitled to an adequate response. This Court has held that part of an adequate response requires identification of all responsive records and all exemptions the agency claims apply to such records, and a

sufficient explanation of how the cited exemption applies to the individual withheld or redacted record. This Court has repeatedly held that a failure to provide a full identification of all existing records and this adequate exemption statement is itself a PRA violation, and that a requestor is entitled to an award of fees and costs in a litigation addressing this inadequate explanation whether or not records are ultimately deemed to have been improperly withheld. **City of Lakewood v. Koenig**, 182 Wn.2d 87, 343 P.3d 335 (2014); **Yakima County v. Yakima Herald-Republic**, 170 Wn.2d 775, 246 P.3d 768 (2011); **Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120 (2010).

> [U]nder *Yakima County v. Yakima Herald-Republic*, 170 Wash.2d 775, 809-10, 246 P.3d 768 (2011), attorney fees are available for a violation of the right to receive a response regardless of whether records are improperly withheld, There, the Yakima Herald-Republic sought information about the expenditures of public funds for the criminal defense of two murder defendants....[W]e remanded for a determination about whether nonjudicial entities actually held any [responsive records]. Thus, while we declined penalties as premature, we awarded costs and reasonable attorney fees to the newspaper because the county's equivocal response violated the brief explanation requirement. The same principles apply here.
>
> Accordingly, Koenig is entitled to an award of reasonable attorney fees, including fees on appeal, pursuant to RCW 42.56.550(4) and RAP 18.1.

Lakewood v. Koenig, 182 Wn.2d at 98 (internal citations omitted).

Here, the agency's exemption statement consisted of the same cut and paste statement for every one of the withheld or redacted records,

typographical errors included. The agency alleged the records were exempt in their entirety for the 66 records and in heavily-redacted form for the 29 records based on attorney client privilege and work product, and in a few occasions a "draft" exemption. The explanation did not adequately explain how the exemption could apply to the withheld record or what the withheld record was. The trial court did not state which of the exemptions it thought applied (stating it was one "and/or" another), requiring the requestor to show records were not privileged. The requestor additionally was prevented from obtaining answers regarding the records or their contents or what they showed, and no information about the circumstances under which they were created was provided.

Division One claims the 35 pages it reviewed in camera appear privileged to it, but again do not state which exemptions apply and which do not to each specific record, and Division One declines to address the withholding in their entirety of the 66 pages of records faulting the requestor, and not the City, for the fact the records were not provided by the City for an in camera review to support the City's claim of exemption. This Court made clear in **Lakewood v. Koenig**, **Sanders** and **Residential Housing Ass'n v. City of Des Moines**, 165 Wn.2d 525, 199 P.3d 393 (2009), the level of specificity required for a withholding log to meet the agency's burden. Based on these precedents, the logs at issue here did not

and could not meet the agency's burden, and the trial and appellate courts were wrong to shift the burden to prove otherwise to Block. Division One erred in finding the exemption logs adequately met the agency's burden and in upholding a denial of summary judgment to Block and granted to the City on this issue.

The adequate exemption log is part of the adequate response requirement, which is a separate right under the PRA: the right to receive an adequate response. The City failed to provide an adequate response for several reasons, including the inadequacy of its identification and exemption statements. The City further did not and could not show its complete withholding of the 66 records were justified as will be explained further below.

B. Unreasonable Search Issue.

This Court held in **Neighborhood Alliance v. County of Spokane**, 172 Wn.2d 702, 261 P.3d 1198 (2011):

> Moreover, records are never exempt from disclosure, only production, so an adequate search is required to properly disclose responsive documents. *See Sanders*, 169 Wash.2d at 836, 240 P.3d 120. The failure to perform an adequate search precludes an adequate response and production. The PRA 'treats a failure to properly respond as a denial.' *Soter v. Cowles Pub'g Co.*, 162 Wash.2d 716, 750, 174 P.3d 60 (2007).

Neighborhood Alliance, 172 Wn.2d at 721.

> An adequate search is a prerequisite to an adequate response, so an adequate search is a violation of the PRA because it precludes an adequate response. But we put off for another day the question whether the PRA supports a freestanding daily penalty when an agency conducts an inadequate search but no responsive documents are subsequently produced. A prevailing party in such an instance is at least entitled to costs and reasonable attorney fees. *Soter*, 162 Wash.2d at 756, 174 P.3d 60; RCW 42.56.550(4).

Neighborhood Alliance, 172 Wn.2d at 724-25.

Thus based on this Court's precedents, the issue of whether a record has been "disclosed" and an adequate exemption log has been provided is a separate issue from whether or not an entity has performed an adequate search first before preparing such a log or responding. It is also a separate issue from whether or not a responsive record is exempt.

In **Neighborhood Alliance**, the agency claimed no further records existed and refused to answer discovery related to the adequacy of the search to test the agency's claims. This Court remanded that case to allow discovery related to the agency's search and motive and other factors relevant to a determination of penalties. In that case, this Court also held that where any agency has not proven its search was reasonable that the requestor is entitled to an award of fees and costs since the inadequacy of the search establishes an inadequacy of the response as the inadequate search precludes an adequate response. 172 Wn.2d at 724-25.

So while this Court has held that an unreasonable search precludes an adequate response, **this Court has never held that a reasonable search alone will establish a response was adequate**. This Court has further never held that an adequate search alone will immunize an agency from PRA liability or from an award of fees or costs to a requestor when other records are located that were not identified or produced to the requestor. The Opinion here equates an alleged "reasonable search" showing to a "Get out of a jail free card" wherein no other facts need be examined if an agency alleges its initial search was reasonable. Here, the error is compounded because the requestor, as in **Neighborhood Alliance**, was denied discovery into what the agency did to search and respond to her request, and was precluded from gathering any information about the search. Here this was because the agency used attorneys to manage the search and production and then prevented participants such as the public records officer Kelly from answering questions regarding what was done and when and what existed and when. See, e.g., CP 587-89.

A "reasonable search" showing is part of the showing an agency must make to show its response was adequate, but it is but one part of that showing or a showing that it has otherwise fully complied with the PRA. An agency must further show it stated and explained exemptions, and it must explain why responsive records that did exist were not identified or produced. It

additionally must prove that any records redacted or withheld are actually exempt. Finally, an agency cannot make a "reasonable search" claim and then deprive the requestor of discovery and information needed to test that claim, as the agency did here. "Relevancy in a PRA action, then, includes *why* documents were withheld, destroyed, or even lost." **Neighborhood Alliance**, 172 Wn.2d at 718 (emphasis in original).

The record here, further, could not support a finding that the agency performed a reasonable search. A reasonable search is one that

> was reasonably calculated to discover all relevant documents. . . . [A]gencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested....{The agency cannot limit its search to only one records system if there are others that are likely to turn up the information requested.

Neighborhood Alliance, 172 Wn.2d at 720. The declarants were prevented from answering questions needed to evaluate and rebut their declaration claims. The declarations offered sought to testify to facts and circumstances for which the declarants were not competent to testify. Mayor Hill was the City's witness regarding efforts to search for emails, and she, with no technical background or expertise made claims about what allegedly was and was not universally possible for searches of AOL accounts and regarding mysterious alleged losses of emails from AOL accounts. The public records officer similarly provided sketchy details and was prevented from answering any questions on the subject during her deposition. The City did not provide

evidence of searches by a competent individual at the time of the requests or efforts to obtain allegedly "lost" emails from a provider, recipients, or other sources. These declarations could not have established the reasonableness of the search, and Block was precluded from testing the statements made by the City's refusal to answer discovery or allow its witnesses to answer in depositions based on a smokescreen of privilege. An agency cannot assert its search was reasonable but by having chosen to have attorneys manage the search successfully hide as privileged all details of what was done on the basis of this alleged privilege. If the reasonableness of a search is to be raised by an agency as a purported defense when responsive records are found to have been silently withheld, then the agency must provide all information to the requestor about what was done and when and by whom so that claim can be adequately evaluated. Here Division One, like the trial court, shifted the burden to Block to rebut the agency's claim of "reasonableness" of the search while at the same time allowing her to be precluded from learning any of the details of the search because of the City's assertion of privilege.

Division One erred in shifting the burden to Block to prove a search was unreasonable, improperly accepted the City's submission as an adequate showing, and confused a showing of "reasonableness" for a showing of an adequate response based solely on the alleged reasonableness of the search.

Division One improperly found the City's submission to establish a reasonable search when the submissions should have been rejected as inadmissible and without adequate foundation.

C. Records Not Proven Exempt.

The City was required to show that each and every record, or part of a record, it failed to produce to Block was exempt and to state, explain, and prove that exemption. It should have provided the trial court with any record where the content of the record bore on the exempt nature of the document. Attorney client privilege and work product privileges are based on the contents of records as well as the circumstances of their creation, use and transmission, so the City bore the burden of providing those records it sought to withhold to the court in support of its summary judgment motions. Here the City failed to do so, and Division one refused to address the exemption claim faulting Block for the City's failure. Records will rarely be entirely exempt, as cases such as **Sanders** have illustrated. The 29 records produced redacted similarly were not shown to be appropriately exempted. The 29 records related to the search for and response to Block's request and was central to a determination as to the reasonableness of the search. The City cannot use the search as a an alleged shield and then use privilege as a sword to prevent any access to the information to challenge the search.

D. This Case Should be Decided by the Supreme Court.

This case raises important issues of substantial public interest and it should be determined by this Court. The case presents a unique vehicle to address these important questions, and Division One's improper application of this Court's precedents, because here the requestor provided proof that records responsive to her request existed at the time of her request, were obtained from other agencies or from the City later in response to other PRA requests, and had terms and characteristics that would have made them easily discoverable by the City if the City had actually looked for them. This case also involves a requestor who sought discovery as to the search efforts and was denied everything because lawyers managed the response and the City alleged every step and communication was thus "privileged." The issues raised in this case continue to recur in the trial courts and will continue stymie the appellate courts until this Court provides guidance. It is also a case with participation by qualified counsel on all sides and representation of numerous Amicus participants. These important issues need to be addressed, and should be addressed in a case such as this with the well-supported record Petitioner has provided here.

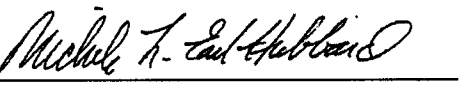
E. Block Should be Awarded Fees and Costs

This Court's precedents make clear that a requestor should be awarded fees and costs when any of the following occur: she was not afforded an adequate response, or an adequate exemption statement, or non-exempt records were not produced to her, or the agency did not perform a reasonable search. All of these harms befell Block here, but if even one occurred, she should have been granted her fees and costs. Requestors keep the PRA alive and valid and government accountable when they litigate to enforce their rights under the PRA. Division One's holding denying her any award, and any relief, undercuts the force of the PRA and defeats its purpose. Despite this Court's many statements of the requirements for fee and cost awards, decisions such as this Opinion continue to issue, showing our courts require additional guidance explaining the distinctions between awards of fees and costs and awards of penalties. This Case is a good vehicle for that further discussion. Review should be granted.

VI. CONCLUSION

The Court should accept review and (1) reverse the decision of the Court of Appeals and reverse the trial court's grant of the City's Motion for Summary Judgment and denial of Block's Motion for Partial Summary Judgment, and (2) award Block her attorneys fees and costs on appeal and below and remand for a determination of statutory penalties.

Respectfully submitted this 11th day of September, 2015.

By: 

Michele Earl-Hubbard, WSBA No. 26454
Allied Law Group LLC

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 11, 2015, I filed the foregoing Petition for Review and accompanying Appendices with the Division One Court of Appeals for transmittal to the State Supreme Court, and by email with the Supreme Court Clerk, and delivered a copy of same by email and U.S. Mail to the following:

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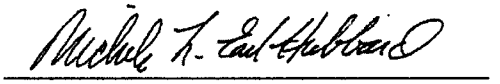
Dated this 11th day of September, 2015, at Shoreline, Washington.



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Rec'd 9/11/15

Supreme Court Clerk's Office

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Cc: info <info@alliedlawgroup.com>
Subject: Filing of Petition for Review to the State Supreme Court in Block v. City of Gold Bar, Div. One Case No. 71425-2-I

Attached please find a copy of the Petition for Review of Appellant/Petitioner Anne Block in the case of Block v. City of Gold Bar, Division One Court of Appeals cause number 71425-2-I which has been filed with the Division One Court of Appeals for transmittal to the State Supreme Court. A separate email is coming with the Appendices A-C to the Petition.

The filing fee has been mailed to the Supreme Court pursuant to directions from the Court of Appeals Division One.

The attorney filing this document is Michele Earl-Hubbard, WSBA # 26454, Attorney for Appellant/Petitioner Anne Block.

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Cc: info <info@alliedlawgroup.com>
Subject: RE: Filing of Appendices A to C to Petition for Review to the State Supreme Court in Block v. City of Gold Bar, Div. One Case No. 71425-2-I

Attached please find a copy of the Appendices A to C to the Petition for Review of Appellant/Petitioner Anne Block in the case of Block v. City of Gold Bar, Division One Court of Appeals cause number 71425-2-I which has been filed with the Division One Court of Appeals for transmittal to the State Supreme Court. The Petition was sent by separate email at 4:53 p.m. today.

The attorney filing this document is Michele Earl-Hubbard, WSBA # 26454, Attorney for Appellant/Petitioner Anne Block.

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Cc: info
Subject: Filing of Petition for Review to the State Supreme Court in Block v. City of Gold Bar, Div. One Case No. 71425-2-I

Attached please find a copy of the Petition for Review of Appellant/Petitioner Anne Block in the case of Block v. City of Gold Bar, Division One Court of Appeals cause number 71425-2-I which has been filed with the Division One Court of Appeals for transmittal to the State Supreme Court. A separate email is coming with the Appendices A-C to the Petition.

The filing fee has been mailed to the Supreme Court pursuant to directions from the Court of Appeals Division One.

The attorney filing this document is Michele Earl-Hubbard, WSBA # 26454, Attorney for Appellant/Petitioner Anne Block.

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No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 71425-2-I

IN THE COURT OF APPEALS, DIVISION ONE

ANNE BLOCK,

Appellant/Petitioner,

v.

CITY OF GOLD BAR,

Respondent

APPENDICES A-C
TO BLOCK'S PETITION FOR REVIEW

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Petition for Review

Appendix A

Division One Court of Appeals Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANNE K. BLOCK,	)	No. 71425-2-I
Appellant,	)	DIVISION ONE
v.	)	
CITY OF GOLD BAR,	)	UNPUBLISHED
Respondent.	)	FILED: June 22, 2015

Cox, J. — The Public Records Act (PRA) requires a government agency to conduct an adequate search for responsive records to a public records request. The agency must then disclose records responsive to the request and either produce such records for inspection and copying or withhold them. The agency may lawfully withhold a record only if it is exempt.[1]

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[1] We use the words "disclose," "produce," "withheld," and "exempt" as they are used in the PRA:

> 1. Records are either 'disclosed' or 'not disclosed.' A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.
>
> 2. Disclosed records are either 'produced' (made available for inspection and copying) or 'withheld' (not produced). A document may be lawfully withheld if it is 'exempt' under one of the PRA's enumerated exemptions. A document not covered by one of the

In this case, Anne Block made two public records requests to the City of Gold Bar. The City produced certain records and either completely or partially withheld others, which it identified as exempt in two separate privilege logs. Block commenced this action, claiming the City violated the PRA and seeking an award of attorney fees and costs.

Because there were no genuine issues of material fact and the City was entitled to judgment as a matter of law, the trial court properly granted the City's cross-motion for summary judgment. Likewise, the court properly denied Block's motion for partial summary judgment. We affirm.

Block made two public records requests to the City that are the subjects of this action, one on December 9, 2008 and the other on February 13, 2009. In her first request, Block sought records about Karl Majerle, a former city employee who was fired for malfeasance. He threatened to sue the City, and the City settled his claim. Block requested that the City produce records relating to his discharge and threatened a lawsuit.

> exemptions is, by contrast, 'nonexempt.' Withholding a nonexempt document is 'wrongful withholding' and violates the PRA.
>
> 3. A document is never exempt from disclosure; it can be exempt only from production. An agency withholding a document must claim a 'specific exemption,' i.e., which exemption covers the document. The claimed exemption is 'invalid' if it does not in fact cover the document.

Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010) (citations omitted).

The City produced 675 pages of public records in response to this first request. The City also withheld as exempt 66 pages of records. These latter records were disclosed in a log titled "Privileged/Exemption/Redaction Log."[2] This log stated they were exempt under the PRA, as attorney-client privilege or attorney work product.

In her second request, Block sought records about how the City gathered public records in response to her first request. The City produced 75 pages of records. The City also redacted and produced 29 pages of e-mail messages, providing the headers and signatures of the documents. The City provided a second log titled "Privileged/Exemption/Redaction Log" with supporting explanations.[3] The City claimed attorney-client privilege or attorney work product under the PRA for the redacted content of these records.

Block commenced her first PRA action against the City on February 12, 2009. The City completed its production of records for both of Block's requests on February 27, 2009, while that first action was pending. Shortly before stipulating to dismissing her first action, she commenced this second PRA action against the City on February 1, 2010.

Following the City's production of records and its two exemption logs to Block on February 27, 2009, she obtained additional responsive records to the requests she made in December 2008 and February 2009. Her declaration

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[2] Clerk's Papers at 534-38.

[3] Id. at 539-44.

states that she received these documents either from other sources or from later requests for records from the City.

Block moved for partial summary judgment. She argued that the City had violated the PRA by failing to produce responsive records, by entirely withholding several records in response to her first request, and by failing to provide adequate explanations for why it withheld or redacted records in response to both her requests. She also asked the court to review in camera the redacted documents that the City produced in response to the second request to determine if they were exempt. She did not seek any in camera review in connection with her first records request.

The City's cross-motion for summary judgment followed.

The trial court reviewed in camera the records redacted in response to Block's second request, as she sought. The court determined that the redacted content was exempt under the work product or attorney-client privilege doctrines.

Thereafter, the court granted the City's cross-motion for summary judgment and denied Block's motion for partial summary judgment.

Block appeals.

SUMMARY JUDGMENT

A threshold issue is whether the trial court properly applied CR 56 to the respective summary judgment motions of the parties in this PRA action. For the reasons we explain, we hold that it did.

In a summary judgment motion, the moving party bears the initial burden of showing the absence of a genuine issue of material fact.[4] If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the nonmoving party.[5] If the nonmoving party fails to make a showing sufficient to establish the existence of a genuine issue of material fact, then the trial court should grant the motion.[6] In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings.[7] CR 56(e) requires that the response, "'by affidavits or as otherwise provided in [CR 56], must set forth specific facts showing that there is a genuine issue for trial.'"[8]

At that point, the court considers the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[9]

Under the PRA, agencies must prove that they adequately responded to record requests:

> The PRA is a strongly worded mandate for broad disclosure of public records. Passed by popular initiative, it stands for the proposition that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. The burden is on the agency to show a withheld record falls within an

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[4] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[5] Id.

[6] Id.

[7] See id.

[8] Id. at 225-26 (quoting CR 56(e)).

[9] Id. at 226.

> exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request.[10]

With these principles of law in mind, we now address Block's contentions on appeal.

ADEQUACY OF SEARCH

Block first essentially argues that the City failed in its burden to establish that it conducted adequate searches in response to her public records requests.[11] More specifically, she contends that the City's searches were inadequate because she subsequently obtained responsive records either "from other source[s]" or "from the City in response to other requests ten months to two years after the City told [her] all responsive records had been produced."[12] Because there are no genuine issues of material fact on the adequacy of the City's searches, the trial court properly granted the City summary judgment.

In Neighborhood Alliance of Spokane County v. Spokane County, the supreme court held that the adequacy of a search for public records under the PRA is the same as exists under the federal Freedom of Information Act.[13]

> Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case.

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[10] Neigh. Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 714-15, 261 P.3d 119 (2011) (quoting RCW 42.17A.001) (citations omitted).

[11] Brief of Appellant at 22-27.

[12] Id. at 23.

[13] 172 Wn.2d 702, 719, 261 P.3d 119 (2011).

> When examining the circumstances of a case, then, ***the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found***.
>
> Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.[14]

To establish that its search was adequate in a motion for summary judgment, "the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith."[15] This evidence should describe the search and "establish that all places likely to contain responsive materials were searched."[16]

Whether a search is adequate "is separate from whether additional responsive documents exist but are not found."[17]

Here, the City relied on evidence that it submitted in support of its motion for summary judgment to show that its searches were adequate. This evidence included the declaration of Laura Kelly, the public records officer for the City.[18]

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[14] Id. at 719-20 (emphasis added) (emphasis omitted) (citations omitted) (quoting Oglesby v. U.S. Dep't of Army, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (1990)).

[15] Id. at 721.

[16] Id.

[17] Id. at 720.

[18] Clerk's Papers at 28.

The evidence also included two declarations of Crystal Hill Pennington, the mayor of the City at the time of Block's two requests.[19] The court also considered the declarations of Block and her counsel.

We examine this evidence to determine whether the City bore its burden under the criteria stated in Neighborhood Alliance.

The Kelly declaration evidences the City's understanding that the scope of Block's December 2008 request was "broader in its scope [than her previous request concerning Karl Majerle] and required the City to conduct a thorough search."[20] The declaration goes on to document where responsive documents were likely to be found. Specifically, Kelly identified Public Works Director John Light, Mayor Crystal Hill Pennington, and Eileen Lawrence, the City's attorney, as the persons likely to have responsive records.[21] This declaration describes the gathering of the documents, review of them, preparation of an exemption log, and production of responsive documents to Block.[22]

There are also two declarations from the former mayor. The most relevant declaration is titled Declaration of Crystal Hill Pennington Regarding Cross-Motions for Summary Judgment.[23] In this declaration, she testifies that she

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[19] Id.

[20] Id. at 201.

[21] Id. at 199, 203.

[22] Id. at 200-04.

[23] Id. at 167-72.

searched Majerle's personnel file for responsive records. She also directed Kelly to search the City's e-mail system for responsive documents. Further, she instructed John Light, the City Public Works Director, and a councilmember to search their e-mails and notes for responsive records. Additionally, she contacted the Snohomish County Sheriff's Department for responsive records because she had filed a theft report with that agency regarding the Majerle matter.

Significantly, the former mayor also detailed her search for responsive e-mails in her various e-mail accounts. These included an AOL account, her Blackberry device, and her professional e-mail for her outside employment. She further described the names and other search terms used in her searches. Thereafter, she reviewed all of her e-mails from the date of notification of the Majerle issue until the date the first request was received. She expressly testified:

> [I] reviewed all of my e-mails from the date that I was first notified of the Majerle credit card use issue until the date that the request was received. I had no e-mails to or from Majerle and do not recall Majerle ever using his City-provided e-mail account. Upon completion of my search, I provided all of the responsive records to City Attorney Cheryl Beyer for review prior to release to Block. I did not withhold any responsive records.[24]

This declaration goes on to describe similar actions in response to Block's second request in February 2009. These actions included a directive to Kelly to search again for e-mail to verify all responsive records were provided.

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[24] Id. at 169.

We note that this declaration also describes technology difficulties that she had with some devices that she used. The following excerpt of her declaration describes the specifics:

> In order to preserve City records, I saved e-mails in my e-mail accounts under various City folders. I also sometimes sent e-mails to myself in order to save a copy and then would forward those e-mails to the City Clerk. I did this specifically to ensure that the e-mails would be properly retained and in order to provide a backup of records of particular importance.
>
> At various times before, during and after my tenure with the City, I experienced numerous incidents with my AOL e-mail and Blackberry accounts where I lost data and e-mails through no fault of my own. I have no way of knowing what specific data and records were lost during these incidents other than my vague recollection of e-mails I may have sent or received over the years. I am certain that at least two hundred e-mails, if not more, were lost from my AOL account based on my recollection of the amount of messages I had . . . .
>
> During the times relevant to this suit, AOL e-mail account users including myself did not have the ability to search for or within e-mail attachments. The search capability was limited to the e-mail itself.[25]

The question before us is whether this record established that the City's searches were "reasonably calculated to uncover all relevant documents," as the law requires.[26] We hold that it does.

Whether a search is reasonable generally depends on the facts and circumstances of each case.[27] In this case, however, reasonable persons could

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[25] Id. at 171-72.

[26] Neigh. Alliance of Spokane County, 172 Wn.2d at 720.

[27] Id.

only conclude that the City's searches were reasonably calculated to uncover all relevant documents. Thus, the searches were adequate.

The declarations that we just described are both "reasonably detailed" and "nonconclusory," as the law requires.[28] Kelly's declaration establishes that, as the public records officer, she understood that the request required searching a broad scope of records. And it details whom she contacted to gather responsive documents. Further, this nonconclusory declaration supports the view the City searched "all places likely to contain responsive materials."[29]

Of particular interest here are the declarations of the former mayor, who was in office at the time of the two requests. The declaration titled "Declaration of Crystal Hill Pennington Regarding Cross-Motions for Summary Judgment" documents, in detail, her identification of who might have responsive documents. It further evidences her instructions to those people to search their records for responsive documents. This declaration also evidences her search of her various e-mail accounts.

As for her search for e-mails, this declaration specifies her search for responsive documents. Notably, this testimony specifies the names and other search terms used in her search. It also describes the second search following receipt of Block's February 2009 second request, including her directive to Kelly to search again for responsive e-mails.

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[28] Id. at 721.

[29] Id.

This declaration also describes the technology difficulties that the former mayor had with certain devices she used. Among them were lost data and e-mails from her AOL account and Blackberry device.[30] Moreover, her AOL account had limited search ability.

Notably, Block fails to point to any evidence in this record that refutes any of this evidence of technical difficulties that Hill Pennington testified that she experienced. We must assume that there is no such evidence.

Block argues that the City failed in its burden to show that its searches were adequate. Specifically, she states, in part, in her opening brief:

> Block has proven the existence of several responsive records ***that existed on the date of her request***, were not identified or produced to her by the City, and that Block subsequently obtained in response ***to other record requests [to the City] or from other sources*** showing they existed on the date of her request. Thus, Block need not show whether or not the search was reasonable to establish the City in fact did not produce a responsive record to her when it claimed it had given her all the records.[31]

At oral argument of this case, Block clarified her position. She argued that the fact that other responsive documents existed on the dates of her requests, documents that she obtained after the City produced documents and privilege logs in response to her two requests, is dispositive of the question of the adequacy of the City's searches. But that is not the law.

We start with the governing principle that the supreme court stated in Neighborhood Alliance. There, the court stated that "the issue of whether the

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[30] Clerk's Papers at 171.

[31] Brief of Appellant at 25-26 (emphasis added).

search was reasonably calculated and therefore adequate is separate from whether additional responsive documents ***exist*** but are not found."[32] Thus, "'a search need not be perfect, only adequate.'"[33] That Block later obtained responsive documents either from the City or from other sources following the City's February 27, 2009 responses does not create a genuine issue of material fact for trial. The City was entitled to summary judgment on this issue.

Turning to Block's declaration that was before the court on the cross-motions of the parties, we see nothing in that document that creates a genuine issue of material fact regarding the adequacy of the City's search. The document generally evidences that she received either from the City or from other sources documents the City did not provide in response to her two requests. But, as we just stated, that does not create a genuine issue of material fact regarding the adequacy of the City's searches.

Significantly, Block's declaration does nothing to challenge the former mayor's testimony regarding the technical difficulties to which she testified in her declaration. Thus, to the extent Block could have argued that there was some lack of reasonableness with respect to the City's efforts to search all locations where documents were likely to be found, such an argument would be unsupported by any evidence in this record.

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[32] Neigh. Alliance of Spokane County, 172 Wn.2d. at 720 (emphasis added).

[33] Id. (quoting Meeropol v. Meese, 252 U.S. App. D.C. 381, 790 F.2d 942, 956 (1986)).

Block also complains that this record is "clear that the City has never produced any email obtained from Hill or from her Blackberry responsive to these two PRA Requests."[34] She further complains that "it is equally clear that the City has not shown [that] it searched for or produced any of those records before it responded in February 2009."[35]

The former complaint appears to be nothing more than a variation on her argument that the fact that a document existed when a request was made means that the City's search for the document was inadequate. Not true, as we explained earlier in this opinion.

The latter complaint is simply untrue, as evidenced by testimony in the record specifying the former mayor's searches of her devices. Given there is no contrary evidence in this record, we must assume such evidence does not exist.

In sum, the City bore its burden to show that its searches for public records were adequate. Under CR 56, the burden then shifted to Block to show otherwise. She failed to do so. Accordingly, the trial court properly granted summary judgment to the City, as it was entitled to judgment as a matter of law.

Block argues that under Neighborhood Alliance, when an agency performs an adequate search, but fails to produce a responsive record, it violates the PRA. In Neighborhood Alliance, the scope of discovery in a PRA case was also an

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[34] Brief of Appellant at 23.

[35] Id. at 24.

issue before the court.[36] The court explained that an agency's reason for failing to comply with the PRA was relevant when determining sanctions.[37] It 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. Discovery is required to differentiate between these situations.[38]

Block argues that this statement means that "[an] agency that performed [a] reasonable search but 'mistakenly' overlooked a record would still be sanctioned." Thus, Block argues that if a responsive record existed, but was not disclosed, the agency committed a per se PRA violation, even if the agency adequately searched for the record.

We disagree. As we discussed earlier, the Neighborhood Alliance court explicitly stated that "the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found."[39] If the failure to disclose an existing record were a per se violation, regardless of whether the agency's search was adequate, the court would have said so. Dictum in the opinion's discussion about the scope of discovery does not persuade us to adopt the argument that Block makes.

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[36] Neigh. Alliance of Spokane County, 172 Wn.2d at 715-16.

[37] Id. at 717.

[38] Id. at 718.

[39] Id. at 720.

WITHHELD AND REDACTED RECORDS

Block argues that the City failed in its burden to show that records that it withheld or redacted were exempt. We again disagree.

Agencies must produce any requested public record unless it falls within a specific, enumerated exemption.[40] The PRA states that these exemptions should be "narrowly construed."[41] Additionally, agencies must produce redacted versions of exempt documents, if "'redaction renders any and all exemptions inapplicable.'"[42]

It is the agency's burden to show that a redacted or withheld record was exempt.[43]

In this case, the disputed exemptions are the work product exemption and the attorney-client privilege.

Under RCW 42.56.290, an agency does not have to disclose attorney work product. Documents are attorney work product if they "are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending

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[40] Id. at 715; RCW 42.56.070(1).

[41] RCW 42.56.030.

[42] City of Lakewood v. Koenig, 182 Wn.2d 87, 94, 343 P.3d 335 (2014) (quoting Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 433, 327 P.3d 600 (2013)).

[43] Gendler v. Batiste, 174 Wn.2d 244, 252-53, 274 P.3d 346 (2012) (quoting RCW 42.56.550(1)).

in the superior courts."[44] Work product includes information gathered by attorneys and attorneys' legal research, theories, opinions, and conclusions.[45]

Under RCW 5.60.060(2)(a), the attorney-client privilege protects communications between a client and her attorney and the attorney's professional advice to the client.

Block's First Request

Block argues that the City failed to establish that the records it withheld in response to her first request were exempt. We disagree.

Here, the City withheld and claimed as exempt 66 pages of documents, which it disclosed in its first "Privileged/Exemption/Redaction Log." The log specifies the date, author, recipient, and subject matter of each document claimed to be exempt. The log also cites authority for its claimed exemptions—the attorney-client privilege and work product doctrines.

For example, the log shows that the City claimed exemption for a November 7, 2008 e-mail from the City's insurance defense counsel on the Majerle matter to her legal assistant. Similarly, the City claimed exemption for a November 6, 2008 e-mail with handwritten notes from insurance defense counsel to the same legal assistant. The log notes that these e-mails regard "Majerle v. City of Gold Bar." It is self-evident that these e-mails fall within the work product doctrine. If there is a legitimate claim they do not, Block has failed to make it.

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[44] RCW 42.56.290.

[45] Limstrom v. Ladenburg, 136 Wn.2d. 595, 609, 611, 963 P.2d 869 (1998).

Any reasonable reading of the privilege log shows that the claim to these exemptions is proper. Thus, the burden to show otherwise shifted to Block for summary judgment purposes.

Block failed in her burden to show any genuine issue of material fact regarding these records. If she believed the claims of exemption were invalid, she could have sought in camera review of these records. But she did not. Moreover, she has failed to call to our attention anything in this record where she provided evidence, not mere allegations, to show the existence of any genuine issue of material fact that the records were not exempt.

Block argues that the trial court should have ordered the City to provide redacted copies of the withheld records. Specifically, she argues that once she had received redacted copies, she could have determined whether to seek in camera review of the redacted portions. But Block fails to cite any authority indicating that this request is a necessary predicate to requesting an in camera review. And it is undisputed that she failed to request an in camera review of the documents the City withheld in response to her first request for public records.

Block argues that entirely withholding rather than redacting the records "was presumptively too great a withholding." She also argues, without citation to authority, that "[r]arely will every portion of a record be exempt, particularly in the context of attorney-client privilege or work product."

But if Block believed that the City's claimed exemptions were invalid because they were overbroad, she could have sought in camera review of the withheld documents. That would have allowed the court to determine whether

the documents contained any non-privileged information. But without in camera review, or any other support in the record, Block's arguments are mere speculation, insufficient to avoid summary judgment.

In sum, Block failed to show any genuine issue of material fact regarding claims of exemption. The City was entitled to summary judgment.

Block's Second Request

Block also argues that the City failed to establish that the portions of records it redacted in response to her second request were exempt. We disagree.

For Block's second request, the City did not entirely withhold records but rather provided redacted copies of them. Block believed that the City's claimed exemptions were invalid or overbroad and sought in camera review of the documents.

The trial court reviewed the unredacted version of these records and determined that the redactions were proper as work product or attorney client privilege. The court further determined that "the exemption logs correctly reflected the applicable exemptions."

Our review of the unredacted documents confirms that the redacted portions were privileged under either the attorney-client privilege or the work product doctrine. Thus, the City established that the redacted portions of the documents were privileged. And it is entitled to summary judgment on this issue.

ADEQUACY OF EXEMPTION LOGS

Block next argues that the City failed to establish that its privilege logs were sufficient. Specifically, she argues that the privilege logs lacked a brief explanation of the claimed exemptions. We disagree.

"When an agency withholds or redacts records, its response 'shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'"[46] "The plain language of RCW 42.56.210(3) and our cases interpreting it are clear that an agency must identify 'with particularity the specific record or information being withheld and the specific exemption authorizing the withholding.'"[47]

The agency must do more than identify the record and the specific exemption—it must explain how the exemption applies to the record.[48] If merely identifying the record and the exemption were sufficient, it "would render the brief-explanation clause superfluous."[49]

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[46] City of Lakewood, 182 Wn.2d at 94 (quoting RCW 42.56.210(3)).

[47] Id. (quoting Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 537–38, 199 P.3d 393 (2009)) (emphasis omitted).

[48] Sanders, 169 Wn.2d at 846.

[49] Id.

There are limited circumstances where a brief explanation is unnecessary. Some exemptions categorically "exempt 'without limit a particular type of information or record.'"[50] "[W]hen it is clear on the face of a record what type of information has been redacted and that type of information is categorically exempt, citing to a specific statutory provision may be sufficient."[51]

For example, RCW 42.56.230(5) exempts "Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial account numbers" from disclosure. If an agency states that a debit card number has been redacted and cites this provision, no further explanation is necessary.[52]

But the agency must not shift the burden "to the requester to sift through the statutes cited by the [agency] and parse out possible exemption claims."[53] Instead, "the agency must provide sufficient explanatory information for requestors to determine whether the exemptions are properly invoked."[54] In other words, "The log should include the type of information that would enable a

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[50] City of Lakewood, 182 Wn.2d at 95 (quoting Resident Action Council, 177 Wn.2d at 434).

[51] Id.

[52] Id.

[53] Id.

[54] Id.

records requester to make a threshold determination of whether the agency properly claimed the privilege."[55]

An agency violates the PRA by failing to provide an adequate explanation.[56]

As described earlier, the City produced two privilege logs in response to Block's requests. The first log deals with the 66 pages of records withheld from the response to Block's first request.[57] The second log describes the 29 pages of documents that the City redacted in response to Block's second request.[58] Both logs adequately allowed Block to make threshold determinations about the validity of the claimed exemptions.

Withheld Documents

This record shows the City's claim of exemption for each of the withheld documents at Clerk's Papers 535 to 538. As described earlier, the log shows that the City claimed exemption for e-mails that its counsel sent to her legal assistant. Similarly, the City claimed exemption for a document described as "undated typed notes of City Insurance Defense Attorney Eileen Lawrence re Case analysis."[59] These descriptions allow a requester to make a threshold

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[55] Gronquist v. Dep't of Licensing, 175 Wn. App. 729, 744, 309 P.3d 538 (2013).

[56] Sanders, 169 Wn.2d at 846.

[57] Clerk's Papers at 534-38.

[58] Id. at 539-44.

[59] Id. at 536.

determination that the documents are exempt as claimed because they are attorney work product.

We have carefully examined each of the other descriptions contained in the log at Clerk's Papers 535 to 538. Similarly to the descriptions that we just discussed, they all allow a requestor to make a threshold determination whether the claim of exemption is proper. Thus, the City's privilege log is adequate.

Block argues that further explanation of the basis of the claim for exemption was required. In doing so, she relies on Sanders v. State.[60] That case is distinguishable.

There, the court found that the agency failed to offer a sufficient explanation for the claimed exemption.[61] That case involved RCW 42.56.290, which exempts documents relating to a "controversy" that the agency is a party to, if the records would not be discoverable. A "controversy" is litigation or anticipated litigation.[62] This exemption includes attorney work product and attorney-client privilege.[63]

In Sanders, the agency claimed that it had offered a brief explanation by "identifying each withheld document's author, recipient, date of creation, and broad subject matter along with [citing the controversy exemption]."[64] But the

---

[60] 169 Wn.2d 827, 240 P.3d 120 (2010).

[61] Id. at 845-46.

[62] Soter v. Cowles Pub. Co., 162 Wn.2d 716, 732, 174 P.3d 60 (2007).

[63] Id. at 734.

[64] Sanders, 169 Wn.2d at 845.

agency's response lacked a true explanation. The supreme court noted, "[t]he identifying information about a given document does not explain, for example, why it is work product under the PRA's 'controversy' exemption."[65] The court also noted that the log did not specify which controversy caused the document to fall under the controversy exemption.[66] The court held that this was insufficient.[67]

The privilege log in this case does not resemble the log in Sanders. In Sanders, one flaw with the agency's response was that it did not specify the controversy that caused the document to be exempt.[68] In contrast, the privilege log here does identify the specific controversy. The log frequently states documents pertain to "Majerle v. City of Gold Bar" or makes other references to that controversy.

For example, the description in the log of the November 2008 e-mails makes it patently clear that they were communications among counsel on the Majerle claim. This information allowed Block to make a threshold determination about whether the e-mails were privileged. That is distinguishable from the log in Sanders, where Sanders could not make a threshold determination whether the claim of exemption was proper.

---

[65] Id. at 846.

[66] Id.

[67] Id.

[68] Id.

Block argues that the City did not explain how any of the claimed exemptions applied to records that existed but that it did not disclose by February 27, 2009. This argument is based on the false legal premise that the City's search was inadequate. We rejected that assertion earlier in this opinion. Accordingly, we need not address this argument any further.

In sum, the City bore its burden to show that its privilege log for the 66 items claimed as exempt in its first log was adequate. There was no genuine issue of material fact for trial. Summary judgment in favor of the City on this issue was proper.

Redacted Documents

The City's privilege log for the documents it redacted in response to Block's second request is also adequate. The second privilege log is similar to the first, but it contains additional brief explanations.

For example, the log notes that the City redacted content in a January 15, 2009 e-mail from the City's attorney to the City Clerk. Apart from citing the exemption, it also includes a brief explanation, stating "content is attorney advice to client." Similarly, when the City redacted content from an e-mail the mayor sent to the City's attorney, the log notes that the "content is requesting attorney advice," and thus privileged.

Thus, the log's descriptions of the redacted content and its brief explanations allowed Block to make threshold determinations about whether the claimed exemptions were valid. Accordingly, the log was adequate, and the City is entitled to summary judgment on this issue.

ATTORNEY FEES

Block argues that she is entitled to attorney fees on appeal. Because she does not prevail on appeal, we disagree.

The PRA awards "[a]ny person who prevails against an agency . . . all costs, including reasonable attorney fees."[69] The attorney fees awardable under the PRA include appellate fees.[70]

Here, we reject all of Block's arguments on appeal. Accordingly, she is not entitled to recover attorney fees.

We affirm the trial court's grant of summary judgment to the City and its denial of partial summary judgment to Block. We deny Block's request for attorney fees on appeal.

Cox, J.

WE CONCUR:

Lippelick, J.

Becker, J.

[69] RCW 42.56.550(4).

[70] Resident Action Council, 177 Wn.2d at 447.

Petition for Review

Appendix B

Order Granting Motion to Publish

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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CASE #: 71425-2-I
Anne Block, Appellant v. City of Gold Bar, Respondent

Counsel:

Enclosed please find a copy of the Order Granting Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions.

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

ANNE K. BLOCK,	)	No. 71425-2-I
Appellant,	)	ORDER GRANTING MOTION TO PUBLISH OPINION
v.	)	
CITY OF GOLD BAR,	)	
Respondent.	)	

The Washington State Attorney General's Office, not a party to this appeal, moved for publication of the opinion filed in this case on June 22, 2015. Appellant, Anne Block, and respondent, City of Gold Bar, have both filed responses to the motion supporting publication of the opinion. The panel hearing the case has considered the motion, including appellant's and respondent's responses, and has determined that the motion should be granted. The court hereby

ORDERS that the motion to publish the opinion is granted.

Dated this 12th day August 2015.

FOR THE PANEL:

Cox, J.

Judge

Petition for Review

Appendix C

Block's Brief of Appellant

No. 71425-2-I

IN THE COURT OF APPEALS, DIVISION ONE

ANNE BLOCK,

Appellant,

v.

CITY OF GOLD BAR,

Respondent

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Appellant identifies the following assignments of error:

> The trial court erred in granting summary judgment to the City and denying the Motion for Partial Summary Judgment of Block, denying Block's Motion for Reconsideration, and failing to make adequate findings explaining the summary judgment decisions.

The issues pertaining to the assignments of error are as follows:

- Whether the trial court erred in granting summary judgment to the City and denying partial summary judgment to Block;
- Whether the City's exemption logs for the February 27, 2009, productions violated RCW 42.56.210(3) and **Sanders v. State** by not providing a clear explanation of the records withheld, the alleged exemptions, and a brief explanation of how the exemptions apply to the withheld records;
- Whether the City violated the PRA by not providing all responsive records to Block on February 27, 2009, failing to identify the records not produced, and failing to perform an adequate search;
- Whether the City violated the PRA by withholding 66 pages of records in their entirety, including header information, based on alleged attorney client privilege and work product privilege;
- Whether the City violated the PRA by providing 29 pages of significantly redacted records based on claims of attorney client privilege and work product privilege and, for some records, a "draft" exemption;

II. STATEMENT OF THE CASE

Appellant Anne Block ("Block") is a resident of the City of Gold Bar, Washington, ("Gold Bar" or "City") and the publisher of the Gold Bar Reporter, an online publication investigating and reporting on the City

of Gold Bar. This case is about two Public Record Act ("PRA") requests Block made to Gold Bar, one on December 9, 2008, and another on February 23, 2009.

In May 2008, Gold Bar learned that a City employee Karl Majerle had misused a City gas credit card and lied about attending a work-related meeting. The City began an investigation of Majerle who was placed on administrative leave in June 2008. CP 444, 462-63 (Block Decl. ¶2 & Ex. 5).

On or about July 1, 2008, while on administrative leave Majerle intentionally disabled the City's water wells. CP 445, 459-61 (Block Decl. ¶7 & Ex. 4). The City fired Majerle on July 31, 2008. CP 445, 459-61 (Block Decl. ¶8 & Ex. 4). Mayor Crystal Hill stated in Majerle's termination letter that Majerle had lied about attending meetings he had not attended, used a City gas card for personal use, and deliberately sabotaged and disabled the water wells and pumps after being placed on administrative leave allowing the reservoir to drop to below 8 feet placing the water system and Gold Bar residents at risk.. CP 459-61. Sometime thereafter, Majerle applied for unemployment benefits, was denied, appealed the denial to the Department of Employment Security, and threatened to sue the City. In the Fall of 2008 the City settled Majerle's claim agreeing to pay Majerle and his attorney more than $7500 and to

withdraw its objection so Majerle could collect unemployment compensation. CP 448, 474, 577-579 (Block Decl. ¶22 & Exs. 15 and 44).

A. December 2008 PRA Request.

On December 8, 2008, Block made a PRA request to the City for records related to the investigation of Majerle's misconduct and subsequent settlement with the City (hereinafter referred to as the "1st PRA Request" or the "December 2008 PRA Request"). CP 447-48, 473 (Block Decl. ¶ 20 & Ex. 14). The request sought

> ALL documents pertaining to the Karl Majerle alleged theft, which shall include all city investigative files, any settlement agreements made by any City of Gold Bar official, any emails regarding Majerle, the amount of taxpayers' money used to pay off Karl Majerle, and where the financial resources came from to pay off Karl Majerle.
>
> In addition, I am also seeking a copy of all the City of Gold Bar's insurance policies and copies of all insurance claim application(s) made as the result of the Karl Majerle alleged theft. Policies and claims shall be construed broadly to include credit card fraud protection benefits as well as employment law claims benefits which are often included in insurance policies.

CP 447-48, 473 (Block 7/9/13 Decl. ¶ 20 & Ex. 14). The City received the request on December 9, 2008, and refers to this request as "PRA 120908". CP 448, 474 (Block Decl., Ex. 15).

On December 12, 2008, and on January 23, 2009, the City responded saying it was gathering records and would notify Majerle of the

request pursuant to a "settlement agreement" with Majerle. CP 448, 450, 474, 487 (Block Decl. Ex. 15 & 21).

On February 27, 2009, the City produced 15 PDF files containing approximately 675 pages of scanned records. CP 453 (Block Decl. ¶45). The records produced revealed that then Mayor Crystal Hill was using her personal AOL email address (hillcrystald@aol.com) to conduct City business. CP 453, 525-28 (Block Decl. ¶46 & Ex. 33 at 2-5). One responsive email dated October 9, 2008, was sent by Hill using her non-City work email address (chill@mark-weiss.com). CP 453, 533 (Block Decl. & Ex. 33 at 10). These emails supported an earlier statement from the City Clerk to Block that Mayor Hill did not have an official City email address. CP 447, 470 (Block Decl. ¶17 & Ex. 11).

Despite Mayor Hill's extensive use of email, the records produced by the City included only 10 pages of scanned email messages relating to Majerle, four of which were identical copies of the same email dated September 18, 2008, from Mayor Hill to City Clerk Laura Kelly, produced from Kelly's copy. CP 453, 524-533 (Block Decl. ¶¶45-46 & Ex. 33). The emails were dated from September 18, 2008, to October 15, 2008. CP 453, 524-533 (Block Decl. ¶¶45-46 & Ex. 33). None of the emails were contemporaneous with the Majerle incident in June 2008. CP 453, 524-533 (Block Decl. ¶¶45-46 & Ex. 33).

The four duplicate emails dated September 18, 2008, included in a string an email dated June 4, 2008, that Mayor Hill had sent to herself, both from and to the same AOL email address. CP 525-528 (Block Decl. Ex. 33 at 2-5). The original June 4, 2008, which clearly related to the Majerle incident, was never produced by the City. CP 445 (Block Decl. ¶ 4). The email produced was one Hill forwarded to the City Clerk on September 18, 2008, with instructions to "print ASAP and place in confidential personnel file." CP 525-528 (Block Decl. Ex. 33 at 2-5).

The City admitted to withholding in their entirety 66 pages or more of emails and other records responsive to Block's request. CP 534-38 (Block Decl. Ex. 34). These records were identified in a privilege log provided on February 27, 2009, stating the City was withholding the records in their entirety as "Exempt under Attorney Client Privilege/work product RCW 5.60.060(2)(a) and Hangartner v. City of Seattle 151, [sic] Wn.2d 439 (2004) and Exempt-RCW 42.56.290 and under Washington case law, notably *Harris v. Drake*, 116 Wn App. [sic] 261, aff'd 1252 Wn.2d 480." This same statement, typographical errors and all, was repeated for each of the entirely-withheld records in the log. CP 535-38 (Block Decl. Ex. 34) (italics in original). The log did not reveal the subject of any of the records or explain the alleged controversy at issue for purposes of RCW 42.56.290 or explain how the two cases cited applied to

the exemption claim. **Id.** Both privileges (attorney client privilege as well as work product) were cited for every one of the withheld records, including records that purported to be notes of an attorney and had not been communicated to anyone. See CP 537-538 (descriptions for withheld documents 679-710 and 717-722). The City further did not provide redacted copies of any of the 66 or more pages but withheld them in their entirety. CP 535-38 (Block Decl. Ex. 34).

B. February 13, 2009, PRA Request.

On February 13, 2009, Block made a second PRA request (hereinafter referred to as the "2nd PRA Request" or the "February 2009 PRA Request"). Block sought records relating to the efforts taken by the City to response to her December 2008, request:

> (i) All records created or received by the City of Gold Bar, including but not limited to, all correspondence, email, internal memoranda and notes, relating to the City's efforts to respond to Ms. Block's request for public records dated November 28, 2008.
>
> (ii) All records created or received by the City of Gold Bar, including but not limited to, all correspondence, email, internal memoranda and notes, relating to the City's efforts to respond to Ms. Block's request for public records dated December 8, 2008.
>
> (iii) All records created or received by the City of Gold Bar, including but not limited to, all correspondence, email, internal memoranda and notes, relating to any notice provided to Karl Majerle regarding Ms, Block's request for public records dated December 8, 2008, and/or any response from Karl Majerle.

> (iv) All records responsive to Ms. Block's requests for public records dated November 28, 2008, and December 8, 2008.

CP 451-52, 513-15 (Block Decl., Ex. 27). The request specifically sought records in electronic format and included records located in personal emails and on personal devices. It stated:

> For those responsive records that currently exist in electronic format (such as email, Word, or PDF files), please provide those documents in such native format by copying the filed onto a CDR or DVD. For those documents which exist only in paper form, please scan those documents into PDF files and copy those files onto a CDR or DVD. Where paper copies of records available in electronic form contain handwritten marks or notes, please provide both the native electronic record and a copy of the paper record.
>
> ...
>
> This request specifically includes – and you are specifically directed to obtain, preserve in native format, and produce – any records that exist on personal computers, portable phones, Blackberries, other devices, or in personal email, data, voice mail, or text mail accounts owned or controlled by any officer, employee or agent of the City.....

Id. The City received this request on February 13, 2009, and refers to this request as the "GB 021209". CP 452, 516 (Block Decl. ¶ 39).

On February 27, 2009, the City produced three PDF files containing 94 pages of scanned records and 13 other files. CP 448, 453, 475-78, 481-86, 488-512, 539-44 (Block Decl. ¶¶23-25, 28, 32-34, 48-49 & Exs. 16, 19-20, 22-26, 35). The records produced included 39 pages of email messages, 29 of which were redacted. **Id.** The redacted records were listed in a privilege log in which the City asserted for each of the

documents "Header and signature provided – Content is attorney advice to client and redacted under Exempt under Attorney Client Privilege/work product RCW 5.60.060(2)(a) and Hangartner v. City of Seattle 151, [sic] Wn. 2d 439 (2004) and Exempt-RCW 42.56.290 and under Washington case law, notably *Harris v. Drake*, 116 Wn [sic] App. 261, *aff'd* 152 Wn.2d 480." CP 539-44 (Block Decl., Ex. 35). The same description was given for each of the 29 pages of redacted records including the same typographical errors. **Id.** The description did not reveal the subject of the records or indicate the "controversy" at issue for purposes of RCW 42.56.290. **Id.** Drafts of letters to Block were redacted based on this same above-quoted description but also adding "Content is redacted as Draft under RCW 42.56.280..." CP 543 (Block Decl., Ex. 35 (log entry for documents 064, 069-070)). Two draft third party notice letters to Majerle were redacted in their entirety except for the salutation and address. CP 451, 501-502 (Block Decl. ¶ 34 & Ex. 24 at 8-9).

The 29 pages of redacted records were dated from December 12, 2008, through February 13, 2009. CP 453, 539-44 (Block Decl. ¶49 & Ex. 35). The email records should illustrate what efforts, if any, were made by Mayor Hill or the City to retrieve and produce records responsive to the 1st PRA request dated December 8, 2008, and received December 9, 2008, particularly whether any attempt was made to obtain and preserve Hill's

emails at that time. See sealed unredacted versions of records attached to CP 34, docket 38, (See Index to Clerk's Papers Vol. I p. 2 "Exhibit to Follow Under Separate Cover").

C. Incomplete Production of Records on February 27, 2009.

The February 27, 2009, production was the City's sole production for the December 2008 and February 2009 PRA Requests at issue in this lawsuit. The City indicated it had produced all non-exempt responsive records on that date and closed Block's request. In the February 27, 2009, production, the City did not identify or produce a number of records that were responsive to Block's two requests for records at issue in this appeal. CP 444-47, 449, 455-58, 462-67, 468-72, 479-80, 568, 572-74 (Block Decl. ¶¶3-5, 9-12, 14, 16, 18-19, 26-27, 60-61 & Exs. 1-3, 5, 7-10, 12-13, 17-18, 43-44). Some of the records produced by the City on February 27, 2009, were incomplete, and other responsive records were not mentioned or identified at all and were obtained by Block later from other sources. **Id.** Some additional responsive records were produced by the City in November 2009, 2010, 2011 and 2012 in response to different requests for records. CP 444-47, 449, 455-58, 465, 468-69, 471-72, 479-80, 568, 572-74 (Block Decl. ¶¶3, 5, 11, 16, 18-19, 26-27, 60-61 & Exs. 1-3, 7, 10, 12-13, 17-18, 43-44).

1. Some Responsive Records Never Identified or Produced by the City.

The City did not produce electronic originals of emails or other records and instead produced only paper copies, scanned in PDFs. The City has not established that any search was performed of Hill's emails at this time or of her blackberry device she used for her emails. Several responsive records were not identified or produced by the City in its February 27, 2009, production, or at any time thereafter.

The City has never produced the June 4, 2008, email from Crystal Hill which contained notes of Mayor Hill's conversation regarding Majerle with a Snohomish County employee. CP 445-46, 464 (Block Decl. ¶¶4, 10, Ex. 6). On February 27, 2009, the City produced only a scanned (PDF) copy of the email that had been forwarded to the City Clerk on September 18, 2008. CP 446, 464 (Block Decl. ¶10 & Ex. 6).

The City has never produced the original email dated October 9, 2008, which Mayor Hill sent from her work email address (chill@mark-weiss.com) regarding Majerle to the City's insurance attorney Eileen Lawrence. CP 446, 466 (Block Decl. ¶12 & Ex. 8). The City produced only a PDF copy that had been received and printed by Lawrence on October 13, 2008. **Id.**

The City has never produced the original email dated October 13, 2008, which Mayor Hill sent to herself, both from and to her AOL account. CP 446, 467(Block Decl. ¶14 & Ex. 9). This email is titled "Address" and contained information relating to the location of Majerle's personal use of the City's gas card for fueling. **Id.** The City produced only a PDF copy of the email forwarded by Mayor Hill to the City Clerk with instructions to forward the email to the City's insurance attorney Lawrence. **Id.**

The City did not identify or produce an email dated August 1, 2008, in which Mayor Hill replied by email, using her AOL email account, to an inquiry from the State Auditor regarding Majerle. CP 445, 462-63 (Block Decl. ¶9 & Ex. 5). The email had a subject of "fuel card theft" and an attachment titled "discipline letter Karl Majerle.doc." **Id.** Block obtained a copy of this email from the State Auditor. **Id.**

2. Additional Responsive, and Previously Silently Withheld, Records Produced in November 2009 in Response to a Different Request.

In its February 27, 2009, production, the City did not identify or produce an email dated June 4, 2008, in which Mayor Hill sent an attached witness statement (as a Word file) regarding Majerle from her AOL account to Snohomish County Deputy Sheriff Jeffrey Ross. CP 445, 457-58 (Block Decl. ¶5 & Exs. 2-3). The City eventually produced this email

as a PDF in November 2009 in response to another PRA request. CP 445, 457-58 (Block Decl. ¶5 & Exs. 2-3). The City has never provided the Word version of the attachment to the email.

3. Additional Responsive, and Previously Silently Withheld, Records Produced in 2010, 2011 and 2012.

On June 2, 2008, Mayor Hill exchanged emails with Gold Bar employee John Light regarding the investigation of Majerle for gas card usage. CP 456 (Block Decl. Ex. 1). The emails were sent between Mayor Hill (using her AOL account) and City employee John Light (using his City email account). CP 444, 455-56, 572-74 (Block Decl. ¶¶3, 60-61 & Exs. 1 & 44 at p. 3-5). These emails clearly related to Majerle's misuse of City gas cards and were sent just one month prior to Majerle's termination, and six months prior to Block's December 2008 PRA Request. **Id.** The fact that these emails were responsive to Block's request would have been obvious to both Mayor Hill and John Light who received her emails. The emails were not identified or produced by the City in response to either the December 2008 or February 2009 PRA requests. They were received by Block on January 15, 2010, in response to a different request. CP 444, 568, 572-74 (Block Decl. ¶¶3, 60-61 & Exs. 1 & 43-44).

On September 20, 2008, the City Clerk Laura Kelly sent an email to City Council member Richard Norris regarding an upcoming interview with an attorney working on Karle Majerle's termination. CP 446, 465 (Block Decl. ¶11 & Ex. 7). This email was not identified or produced by the City in response to Block's December 2008 or February 2009 PRA Requests. CP 446 (Block Decl. ¶11). Block obtained it in 2010 in response to a different request for records. **Id.**

On December 3, 2008, the City of Bellevue emailed the City Clerk asking for a reference for Majerle whom they had just hired, and the email was forwarded to Mayor Hill by the City Clerk on December 4, 2008. CP 447, 471 (Block Decl. ¶18 & Ex. 12). Mayor Hill sent an email to the City Clerk on December 4, 2008, in response. CP 447, 472 (Block Decl. ¶19 & Ex. 13). The subject for all three messages was "Karl Majerle". CP 471-72. They were sent and received just days before Block's December 2008 PRA Request, which sought all emails regarding Majerle on any subject. The City did not identify or provide a copy of any of these three emails to Block in February 27, 2009. CP 447. Block received a copy from the City on January 15, 2010, in response to another request. **Id.**

On October 24, 2008, the City's attorney forwarded an email regarding the settlement with Majerle to Mayor Hill and other City

attorneys. CP 447, 468-69 (Block Decl. ¶16 &Ex. 10). The subject of the email was "Karl J. Majerle re Settlement and Hold Harmless Agreement." CP 468-69 (Block Decl. Ex. 10). This email was not identified or produced by the City in response to Block's December 2008 or February 2009 PRA Requests. CP 447 (Block Decl. ¶16). Block obtained a redacted copy of this email in 2011 in response to a different request for records. **Id.**

On January 15, 2009, the City Clerk sent an email to Mayor Hill regarding Block's December 2008 PRA request. The Clerk stated: "In the records request on Karl, she [Anne Block] is asking for any emails regarding Majerle. I will need these ASAP. Thank you." CP 449, 479 (Block Decl. ¶26 & Ex. 17). This record was responsive to the February 2009 PRA request, and the City produced a PDF copy of this email on February 27, 2009. **Id.** The City did not produce any response from Mayor Hill at that time. Three years later, more than two years after this lawsuit was filed and served, in response to a different request for records, the City produced a copy of the same email but with a response from Mayor Hill. CP 449, 480 (Block Decl. ¶27 & Ex. 18). Replying to the City Clerk using her AOL email account, Mayor Hill had written "Those would also be in Eilleen Lawrence's docs. – Crystal." CP 480 (Block Decl., Ex. 18). This email, which the City did not produce in response to

the February 2009 PRA request, confirmed that Mayor Hill apparently failed to retrieve responsive records from her AOL account back in 2009. Had Block been provided this record back in 2009, Block could have taken steps to assure a reasonable search was performed by Hill and the City. Given that the reply email was sent to the City Clerk it is unclear why the City failed to produce this record in February 2009.

D. Records Withheld in Their Entirety or Redacted by the City as Privileged and Work Product and "Drafts".

The City has admitted it withheld 66 pages of emails and other records responsive to Block's December 2008 PRA request in their entirety based on a privilege log stating they are exempt as attorney-client privilege and work product pursuant to RCW 42.56.290. CP 525-28, 534-34 (Block Decl. Exs. 33-34).

The City produced 29 pages of records in redacted form in response to the February 2009 PRA Request alleging the redacted portions were exempt as attorney-client privilege and work product pursuant to RCW 42.56.290 and a few letters to Block additionally claimed as exempt as "drafts". CP 448, 453, 475-78, 481-86, 488-512, 539-44 (Block Decl. ¶¶23-25, 28, 32-34, 48-49 & Exs. 16, 19-20, 22-26, 35).

E. Block and City's Motions for Summary Judgment and Court's In Camera Review of 35 Redacted Records.

Block filed a motion for partial summary judgment on July 9, 2013, seeking a finding that the City violated the PRA by failing to produce responsive records, failing to produce redacted copies of records that the City asserted were exempt as privileged or work product, and failing to explain how exemptions applied to redacted or withheld records as required by RCW 42.56.210(3). CP 590-613 (Block Motion for Summary Judgment). Block also made a motion for in camera review of the 29 pages of redacted records withheld in response to the February 2009 PRA Request. CP 590, 607-611. The City also moved for Summary Judgment. The trial court granted the motion for in camera review and accepted 35 pages of records produced in redacted form and sealed by the Court pursuant to CP 34 (sealed exhibit sent to Appellate Court under separate cover).

On October 2, 2013, the trial court granted the City's motion for summary judgment and denied Block's motion for partial summary judgment. CP 29. Its sole findings regarding withheld or redacted records related to the 35 pages it reviewed in camera. The entirety of its findings for the summary judgment decisions stated as follows:

> 2.1. [A]l of the documents qualified as either work product and/or attorney-client privilege and the exemption logs correctly reflected the applicable exemptions.
>
> 2.2. The records reviewed in camera are all protected by either or both the work product or attorney-client privilege. Some of the records contain information regarding the search for records responsive to Block's PRRs, but in the context of attorney communications.

CP 29 (10/2/13 Order.). The trial court did not address the fact that several responsive records had not been identified or produced in the February 2009 production, were silently withheld, some were never provided, and others were provided later in response to other requests or had been obtained by Block from other sources after filing suit.

Block moved for reconsideration of November 22, 2013, (CP 20-26), which was denied in an order dated December 10, 2013, and filed on December 11, 2013, without any additional findings. CP 8. This appeal by Block followed.

III. LEGAL AUTHORITY AND ARGUMENT

A. Standard of Review and Burden of Proof

In an PRA case, the appellate court, like the trial court, reviews the agency's actions de novo. RCW 42.56.550(3); **Neighborhood Alliance v. Spokane County**, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). The trial court's decision to grant and deny the summary judgment motions is

similarly reviewed de novo. **Lybbert v. Grant County**, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The City has the burden, at all times, to prove that it has complied with the PRA.

> 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.

RCW 42.56.550(1); **see also 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 includes the burden to prove an agency's search was reasonable and adequate (**Neighborhood Alliance**, 172 Wn.2d at 715), and that its statement of exemptions and their application to withheld records was sufficiently detailed. **Sanders v. State**, 169 Wn.2d 827, 240 P.3d 120 (2010).

B. 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; **see also Hartman v. Washington State Game Comm'n**, 85 Wn.2d 176, 179, 532 P.2d 614 (1975) ("Where the legislature prefaces an enactment with a statement of purpose... that declaration... serves as an important guide in understanding the intended effect of operative sections.") (citation omitted); **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).

C. The Records at Issue are Public Records.

It is undisputed that the records at issue, including Hill's AOL emails located on her Blackberry, are "public records" pursuant to RCW 42.56.010(3). Emails of public officials and public employees, including those sent and received via personal email addresses and devices, are "public records" under the PRA when the email relates to the conduct of government of or the performance of any government or proprietary function. **O'Neill v. City of Shoreline**, 170 Wn.2d 138, 147, 150, 240 P.3d 1149 (2010) (holding email sent to Deputy Mayor from constituent relating a zoning matter was a public record as was the metadata of the original email the Deputy Mayor received; noting the PRA is "a very broad statute defining public records as nearly any conceivable government record related to the conduct of government is liberally construed in Washington."); **Mechling v. Monroe**, 152 Wn. App. 830, 843-44, 222 P.3d 808 (2009). In contrast, "purely personal" emails of government officials are not public records. **See Forbes v. City of Gold Bar**, 171 Wn. App. 857, 288 P.3d 384 (2012).

In **O'Neill v. Shoreline**, the Washington Supreme Court declared that an email sent to a Deputy Mayor from a constituent to the Deputy Mayor's personal email address, and read by the Deputy Mayor after hours on her personal computer in her home was a public record as it referenced a zoning matter about which constituents planned to complaint at an upcoming City Council meeting. 170 Wn.2d at 147, 150. The State Supreme Court further held that the metadata of the original email, sent to the Deputy Mayor's personal email address and read by the Deputy Mayor on her personal computer after hours in her home, was itself a public record, making the production by the City of a print out of the email an insufficient response. **Id.** The State Supreme Court warned against allowing public officials to conduct government business on private emails without regard to the PRA: "If government employees could circumvent the PRA by using their home computers for government business, the PIA could be drastically undermined." **Id.** at 150.

In **Mechling**, Council members used personal emails to discuss agency business. Division One Court of Appeals held the emails were public records, but the email addresses of the Council members were not exempt. App. at 830, 843-44.

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In **Mechling**, City Council members used personal emails to discuss agency business. The Division One Court of Appeals held the emails were public records and that the email addresses of the Council members were not exempt. 152 Wn. App. at 830, 843-44.

In this case, all of the records at issue here are "public records", including the 66 pages of emails withheld in their entirety, the 29 pages of

records produced in redacted form, and the numerous records the City did not identify or produce in response to these requests in February 2009, and then either produced later in response to other PRA requests or still has failed to identify and produce. They are not "purely personal" emails. They are emails and other records related to the investigation and ultimate termination of a City employee for improper use of City gas cards and the sabotage of the City's water wells, and then the City's response to a PRA request for those records. Even though the Mayor chose to use a personal non-City email address to conduct City business, those emails sent to and from her email address are nonetheless "public records" which the agency is obligated to obtain and produce. **O'Neill**, 170 Wn.2d at 147, 150 (email a Deputy Mayor received after working hours on her personal email address and read on her personal laptop and at her home was a public record as was the metadata of the original email she received on her personal email making a print out of the email an insufficient response).

D. City Failed to Identify all Responsive Public Records.

RCW 42.56.070(1) provides in relevant part:

> Each agency ... shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

In any action for judicial review the City bears the burden of proof to show that it has identified all responsive records, including those it claims are exempt. Here, the record establishes that the City did not identify the existence of several records when it responded on February 27, 2009. The City failed to identify in its February 2009 response numerous records, that were clearly responsive to the requests, which Block subsequently from other source or received from the City in response to other requests ten months to two years after the City told Block all responsive records had been produced. CP 444-47, 449, 455-58, 468-69, 471-72, 479-80, 568, 572-74. It has failed to identify or produce responsive records even to this day. See for example CP 445-46, 462-64, 466-67. In addition to the records Block knows were denied to her, because she later obtained a copy or can establish a copy of a known records was not produced, the record is equally clear that the City has never produced any email obtained from Hill or from her Blackberry responsive to these two PRA Requests. All of the records produced were emails forwarded by Hill to others or sent to Hill from others. The City has not produced a single email retrieved by Hill from her email account or from her Blackberry. There is no evidence that the City or Hill even tried to retrieve or produce such emails from Hill's email account or from her Blackberry before the City responded on February 27, 2009, claiming to be providing all responsive

records. It is undisputed that Hill created, received and possessed relevant emails and that these emails existed at the time of Block's request – some of them were created within days of Block's requests – and it is equally clear that the City has not shown it searched for or produced any of those records before it responded in February 2009.

The City thus failed to identify responsive records when it told Block in February 2009 that all responsive non-exempt records had been provided. It further silently withheld these non-exempt records it subsequently produced and continues to silently-withhold those records it has never provided..

> The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.... Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. ... Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.
>
> The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying

> any individual records which are being withheld in their entirety. Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act.

PAWS II, 125 Wn.2d at 270-71.

The City argued that it could not be held responsible for allegedly failing to produce additional responsive records that had not yet been provided, including specifically Mayor Hill's emails. The City claimed the issue was one of the "reasonableness" of their search under **Neighborhood Alliance** and argued Block had the burden to prove the City's search had not been reasonable. The City attempts to confuse two separate doctrines. In **Neighborhood Alliance**, an agency did not search a computer for responsive records and then claimed no record existed. The State Supreme Court found the search performed not to have been reasonable and thus the response not to have been reasonable. At issue in that case was the agency's claim there were no responsive records in light of evidence the City had not searched the very computer that originally contained the record.

Here, Block has proven the existence of several responsive records that existed on the date of her request, were not identified or produced to her by the City, and that Block subsequently obtained in response to other record requests or from other sources showing they existed on the date of

her request. Thus, Block need not show whether or not the search was reasonable to establish the City in fact did not produce a responsive record to her when it claimed it had given her all the records. The trial court should have granted Block's motion for partial summary judgment on this basis and denied the City's summary judgment.

The City in its own motion alleged there were no additional responsive records and that its search was reasonable. But this was not only incorrect, but frankly irrelevant to the right of Block to a grant of partial summary judgment for the records Block proved had not been provided and were responsive. Block alleged there may be additional responsive records that had yet to be produced, but this was a subject to be addressed another day, and the trial court should have deferred its consideration, as the Supreme Court had ordered in **Neighborhood Alliance** until after discovery could be conducted into exactly what steps had been taken to search for records – efforts that were obstructed here due to the City's claim of privilege for virtually all records and communications showing such efforts.

The City did not, in fact, prove a reasonable search, as the City did not indentify 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.

So while Block need not show the City's search was "reasonable" to prevail on her motion for partial summary judgment as Block has submitted responsive documents the City did not provide her with its February 27, 2009, response, 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.

E. City Failed to Provide Adequate Exemption Citation and Explanation.

Many of the records the City seeks to withhold are the very documentary evidence of the City's efforts to search for and provide records to Block. The City, citing alleged privilege, sought to block all

access to these records and the information they contained, evidence that is both relevant and admissible under **Neighborhood Alliance.**

PRA requires an agency, when it withholds a requested public record, to do two things: (1) cite an applicable exemption, and (2) provide a brief explanation of how that exemption applies to the records withheld or redacted. **See** RCW 42.56.210(3) ("Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld."). **See Residential Housing Ass'n v. City of Des Moines**, 165 Wn.2d 525, 539, 199 P.3d 393 (2009) ("**RHA**") (discussing withholding index requirement); **see also** WAC 44-14-04004(4)(b) (discussing the two requirements of a proper withholding index (citing exemption and brief explanation). The PRA is supposed to provide the public access to public records. To that end RCW 42.56.210(3) gives the requestor the right to be informed by the agency, before he or she is sued or has to sue, why requested records are exempt. That right is meaningless unless the exemption statement provided by the agency is both legally correct—citing exemptions that actually apply to the records at issue—and their application to the record sufficiently explained. An agency must provide a brief explanation of "each" withheld record—blanket explanations for

entire categories of records are improper. **See Sanders**, 169 Wn.2d 827. An agency's failure to provide a proper withholding index is a per se violation of the PRA. **See Sanders**, 169 Wn.2d 827; **Citizens For Fair Share v. State Dept. of Corrections**, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (holding agency "violated the [PRA] by failing to name and recite to [requestor] its justification for withholding" portions of records and therefore finding requestor to be prevailing party).

In **Sanders**, former Justice Sanders requested records from the Attorney General's Office ("AGO") related to Justice Sanders' visit to McNeil Island and a resulting inquiry by the Judicial Conduct Commission. In response the AGO produced approximately 1000 pages of documents. The AGO also produced an index that identified exempt documents by author, recipient and date and specifically the AGO's claimed exemption for 144 documents that were withheld or redacted. **Sanders**, 169 Wn.2d at 836-37. The AGO index "did not contain any facts or explanation of how its claimed exemptions applied to each document withheld." **Id.**

Justice Sanders sued the AGO for violations of the PRA. Sanders argued that the AGO had failed to provide the brief explanation required by RCW 42.56.210(3). **Id.** On cross motions for summary judgment the trial court agreed with Sanders, rejecting the AGO's argument that it had

"explained" its exemptions by identifying the documents and their subject matter, and by specifying exemptions. **Id.** at 839-40, 845-46. The State Supreme Court affirmed stating:

> The trial court's interpretation of the statute is correct: an agency withholding or redacting any record must specify the exemption *and* five a brief explanation of how the exemption applies to the document. RCW 42.56.210(3) ... The identifying information about a given document does not explain, for example, why it is work product under the PRA's "controversy" exemption. *See* CP at 187-224 (claiming the controversy exemption for numerous records without specifying the details such as the controversy to which each record is relevant). Allowing the mere identification of a document and the claimed exemption to count as a "brief explanation" would render the brief-explanation cause superfluous.

Sanders, 169 Wn.2d at 846 (footnote omitted). The **Sanders** court also held that an agency's failure to provide the brief explanation required by RCW 42.56.210(3) is a violation of the PRA that requires a remedy. **Id.** The Court rejected Justice Sanders' argument that the remedy should be waiver or estoppel. **Id.** at 847. The court also rejected the AGO's argument that the requestor's only remedy would be to sue the agency to compel an explanation. **Id.** The court agreed with the trial court that the remedy for an agency's failure to provide the required explanation is both attorney fees and consideration of the violation in awarding penalties, if any. **Id.** at 842, 870. Subsequent cases leave no doubt that an agency violating RCW 42.56.210(3) is liable for attorneys fees whether or not the

agency has wrongfully withheld any records for which a daily penalty under RCW 42.56.550(4) is required. **Yakima County v. Yakima Herald-Republic**, 170 Wn.2d 775, 809, 246 P.3d 768 (2011); **Delong v. Parmelee**, 164 Wn. App. 781, 787, 267 P.3d 410 (2011).

Here, the City exempted 66 pages of records withheld in their entirety and 29 pages of redacted records claiming them exempt, without adequate explanation as attorney client privileged and work product (the same "controversy exemption" at issue in **Sanders**), and for some draft letters to Block a "drafts" exemption that does not exist merely for "drafts" and could not apply to the records here.. Like the inadequate exemption log in **Sanders**, 169 Wn.2d at 845-46, the City's log did not explain how the cited exemptions applied to the redacted records. The alleged "drafts" exemption, RCW 42.56.280, .is known as the "deliberative process" exemption, and does not apply to a record, such as these letters, where a final has been created. **Id.**

The City did not explain how any of these exemptions applied to the records. This is a violation of the PRA. It did not cite any exemption for the several pages of records it failed to admit existed in 2009 and did not produce until November 2009, 2010, 2011 and 2013, and thus silently withheld those records in violation of the PRA.

The trial court in its ruling did not state which of the exemptions it found applied stating they were exempt as attorney client privilege "and/or" work product. CP 29. Such a finding suggests the trial court, also, failed to follow the City's exemption statement.

The need for an accurate and correct citation of exemption in an agency response and an adequate explanation for how they apply to the records at the outset is clear. Requestors require information about the agency's claims of exemption to understand why their government is denying them records and to decide whether or not to pursue the request or litigation stemming from the denial. This interest was recognized by the Supreme Court in **RHA**, stating:

> Our analysis in *PAWS* II, however, underscores we were concerned with the need for sufficient identifying information about withheld documents in order to effectuate the goals of the PRA. **To sever this important concern from the statute of limitations would undermine the PRA by creating an incentive for agencies to provide as little information as possible in claiming an exemption and encouraging requesters to seek litigation first and cooperation later**.

RHA, 165 Wn.2d at 538 n.2 (emphasis added).

The State Supreme Court went on in **Sanders v. State** to find a PRA violation for an inadequate explanation of how cited exemptions (attorney client privilege and work product) applied to withheld or redacted records. **Sanders**, 169 Wn.2d 827.

The State Supreme Court realized the need for an adequate explanation of how an exemption applies so those exemptions could be "vetted for validity" by the requestor. **Id.** at 846. Here, the City—utilizing generic cut and paste explanations for all withheld records failed to provide the actual exemption upon which it relied or an explanation how it applied to the records at issue. The City's behavior here prevented the requestor, and frankly the trial court, from knowing what exemptions were being asserted and any means to vet them for validity. The failure to explain an exemption is a violation of the PRA and entitled Block to an award of attorneys' fees and costs, and additionally as an enhancement for penalties for non-exempt records that were not produced.

F. 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 (Block Decl. Ex. 3). 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 Decl. ¶¶23-25, 28, 32-34, 48-49 & Exs. 16, 19-20, 22-26, 35).

Rarely will every portion of a record be exempt, particularly in the context of attorney-client privilege or work product. An email for example, would contain non-exempt information in the header showing the date it was sent, to whom, and perhaps portions of the communication. "If the requested records contain information covered by the attorney-client privilege and information that is not covered by the privileged, subject to in camera review, the City may only redact the privileged information." **Mechling**, 152 Wn. App. at 853. The trial court should have ordered the City to produce at least redacted versions of the 66 pages to Block. If Block disputed that the redactions went beyond the parameters of exempt information, Block could then have asked for in camera review of just those allegedly exempt portions, after being provided a thorough exemption explanation as to whether the exemption being claimed was attorney-client privilege, work product, or both, for a given record and how those exemptions applied to the record in question. Withholding the record in its entirety was presumptively too great a withholding, and the City did not establish that every portion of such records were in fact exempt. In fact, it could not have done so without voluntarily submitting those 66 pages to the court for an in camera review, something it did not do.

The PRA exemption for attorney client privilege is narrow and only applies to legal advice. 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. In **Hangartner v. Seattle**, the Washington State Supreme Court stated:

> The attorney-client privilege is a narrow privilege and protects only "communications and advice between attorney and client." It does not protect documents that are prepared for some other purpose than communication with an attorney.

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.").[1]

The 29 pages of records produced heavily redacted 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

[1] In **Sanders v. State**, the Washington State Supreme Court addressed, but did not resolve, a dispute over the scope of the attorney-client privilege. The trial court in **Sanders** ruled that "the attorney-client privilege protects all communications arising from the attorney-client relationship, once formed, not merely those pertaining to legal advice." 169 Wn.2d at 840. Reviewing he trial court's decision, the Washington State Supreme Court assumed, without deciding, "that the attorney-client privilege only protects communications pertaining to legal advice." 169 Wn.2d at 853. The Supreme Court held that certain records deemed to be exempt did not meet the test of the exemption. **Id.**

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 Decl. ¶63 & Ex. 45). 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:

> Q. Do these emails address – the redacted portions of these emails address the question of whether or not Crystal Hill had responsive records?
>
> MR. MYERS (City's attorney): I'm going to object on the grounds that the content of the redactions is withheld as attorney-client privilege and it's inappropriate to ask for the content of the privileged materials, and instruct the witness not to answer...
>
> Q. Does anything in these emails address whether or not Crystal Hill had actually provided records to you and Cheryl Beyer [for review]?
>
> MY MYERS: I'm going to object... [and] instruct the witness not to answer.
>
> Q. Do these redactions address whether or not the City has completed the process of searching for responsive records?
>
> MR. MYERS: Same objection. Same instruction.

> Q. Do these redactions address whether or not the City has finished the process of reviewing the documents that it has obtained?
>
> MR. MYERS: Same objection. Same instruction.

CP 587-89 (Block Decl. Ex. 45 at 4-6). 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 curt'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 cited two cases without explanation in its exemption log as alleged justification for its claim these communications were all privileged. It cited **Hangartner**, which recognized attorney-client privilege could be an "other statute" exemption and then remanded to the trial court for in camera review to determine if particular records were privileged. 151 Wn.2d at 453-54. And it cited **Harris v. Drake**, 116 Wn.App. 261, 65 P.3d 350 (2003), **aff'd**, 152 Wn.2d 480, 99 P.3d 872 (2004), which held that a medical examination conducted pursuant to the terms of personal injury protection coverage in an automobile insurance

policy may be considered work product in subsequent litigation with the tortfeasor. 152 Wn.2d at 483-84. Neither case explains, nor supports, a claim that communications related to the gathering, search for, and production of public records would qualify as privilege just because the work was performed by an attorney or communications about those efforts were copied to an attorney.

Block is not required to prove records are not privileged. Rather the City must prove its claim of exemption for each part of a record withheld. RCW 42.56.550(1). The City did not, and could not, meet that burden for the 66 pages of records it withheld in their entirety, including header information as its explanation was not sufficient and it did not provide those records to the court for an in camera review to try and prove the exemptions. The City further did not prove all of the redacted portion of the 29 pages were exempt given the narrow scope of the exemption cited, the breadth of the redacted information, and its lack of admissible evidence offered to justify that everything redacted was an attorney client privileged communication or attorney work product.

G. Failure to Claim an Exemption is a Violation of the PRA.

The City was required to identify every responsive record that was not provided to Block, and to cite an exemption for any records not being

provided. An agency that does not produce a record, and does not identify that record and cite an exemption for it, commits a silent withholding. This is a violation of the PRA. **PAWS II**, 125 Wn.2d 243.

RCW 42.56.070 only allows withholding based on specific statutory exemptions:

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, **unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure** of specific information or records.

(emphasis added). **See e.g. PAWS II**, 125 Wn.2d at 260-61 (records or portions of records withheld must fall within a specific exemption from disclosure); **Citizens for Fair**, 117 Wn. App. at 431 (finding agency violated the PRA by failing to cite an exemption in its initial response and stating: "[a]lthough the Department now cites a legal exemption for personal addresses, it did not recite this exemption in response to Citizens' request for offender addresses."). **See also RHA**, 165 Wn.2d at 538 ("Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record."); **see also Newman v. King County**, 133 Wn.2d 565, 571, 947 P.2d 712 (1997) ("Once documents are determined to be within the scope of the [PRA], disclosure is required unless a specific statutory exemption

is applicable."). If an agency withholds information and does not cite an exemption from disclosure, it is in violation of the PRA.

In **Citizens for Fair Share**, the requestor made a public records request seeking "offenders' addresses, addresses of current reporting facilities, Department policies for managing political opposition to siting of correctional facilities, and the effect of a [CJC] on crime rates and property values." 117 Wn. App. at 418. The agency responded to most of the request, but did not provide any of the addresses of offenders, nor did it provide any claim of exemption. **Id**. at 430-31. The requestors brought a claim alleging multiple causes of action, including one under the PRA. **Id**. at 418-19. The trial court granted summary judgment in favor of the agency. **Id**. at 419.

On appeal, the requestors asserted that the failure to cite *any* exemption in withholding the public records was a violation of the PRA. **Id**. at 430. The agency attempted to argue that the home addresses sought by Citizens were exempt under RCW 42.56.230 (then RCW 42.17.310(1)(a)). **Id**. at 431.

The Court of Appeals rejected the agency's argument, and reversed the trial court on this issue, finding conclusive the fact that "[a]lthough the Department now cites a legal exemption for personal addresses, it did not recite this exemption in response to [the requestors'] request for offender

addresses." **Id**. Specifically, the appellate court in **Citizens for Fair Share** refused to consider whether or not the new exemption (presumably cited only after the cause of action was filed) was actually applicable. **Id**. The Court of Appeals concluded that the fact that the agency did not cite any exemption at all in its response to the request was by itself a violation of the PRA: "[T]he Department nevertheless violated the [PRA] by failing to name and recite to [the requestors] its justification for withholding the addresses." **Id**. Because failing to cite any exemption at all is a per se violation of the PRA, the appellate court found that the trial court had erred in granting the defendant's motion for summary judgment on that claim. **Id**.

Further, in **RHA** the Supreme Court rejected the City of Des Moines' attempt to argue that the requirement to provide a withholding index describing the justification for withholding records "is at odds with prior case law establishing that an agency may argue new grounds for exemption at a PRA show cause hearing even if previously-stated reasons for refusing disclosure are invalid." **RHA**, 165 Wn.2d at 536-37. In rejecting this argument, the Supreme Court "emphasized the need for particularity in the identification of records withheld and exemptions claimed." **Id**. at 537 (citing **PAWS II**, 125 Wn.2d 243). A failure to cite an exemption in the first instance is a violation of the PRA. As described

above, the City did not identify or produce several responsive records nor did it cite an exemption justifying their withholding.

Not only is failure to cite an exemption a violation of the PRA, but failure to adequately explain how that exemption would apply to the records in question is a violation as well. **See Sanders**, 169 Wn.2d at 846 ("Claimed exemptions cannot be vetted for validity if they are unexplained. Thus, [the agency's] failure to explain its claimed exemptions violated the PRA."). Because the City failed to claim an exemption from the PRA for the silently-withheld records, the City necessarily failed to explain how an exemption applied to the records in question and thereby violated the PRA. Thus granting of the City's motion for summary judgment and denial of Block's motion for partial summary judgment was error.

H. Block is Entitled to an Award of Fees, Costs and Penalties under the PRA and as a Prevailing Party in this Appeal.

RCW 42.56.550(4)**Error! Bookmark not defined.** of the PRA provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.]

Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." **Spokane Research & Defense Fund v. City of Spokane**, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citation omitted). Moreover, "permitting a liberal recovery of costs" for a requestor in a PRA enforcement action, "is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records." **Am. Civil Liberties Union of Washington ("ACLU") v. Blaine Sch. Dist. No. 503**, 95 Wn. App. 106, 115, 975 P.2d 536 (1999); **see also** WAC 44-14-08004(7) ("The purpose of [the PRA's] attorneys' fees, costs and daily penalties provisions is to reimburse the requester for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.") (citing **ACLU**).

Previous case law is clear that a person that loses at trial in a PRA action, but prevails on the principal issue on appeal is entitled to attorneys' fees, costs, and mandatory penalties. **See O'Connor v. Washington State Dept. of Social and Health Services**, 143 Wn.2d 895, 911, 25 P.3d 426 (2001); **see also Olsen v. King County**, 106 Wn. App. 616, 625, 24 P.3d 467 (2001)**Error! Bookmark not defined.** (remanding on appeal to calculate fees and costs for requester that had lost at trial, finding that

agency had still not provided responsive records—even though requesters already had copies of requested documents); **see also Zink**, 144 Wn. App. 348-49 (finding requester substantially prevailed on appeal, and remanding to determine fees and costs).

The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. **Progressive Animal Welfare Society v. University of Washington** ("**PAWS I**"), 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); **Amren**, 131 Wn.2d at 35 . The only discretion the court has is in determining the *amount* of reasonable attorney's fees. **Amren**, 131 Wn.2d at 36-37 (discussing how statutory penalties combine with attorney's fees and costs under the PRA to comprise the statute's "punitive provisions") (citation and internal quotation marks omitted).

The Supreme Court in **Limstrom v. Ladenburg**, 136 Wn.2d 595, 616, 963 P.2d 869 (1998) **Error! Bookmark not defined.**remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees—"[including] fees on appeal"—to the requester. Should Block prevail on appeal in any respect, she should be awarded her fees and costs on appeal and below, and should she prevail on her claims that any portion of a non-exempt record was not provided to her on February 27, 2009, when the City claimed to provide its final production

to her requests, she will also be entitled to statutory penalties for each day the records were not provided.

IV. 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 2nd day of July, 2014.

ALLIED
LAW GROUP

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 2, 2014, I delivered a copy of the foregoing Brief of Appellant by U.S. Mail to the following:

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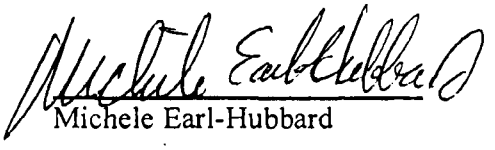
Dated this 2nd day of July, 2014, at Seattle, Washington.



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