96306-1

Supreme Court No.
Court of Appeals No. 76814-0-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

CREER LEGAL,
Appellant

vs.

MONROE SCHOOL DISTRICT,
Respondent

On Appeal from the Snohomish County Superior Court
Case No. 16-2-19365-31

APPELLANT'S PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONERS

Creer Legal ("Creer") hereby asks this Court to accept review of the Court of Appeals decision designated in Section II below.

II. COURT OF APPEALS DECISION

Petitioner appeals from the published decision of *Creer Legal v. Monroe School District.,* Division I, Case No 76814-0-I. The decision was filed August 13, 2018, a copy of which is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1) Can the law of agency be applied to the Public Records Act to prohibit a requestor from seeking to enforce a legitimate and legally compliant PRA request?
2) Does an attorney who requests records under the PRA "own" the right to seek enforcement of such request, if some or all of the records benefit one or more of the attorney's clients?

RAP 13.4 (b) provides that a petition for review will be accepted by the Supreme Court: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or of the United States is

involved; or, (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Review here is warranted under all four subdivisions of RAP 13.4.

The opinion here is contrary to all applicable authority, including clearly articulated and well-established decisions of the Washington Supreme Court and the Court of Appeals as well as the letter and spirit of the PRA. It is a direct attack on the legal mechanism that allows citizens to assess records revealing the conduct of public officials and ensure government transparency. The decision is without legal authority and, if left to stand, would undermine all that the PRA is designed to protect.

IV. STATEMENT OF THE CASE

1. INTRODUCTION AND PROCEDURAL BACKGROUND

The claims herein arise out of Creer's request that the Monroe School District ("the District") produce specific internal emails concerning the District's special education program. The District's search of its database revealed thousands of responsive emails. After almost one year of bi-monthly document productions, the District had released less than ten percent of the responsive emails. Then the District declared the PRA request closed. As of the date of this brief, 1,235 days have passed since the request was served and thousands of emails remain outstanding.

In October 2016, Creer filed a PRA enforcement action in

Snohomish County Superior Court, followed by a motion for summary judgment. Creer's motion was supported by overwhelming evidence that not only established flagrant PRA violations, but revealed the District's willful, bad faith conduct designed to circumvent its obligations under the PRA and avoid detection. The District did not offer any evidence disputing the violations. In short, Creer's motion was substantively unopposed. Rather, the District filed a cross-motion for summary judgment and sought dismissal of the case claiming that: 1) Creer lacked standing to bring a PRA enforcement action[1]; 2) Creer's client (in a separate federal civil rights action) waived Creer's right to bring a PRA enforcement action; and 3) Creer's claims were barred by doctrine of equitable estoppel. Creer opposed the District's motion on the law and the facts.

Both motions were scheduled for oral argument on April 5, 2017. At the hearing, the trial court granted the District's motion, in its entirety, and ordered the case dismissed with prejudice. Given the order of dismissal, the court did not issue a separate ruling on Creer's motion. The trial court's order does not identify the grounds on which the District's motion was granted and the hearing was not recorded. Creer filed a

1 As the Court of Appeal concedes, the issue addressed before the trial court concerned standing. Neither party briefed, or even mentioned, any issue regarding "ownership" of "rights" under the PRA. The Court of Appeals introduced the issue of "ownership", for the first time, in its decision attached.

Notice of Appeal on May 5, 2017. As set forth above, Division One affirmed the trial court's order by its decision of August 13, 2018.

2. BACKGROUND FACTS

Erica Krikorian ("E. Krikorian") is an attorney and practices in the area of disability discrimination and special education. She operates her practice under the dba Creer Legal, the plaintiff and appellant in this matter. One of the most pressing issues now in special education concerns the use of "aversive interventions" on special education students, particularly those with autism. Aversive interventions include placing a student in physical restraints or isolating a student in an enclosed area for some period of time. These practices are known to be dangerous and have resulted in serious student injury and death. The planned use of aversive interventions is now illegal in the State of Washington. Unfortunately, their use continues.

On April 27, 2015, Creer presented the District with a PRA request for all emails in the District's database, dated January 2010 to April 2015, that concern, refer or relate to aversive interventions. At the time of the request, Creer was counsel in a federal civil rights action arising out of the District's abuse of a seven-year-old autistic student and the April 2015 request included a request for all emails that concerned the autistic student

and his family, irrespective of the subject matter.[2]

In order to prevent the capture of emails containing search terms used in an unrelated context, Creer and the District agreed upon a set of two-word search terms that the IT department would use to identify responsive emails.[3] The District's search captured 28,774 emails containing one or more of the two-word aversive intervention search terms.[4] Given the volume of responsive records, the District arranged to produce the emails in bi-monthly installments until all responsive emails were produced.

Ultimately, the District produced over 40,000 bates-numbered pages. However, less than one percent of the requested emails were included in the pages produced.[5] The vast majority of the material produced had nothing whatsoever to do with the subject matter of the request, including sex-industry spam emails, obituaries, school board member lunch orders, 750 consecutive pages of name tags from a Washington State School Directors' Association conference, a dog

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2 CP 2374 (¶7); CP 2385-86. Creer had earlier made PRA requests that involved the represented parent and the child. The April 27, 2015 request was independent of those earlier requests.

3 CP 17 (¶9)

4 The District's original search captured 309,207 emails. Over the course of the production period, the District provided numerous totals for various sub-groups of emails that it categorized by content, sender, and/or time frame. The totals provided by the District ranged from 758 to 309,207. CP 2383 (¶37). Based upon the declaration testimony of the District's counsel, it could be established that at least 28,774 of the 309,207 emails fell within the confines of the April 2015 request. CP 2397-98.

5 CP 2374-2378 (¶¶7-12)

walking tutorial, a tax manual, building specifications for a structure in another school district, redacted elementary school phone directories, hundreds of pages of email delivery failure notifications, 3,164 completely black pages (with no text other than the bates-stamp) and countless internet vendor emails – peddling everything from purses and sunglasses to light bulbs and vacation packages.[6] The handful of responsive emails that were included were duplicated numerous times and reproduced over multiple production dates.[7]

In March 2016, the District declared the production complete. Creer demanded that the District identify the responsive emails by bates number. The District refused. Creer then demanded that the District "re-produce" the sub-set of 758 board member emails dated January 2013 and April 2015. The District refused, stating only that all 758 of those emails were contained within the 4,174 pages produced on April 22, 2015 (bated-numbered 7643-11816).[8] Creer reviewed the April 22 production numerous times. Each examination yielded a total of 38 responsive emails.[9]

Creer advised the District that it would be moving forward with an

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6 Exemplars of the filler material included in the productions were filed as an Appendix to Creer's motion for summary judgment. CP 292-1530

7 CP 2374 (¶5), CP 2377 (¶10), CP 2382 (¶34).

8 CP 1740-41

9 CP 2377 (¶11)

enforcement action under the PRA. Hoping to stave off such an action, the District agreed to identify by bates number the sub-set of 758 board member emails that it claims were produced on April 22. The District then created a document entitled "Itemization of Emails," in which 775 emails are listed and identified by date, time, author, recipient, and bates-number. According to the District, all 758 board member emails dated January 2013 and April 2015 are included on the list.[10] However, a review of the Itemization reveals that only 34 of the 758 emails are included. More importantly, the content and configuration of the Itemization reveals the District's elaborate plan to conceal its wrongdoing.[11]

A few weeks after it created the Itemization, the District commenced settlement negotiations with the parent in the federal civil rights action. An agreement was reached on June 3, 2016 and the District prepared a draft release. No PRA claims were asserted in the federal complaint or presented for trial and no mention was made of such claims in the District's draft release. However, at the time of the agreement, the District knew that Creer was moving forward with its PRA enforcement action. The District also knew that, pursuant to *Kleven v. City of Des*

10 CP 2382 (¶ 34), CP 2082-2142 (Ex. 33 in support of Creer MSJ)
11 CP 2394-2395; CP 2382 (¶¶34 and 35); CP 1779-1800 (Ex. 17 in support of Creer MSJ)

Moines, 111 Wn.App. 284, 291 (2002), the parent would have the right to join in Creer's PRA action, at least with respect to the records that concerned her family.[12] As such, the District demanded that the parent's release of her claims under the PRA, along with her release of the federal civil rights claims. The parent agreed to the "pork barrel" addition to the waiver and the District amended the release agreement accordingly. At no time did Creer agree to release its rights to seek enforcement of its April 2015 PRA request and Creer is not a signatory to the June 2016 federal civil rights settlement agreement.

V. ARGUMENT

Whether it is characterized as "standing" or "ownership", the issue presented in this appeal is whether Creer has a legal right to seek judicial enforcement of its April 2015 PRA request. The answer to that question is "yes" and the decision of the Court of Appeals must be reversed.

1. THE PERSON WHO COMMUNICATES A REQUEST FOR RECORDS HAS A LEGAL RIGHT TO SEEK ENFORCEMENT OF SUCH REQUEST

The PRA guarantees that "any person" who submits a request for public records has the right to access such records. RCW 42.46.080(2). The statute further provides that provides that "any person" who is denied

12 It is unclear under the law if the parent would have had standing to seek enforcement of the portions of the request that concerned other students or aversive interventions generally.

access to requested public records is entitled to seek judicial review of the agency's denial. RCW 42.56.550(3)-(4); WAC 44-14-04003(12)("The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested").[13]

The person who seeks records under the PRA is referred to in the statute and the regulations as "the requestor." RCW 42.56.520; WAC 44.14, et seq. The "requestor" is the person whose name is on the request, who communicated the request to the agency and who serves as the agency's contact during the course of the production. WAC 44.14.030(4); *Germeau v. Mason County,* 166 Wn.App. 789, 802-04 (2012)(holding that the individual who submitted the request was the requestor with the right to seek enforcement); *Burt v. Washington State Dept. of Corrections,* 168 Wn.2d 828, 834-35 (2010)(holding that the individual person who submits a public records request is an indispensable party to a proceeding arising out the request).

The rule is consistent under federal law. *Hajro v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086, 1105 (9th Cir. 2015)("[I]f [one] can show that he personally filed and signed the request, he is the

13 The "any person" language is not just a creation of the legislature, it was part of the original initiative Initiative 276: "The initiative would require all . . . 'public records' of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record . . ." *Hearst Corp. v. Hoppe*, 90 Wn2d 123, 128 (1978)

requestor for purposes of FOIA"); *Mahtesian v. U.S. Office of Personnel Mngmt*, 388 F.Supp.2d 1047 (N.D. Cal. 2005)("[I]t is clear that any person who submits an FOIA request has standing to bring a FOIA challenge.")[14]

In addition to a requestors inherent interest in the records, the rule that defines the submitting party as the requestor is designed to further facilitates open communication between the agency and the requestor thereby expediting productions. WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies"); WAC 44-14-04001("Both the agency and the requestor have a responsibility to communicate with each other when issues arise concerning a request"); *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014).

Here, E. Krikorian drafted the request, submitted the request and served as the agency contact during the course of the production. No legitimate argument can be made that anyone other than E. Krikorian was the "requestor." As a requestor, E. Krikorian has the right to seek enforcement of her request. Whether it is characterized as standing, ownership or some other property right, E. Krikorian is entitled to seek

14 The PRA closely parallels the federal Freedom of Information Act ("FOIA"), though the PRA providers for broader protections. As such, court looks to federal law when interpreting the PRA unless such reference would serve to narrow the protections under the PRA. *Hearst v. Hoppe,* 90 Wn.2d 123, 128-29 (1978); *Kleven,* 111 Wn.App. at 291.

judicial review of the District's violations of the PRA. [15]

The Court of Appeal seeks to circumvent this law by holding that E. Krikorian was the parent's attorney at the time of the request and that the request was therefore communicated as the parent's agent. From this, the Court of Appeals concluded that the *parent,* not E. Krikorian, was the requestor with enforcement rights. There is no authority, state or federal, published or unpublished that stands for such a proposition. In fact, the Court of Appeal's proposition was specifically addressed and rejected in *Germeau v. Mason County,* 166 Wn.App. 789 (2012).

In that case, Richard Germeau, in his capacity as the Mason County Sheriff's Office Guild representative, submitted a PRA request to the county seeking records regarding an internal investigation of an individual Guild member. It was undisputed that Germeau was acting on behalf of the Guild and in his capacity as its representative when the request was made. The county argued that Germeau, as an individual, could not seek enforcement of the PRA request, and that only the Guild had standing. The court rejected the argument wholesale and held that the individual human being whose name is on PRA request has an inherent

15 In an exhaustive search of authority across all jurisdictions, Creer has been unable to find a single case, state or federal, published or unpublished, in which the individual person who submitted the public records request was found to be without standing to bring an enforcement action, or somehow lost its right to pursue such an enforcement action if another interested party waived their right. Nor is there any case suggesting that ownership and agency law trump the clear strictures of the PRA.

interest in its enforcement, *irrespective of the capacity in which he was acting when the request was made. Germeau,* 166 Wn.App. at 804. Inexplicably, the Court of Appeals does not attempt to distinguish *Germeau* but, rather, summarily states that its reasoning is "harmonious" with *Germeau.* The nature of such harmony is simply incomprehensible.

A similar question was presented to the D.C. District Court in *Ebling v. U.S. Dept. of Justice,* 796 F.Supp.2d 52, 64 (2011). In that case, the agency denied Ebling's request for records regarding criminal investigations involving her nephew, Price. Price was precluded from seeking the records as part of a prior plea agreement. In support of its denial, the agency argued that Ebling was a thinly disguised agent of Price and that her request was an attempt to do an end run around Price's plea agreement. The court rejected the agency argument, wholesale, stating "the question of whether Ms. Ebling is acting as Mr. Price's 'representative' in pursuing her FOIA requests is, quite simply, irrelevant to this action"). *Ebling,* 796 F.Supp.2d at 64.

The Court of Appeals states that the holding in *Ebling* is inapposite on the grounds that "it relates to the waiver of a right to make a records request, not the right to maintain a cause of action." This is a meaningless distinction. Ebling's enforcement action arose out of the agency's denial of her request, based solely on the status of her relationship with Price.

Reliance on the law of agency to undermine rights under the PRA is no more legitimate when the alleged agent is an attorney. First, there is no language in the PRA that provides for *any* exceptions to the enforcement provisions under agency principles. Second, attorneys are among the most common requestors of public records and regularly seek records that benefit one or more clients. In all such cases, the attorney who submitted had the right to seek enforcement of the request – irrespective of whether the request was made on behalf of a client. *Hajro,* 811 F.3d at 1104 ("[A] practicing immigration attorney who files and signs FOIA requests is a requestor under FOIA"); *Mahtesian,* 388 F.Supp.2d at 1048 (holding "there is no dispute" that the attorney who submits an FOIA request on behalf of a client has standing to bring an FOIA action); *Mayock v. Nelson,* 938 F.2d 1006 (9th Cir. 1991)(attorney seeking records on behalf of client could sue for enforcement).[16]

The Court of Appeals decision states that an application of agency law is further supported by the fact that requested records were useful in the federal civil rights action. This reasoning defies the plain language of

16 The only standing issue presented in attorney-requestor cases is whether the client ***also*** has standing to sue ***in addition*** to the attorney. In Washington, the client has standing along with the attorney requestor, at least with respect to the portion of the request that is specific to that client. *Kleven,* 111 Wn.App. at 291. Under federal law, the client has standing if specifically identified by name in the attorney's request. *Mahtesian v. U.S. Office of Personal Management*, 388 F.Supp.2d 1047, 1048 (N.D. Cal. 2005).

the statute that prohibits an agency from considering the identity of the requestor or the purpose of the request when carrying out its obligations under the act. RCW 42.56.080(2); WAC 44.14.04003(1) and (2); WAC 44-14-03006 ("An agency cannot require the requestor to disclose the purpose of the request, apart from exceptions permitted by law (emphasis added)").

While the Court of Appeals concedes that agencies cannot consider the capacity or motivation of the requestor, it holds that the court is not so bound. But the court ***is*** bound by the language in the statute. In fact, the PRA includes a ***statutory mandate*** that requires courts to liberally construe the disclosure provisions. RCW 42.56.030; *Nissen v. Pierce County,*183 Wn.2d 863, 884 (2015); WAC 44-14-010 ("The act and these rules will be interpreted in favor of disclosure").

2. MULTIPLE PLAINTIFFS CAN SEEK ENFORCEMENT OF A SINGLE PRA REQUEST

The Court of Appeals states that other issue presented on appeal asks: "Does the same alleged PRA violation support more than one cause of action?" This characterization of the issue and legal conclusion reached thereon are flawed.

This case is an enforcement action that asserts a single claim for violation of the PRA. As such, the Court of Appeal's question is more

accurately stated as: "Can more than one *party* seek enforcement of a single PRA request?" To this question, the Court of Appeal holds "no." The law, however, holds: "yes." Indeed, the caselaw is replete with cases involving multiple plaintiffs seeking enforcement of a single request. For example, in *West v. Olympia*, 146 Wn.App. 108 (2008) numerous plaintiffs in a consolidated action sought enforcement and penalties against the Port of Olympia arising out of the Port's failure to produce records regarding its lease negotiations with Weyerhaeuser. Two of the plaintiffs in that action, Walter Jorgensen and Eve Johnson of the League of Women Voters, sought enforcement of a single PRA request that they jointly submitted. Finding the Port's response to the joint request to be in violation of the PRA, the court awarded attorney's fees, costs and penalties favor of both Jorgensen and the League, as joint creditors. Separate awards were also granted in favor of the other consolidated plaintiffs.

Similarly, in *King County v. Sheehan,* 114 Wn.App. 325, 341 (2002), the court issued two separate fee awards to two plaintiffs who established that King County violated the PRA in responding to the plaintiffs' requests for information regarding law enforcement officer names, titles and salaries. The court further rejected the County's argument that the individual fee awards should be reduced on the grounds

that the two parties worked together and that much of the fees were duplicative and redundant. *King County,* 114 Wn.App. at 350.

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89 (2005), involves a PRA request that Tim Conner, an independent reporter, submitted to the City of Spokane. Finding the response to be inadequate, Connor along with his publisher Rhubarb Sky, LLC filed an enforcement action. Thereafter, both parties intervened in Spokane Research & Defense Fund's pending action that sought the same records. All parties were ultimately awarded costs, penalties and fees. *SRDF,* 155 Wn.2d at 105.[17] In cases involving attorney requests, the attorney and the client often file the enforcement action together, as co-plaintiffs with independent claims. *See Mayock v. Nelson* and *Hajro v. U.S. Citizenship, supra.*

Finally, the Court of Appeal suggests that an application of agency law is required to ensure that an agent cannot recover damages on a claim

17 The federal law is also replete with FOIA cases involving multiple plaintiffs. In *Council on American-Islamic Relations v. FBI*, 749 F.Supp.2d 1104 (S.D. Cal. 2010), the Council on American-Islamic Relations, the Islamic Center of San Diego and Edgar Hopida brought an action against the FBI and the Justice Department. In *Cameranesi v. U.S. Department of Defense*, 941 F.Supp.2d 1173 (N.D. Cal 2013) Theresa Cameranesi and Judith Lity brought an action against the Department of Defense. In *Hiken v. Department of Defense*, 836 F.3d 1037 (9th Cir. 2016) the Military Law Task Force and Marguerite Hiken brought an action against the Department of Defense. In *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002), seven individual plaintiffs brought an action against the United States. In *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980) the Consumers Union of the United States and Public Citizen's Health Research Group brought against the Consumer Product Safety Commission.

released by the principal. As set forth above, this fact scenario cannot present itself here as the requestor has inalienable rights to seek enforcement and those rights cannot be waived by another. Moreover, there are no "damages" subject to recovery. PRA enforcement actions provide for an award of penalties, not damages. Causation and damages are completely irrelevant to the penalty phase of a PRA case. *Amren v. City of Kalama,* 131 Wn.2d 25, 36 (1997); *Neighborhood Alliance v. Spokane County,* 172 Wn.2d 702, 726 (2011). The dollar amount of the penalty is based on two considerations: 1) the nature and extent of any bad faith; and 2) the amount necessary to serve as an effective deterrent. *Amren,* 131 Wn.2d at 36. The number of claimants in the case has nothing to do with the calculation, except to the extent that it factors into the considerations above.

3. THE APPELLATE COURT'S RELIANCE ON RPC 1.8 IS IN ERROR

The Court of Appeals further states that an attorney who seeks to enforce his or her PRA request risks running afoul of RPC 1.8. The argument is premised on the Court of Appeal's position that an attorney who requests public records for the benefit of client does not "own" the right to seek enforcement of the request. For the reasons set forth herein, this argument is fundamentally and fatally flowed. Because the Court of

Appeal chose to analyze Creer's PRA request as one of a "mere agent", and not on a basis of its interest as the "requestor", it has created a potential morass of ethical problems for Washington lawyers who seek to enforce their own PRA requests.

RPC 1.8 prohibits an attorney from entering into a business transaction with a client. Seeking enforcement of a legitimate request for public records is not a "business transaction." To the contrary, it is the exercise a civic right that, according to the legislature and this court, is vital to a sound and healthy democracy. If permitted to stand, the Court of Appeals' decision would create havoc for lawyers in the State of Washington who are acting on their own behalves, and the client's behalves, in making public record requests. It would chill requests, and would be anathema to the stated purpose of the Act, to wit:

> "The stated purpose …is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions."

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 251 (1994).

IV. CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Petitioner respectfully request that this Court grant their Petition for Review, reverse the decision of the Court of Appeals and grant the following relief previously requested from the Court of Appeal:

1) Reverse and vacate the summary judgment order of April 5, 2017;
2) Order the trial court to:
    a. enter summary judgement in favor of Creer;
    b. conduct an in-camera review of the District email database and facilitate the release of all records responsive to the April 2015 PRA request;
    c. award Creer all reasonable attorneys' fees and costs incurred in connection with the request, from April 27, 2015 through the date of the hearing on a fee motion filed upon remand, pursuant to RAP 18.1, RCW 42.56.550(4),
3) Issue an award of daily penalties against the District or, alternatively, order that the trial court issue such an award in an amount commensurate with evidence presented of the District's bad faith; and

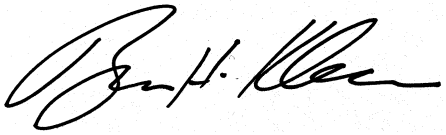
4) All other relief that the court deems reasonable and appropriate.

Dated: September 11, 2018

CREER LEGAL, dba for Erica Krikorian

By_____
Erica A. Krikorian WSBA #28793

LAW OFFICES OF BRIAN H. KRIKORIAN



By_____
Brian H. Krikorian, WSBA # 27861

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CREER LEGAL, d/b/a for attorney, Erica Krikorian, real party in interest, Appellant, v. MONROE SCHOOL DISTRICT, a political subdivision of the State of Washington, Respondent.	)	DIVISION ONE No. 76814-0-I PUBLISHED OPINION FILED: August 13, 2018

DWYER, J. — Over the course of her representation of Erica Miller, attorney Erica Krikorian made Public Records Act[1] (PRA) requests to the Monroe School District (the District). Krikorian then negotiated a settlement with the District in which Miller released any potential PRA claims. Krikorian, asserting that the PRA claims were hers, later filed suit against the District for an alleged denial of her opportunity to inspect requested records. The trial court granted summary judgment to the District on the theory that Krikorian lacked standing to prosecute this action. We affirm, holding that Krikorian, as Miller's agent, did not own the cause of action and could not prosecute it once it was released by Miller.

[1] Ch. 42.56 RCW.

I

In December 2014, Erica Miller filed suit in the United States District Court against the District, alleging civil rights violations related to the seclusion and restraint of her autistic child. She was represented by Erica Krikorian of Creer Legal (Krikorian) and Brian Krikorian.[2] In the course of litigation, Krikorian sent the District two PRA requests on behalf of Miller. Krikorian e-mailed the first request on February 12, 2015. The District produced records to Miller's attorneys in installments. On April 27, 2015, Krikorian sent an e-mail to the District both requesting additional records and following up on the first request. Krikorian threatened to file a lawsuit under the PRA based on the District's failure to produce records responsive to the first request, noting that the records were necessary for depositions in the civil rights litigation. The District produced records to Miller's attorneys in installments.

On June 4, 2015, Miller filed a motion to show cause in federal district court, alleging that the District wrongfully withheld records from her under the PRA. The district court denied the motion.

On January 13, 2016, Miller filed another motion to show cause for a PRA violation. She requested that she be awarded $55,250 in attorney fees, noting that in the time since the original motion, "another 75 hours of attorney time has been invested." The court denied Miller's motion, but the District was ordered to produce any remaining responsive documents.

[2] We refer to plaintiff Erica Krikorian, doing business as Creer Legal, as "Krikorian."

Miller's suit was tried in federal district court. The jury returned a defense verdict. Miller was ordered to pay $17,224.07 in costs to the District. Thereafter, she and the District entered into a settlement agreement in which the District agreed to waive execution on the cost bill in consideration for Miller waiving her right to appeal and releasing all claims, including those under the PRA. In so doing, Miller and the District agreed to

> hereby release, acquit and forever discharge each other, their employees, agents, board members, attorneys in this litigation, and assigns of and from any and all claims, demands, actions, causes of action, or damages of whatever nature, known or unknown, to the date of the settlement, including, but not limited to . . . claims brought pursuant to the Washington Public Records Act. . . . PLAINTIFF and DEFENDANTS individually *represent and warrant that they individually are the sole owner of all such claims*, demands, actions, causes of action, or damages released and discharged hereunder.

(Emphasis added.)

On October 25, 2016, Krikorian filed a PRA complaint in superior court against the District alleging violations related to the two requests made in the course of representing Miller. Both parties filed motions for summary judgment. On April 5, 2017, the trial court granted the District's motion for summary judgment, dismissing Krikorian's PRA claims on the basis that she lacked standing. The trial court did not rule on Krikorian's motion. Krikorian appeals.

II

This case presents two related questions. First, does the same alleged PRA violation support more than one cause of action? Second, who is entitled to prosecute a PRA cause of action?

A

We review summary judgment de novo. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). We engage in the same inquiry as the trial court and consider the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275.

"The PRA 'is a strongly worded mandate for broad disclosure of public records.'" Yakima County v. Yakima Herald–Republic, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (internal quotation marks omitted) (quoting Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007)). Under the PRA, all state and local agencies must promptly disclose any public record on request unless the record falls under a statutory exemption. RCW 42.56.520, .550(1); Wood v. Lowe, 102 Wn. App. 872, 876, 10 P.3d 494 (2000). "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request." RCW 42.56.080(2).

B

Neither party in this case takes a position on our first inquiry, whether the same alleged PRA violation supports more than one cause of action. But we read the Act to provide for a single cause of action arising from an alleged PRA denial, regardless of how many individuals were involved in making the request.

> If the agency fails to disclose records, then
>
> [u]pon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.

RCW 42.56.550(1). This provision authorizes any person to file "the motion" if that person was "denied an opportunity" to inspect requested records. This reference to "the motion" establishes the cause of action for a PRA violation. The statute then ties the cause of action to the alleged violation: "denied an opportunity to inspect." The PRA references a cause of action in the singular—*the* motion—and links that singular cause of action to the alleged denial while also linking the denial to the request. In so doing, RCW 42.56.550 provides that there is but one cause of action per alleged denial under the PRA.

C

Having established that the denial of an opportunity to inspect records gives rise to a single cause of action under the PRA, we turn to this question: who is authorized to bring that action? Both parties in this case argue that this is a question of standing. While this is an understandable viewpoint, given the existing appellate court opinions on the matter, a standing framework is not useful here. The question of ownership of the cause of action is the more appropriate inquiry. In this case, the question of ownership is resolved by resort to the law of agency.

The District's position is that Krikorian acted as Miller's attorney-agent with respect to the PRA request and litigation. The District contends that because

Miller, Krikorian's principal, owned the cause of action and released that cause of action in her settlement with the District, Krikorian, as a mere agent, cannot maintain her PRA claims. The District is correct.

"Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006). "The elements of common-law agency are present in the relationships between . . . client and lawyer." RESTATEMENT (THIRD) OF AGENCY § 1.01 note c. The burden of establishing the agency relationship rests on the party asserting its existence. Hewson Constr., Inc. v. Reintree Corp., 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).

The evidence in the record incontrovertibly supports the District's position that Krikorian acted as Miller's agent with respect to the records requests. In federal district court motions, Krikorian repeatedly represented that Miller made the PRA requests: "Miller has been requesting documents reflecting the subject communications since January 2015"; "Miller submitted a second PRA request"; "Miller has been requesting documents reflecting the subject communications." A second federal court PRA motion referenced "Miller's request" and "Miller's PRA request".

These motions also alleged that it was Miller who was harmed by the wrongful withholding of records, and requested penalties on her behalf: "Miller should have been given access to an electronic folder containing the requested

emails." Alleging that the District wrongfully withheld records, "Miller respectfully requests an award of penalties against defendants in the amount of $27,200 - $100 per day for each of the 272 days [that] have lapsed since April 14."

Miller's PRA motions even requested an award of attorney fees. When arguing that "Miller is entitled to an award of attorneys' fees", the court was told that,

> [a]s a result of the District's conduct, Krikorian was forced to invest approximately 45 hours attempting to obtain the records and resolve this ongoing dispute. . . . Krikorian has made every imaginable attempt to find a solution to this dispute and has granted every requested courtesy. Yet, six months into this action, Miller is still without communications having to do with her child and the District's use of aversive interventions. As such, Miller respectfully requests that this Court grant an award of attorneys' fees in the amount of $30,875, pursuant to the declaration of Erica Krikorian.

The second PRA motion requests an award of even more attorney fees, explaining that,

> [a]t the time of the original motion, Miller had incurred $30,875 in attorneys' fees in connection with the dispute arising out of the Board Member emails. Since that time, another 75 hours of attorney time has been invested in the review of the subsequent productions, cataloging [the] nature and date of the content produced and in negotiations with opposing counsel for an informal resolution. As such, Miller respectively [sic] requests an award of $55,250 in attorneys' fees pursuant to paragraph 21 of the Declaration of Erica Krikorian.

This is all clear evidence that Krikorian was acting as Miller's agent with respect to the PRA claims.

Further, in negotiating the settlement between Miller and the District, Krikorian communicated with the District on Miller's behalf. Significantly, Miller

represented in her settlement agreement with the District that she was the sole owner of the PRA claim.

In support of her argument that she owns the PRA claim, Krikorian points only to the fact that she, herself, e-mailed the PRA requests to the District. This is not in dispute. Rather, it provides additional evidence that Krikorian sent the requests as an agent on behalf of a client. The first request states, "since we are in litigation, I am directing the request to you, as opposed to my client submitting the request directly to the district. However, if you prefer that she submit the request directly please let me know so she can proceed accordingly." And in the second records request, Krikorian discusses the federal court litigation at length, contextualizing her requests as being taken in furtherance of her client's goals in that lawsuit.

The records requests, federal court motions, and settlement agreement support that Krikorian was Miller's agent from the inception of the PRA request to its settlement. Krikorian acted "on the principal's behalf and subject to the principal's control." She submitted the request on behalf of Miller, filed motions to enforce the requests on behalf of Miller, and negotiated the resolution of the PRA claims on behalf of Miller. By releasing the PRA claim as its sole owner, Miller demonstrated that Krikorian, as agent, was subject to her control. Viewing the evidence in the light most favorable to Krikorian, there is no indication that she was anything other than Miller's agent with respect to the PRA requests and claims.

Miller released the PRA cause of action in the settlement agreement. An agent derives from her principal only such powers as the principal has. Schorman v. McIntyre, 92 Wash. 116, 119, 158 P. 993 (1916). Because Miller, as principal, extinguished the cause of action, Krikorian, as agent, cannot assert rights that Miller no longer possesses. Moreover, because Krikorian was Miller's agent, it is irrelevant that Krikorian was not a party to the settlement agreement.[3]

In further support of this outcome, our Rules of Professional Conduct (RPC) militate against the inference that an attorney-agent would find herself as anything other than the client's agent in the prosecution of such a cause of action. These rules provide, as follows:

> **CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**
>
> **(a)** A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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[3] Krikorian cites Ebling v. United States Dep't of Justice, 796 F. Supp. 2d 52 (D.D.C. 2011), for authority that Miller cannot waive Krikorian's right to a PRA cause of action. In that case, the court held that the requestor's nephew did not, in a plea agreement, waive the requestor's right to make a Freedom of Information Act (FOIA) (5 U.S.C.A. § 552) request. Ebling is not analogous because it relates to waiver of the right to make a records request, not the right to maintain a cause of action. Also, there was no indication in Ebling that the aunt and nephew had a recognized principal-agent relationship, such that the nephew could affect the rights of the aunt.

> . . . .
> **(i)** A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
> (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
> (2) contract with a client for a reasonable contingent fee in a civil case.

RPC 1.8.

Krikorian asserts that she has an independent propriety interest in the PRA cause of action that Miller attested to be hers alone. If this were so, Krikorian would be afoul of RPC 1.8(a). During settlement negotiations, Krikorian's asserted interest in a PRA cause of action was directly adverse to her client's interest in settling the case. The record lacks evidence that Krikorian made the necessary disclosures to overcome this conflict of interest.

Moreover, if Krikorian had an interest in the PRA cause of action as a co-principal along with Miller, that would be in clear violation of RPC 1.8(i), because Krikorian's asserted interest does not involve acquiring a lien to secure a fee or contracting with a client for a reasonable contingency fee.

The parties refer us to three Washington cases that, while discussing similar issues as concerning standing, can easily be seen as consistent with the agency law framework that we utilize.[4] In Germeau v. Mason County, 166 Wn.

[4] Krikorian also cites a number of federal cases on standing to maintain a FOIA cause of action. These cases are inapposite. Not only do federal courts have a different test for standing, but FOIA bestows a cause of action only on the individual who personally signs and submits the request. Hajro v. United States Citizenship & Immigration Servs., 811 F.3d 1086, 1105 (9th Cir. 2016). This approach was rejected in Kleven and Cedar Grove.

App. 789, 271 P.3d 932 (2012), a representative of a guild requested county public records. The representative later brought a PRA suit against the county. The county argued that the guild, not the representative, had standing to bring the PRA action. The court disagreed, reasoning that the representative had standing because he had a personal stake in receiving the requested information. Germeau, 166 Wn. App. at 804. Viewing this case through an agency framework, the representative requested public records as an agent of the guild. He then continued, as an agent, to prosecute the cause of action for a violation related to the request, with no indication either that he was acting outside the authority given to him by the guild or that he would have kept for himself any monetary recovery resulting from the action.

In Kleven v. City of Des Moines, 111 Wn. App. 284, 44 P.3d 887 (2002), an attorney submitted a public records request to the city without mentioning a client. The client later sued the city under the PRA. The city argued that the client lacked standing because the attorney communicated the request. However, because the attorney certified that he had made the request on behalf of the client, the court concluded that the client had a personal stake in the PRA claim and, thus, standing to bring suit. Kleven, 111 Wn. App. at 290-91. Similarly, in Cedar Grove Composting, Inc. v. City of Marysville, the undisclosed client of an attorney requester was found to have standing to maintain a later PRA cause of action arising from the request. 188 Wn. App. 695, 712-13, 354 P.3d 249 (2015).

These decisions are harmonious with today's decision. The attorney-agents in Kleven and Cedar Grove took their actions on behalf of properly undisclosed principals. Those principals owned the PRA cause of action and later prosecuted that cause of action. Because they owned the cause of action, the principals, of course, had standing to bring the action.[5]

Government agencies, forbidden to inquire into the purpose of a PRA request, cannot examine the nature of a requestor's interest as we have done here. But application of the law of agency should give governments reason for serenity. Governments, as the third party in the principal-agent relationship, may be assured that they are responding properly to a request by relying on principles of apparent authority.[6] A government can discharge its duties under the PRA by providing records to an agent acting with actual or apparent authority.

III

Krikorian requests an award of attorney fees pursuant to RCW 42.56.550(4), which mandates a fee award to any person denied the opportunity to inspect records under the PRA. As Krikorian has not established a PRA violation, she is not entitled to an award of fees.[7]

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[5] A cause of action is a thing with value. It is owned and can be conveyed. In any particular case, a body of law will exist to assist in determining ownership, e.g., the laws of agency, personal property, corporations, partnerships, etc.

[6] "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.03.

[7] No purpose would be served by our review of the trial court's determination not to rule on Krikorian's summary judgment motion. Krikorian's request that we do so is, therefore, denied.

The District requests an award of attorney fees, costs, and terms under RAP 18.9(a), claiming that Krikorian filed a frivolous appeal. "An appeal is frivolous if there are 'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." West v. Thurston County, 169 Wn. App. 862, 868, 282 P.3d 1150 (2012) (internal quotation marks omitted) (quoting In re Recall Charges Against Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003)). Krikorian's appeal is not frivolous, as it presented an issue warranting a published opinion. We decline to award fees or terms to either party. The District may recover the costs otherwise available to parties who prevail in our court.

Affirmed.

WE CONCUR:

Mann, A.C.J.

LAW OFFICES OF BRIAN KRIKORIAN PLLC

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