96979-5

Court of Appeals No. 50718-8-II

WASHINGTON SUPREME COURT

WASHINGTON COALITION FOR OPEN GOVERNMENT,
a Washington nonprofit corporation,

Petitioner,

v.

PIERCE COUNTY,

Respondent.

PETITION FOR REVIEW

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II. COURT OF APPEALS DECISION

WCOG seeks review of the *Unpublished Opinion* in *Washington Coalition for Open Government v. Pierce County*, No. 50718-8-II dated February 20, 2019. **Appendix A**.

III. ISSUES PRESENTED FOR REVIEW

A. Whether RCW 42.56.100 requires agencies to adopt and enforce rules for the production of electronic records.

B. Whether RCW 42.56.550(1) requires agencies to prove that records are exempt.

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D. Whether RCW 42.56.210(3) requires an agency to explain the application of the common interest doctrine where work product records have been shared with other parties.

IV. STATEMENT OF THE CASE

WCOG's proposed findings and conclusions are attached as **Appendix B**. Although the lower courts declined to adopt these

proposed findings the County has never argued that any of WCOG's proposed findings are incorrect.

A. The *Nissen* litigation

In 2011 a former deputy sheriff brought a PRA action against Pierce County, seeking access to public records created or retained on Prosecutor Lindquist's personal cell phone. CP 2158-2166. Nissen's complaint specifically alleged that "Lindquist was using his cell phone to take actions retaliating against her and other official misconduct." CP 2159. Two deputy prosecutors represented the County in the trial court. CP 2170-71.

In addition, Lindquist, represented by a private attorney, intervened in the *Nissen* case, and filed a motion for a temporary restraining order and preliminary injunction against the County. CP 2179-2214. But Lindquist never withdrew from representing the County in the *Nissen* case. CP 2483-85, 2579-83.

The trial court dismissed the case. The Court of Appeals reversed, rejecting the argument that the PRA did not apply to Lindquist's cell phone. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014). This Court granted review.

Unknown to the appellate courts in *Nissen*, Lindquist was personally involved in both the County's unsuccessful defense in

Nissen and the drafting of amicus briefs filed in support of the County. CP 781. Lindquist's continued representation of the County in *Nissen* despite his intervention as an adverse party was unprecedented. The parties have been unable to find any case that even addresses the bizarre situation in which an attorney for one party is also an adverse party in the same case. CP 2071.

On August 27, 2015, this Court rejected Lindquist's argument that the PRA did not apply to records on his phone. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

On remand the Pierce County Executive, Pat McCarthy, became aware that Lindquist had a conflict of interest in *Nissen*. The Executive received a 13-page legal opinion from her own attorney explaining that Lindquist had a conflict of interest in the *Nissen* case, and that none of the attorneys in Prosecutor's Office should represent the County in *Nissen*. When Lindquist refused to withdraw, the Executive filed a motion for a special prosecutor. CP 2474-82. Without deciding whether Lindquist had a conflict of interest, the court allowed the appointment of a new attorney selected by the Prosecutor. CP 2474-82.

On or about December 23, 2015, former deputy prosecutor Mary Robnett, who had left the Prosecuting Attorney in 2011,

disclosed that she had received a text message from Lindquist on August 2, 2011, that stated: "Tell allies to comment on TNT story." CP 1352, 2483-85. The superior court ruled that Lindquist's text message was a public record that should have been disclosed. CP 2584-91. The court awarded Nissen more than $118,000. CP 2596-2600. The County had already spent more than $325,000 on attorneys to defend Lindquist. CP 2592.

B. WCOG's PRA Requests

While the *Nissen* case was pending in this Court, WCOG became concerned about Lindquist's disregard for the obvious conflict of interest created by his intervention as a private party in the *Nissen* case. On April 1, 2015 WCOG made a PRA request to the Pierce County Prosecuting Attorney for communications between the various parties in *Nissen*, the conflict of interest created by Lindquist's intervention in the *Nissen* case, and the retention of private attorneys in the *Nissen* case. To avoid unnecessary delay WCOG demanded that the County produce the requested records in electronic format and that the County produce the records by email or internet file transfer. CP 2645-476.

WCOG repeatedly demanded that the County respond by email and produce records electronically. CP 2646, 2650-51,

2655, 2664-65, 2668. The County repeatedly ignored WCOG's requests and sent correspondence by mail, causing delays. CP 2649, 2654, 2656-57, 2659, 2667. Despite the fact that the County had already been using email for years, the County asserted that email was insufficiently reliable for PRA requests. CP 2689.

By letter dated May 11, 2015, the County stated that it was prepared to provide a "first installment" of 533 pages of records, many of which were completely redacted as "work product." CP 2658-2663. These records were electronically redacted using Adobe Acrobat XI Pro, which resulted in the creation of redacted PDF files that could have been provided to WCOG in that format as WCOG requested. CP 2843. But the County required WCOG to pay $88.65 for paper copies sent by mail. CP 2658-59:

CP 2665, 2670, 2676.

Additional delays were caused when the County's PRA officer retired on August 28, 2015. CP 457. The County made no

arrangements to have the PRA officer's email account forwarded to or processed by the new PRA officer. As a result, the County did not receive at least one email from WCOG's attorney, which was re-sent in October 2015. CP 2680-93.

The County produced a second installment of records as a single 233-page PDF file on a CDR mailed to WCOG. CP 2700.

The County's PRA rules, which were updated in 2007, do not address (i) whether the County will respond to a requestor by email or (ii) whether or how the County will produce electronic records. CP 262-266.[1] The lack of proper PRA rules for email and electronic documents enabled the County to be intentionally unhelpful in response to WCOG's PRA request.

The County's assertion that email was too unreliable for PRA requests was a pretext. The PRA officer could have sent her correspondence by both email and regular mail. Nor was there any reason for the County to ***print*** redacted PDF files rather than copying the PDF files onto a CDR which could be mailed. The

[1] The *Unpublished Opinion* at 17 n.8 suggests that WCOG "expanded" its argument during oral argument by asserting that the County had not adopted "any" rules for responding to PRA requests. WCOG's written arguments and documentary evidence clearly indicate that the County had not updated its PRA rules since 2007. *Reply Br.* at 21; CP 262-66, 776. WCOG apologizes if its counsel misspoke or if the lower court misinterpreted counsel's oral argument.

County has never even bothered to deny that it was intentionally unhelpful or provided any valid explanation for its behavior.

Each of the County's exemption logs asserted that the redacted records were work product (RCW 42.56.290) or privileged. CP 2674. With respect to some of the records the County's exemption logs asserted that the "common interest" doctrine applied as well. CP 2674. The County's exemption logs did not indicate the scope of the alleged "common interest," whether or when any common interest agreement had been made, or who the other parties to the common interest were. To obtain that information WCOG had to conduct discovery. CP 2835.

In December 2015, WCOG sued the County for improper claims of work product exemptions, for providing inadequate exemption logs, and for violating RCW 42.56.100 by failing to adopt proper PRA rules. CP 1027-1036.

From January 2016 to April 2016, the County produced three more installments of heavily-redacted PDF files, which were copied onto CDRs and mailed to WCOG's attorney. CP 2713-60.

In May 2016, the Prosecutor's Office stated that it had changed its policy on the use of internet transfer services, and that the PRA officer was now authorized to provide responsive records

through internet file transfer. CP 2766. The County produced four more installments of heavily-redacted records as PDF files transmitted via the internet. CP 2830-31.

The trial court dismissed all of WCOG's claims. CP 354-360. The Court of Appeals affirmed in the *Unpublished Opinion*.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals failed to enforce RCW 42.56.100, which requires agencies to adopt and enforce reasonable rules for responding to PRA requests.

RCW 42.56.100 requires the County to adopt and enforce reasonable PRA rules. "Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. This provision was part of the original 1972 Initiative. Laws of 1973, ch.1, § 29 (former RCW 42.17.290).

In 2005, the Legislature amended RCW 42.56.580 to require the Attorney General to adopt model rules for the PRA, specifically including "[f]ulfilling requests for electronic records." Laws of 2005, ch. 483, §4. The AGO promulgated such rules in Chap. 44-14 WAC. But the County failed to comply with RCW 42.56.100 by adopting its own rules for electronic public records.

It is undisputed that the County's PRA rules, updated in 2007, do ***not*** address (i) whether the County will respond to a requestor by email or (ii) how the County will produce electronic records. The absence of rules required by RCW 42.56.100 enabled the County to be intentionally unhelpful to WCOG, by refusing to respond by email and by printing redacted PDF files onto paper.

Two published decisions of the Court of Appeals (Division One), suggest that an agency's failure to adopt and enforce rules is a PRA violation. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002); *ACLU v. Blaine School Dist.*, 88 Wn. App. 688, 695, 937 P.2d 1176 (1997). In contrast, this Court has only addressed RCW 42.56.100 in passing.[2]

In this case, Division Two failed to analyze RCW 42.56.100 in any meaningful way. Instead, the court cited its own opinion in *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011) for the erroneous proposition that "[n]othing in the PRA obligates an agency to disclose records electronically." *Unpublished Opinion* at 17. Like the court's

[2] *See Hearst v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978); *Servais v. Port of Bellingham*, 127 Wn.2d 820, 829, 904 P.2d 1124 (1995); *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 431-32, 327 P.3d 600 (2013); *Fisher Broadcasting v. Seattle*, 180 Wn.2d 515, 541, 326 P.2d 688 (2014).

opinion in this case, *Mitchell* failed to analyze RCW 42.56.100, citing the statute only once in passing. 164 Wn. App. at 607.

Division Two's assertion that the PRA does not require agencies to disclose records electronically is an incorrect statement of the law that this Court should emphatically reject. Computers and electronic data already existed in 1972, and the original 1972 PRA explicitly applied to several types of electronic information that could only be provided to a requestor in electronic format, including magnetic tapes, magnetic cards, discs and drums. Laws of 1973, ch.1, § 2; *see* RCW 42.56.010(4).

By design, the PRA does ***not*** specify how any particular type of data should be provided to the requestor. Instead, RCW 42.56.100 requires agencies to adopt and enforce reasonable rules that provide "fullest assistance" and "the most timely possible action on requests for information." RCW 42.56.100. Such rules need to address electronic records as well. RCW 42.56.580.[3] Division Two's unwillingness to enforce RCW 42.56.100 and its incorrect understanding of electronic records, prevents the PRA

[3] The *Unpublished Opinion* at 17-18 erroneously states that WCOG had argued that the County was required to adopt the AGO model rules. In fact, WCOG argued that the County violated RCW 42.56.100 by failing to adopt "its own rules for electronic public records." App. Br. at 49.

from adapting to the use of electronic information in government.[4]

This Court should grant review pursuant RAP 13.4(b)(4) because the application of the PRA to electronic records is a matter of substantial public interest. This Court has not addressed how RCW 42.56.100 works or how the PRA applies to electronic information in more than forty years. The Court should also grant review pursuant to RAP 13.4(b)(2) as Division Two's decision conflicts with Division One's decisions in *Kleven* and *ACLU*.

B. The Court of Appeals violated RCW 42.56.550(1) by shifting the burden of proof to WCOG.

Unlike the plaintiff in most lawsuits the plaintiff in a PRA case does ***not*** have the burden of proof. For important policy reasons Washington voters explicitly placed the burden of proving PRA exemptions ***on the agency***. Laws of 1973, ch.1, § 34. The current PRA, RCW 42.56.550(1), provides:

> 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.

[4] The statement in *Mitchell*, 164 Wn. App. at 607, that redacting a computer database would require an agency "to print the records, redact them, and then scan them back into electronic format" is patently erroneous. Databases can be accessed, redacted and queried ***electronically***. *See Fort Cherry Sch. Dist. v. Acton*, 38 A.3d 1092, 2012 WL 8681602 (Pa. Commw. Ct. 2012).

There are dozens of exemptions in the PRA itself, and perhaps hundreds of "other statute" exemptions in other state statutes and under federal law.[5] By enacting the PRA the voters decided that agencies, which have attorneys and are expected to know the law, are required to explain why records are exempt and to prove the applicability of those exemptions in court. RCW 42.56.210(3); -550(1). These provisions are particularly important where, as here, an agency's exemption claim is unprecedented and neither party is able to find case law on point. Forcing a requestor to hire attorneys convince a court that a record is ***not exempt*** violates the plain language and underlying policy of the PRA.

Because Lindquist never withdrew from representing the County in *Nissen* he was both (i) the County's attorney and (ii) the Intervenor in the same case. In response to discovery the County asserted that Lindquist and the County had a "common interest," and that there was an "agreement and understanding" between Lindquist and the County that they could share information while preserving "applicable privileges." CP 2836-37. Although WCOG did not have the burden of proof, WCOG proved that the

[5] *See, e.g. Ameriquest Mortgage Corp. v. Wash. Attorney General*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (federal financial privacy statute and FTC rule are an "other statute" exemption under RCW 42.56.070).

County's common interest agreement claim is not supported by any evidence, not credible, and contrary to all the evidence in the record. *See App. Br.* at 28-34; *Reply Br.* at 11-13.[6]

WCOG also challenged the legal basis for the County's claim of a "common interest" between Lindquist and the County. WCOG retained an ethics expert who (i) agreed with Executive McCarthy that Lindquist had an impermissible conflict of interest in *Nissen*, and (ii) testified that he could not find "any authority anywhere" that would allow a lawyer to represent a party when that lawyer was also an adverse party in the same case. CP 2070-71. Having shown that Lindquist's actions were unprecedented, WCOG challenged the County's "common interest" claims:

- Lindquist had a conflict of interest in the *Nissen* case under RPC 1.7(a), and a special prosecutor should have been appointed to represent the County. CP 1607, 2016-2017.
- There is no legal authority to allow a prosecutor who has intervened in a case to form a common interest agreement with himself. CP 1608, 2018; *App. Br.* at 35.

[6] The Court of Appeals ignored all the evidence, erroneously holding that the County had a "reasonable expectation of privacy" simply because, according to the court, the County and Lindquist had a "common interest." *Unpublished Opinion* at 13WCOG may revisit these factual issues if review is granted.

- As a matter of first impression, the court should rule that an attorney cannot form a valid common interest agreement with himself as an adverse party. *Id*.
- In the alternative, the exemption in RCW 42.56.290 should not apply where one party is also the attorney for an adverse party in the same case. *App. Br.* at 39-40.

The trial court ruled against WCOG by erroneously shifting the burden of proof to WCOG.[7]

On appeal, WCOG explained that unanswered questions of fact or law preclude upholding an agency's exemption claim. Either the agency must answer such questions or the court must rule that the agency has ***not*** carried its burden of proof under RCW 42.56.550(1). *App. Br.* at 37 n. 13. Noting that its review was *de novo*, the Court of Appeals declined to address the trial court's shifting of the burden of proof. *Unpublished Opinion* at 8 n.2.

But then the Court of Appeals erroneously shifted the burden of proof to WCOG, exactly as the trial court had done:

[7] The trial court erroneously cited *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 937, 361 P.3d 749 (2015) for the proposition that WCOG had the "burden to prove the elements necessary to recovery." CP 358. That part of *Adams* addresses whether an inmate-requestor has the burden to prove bad faith under RCW 42.56.565. 189 Wn. App. at 952; CP 358. *Adams* clearly states that the burden of proving exemptions is on the agency. 189 Wn. App. at 937. The trial court then refused to consider WCOG's legal arguments, asserting that the record was somehow "insufficiently developed" to decide the issues. CP 359.

> WCOG provides no authority to support its assertion that Lindquist became an adverse party to the County simply because he personally intervened in the *Nissen* litigation. WCOG similarly fails to provide any support for its claim that Lindquist and the County were adversaries in the *Nissen* litigation because they had a conflict of interest.

Unpublished Opinion at 13. Under RCW 42.56.550(1) it was the County's burden to establish that it is legally permissible for an attorney to have a common interest relationship with himself as an adverse party in the same case, and that RCW 42.56.290 permits an agency to redact or withhold records that were shared with a prosecutor who should have withdrawn from representing the agency. The County did not carry this burden. But the Court of Appeals erroneously required WCOG to convince the court that the records were ***not*** exempt.

This Court should grant review pursuant RAP 13.4(b)(1) because the *Unpublished Opinion* conflicts with *Neighborhood Alliance* and numerous other decisions of this Court which state that the agency, not the plaintiff requestor, has the burden of proof.

C. The County waived its work product protection under *Kittitas County v. Allphin* by disclosing its *Nissen* communications to numerous cities and counties with which it had no common interest or reasonable expectation of confidentiality.

The records redacted by the County as work product (RCW

42.56.290) were not only shared with Lindquist and his private attorney, but also with a large and unknown number of counties through WAPA, cities through WSAMA, and various employee amicus groups that filed briefs in *Nissen*. CP 2490-2515, 2569-77, 2917-32. The County argued that the common interest doctrine prevented any waiver of the work product privilege.

After the briefing was completed in this case, this Court issued its opinion in *Kittitas County v. Allphin*, 190 Wn.2d 691, 416 P.3d 1232 (2018). This Court held that "a party waives its work product protection when it discloses work product documents to a third party in a manner creating a significant likelihood that an adversary will obtain the information." 190 Wn.2d at 700. Applying the *Kittitas* rule, the Court of Appeals erroneously held that WCOG had failed to show that the disclosure of work product "***to the amicus groups***" created a significant likelihood that an adversary would obtain the records. *Unpublished Opinion* at 12.

The Court of Appeals failed to grasp that the County's records were also shared with dozens of cities and counties. Although WAPA and WSAMA each decided to file amicus briefs in support of the County, their email deliberations were the public records of the cities and counties that employed the WAPA and

WSAMA members. Those agencies never agreed to keep the discussions of *Nissen* confidential. The County admits that it did ***not*** have a common interest relationship with the cities or counties:

> Regardless of the opinions that individual members of these organizations had about the County's position in *Nissen*, the organizations themselves decided to take the same position as the County. **Thus, the organizations and their attorneys in the litigation, not the organizations' individual constituents, had a common interest relationship with the County.** (Emphasis added).

Resp. Br. at 40 n. 27.

When WCOG requested records of WAPA's and WSAMA's participation in the *Nissen* case from numerous other counties and cities, those agencies produced their unredacted records without any claim of a "common interest" with the County. CP 1289-1292, 2516-57, 2868-98. Some of the records produced by other agencies were the exact same records redacted by the County. CP 1128, 1290, 1295-97. By sharing work product records with numerous cities and counties, without any attempt to maintain the confidentiality of the records, the County created a significant likelihood that an adversary would obtain the records.

Furthermore, when WCOG requested *Nissen* records from WAPA itself that agency produced its records unredacted and

without any claim of a common interest agreement with the County. CP 2566. In addition, in an email from WAPA staff attorney Pam Loginsky to more than fifty (50) other prosecutors around the state, Ms. Loginsky reminded WAPA members that their emails about the *Nissen* amicus brief were public records and suggested using the phone to avoid creating such public records.

> Caution-- a reminder that your responses are public records. Typos, etc., can be sent by e-mail. Concerns about the arguments, themselves, are best shared by phone.

CP 2561; FOF 92. This email, which was sent to Lindquist and the County's attorneys, shows that the County had no reasonable expectation of confidentiality in its communications with WAPA.[8] The lower courts erred in holding that the County had not waived its work product protection.

This Court should grant review pursuant RAP 13.4(b)(1) because the *Unpublished Opinion* conflicts with *Kittitas County*.

[8] The Court of Appeals failed to understand the significance of the Loginsky email, erroneously stating that this email was sent by Loginsky "to her client, WAPA member attorneys." *Unpublished Opinion* at 10 note 5. First, the Court of Appeals failed to note that Loginsky's email was also sent to Lindquist and the County's attorneys. Second, the actual language of the email, which the Court of Appeals failed to quote, is clearly a warning that email discussions of *Nissen* could be obtained from WAPA under the PRA, which directly contradicts the County's position. Third, while Ms. Loginsky represented WAPA itself, the thirty-nine elected prosecuting attorneys and their counties were ***not*** Ms. Loginsky's "clients." That is why WAPA produced ***unredacted*** communications with other prosecutors about *Nissen*. CP 2566.

D. The Court of Appeals erroneously ruled that RCW 42.56.210(3) does *not* require an agency to explain how the common interest doctrine applies to records that have been shared with other parties.

RCW 42.56.210(3) requires agencies to provide a brief explanation of "how the exemption applies to the record withheld." In *Sanders*, 169 Wn.2d 827, former Justice Sanders sued the Attorney General (AGO) for failing to provide the brief explanation required by RCW 42.56.210(3). This Court held that the AGO had failed to provide the brief explanation required by RCW 42.56.210(3). In *Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014), this Court clarified that a PRA exemption log must provide "sufficient explanatory information for requestors to determine whether the exemptions were properly invoked."

In this case the Court of Appeals cited *Sanders* for the proposition that the common interest doctrine is not an enumerated exemption but "merely an exception to waiver." *Unpublished Opinion* at 16. But the court failed to recognize that this part of *Sanders* had rejected the ***requestor's*** argument that the common interest doctrine did not apply to the PRA. *Sanders*, 169 Wn.2d at 853-54. Applying the reasoning in *Sanders* and *Lakewood*, if an agency's claim of work product under RCW 42.56.290 depends on

the application of the common interest doctrine then the application of that doctrine must be explained under RCW 42.56.210(3). As this Court noted in *Sanders*, requestors should not have to sue an agency in order to obtain an explanation of why records have been redacted or withheld. 169 Wn.2d at 847.

The Court of Appeals also erroneously held that no explanation of the common interest doctrine was required because, according to the court, the County did not waive its work product privilege. *Unpublished Opinion* at 16. Under *Lakewood*, the adequacy of an exemption log does ***not*** depend on whether the exemption is correct. 182 Wn.2d at 97-99. The County's failure to explain how the common interest doctrine might apply to avoid waiver was a separate violation of RCW 42.56.210(3).

This Court should grant review pursuant RAP 13.4(b)(1) because the *Unpublished Opinion* conflicts with this Court's opinions in *Sanders* and *Lakewood*.

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RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

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Certificate of Service

I, the undersigned, certify that on the 22nd day of March, 2019, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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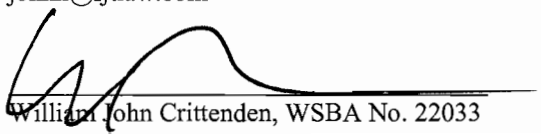

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Washington State
Court of Appeals
Division Two

February 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON COALITION FOR OPEN GOVERNMENT, Appellant, v. PIERCE COUNTY, Respondent.	No. 50718-8-II UNPUBLISHED OPINION

LEE, J. — The Washington Coalition for Open Government (WCOG) appeals the superior court's order dismissing its Public Records Act (PRA) claim against Pierce County. WCOG argues that the County improperly redacted hundreds of responsive documents that were not exempt from disclosure under the PRA. WCOG also challenges the adequacy of the County's exemption logs and claims that the County violated the PRA by not providing for electronic transmittal of the requested documents.

We hold that the County met its burden of establishing that the work product privilege exemption applied to the redacted documents. We also hold that the County's exemption logs were adequate and that the County did not violate the PRA by refusing to transmit the requested documents electronically. Because we hold that the County did not violate the PRA, we affirm.

Appendix A

FACTS

A. THE *NISSEN* LITIGATION

In 2011, Glenda Nissen, a Pierce County Sheriff's detective, filed a complaint against Pierce County for disclosure of public records. Her request sought records that Pierce County Prosecutor Mark Lindquist had generated on his private cell phone.

The *Nissen* case was eventually heard by the Washington Supreme Court. *Nissen v. Pierce County*, 183 Wn.2d 863, 888, 357 P.3d 45 (2015). There, the County argued that Lindquist's private cell phone records were exempt from disclosure under the PRA. Several organizations appeared as amicus curiae on behalf of the County, including the Washington Association of Prosecuting Attorneys (WAPA) and the Washington State Association of Municipal Attorneys (WAMA). Like the County, WAPA and WAMA argued that Lindquist's private cell phone records were outside the scope of the PRA. Lindquist also personally intervened in the *Nissen* case. Lindquist argued that disclosure of his private cell phone records would constitute an unlawful search and seizure of his personal property.

Our Supreme Court rejected these arguments. *Id*. The court held that the records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can constitute public records under the PRA. *Id*.

B. WCOG'S PRA REQUEST

WCOG appeared as an amici curiae and supported Nissen's position in the *Nissen* case. *Id.* at 868. While the *Nissen* litigation was still pending before the Washington Supreme Court, WCOG sent the County a request for public records in April 2015. WCOG requested the following:

> (a) All correspondence, including email, between the County and Mr. Lindquist, other agencies, other public officials, and/or amicus organizations relating to the Glenda Nissen v. Pierce County litigation;
>
> (b) All records discussing the conflict of interest between the County and Mr. Lindquist in the Glenda Nissen v. Pierce County litigation, including any waiver or other resolution of such conflict;
>
> (c) All records, including correspondence, agreements and invoices, relating to the retention of any private attorneys to represent Pierce County in the Glenda Nissen v. Pierce County litigation; and
>
> (d) All records of litigation decisions being made for Pierce County as the defendant in the Glenda Nissen v. Pierce County litigation, specifically including but not limited to, records indicating which person(s) are making litigation decisions for the County in the Glenda Nissen v. Pierce County litigation in light of Mr. Lindquist's status as a separate party to that litigation.

Clerk's Papers (CP) at 2645.

WCOG "insist[ed]" that the County respond to its request either by email or internet transfer service. CP at 2646. WCOG instructed the County: "**DO NOT SEND ME CORRESPONDENCE OR RECORDS BY SNAIL MAIL**." CP at 2646 (emphasis in original).

The County sent WCOG a responsive letter by regular mail on April 8. In its letter, the County explained that it did not release responsive public records "through untried or potentially unreliable internet transfer services." CP at 2648. The County also explained that it would not communicate through email "because there [was] no guarantee of timely receipt of emails from external senders due to multiple spam filters" outside its control. CP at 2648. The County estimated that the first installment of responsive records would be available to WCOG in four weeks.

On April 17, WCOG emailed the County and objected to its refusal to correspond through email. WCOG emailed the County two days later and expanded its request to include:

> (e) All records, including correspondence, email, notes, drafts and word processing files, relating in any way to the amicus briefs filed by the Pierce County Prosecuting Attorneys' Association in the Glenda Nissen v. Pierce County litigation.

CP at 2651.

The County responded to WCOG's expanded records request by a letter dated April 24. The County informed WCOG that it had expanded the records search per WCOG's request and it estimated that the first installment would be available on May 6.

On April 27, WCOG emailed the County and again objected to communication by regular mail, rather than email. WCOG instructed the County to notify WCOG by email "when at least the portion of the records" identified in its April 17 letter would be provided. CP at 2655.

The County responded by regular mail on May 5. The County informed WCOG that it required an additional three days to provide the responsive records due to "unforeseen circumstances, to include multiple communications to and from [WCOG]." CP at 2657.

On May 11, the County informed WCOG by regular mail that the first installment of records was available. The County identified 533 pages responsive to WCOG's request, but informed WCOG that "a good number of these pages" had been fully redacted. CP at 2659. The County informed WCOG that the cost for copying and delivering the records was $88.65. The County offered to omit the fully redacted pages from release and to recalculate the cost excluding the redacted pages. The County also provided an exemption log explaining that the redacted pages were exempt as work product. The brief explanation for each of the redacted pages stated:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash. App. 221 (2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.
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> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2660-63.

WCOG responded by email on May 14. WCOG claimed that the exemptions were improper because they did not contain adequate description of the claimed exemption. The County did not respond to WCOG's email. On July 1, WCOG sent the County an email notifying the County that it would be sending a check for $88.65 "under protest." CP at 2665.

On July 9, the County sent WCOG another letter by regular mail. The letter explained that the County had sent WCOG the 72 pages that had not been fully redacted. The County returned WCOG's check and informed WCOG that it would send the 461 pages of fully redacted records upon request. WCOG requested the remaining 461 pages by email on July 15.

On August 10, the County informed WCOG by regular mail that the second installment of responsive records was ready. The County also included an exemption log for this installment, which identified hundreds of pages of responsive records as work product. The exemption logs contained the following brief explanations:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.

. . . .

> RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document – Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.
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> . . . .
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> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2674.

WCOG responded by email on August 13. WCOG claimed that the County's brief explanation was inadequate because the County could not claim work product for communications with other parties and amicus groups in the *Nissen* litigation.

The County responded to WCOG's email by letter dated August 20. In its letter, the County called WCOG's August 13 email "factually and legally baseless." CP at 2679.

WCOG attempted to email the County on August 31. However, the County's public records officer had retired, and her email account was deactivated. WCOG re-sent its August 31 email to another County employee on October 19, who forwarded the email to the County's new public records officer that day. The County informed WCOG that the error evidenced why email is not always the best way to ensure a party receives communication.

WCOG sent the County a letter by email on October 19. WCOG's letter detailed the history of its PRA request, including its communication with the County. WCOG again challenged

the adequacy of the County's exemption logs, and WCOG again claimed that the County had violated the PRA by refusing to communicate through email.

The County responded by regular mail on October 23. The County offered to scan the paper documents and copy them to a CD at a cost of $.84 per minute. The CD would then be sent to WCOG by regular mail. WCOG declined this offer by email on November 19.

The County notified WCOG by regular mail on December 2 that information regarding the third installment would be ready in two weeks. Again, the County offered to provide the responsive records in the second installment by CD. WCOG sent the County a check to receive the second installment by CD, which the County provided.

On December 14, WCOG filed a complaint for violations of the PRA. WCOG alleged that the County had (1) improperly withheld records subject to disclosure, (2) failed to provide a brief explanation explaining how the County's claimed exemption applied to the redacted records, and (3) violated its duty to provide the " 'fullest assistance' " when it refused to communicate with WCOG through email. CP at 2709. WCOG claimed that the records were improperly withheld because the County waived its work product privilege when it shared the documents with Lindquist and the amicus groups involved in the *Nissen* litigation.

After WCOG filed its complaint, the County continued to send WCOG's installments of responsive records. The County released the sixth installment on May 13, 2016. At that time, the County informed WCOG that it had changed its policy on the use of internet transfer services and began providing the responsive records electronically.

In June, the superior court issued a ruling in favor of the County on the merits of WCOG's PRA complaint. The superior court ruled that the County did not violate the PRA by refusing to

allow electronic transmittal of documents. The superior court further ruled that the County had not waived its work product privilege by disclosing the requested documents to Lindquist and the amicus groups. And the superior court ruled that the County's brief explanation of the work product exemption in its exemption logs was adequate under the PRA.

WCOG appeals.

ANALYSIS

A. STANDARD OF REVIEW

We review de novo agency action taken or challenged under the PRA. RCW 42.56.550(3)[1]; *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013). An agency bears the burden of establishing that an exemption to production applies under the PRA.[2] *Id.*.

[1] RCW 42.56.550 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including "former" before RCW 42.56.550.

[2] WCOG claims that the superior court improperly shifted the burden of proof in its ruling. However, WCOG acknowledges that the superior court's ruling is "immaterial" because this court's review is de novo. Br. of Appellant 23. Therefore, we do not consider this alleged error.

B. WAIVER OF WORK PRODUCT PROTECTION[3]

In response to WCOG's PRA request, the County claimed that hundreds of drafts, draft pleadings, handwritten notes, legal research, and correspondence related to the *Nissen* litigation were exempt from production as work product. As such, the County redacted these communications and documents either in part or in full in its response to WCOG's PRA request. WCOG argues that these documents were improperly redacted because the County waived its work product protection when it shared the documents with various amicus groups and Lindquist, who had personally intervened in the *Nissen* case. We disagree.

"The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014). Under the PRA, an agency must disclose responsive public records "unless the record falls within the specific exemptions of [the PRA] . . . or other statute." RCW 42.56.070(1).[4] "[C]ommonly referred to as the 'controversy exception,' " RCW 42.56.290 exempts records from disclosure under the PRA if they " 'would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.' " *Kittitas County v. Allphin*, 190 Wn.2d 691,

[3] The County argues that WCOG's lawsuit was premature under *Hobbs v. Washington State Auditor's Office*, 183 Wn. App. 925, 335 P.3d 1004 (2014). WCOG and the County filed competing motions for summary judgment on this issue below. The superior court granted WCOG's motion for partial summary judgment on standing and denied the County's motion for summary judgment based on *Hobbs*. The County never appealed this order. The County also never filed a cross-appeal in this case. Therefore, we do not consider the County's argument based on *Hobbs*.

[4] RCW 42.56.070 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory relied on by this court. Accordingly, we refrain from including the word "former" before RCW 42.56.070.

701, 416 P.3d 1232 (2018) (quoting RCW 42.56.290) (citing *Soter v.Cowles Publ'g Co.,* 162 Wn.2d 716, 732, 174 P.3d 60 (2007) (plurality opinion)).

Here, the County claimed that hundreds of redacted documents qualified as work product under CR 26(b)(4), and, therefore, were exempt from disclosure under the controversy exception of RCW 42.56.290. The work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26(b)(4). Thus, the doctrine only applies to materials prepared in anticipation of completed, existing, or reasonably anticipated litigation. *Allphin*, 190 Wn.2d at 704. "When creating work product in anticipation of litigation, 'there is no distinction between attorney and nonattorney work product.' " *Id.* (quoting *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985)).

WCOG argues that the County waived its work product protection in these documents when it shared them with third parties.[5] WCOG does not identify every document it believes the County improperly redacted, but instead, identifies "examples" of documents it believes that the County improperly redacted.[6] Br. of Appellant at 26. And WCOG appears to argue, based on

[5] At oral argument, WCOG argued that the County knew that it was waiving the work product privilege because it had received an email from Pam Loginski stating that sharing the documents would waive any privilege. Wash. Court of Appeals oral argument, *Washington Coalition for Open Government v. Pierce County*, No. 50718-8-II (Jan. 10, 2019), at 2 min., 55 sec. to 3 min., 20 sec. (on file with court). The record fails to support WCOG's argument. The record contains an email from Pam Loginski to her client, WAPA member attorneys, discussing her *Nissen* brief and reminding the WAPA member attorneys that their responses to her email are public records.

[6] WCOG assigns error to the superior court's conclusion that WCOG had failed to identify specific records that it believed had lost their work product privilege because they were shared. However, even WCOG admits that it merely provided "examples" of the records it believed the County had

these examples, that the County waived its work product protection in every document that it shared with Lindquist and the amicus groups in the *Nissen* litigation.

WCOG's argument confuses waiver under the work product doctrine with waiver of attorney-client privilege. WCOG narrowly focuses its argument on the applicability of the common interest doctrine, an exception to the general rule that voluntary disclosure of privileged attorney-client or work product communications to a third party waives privilege. But WCOG fails to distinguish between waiver of work product privilege and attorney-client privilege, and it fails to analyze whether the County waived its work product privilege to begin with.

" '[W]hile the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.' " *Allphin*, 190 Wn.2d at 710 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299). A party only waives its work product privilege when " 'the client, the client's lawyer, or another authorized agent of the client . . . discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.' " *Id.* at 708 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4) (AM. LAW INST. 2000)). The work product doctrine protects the efforts of an attorney, and those who assist that attorney, from disclosure to a litigation adversary. *Id* at 709. The attorney-client privilege, by contrast, safeguards confidentiality of communications between an attorney and client. *Id*.

improperly redacted. Br. of Appellant at 26. Because our review is de novo, we need not review the factual and legal conclusions of the superior court.

The work product doctrine allows parties to share work product in certain contexts without waiving the accompanying protections of the work product doctrine. *Id.* at 712. "A party can share work product with coparties and others who are similarly aligned on a matter of common interests because such parties are unlikely to disclose work product to adversaries." *Id*.

WCOG fails to show that the County's disclosure of work product to the amicus groups in the *Nissen* litigation created a significant likelihood that an adversary or potential adversary in the *Nissen* case would obtain these documents. Instead, WCOG relies on *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012), to argue that a shared desire for the same outcome in a legal matter was insufficient to create a common interest agreement between the County, Lindquist, and the amicus groups in the *Nissen* litigation.

In *Pacific Pictures*, the court stated that a shared desire to see the same outcome in a legal matter is not sufficient for communication between two parties to fall under the "common interest" or "joint defense" exception to waiver of attorney client privilege. 679 F.3d at 1129 (explaining that the common interest or joint defense rule is an exception to the ordinary waiver rules designed to allow attorneys representing different clients in pursuit of common legal strategies to communicate with one another). Thus, *Pacific Pictures* is inapplicable because that case involved waiver of the attorney-client privilege, not the work product doctrine.

WCOG also relies on the absence of a formal agreement between the County, Lindquist and the amicus groups to argue that the County waived its work product protections. However, parties do not need a written agreement to maintain confidentiality in order for the work product protection to apply. *Allphin*, 190 Wn.2d at 713. "Instead, a reasonable expectation of

confidentiality may derive from common litigation interests between the disclosing party and the recipient." *Id.*

The record shows that the County disclosed its work product to Lindquist, WAPA, and the WAMA and that they all shared a common litigation interest with the County. Like the County, Lindquist and the amicus groups argued that text messages on Lindquist's private cellphone were not subject to disclosure under the PRA. Because the County, Lindquist, and the amicus groups were similarly aligned on a matter of common interest in the *Nissen* litigation, the County had a reasonable expectation of confidentiality in sharing its work product with the amicus groups and Lindquist. WCOG fails to show that disclosure of work product to similarly aligned amicus groups created a significant likelihood that the County's adversary (Nissen) would obtain these documents.

WCOG also argues that the County waived its work product privilege by disclosing certain documents to Lindquist because Lindquist personally intervened in the *Nissen* litigation. However, WCOG fails to acknowledge that Lindquist and the County shared common litigation interests in *Nissen*, as both argued that records on Lindquist's private cellphone were not subject to PRA disclosure. And WCOG provides no authority to support its assertion that Lindquist became an adverse party to the County simply because he personally intervened in the *Nissen* litigation. WCOG similarly fails to provide any support for its claim that Lindquist and the County were adversaries in the *Nissen* litigation because they had a conflict of interest.

Thus, the County did not waive its work product protection by sharing the redacted documents with the amicus groups and Lindquist in the *Nissen* litigation. The County's claimed

exemptions were proper under RCW 42.56.290 and CR 26(b)(4), and it did not violate the PRA by redacting the exempt records.[7]

C. ADEQUACY OF EXEMPTION LOGS

Next, WCOG argues that the County's exemption logs failed to provide the brief explanation of how the work product exemption applied to the redacted records. We disagree.

When an agency withholds or redacts records subject to a PRA disclosure, 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." RCW 42.56.210(3). The purpose of the brief explanation requirement is to inform the requestor why a document is being withheld and to provide for meaningful judicial review. *Koenig*, 182 Wn.2d at 94. Thus, under RCW 42.56.210(3), an agency must identify " 'with particularity' the specific record or information being withheld and the specific exemption authorizing the withholding." *Id.* (internal quotation marks omitted) (quoting *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009)). Merely specifying the claimed exemption and identifying the withheld document's author, recipient, date of creation, and broad subject matter is insufficient. *See Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) (holding that identification of the document and the claimed exemption does not constitute a brief explanation under RCW 42.56.210(3)).

[7] WCOG also asks that we rule, in the alternative, that a party may not claim that records are exempt from disclosure under the PRA when one party is also the attorney for an adverse party in the same case. WCOG provides no case law to support this argument. Also, as explained above, nothing in the record shows that Lindquist was an adverse party to the County in this case.

Contrary to WCOG's claim, the County's exemption logs did not merely assert that the redacted records were work product. The County also provided a brief explanation that certain records constituted work product because they contained mental impressions, legal opinions, and legal researched generated by or for an attorney in the *Nissen* litigation. Some of the exemption logs also explained that the redacted materials were shared with other parties based on a common claim or defense in the *Nissen* litigation. The County provided WCOG with the following brief explanations in its exemption logs:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.
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> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.
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> RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document – Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.
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> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior

> Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2660-63, 2674

Nonetheless, WCOG argues that under *Sanders*, the County was required to (1) explain in writing that it had made a common interest agreement with the other parties in the *Nissen* litigation, (2) identify the scope of that agreement, and (3) identify all other parties to that common interest agreement. *Sanders* imposes no such requirements.

In *Sanders*, our Supreme Court held that merely identifying a document and the claimed exemption did not constitute a "brief explanation" under RCW 42.56.210(3). 169 Wn.2d at 846. An agency withholding or redacting records under RCW 42.56.210(3) must "specify the exemption *and* give a brief explanation of how the exemption applies to the document." *Id.* (emphasis in original). However, the *Sanders* court explained that the common interest doctrine is not one of the enumerated PRA exemptions. *Id*. at 853. It "is merely an exception to waiver." *Id.* at 854. Because the common interest doctrine is not one of the enumerated PRA exemptions, the County was not required to specify in the detail WCOG argues as to how the common interest doctrine applied to the redacted records in its brief explanation under RCW 42.56.210(3). *See Id.* at 853.

Also, even if such a detailed explanation is required when an agency waives its work product privilege, as explained above, the County did not waive its work product privilege by sharing the redacted documents with Lindquist and the amicus parties. Thus, we hold that the County did not violate the PRA by failing to explain in detail in its exemption logs how an exception to the waiver of a claimed exemption applied to the redacted records.

D. FAILURE TO PRODUCE ELECTRONIC RECORDS

WCOG also argues that the County violated the PRA because it failed to adopt and enforce rules allowing for electronic dissemination of public records.[8] WCOG also claims that the County violated the PRA by communicating with WCOG through regular mail, rather than by email. We disagree.

Under RCW 42.56.100 "[a]gencies shall adopt and enforce reasonable rules and regulations . . . consonant with the intent of this chapter to provide full public access to public records . . . Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." However, "[n]othing in the PRA obligates an agency to disclose records electronically." *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011). WCOG cites no authority to the contrary. WCOG also cites to no authority holding that an agency must communicate through email upon request.

Instead, WCOG relies on WAC 44-14-05001, model rules promulgated by the Attorney General for processing electronic records requests. Under the model rules, "an agency should provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so." WAC 44-14-05001. While the model rules provide useful guidance to agencies, they are not binding. *Mitchell*, 164 Wn. App. at 606; *Mechling v. City of Monroe*, 152 Wn. App.

[8] At oral argument, WCOG expanded its argument by claiming the County failed to adopt *any* rules for responding to PRA requests. Wash. Court of Appeals oral argument, *supra*, at 11 min., 55 sec. to 12 min., 16 sec. However, in its briefing, WCOG references the "County's 2007 rules," which required requestors to provide an email address. Br. of Appellant at 47. Thus, WCOG's own briefing undermines its attempt to broaden its claim during oral argument that the County failed to adopt *any* rules for responding to PRA requests.

830, 849, 222 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007 (2010). Thus, WCOG fails to show that the County violated the PRA when it failed to adopt the model rules promulgated by the Attorney General.

E. ATTORNEY FEES

WCOG requests attorney fees if it prevails on appeal under RAP 18.1. Br. of Appellant at 50. Because WCOG does not prevail on appeal, we decline to impose attorney fees.

CONCLUSION

We hold that the County met its burden of establishing that the work product privilege exemption applied to the redacted documents. We also hold that the County's exemption logs were adequate and that the County did not violate the PRA by refusing to transmit the requested documents electronically. Because we hold that the County did not violate the PRA, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Maxa, C.J.

☐ EXPEDITE
☐ No hearing set
■ Hearing is set
Date: Friday, April 21, 2017
Time: 3:00 pm
Judge: Carol Murphy

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

WASHINGTON COALITION FOR OPEN GOVERNMENT, a Washington nonprofit corporation, Plaintiff, vs. PIERCE COUNTY, Defendant.	No. 16-2-01006-34 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** ***(Revised Proposed)***

Plaintiff Washington Coalition for Open Government ("WCOG") brought this action against defendant Pierce County for violations of the Public Records Act, Chap. 42.56 RCW ("PRA"). This matter came before the Court for a hearing on the merits on April 21, 2017.

Pursuant to RCW 42.56.550(3) the Court did not hear any live witnesses, but considered the following declarations and exhibits thereto:

1. *Declaration of William John Crittenden in Support of Motion for Partial Summary Judgment on Standing* (May 20, 2016);

2. *Declaration of John R. Nicholson* (May 20, 2016);

3. *Declaration of Theresa Brown* (May 20, 2016);

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4. *Supplemental Declaration of William John Crittenden in Support of Motion for Partial Summary Judgment on Standing* (June 6, 2016);

5. *Declaration of John R. Nicholson in Support of Defendant's Motion for Protective Order* (October 28, 2016);

6. *Declaration of William John Crittenden in Support of Response to Motion for Protective Order* (November 2, 2016);

7. *Supplemental Declaration of John R. Nicholson in Support of Defendant's Motion for Protective Order* (November 3, 2016);

8. *Declaration of John R. Nicholson in Support of Defendant's Renewed Motion for Protective Order* (January 4, 2017);

9. *Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 4, 2017);

10. *Declaration of Arthur J. Lachman* (January 4, 2017);

11. *Supplemental Declaration of John R. Nicholson re: Discovery Motions* (January 9, 2017);

12. *Second Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 9, 2017);

13. *Second Supplemental Declaration of John R. Nicholson re: Discovery Motions* (January 12, 2017);

14. *Third Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 12, 2017);

15 *Declaration of Ramsey Ramerman* (January 12, 2017);

16 *Supplemental Decl. of William John Crittenden re: Additional Exhibits*;

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17. *Supplemental Declaration of Theresa Brown*;

18. *Declaration of John R. Nicholson in Support of Defendant Pierce County's Responding Brief for [PRA] Hearing*;

19. *Declaration of Stephen Penner*; and

20 *Declaration of Mary Robnett*.

The Court also considered (i) *Plaintiff's Corrected Hearing Brief*, (ii) *Defendant Pierce County's Responding Brief for [PRA] Hearing*; and (iii) *Plaintiff's Hearing Reply Brief*.

Having considered all the evidence presented and having heard the arguments of the parties' counsel, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. History of *Nissen* Litigation

1. On June 3, 2011, an attorney representing Glenda Nissen, a Pierce County deputy sheriff, submitted a request for public records to the Pierce County Prosecuting Attorney for records from the cell phone used by Pierce County Prosecutor Mark Lindquist. **Ex. P1**

2. On June 8, 2011, the Public Records Officer for the Pierce County Prosecuting Attorney responded to the Nissen's PRA request by asserting, *inter alia*, that the cell phone at issue was Mark Lindquist's personal cell phone. **Ex. P2**.

3. On June 15, 2011, Glenda Nissen, a Pierce County deputy sheriff, filed a whistleblower complaint against Pierce County Prosecutor Mark Lindquist. Nissen alleged, *inter alia*, that Lindquist had retaliated against Nissen for her criticism of Lindquist and her lack of support for his election campaign. Nissen also alleged that Lindquist attempted to focus the investigation of an anonymous death threat, received by deputy prosecutor Mary Robnett in

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2010, on Nissen despite the lack of any evidence, and that Lindquist also improperly barred Nissen from the Prosecutor's Office. **Ex. P3**. The fact that Nissen made these allegations is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.

4. On July 26, 2011, the County entered into a settlement agreement with Nissen. Lindquist's senior deputy, Dan Hamilton, represented the County in the mediation leading to the settlement. The settlement required a payment of $39,500 to Nissen's attorney, released all claims against Nissen, and prohibited further retaliation against Nissen. **Ex. P4**. The fact that the County entered into the settlement agreement with Nissen is admissible and relevant to the County's exemption claims.

5. A news story about the Nissen settlement appeared in the Tacoma News Tribune (TNT) on August 2, 2011. **Ex. P51**. Lindquist spent that day trying to manage the news story, seeking minor changes after the story was published. *Id*. The allegations in the TNT are relevant to whether Lindquist had a conflict of interest, which is an issue on which the County has the burden of proof. But the County has offered no evidence to contradict the allegations.

6. Unknown to anyone outside Lindquist's office (at that time) Lindquist sent a text message to at least two deputy prosecuting attorneys, Mary Robnett and Mike Sommerfeld. The text message stated "Tell allies to comment on TNT story." *Declaration of Mary Robnett ("Robnett Dec."),* ¶ 5; *see* **Exs. P50, P51**.

6A. The allegation that Lindquist sent the August 2, 2011 text message to DPA Sommerfeld is relevant to whether Lindquist had a conflict of interest, which is an issue on

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which the County has the burden of proof. But the County has offered no evidence to contradict the allegation.

7. DPA Sommerfeld then posted an anonymous comment on the TNT website, calling Nissen's lawsuit "more than frivolous," and accusing Nissen's attorney of "extorting county taxpayers." **Ex. P51**. The allegation that Sommerfeld posted an anonymous comment critical of Nissen and her attorney on the TNT website is relevant to whether Lindquist had a conflict of interest, which is an issue on which the County has the burden of proof. But the County has offered no evidence to contradict the allegation.

8. Nissen correctly suspected that Lindquist was continuing to retaliate against her. On August 3, 2011, Nissen's attorney made a PRA request for records from Mark Lindquist's cell phone on August 2, 2011. **Ex. P5**.

9. On or about August 29, 2011, Nissen filed another whistleblower complaint against Lindquist. Nissen alleged, *inter alia*, that Lindquist was continuing to retaliate against her. **Exs. P6, P7**. The fact that Nissen made these allegations and filed the second whistleblower complaint is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.

10. On September 28, 2011, the County responded to Nissen's second PRA request. **Ex. P8**.

11. After the County refused to produce Lindquist's text messages Nissen brought a PRA case against the County. *Glenda Nissen v. Pierce County*, Thurston County No. 11-2-02312-2 (hereafter "*Nissen* case"). Nissen's complaint specifically alleged that her PRA request sought records from Mark Lindquist's own cell phone, and that Nissen believed the

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requested records would show that "Lindquist was using his cell phone to take actions retaliating against her and other official misconduct." **Ex. P9**.

12. By email dated November 2, 2011, deputy prosecutor Hamilton asserted that Nissen's complaint was frivolous, and "interposed for improper purposes as part of [Nissen's] ongoing attempt to harass Prosecutor Lindquist…" **Ex. P10**. The fact that the Lindquist's deputies attacked Nissen and asserted that her claim was frivolous when in fact it had merit is not hearsay, even if the substance of Hamilton's remarks are hearsay. This fact is relevant to whether Lindquist and his deputies had a conflict of interest, which is an issue on which the County has the burden of proof.

13. On or about November 3, 2011, deputy prosecutors Dan Hamilton and Mike Sommerfeld appeared in the *Nissen* case on behalf of the County. **Ex. P11**. The following day these deputy prosecutors filed a motion to strike and seal Mark Lindquist's cell phone number. **Ex. P12**. These pleadings indicated that Lindquist was counsel of record for the County in the *Nissen* case. *Id*.

14. ~~According to the October 22, 2015 report by attorney Mark R. Busto,~~ Lindquist "kind of flipped out" after Nissen filed the PRA case, and Lindquist pressured deputy prosecutor Robnett to bring a civil action against Nissen. *Robnett Dec.*, ¶ 4 ~~**see Ex. P42**~~.

15. Robnett never brought an action against Nissen. However, Robnett retained an attorney who made extensive PRA requests to the Pierce County Sheriff for records relating to Nissen. *Robnett Dec.*, ¶ 4; **Ex. P13**.

16. On or about November 22, 2011, Prosecutor Lindquist, represented by a private attorney, Stewart Estes, filed a motion to intervene in the *Nissen* case under RCW 42.56.540 "for the purposes of asserting certain individual rights and seeking to restrain and enjoin

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[Nissen] from receiving, and Defendant Pierce County from disclosing, certain personal records." **Exs. P14, P15**.

17. The County denies that Lindquist had a conflict of interest in the *Nissen* case, either before or after he intervened. *See Defendant's Response in Opposition to Plaintiff's Motion to Compel* (January 9, 2017) at 4. It is undisputed that the County and Lindquist never prepared a written waiver of any conflict of interest.

18. On or about November 28, 2011, Lindquist, represented by Estes, filed a motion for a temporary restraining order and preliminary injunction against Pierce County. **Ex. P16**.

19. Lindquist's motion to intervene was granted on November 30, 2011. **Ex. P17**.

20. The superior court dismissed the *Nissen* case on or about December 23, 2011, and Nissen appealed. **Ex. P58**.

21. On or about March 12, 2011, Nissen entered into an agreement with the Pierce County Sheriff to put Nissen's emails in the custody of attorney Ramsey Ramerman, who had been appointed a special deputy prosecutor to represent the Sheriff for that purpose. **Exs. P19, P20**.

22. On or about March 4, 2013, Intervenor Mark Lindquist, represented by attorney Stewart Estes, filed his brief of respondent. **Ex. P21**.

23. On or about March 7, 2013, the County filed his its brief of respondent, listing Lindquist and deputy prosecutor Hamilton as counsel for the County. **Ex. P22**.

24. On or about January 24, 2014, amicus briefs supporting the County and Lindquist were filed in *Nissen* on behalf of the Washington Association of Prosecuting Attorneys (WAPA), and the Washington State Association of Municipal Attorneys (WSAMA). **Exs. P23, P24**.

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25. Also on or about January 24, 2014, an amicus brief supporting Lindquist was filed in *Nissen* on behalf of six organizations: (i) the Washington Federation of State Employees (WFSE), (ii) the International Association of Firefighters (IAF), (iii) the Washington Education Association (WEA), (iv) the Washington Council of Police and Sheriffs (WACOPS), (v) the Washington State Patrol Troopers Association (WSPTA), and (vi) the Pierce County Prosecuting Attorney' Association (PCPAA). Deputy prosecutor Jared Ausserer was identified as counsel for the PCPAA and as the author of the brief, along with four other attorneys. **Ex. P25**.

26. On September 9, 2014, the Court of Appeals reversed, rejecting the argument of Lindquist and the County that the PRA did not apply to Lindquist's cell phone. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014).

27. On or about October 6, 2014, the County filed a petition for review in *Nissen*. The County's petition indicated that Lindquist was still counsel of record for the County. **Ex. P26**. On or about October 9, 2014, Mark Lindquist, represented by attorney Estes, also filed a petition for review as intervenor. **Ex. P27**.

28. On or about December 5, 2014, WSAMA filed a memorandum in support of review in *Nissen*. **Ex. P28**.

29. On or about December 5, 2014, an amicus brief supporting review was filed by WFSE, IAF, WEA, WACOPS,WSPTA and PCPAA. This brief was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney. **Exs. P29, P30**.

30. The Supreme Court granted review on March 4, 2015. *Nissen v. Pierce County*, 182 Wn.2d 1008 (2015).

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31. On or about April 20, 2015, the County and Intervenor Lindquist each filed supplemental briefs in *Nissen*. **Exs. P31**. Again, Mark Lindquist was represented by attorney Estes, but Lindquist was also counsel of record for the County. *Id*.

32. On or about April 27, 2015, amicus briefs supporting Lindquist and the County were filed in *Nissen* by WAPA and WSAMA. **Exs. P32, P34**.

33. On or about May 4, 2015, an amicus brief supporting Lindquist and the County was filed in *Nissen* by WFSE, IAF, WEA, WACOPS,WSPTA and PCPAA. This brief was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney. **Ex. P36**.

34. On or about May 4, 2015, the Washington Attorney General filed an amicus brief in Nissen that disagreed with the argument of Lindquist and the County that the PRA did not apply to records on Lindquist's personal phone. **Ex. P37**.

35. On or about May 12, 2015, a Pierce County Deputy Prosecutor, Steve Merrival, filed a whistleblower complaint with the Pierce County Human Resources Department, alleging numerous instances of misconduct and retaliation by Prosecutor Lindquist, including misconduct relating to Glenda Nissen and violations of the PRA. **Ex. P38**. The fact that DPA Merrival made these allegations is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.

36. On May 21, 2015, another whistleblower complaint was filed by Chief Criminal Deputy Stephen Penner, also alleging numerous instances of misconduct, waste of public funds, and abuse of authority by Prosecutor Lindquist, including misconduct relating to Glenda

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Nissen's lawsuit(s) and attempts by Lindquist to circumvent the PRA. **Ex. P39**; *Declaration of Stephen Penner ("Penner Dec."),* ¶ 3.

37. By letter dated June 22, 2015, Chief Criminal Deputy Stephen Penner informed the director of Pierce County Human Resources that he waived any confidentiality with respect to his whistleblower complaint. Penner further complained that Chief Civil Deputy Doug Vanscoy had falsely informed the Tacoma News Tribune (TNT) that Penner's complaint was "anonymous." **Ex. P40**; *Penner Dec.*, ¶ 3.

38. On August 27, 2015, the Supreme Court issued its opinion in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), unanimously rejecting Lindquist's argument that the PRA did not apply to records on his personal phone.

39. After the Supreme Court remanded the *Nissen* case to the superior court, the Pierce County Executive, Pat McCarthy, became aware that Lindquist had a conflict of interest in the *Nissen* case. The Executive retained her own attorney, and received a 13-page legal opinion explaining that Lindquist had a conflict of interest in the *Nissen* case and that no attorneys in Prosecutor's Office should represent the County in *Nissen*. **Ex. P41**.

40. On or about October 22, 2015, the results of a County investigation into the two whistleblower complaints by deputy prosecuting attorneys against Lindquist were released. **Ex. P42**.

41. By letter dated November 10, 2015, Executive McCarthy told Lindquist that he had a conflict of interest in the Nissen case, and asked him to appoint a special prosecutor chosen by McCarthy. **Ex. P43**.

42. On November 24, 2015, attorneys hired by Executive McCarthy filed a motion in *Nissen* for the appointment of a special prosecutor chosen by McCarthy. **Exs. P44, P45**.

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43. Lindquist responded by appointing a law firm of his choosing, Freimund, Jackson & Tardif, PLLC, to represent the County in Nissen. On December 18, 2015, without deciding the issue of whether Lindquist had a conflict of interest, the superior court accepted the appointment of Freimund, Jackson & Tardif, PLLC, and denied the Executive's motion. **Exs. P48, P49**.

44. On or about December 23, 2015, former deputy prosecutor Mary Robnett, who had left the Prosecuting Attorney in 2011, disclosed in a letter to the County that she had received a text message from Lindquist on August 2, 2011. The text message stated "Tell allies to comment on TNT story." Robnett enclosed a copy of the text message. Robnett denied being involved in any political activity for Lindquist, and she opined that the text message was public record. *Robnett Dec.*, ¶¶ 5-8; **Ex. P50**.

45. After Robnett disclosed the existence of the August 2, 2011 text message, the TNT determined that deputy prosecutor Sommerfeld had posted the disparaging comments about Nissen on the TNT website. That fact was reported in the TNT on January 19, 2016. The revelation of Sommerfeld's improper involvement in the *Nissen* case caused the Pierce County Sheriff to dismiss Sommerfeld as his legal advisor. **Exs. P50, P51**. The allegation that Sommerfeld posted disparaging comments on the TNT website is relevant to the conflict of interest. That allegation has not been denied by the County despite having the burden of proof.

46. On February 9, 2016, the superior court issued a ruling, after *in camera* review, that Lindquist's text message to Robnett on August 2, 2011, was a public record that should have been disclosed. **Exs. P52, P53, P54**.

47. On or about March 18, 2016, the superior court awarded Nissen more than $118,000 in attorney fees and penalties against the County. **Ex. P56**.

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48. By that time the County had already spent more than $325,000 on private attorneys to defend Lindquist. **Ex. P55**.

49. No party appealed from the superior court's order in *Nissen*. Both Nissen and the County filed motions to recall the Supreme Court's mandate, which were denied on June 1, 2016.

B. WCOG PRA Request

50. After the Supreme Court granted review in *Nisse*n, on or about April 1, 2015, plaintiff Washington Coalition for Open Government ("WCOG") made a PRA request to Pierce County for records relating to the *Nissen* case. **Ex. P61**.

51. WCOG requested the following records:

> (a) All correspondence, including email, between the County and Mr. Lindquist, other agencies, other public officials, and/or amicus organizations relating to the Glenda Nissen v. Pierce County litigation;
>
> (b) All records discussing the conflict of interest between the County and Mr. Lindquist in the Glenda Nissen v. Pierce County litigation, including any waiver or other resolution of such conflict;
>
> (c) All records, including correspondence, agreements and invoices, relating to the retention of any private attorneys to represent Pierce County in the Glenda Nissen v. Pierce County litigation; and
>
> (d) All records of litigation decisions being made for Pierce County as the defendant in the Glenda Nissen v. Pierce County litigation, specifically including but not limited to, records indicating which person(s) are making litigation decisions for the County in the Glenda Nissen v. Pierce County litigation in light of Mr. Lindquist's status as a separate party to that litigation.

52. WCOG's PRA request explicitly stated that "Time is of the essence in this request" and demanded that the County "send all records and correspondence to [WCOG] by email or internet transfer service (such has drop box)." *Id.* WCOG's

53. WCOG's PRA request explicitly requested that the County provide existing electronic records (such as email, Word or PDF files), and that the County provide paper

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records by scanning the to PDF files. "PDF" stands for Portable Document Format, which is an open standard commonly used to share electronic documents. *Id*.

54. The County responded to the PRA request by letter dated April 8, 2015. The County failed to send the letter to WCOG's attorney by email as requested. Instead, the County sent the letter by regular mail, and WCOG's attorney did not receive that letter until approximately April 17, 2015. **Exs. P62, P63**.

55. On April 17, 2015 WCOG's attorney sent the County a letter (by email), objecting to the County's failure to respond by email, and warning the County that it was violating the PRA. **Ex. P63**.

56. On April 19, 2015 WCOG's attorney sent the County a letter (by email) expanding the existing PRA request to include additional records. WCOG's attorney advised the County to see the prior letters regarding the County's obligation to respond by email and to produce electronic records. **Ex. P64**.

57. The County responded to the letter dated April 19, 2015, by letter dated April 24, 2015. The County failed to send the letter to WCOG's attorney by email as requested. Instead, the County sent the letter by regular mail, and WCOG's attorney did not receive that letter until approximately April 27, 2015. **Ex. P65**.

58. By email dated April 27, 2015, WCOG's attorney objected to the County's ongoing refusal to communicate by email, and warned both PRA officer Joyce Glass and deputy prosecutor Dan Hamilton that the County was violating the PRA. **Ex. P66**.

59. On May 5, 2015, the County responded with another letter sent by regular mail but not by email. As a result WCOG's attorney did not receive the letter until approximately May 12, 2015. The County's letter asserted, *inter alia*, that the County's refusal to correspond

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by email did not violate the PRA or *ACLU v. Blaine School Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999). **Ex. P67**.

60. On May 11, 2015, the County responded with another letter sent by regular mail but not by email. As a result, WCOG's attorney did not receive the letter until approximately May 14, 2015. **Ex. P68**.

61. The May 11, 2015 letter stated that the County was prepared to provide a "first installment" of 533 paper pages of redacted records, many of which were "fully redacted leaving no text and fully blackened pages." The letter requested payment of $88.65 in order to receive these records by regular mail. The letter included an exemption log that asserted that various records were exempt under RCW 42.56.290 (work product). **Ex. P68**.

62. By email dated May 14, 2015, WCOG's attorney notified the County that, *inter alia*, (i) the County was still refusing to correspond by email, and (ii) the County had ignored WCOG's request that responsive records be scanned to PDF files. **Ex. P69**.

63. By email dated July 1, 2015, WCOG's attorney objected to the County's failure to respond to the objections in the earlier email on May 14, 2015. Also on July 1, 2015, WCOG's attorney sent the County the requested check for $88.65 and notified the County by email that WCOG was making that payment under protest as WCOG had specifically asked the County to scan paper records to PDF. **Ex. P70**.

64. The County received WCOG's check for $88.65 on July 6, 2016. However, the County decided to return the check and only send WCOG the seventy-two (72) pages of the first installment that " that were not fully redacted. *Declaration of Theresa Brown* (May 20, 2016), ¶ 13.

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65. By letter dated July 9, 2015, the County informed WCOG's attorney that the County had decided to send only those seventy-two (72) pages of the "first installment" that were not fully redacted, and that the check for $88.65 was being returned. **Ex. P71**.

66. The County again responded by regular mail but not by email. As a result, WCOG's attorney did not receive the letter until July 13, 2015.

67. The County's letter dated July 9, 2015, included seventy-two (72) pages of paper copies of extensively redacted records, all of which were allegedly exempt under RCW 42.56.290 (work product). *Id.*

68. The records produced on July 9, 2015, were first electronically redacted using Adobe Acrobat XI Pro. **Ex. P98**. This electronic redaction process resulted in one or more PDF files that could have been provided to WCOG in that format as WCOG had explicitly requested.

69. Rather than produce PDF files—as WCOG requested and which already existed as a result of the County's electronic redaction—the records produced by the County on July 9, 2015, were printed the PDF files to create paper copies that had to be mailed to WCOG. **Ex. P74**.

70. By email dated July 15, 2015, WCOG's attorney objected to the County's ongoing refusal to communicate by email. WCOG's attorney stated that WCOG still wanted the other 461 pages of records and that a replacement check would be sent. **Ex. P72**.

71. On or about August 10, 2015, the County produced 533 pages of redacted paper records. Those records were also electronically redacted and then printed onto paper. **Exs. P73, P74**.

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72. On or about August 28, 2015, Theresa Brown replaced Joyce Glass as the Public Records Officer for the Prosecuting Attorney. *Declaration of Theresa Brown* (May 20, 2016), ¶ 2.

73. By email dated August 31, 2015, WCOG's attorney reviewed the status of the pending PRA request and the County's response, and objected to the County's violations of the PRA. **Ex. P79**. The County never responded to the email dated August 31, 2015.

74. The County did not receive the email from WCOG's attorney dated August 31, 2015 because the County simply deactivated Ms. Glass' email account after she left the Prosecuting Attorney on August 28, 2015. *Declaration of Theresa Brown* (May 20, 2016), ¶¶ 19-20. The County did not make arrangements for Ms. Glass' email to be forwarded to or processed by the new PRA officer (Ms. Brown). **Ex. P78**.

75. By letter dated October 19, 2015, WCOG's attorney (i) informed the County that it had not responded to the email dated August 31, 2015, (ii) summarized the status of the PRA request and the County's response, and (iii) explained the County's violations of the PRA. **Ex. P77**.

76. On October 19, 2015, the County informed WCOG's attorney that the PRA officer for the Prosecuting Attorney had retired and provided an email address for the new PRA officer. WCOG's attorney re-sent the email dated August 13, 2015, email dated August 31, 2015, and letter dated October 19, 2015, to the new PRA officer. **Ex. P77, P79**.

77. By letter dated October 23, 2015, the County repeated its assertions that there was no conflict of interest between the County and Mr. Lindquist, that most of the requested records were exempt as "work product," that the County had no obligation to communicate by

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email or produce electronic records, and that the County's exemption logs were adequate. **Ex. P80**.

78. By letter dated December 2, 2015, the County stated that the cost of paper copies of the "second installment" of 233 pages of records is $38.60, and that if the requester would rather receive the documents on CD then "the cost to scan and copy these pages plus the cost of materials and postage is $13.80." WCOG's attorney sent the County a check for $13.80. **Exs. P82, P83**.

79. On or about December 14, 2015, the County produced a second installment of records consisting of a single 233-page PDF file of heavily redacted records. These records were copied onto a CDR and mailed to WCOG's attorney. **Ex. P83**.

80. On December 14, 2015, WCOG served its Complaint in this action on the Pierce County Auditor. **Ex. P84**.

81. The County produced its third, fourth and fifth installments of records, as heavily-redacted PDF files, on or about January 5, 2016, February 17, 2016, and April 1, 2016. These records were copied onto CDRs (or DVDs) and mailed to WCOG's attorney. **Exs. P85, P86, P87, P88, P89, P90, P91, P92**.

82. By letter dated May 13, 2016, the County stated that the Pierce County Prosecutor's Office had changed its policy on the use of internet transfer services as a means of providing public records, and that the PRA officer was now authorized to provide responsive records through an internet transfer service, "Filelocker." **Ex. P95**.

83. The County produced its sixth, seventh, eighth, and ninth installments of heavily-redacted records, as PDF files transmitted to over the Internet via "Filelocker," on or about May 13, 2016, July 6, 2016, August 16, 2016, and September 15, 2016. **Ex. P96, P97**.

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84. In its *Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment on Standing* (June 5, 2016) at 5, the County asserted that "the County is not close to finishing its response to Plaintiff s PRA request." By this time the County had been working on WCOG's PRA request for more than a year.

85. WCOG filed an *Amended Complaint* on October 3, 2016, which expanded the Complaint to address the County's third through ninth installments of records.

C. Claim of "Common Interest" With WAPA

86. The County has redacted a large number of records of communications between the County and the Washington Association of Prosecuting Attorneys relating to the *Nissen* litigation. The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P96**. Examples of such records are found at Record Nos. 1007-1008, 1491-1493, 2064, 1966, 1944-1946, 1910-1912, 658-690, 2132, 2311, and 2308. **Ex. P102**. The Court has not determined the exact number of records of communications with WAPA that the County has withheld as that number is not relevant at this time.

87. Although these records were shared with an outside party (WAPA) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**. The County's answers to WCOG's interrogatories state, in relevant part:

> a. The County and Mr. Lindquist's interests in the *Nissen v. Pierce County* public records litigation were co-extensive with one another. Each had the interest of producing any records responsive to the request in the underlying case that were properly classified as "public records," but also preventing the requestor from invading the right of privacy held by governmental employees and officials in their private records.
>
> b. The common interest between Pierce County and Pierce County Prosecuting Attorney Mark Lindquist existed from the outset of the *Nissen* public records litigation. When Prosecuting Attorney Lindquist retained private

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> counsel to intervene in the case, the agreement and understanding between the County and Mr. Lindquist was that they and their attorneys would share information regarding case strategy and briefing, and that any applicable privileges would be preserved. No written agreement was executed. …
>
> d. The following amicus groups and their attorneys in the *Nissen* public records litigation also shared in the common interest identified above: Washington Council of Police and Sheriffs; Washington State Patrol Troopers Association; Pierce County Prosecuting Attorneys Association; Washington State Association of Municipal Attorneys; Washington State Attorney General's office; Washington Association of Prosecuting Attorneys.

88. The records redacted by the County were not merely shared with WAPA and its in-house attorneys (McBride and Loginsky) but were shared with every one of the other thirty-eight prosecuting attorneys in the state. Although each of those prosecutors, and many of their deputies are members of WAPA, each member of WAPA is the attorney for their own County. It would be impractical if not impossible for the County to have entered into a common interest agreement with thirty-eight other Counties. Furthermore, the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** The County has presented no admissible evidence of a common interest agreement between the County and WAPA. The fact that WAPA's amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

88A. The letter from WCOG's counsel to the legislature dated December 14, 2016 (**Ex. P120**) was filed by the County in the *2d. Supp. Nicholson Dec*., Ex. 32. Nothing in that letter supports the County's assertion that WCOG's counsel believed there was a common interest agreement between the County and other parties in the *Nissen* case.

89. The County's unsupported claim of a common interest agreement with WAPA directly conflicts with the conduct of other counties that were allegedly a party to that agreement. When WCOG requested that other counties produce their records of WAPA's

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participation in the *Nissen* case those counties produced their records without any redactions or claims of exemption. Some of the records produced by other counties are the exact same emails that the County has redacted as work product. If the County had actually entered into a common interest agreement with WAPA and the other counties the release of such records would have violated the agreement. **Ex. P103**. The fact that these agencies produced their *Nissen* records without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

89A. There is no evidence to support the County's assertion that WAPA and/or its member counties decided to "waive" any common interest agreement in producing *Nissen* records. The County's unsupported claim of unilateral waiver contradicts the County's assertion that those agencies had agreed to maintain confidentiality.

90. WAPA has also released unredacted records of WAPA members discussing possible WAPA amicus participation in two other recent cases. **Ex. P104** . The fact that these agencies produced their correspondence relating to other amicus matters without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

91. On or before December 22, 2016, the County discovered that WCOG had obtained unredacted emails from WAPA that the County had previously withheld as work product. If the County had actually entered into a common interest agreement with WAPA and the other counties then the County would have been expected to object to the improper release of records and attempted to claw the records back. But the County merely acknowledged that WAPA had released the records and offered no explanation of why WAPA had released the records, which is inconsistent with the County's claims. **Ex. P101**.

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92. By email dated January 17, 2014, WAPA staff attorney Pam Loginsky sent an email to several dozen WAPA member prosecutors from various counties requesting feedback on a draft amicus brief. Nine minutes later Ms. Loginsky sent a second email that stated "Caution-- a reminder that your responses are public records. Typos, etc., can be sent by e-mail. Concerns about the arguments, themselves, are best shared by phone." **Ex. P105**. Ms. Loginsky's statements directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. The fact that Whitman County released this email to WCOG also contradicts the County's claim. The fact that Ms. Loginsky instructed WAPA members to use the phone to avoid creating public records is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

93. When WAPA director Tom McBride responded to WAPA's PRA request by email dated January 25, 2016, he explicitly stated that "Neither Pam Loginsky or I are asserting any exemptions." **Ex. P107**. Mr. McBride's statement directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. The fact that WAPA did not claim any exemptions with respect to its *Nissen* records is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

94. By email dated December 15, 2016, Benton County Prosecuting Attorney Andy Miller stated that he had never changed his position against filing an amicus brief in support of Lindquist, and that while Miller was on the WAPA board (through December 2014) WAPA did not agree to submit an amicus brief. **Ex. P109**. Prosecutor Miller's statement directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. Given that Prosecutor Miller did not agree with or support Lindquist's arguments

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he could not and did not enter into a common interest agreement with the County. Prosecutor Miller's unsworn letter is hearsay. But the allegation that Miller never agreed with Lindquist is relevant to whether the County actually formed the alleged common interest agreement, which is an issue on which the County has the burden of proof but has offered no evidence.

95. The County's assertion that the alleged common interest agreement included the Washington Attorney General (AGO) is directly contrary to the documentary evidence, and further undermines the County's claims. The County produced **unredacted** an email discussion of the *Nissen* case between Lindquist and AG Bob Ferguson (Record No. 2052-2053). **Ex. P117**. The County's exemption log for this record erroneously indicates that this record was exempt as work product under RCW 42.56.290. **Ex. P96**. The County admits that it has not redacted its correspondence with the AGO despite having claimed a common interest agreement with the AGO. The County's assertion that the Attorney General had a common interest with the County is directly rebutted by the fact that the Attorney General filed an amicus brief in the *Nissen* case that disagreed with Lindquist's argument that the PRA did not apply to his cell phone. **Ex. P37**.

96. The County's assertion that it had an oral common interest agreement with WAPA is not credible. The Court finds that the County never entered into a common interest agreement with WAPA. Any work product protection for records shared with WAPA or any other county has been waived.

D. Claim of "Common Interest" With WSAMA

97. As with the redacted communications with WAPA, the County has redacted a large number of records of communications between the County and the Washington State Association of Municipal Attorneys relating to the *Nissen* litigation. The County asserts that

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these records are exempt as work product under RCW 42.56.290. **Ex. P96**. Examples of such records are found at Record Nos. 2174-2176, 945, 2081-2082. **Ex. P110**. The Court has not determined the exact number of records of communications with WSAMA that the County has withheld as that number is not relevant at this time.

98. Although these records were shared with an outside party (WSAMA) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

99. The records redacted by the County were not merely shared with WSAMA's amicus attorneys but were shared with a very large but unknown number of municipal attorneys around the state. Although each of those attorneys are members of WSAMA, each member of WSAMA is the attorney for their own city. It would be impractical if not impossible for the County to have entered into a common interest agreement with every other member of WSAMA. Furthermore, the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. The County has presented no admissible evidence of a common interest agreement between the County and WSAMA. The fact that WSAMA's amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

99A. The *Declaration of Ramsey Ramerman* does ***not*** establish that any common interest agreement was made. Mr. Ramerman does not claim to have personal knowledge of any common interest agreement, and the word "agreement" never appears in his declaration. Mr. Ramerman merely states that, based on unspecified conversations and emails with deputy Dan Hamilton, he "believed that [his] clients shared a common interest with Pierce County." Mr. Ramerman's unsupported beliefs are not evidence.

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100. The County's unsupported claim of a common interest agreement with WSAMA directly conflicts with the conduct of other cities that were allegedly a party to that agreement. When WCOG requested that other cities produce their records of WSAMA's participation in the *Nissen* case those cities produced their records without any redactions or claims of exemption. If the County had actually entered into a common interest agreement with WAPA and the other counties the release of such records would have violated the agreement. **Ex. P111**. The fact that these agencies produced their *Nissen* records without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

100A There is no evidence to support the County's assertion that WSAMA and/or its member cities decided to "waive" any common interest agreement in producing *Nissen* records. The County's unsupported claim of unilateral waiver contradicts the County's assertion that those agencies had agreed to maintain confidentiality.

101. WSAMA has also released unredacted records of WSAMA members discussing possible WAPA amicus participation in two other recent cases. **Ex. P112**. The fact that these agencies produced their correspondence relating to other amicus matters without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

102. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA and the Washington Attorney General further undermines the County's claim of a common interest agreement with WSAMA.

103. The County's assertion that it had an oral common interest agreement with WSAMA is not credible. The Court finds that the County never entered into a common interest

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agreement with WSAMA. Any work product protection for records shared with WSAMA or any other city has been waived.

E. Claim of "Common Interest" With Employee Amicus Groups

104. As with the redacted communications with WAPA and WSMA, the County has redacted a large number of records of communications between the County and five other amicus groups who filed amicus briefs in the *Nissen* litigation, including the Pierce County Prosecuting Attorneys Association (PCPAA). The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P98**. Examples of such records are found at Record Nos. 1672, 1433-1434, 8093-8124, 1342-1346. **Ex. P113**. The Court has not determined the exact number of records of communications with WSAMA that the County has withheld as that number is not relevant at this time.

105. The redacted records are not limited to communications between the five amicus groups and the deputy prosecutors who represented the PCPAA. Such communications were also shared with Lindquist himself, Phil Talmadge, and deputies Hamilton and Farina. **Ex. P113**.

106. Although these records were shared with several outside parties the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

107. The amicus briefs filed by the employee groups were authored by deputy prosecutors working on County time and using County resources. *Penner Dec.*, ¶ 6. The briefs were filed by legal assistants employed by the County. **Exs. P25, P29, P30, P36, P42**. According to the Busto whistleblower investigation report (at page 52) multiple prosecuting attorneys spent "extensive" County time on these amicus briefs. *Id*.

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108. ~~According to the Busto whistleblower investigation report t~~The employee amicus briefs in the *Nissen* case were drafted by senior leadings in the Prosecuting Attorney, including but not limited to, Lindquist and deputies Hamilton and Sommerfeld. *Penner Dec.*, ¶ 6; *see* **Ex. P42**. On January 3, 2014, deputy Hamilton emailed a 30-page draft pleading, presumably the draft amicus brief, to deputy Ausserer. **Ex. P113**.

109. The County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** At least a dozen attorneys (Lindquist, Talmadge, Hamilton, Sommerfeld, Farina, Hunter, Ausserer, Nobile, Woodley, Peters, Iverson, Garfinkel, Julius), not including any WAPA or WSAMA attorneys, would have been parties to the alleged oral common interest agreement. It would be impractical if not impossible for a dozen attorneys (some out-of-state) representing at least seven different parties to have entered into such an oral common interest agreement. It is extremely unlikely that such an agreement could have been made without some sort of documentation being created. Yet the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** The County has presented no admissible evidence of a common interest agreement between the County and the employee amicus groups. The fact that the employee amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

110. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA, WSAMA and the Attorney General further undermines the County's claim of a common interest agreement with the employee amicus groups.

111. The County's assertion that it had an oral common interest agreement with the employee amicus groups is not credible. The Court finds that the County never entered into a

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common interest agreement with those amicus groups. Any work product protection for records shared with those amicus groups has been waived.

F. Claim of "Common Interest" With Intervenor Lindquist

112. The County has redacted a large number of records of communications between the County and Intervenor Lindquist relating to the *Nissen* litigation. The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P98**. Examples of such records are found at Record Nos. 986, 994-996, 1665-1666, 1831-1839. **Ex. P114**. The Court has not determined the exact number of records of communications with Lindquist that the County has withheld as that number is not relevant at this time.

113. Although these records were shared with an outside party (Intervenor Lindquist) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

114. Because Lindquist did not withdraw from representing the County in the *Nissen* case, even after he intervened in that litigation as a separate party, Lindquist was wearing two hats: (1) Lindquist was the County's attorney, and (2) Lindquist was an adverse party. Consequently, any record shared with Lindquist in his capacity as the County's attorney was also shared with Lindquist in his capacity as Intervenor.

115. The interests of the County and Intervenor Lindquist were not "co-extensive" as the County asserts. **Ex. P98**. Before the *Nissen* case was filed the County had paid $39,500 to settle claims of retaliation by Lindquist himself. **Ex. P4**. Nissen's new PRA complaint was explicitly based on allegations that Lindquist had continued to retaliate against Nissen and that the requested records would show that. **Ex. P9**. Lindquist had significant employment and

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reputational interests in preventing the disclosure of the text message. The County's conflicting interest was to comply with the PRA and not incur liability for violating the PRA.

116. In light of Lindquist's prior conflicts with Nissen, the prior settlement, and the fact that Nissen's PRA complaint was explicitly directed at Lindquist himself, Lindquist had conflict of interest at the outset of the *Nissen* litigation because there was a significant risk that Lindquist's representation of the County would be materially limited by Lindquist's own personal interests.

117. The facts that Lindquist intervened in the *Nissen* litigation and sought a temporary restraining order against his own agency establish that the interests of the County and Lindquist were directly adverse.

118. It was never in the County's interest to erroneously argue that the PRA was unconstitutional or that the text message wrongfully withheld by the County was not a public record. The County took those positions because Lindquist failed to recognize that he had conflict of interest and should not have represented the County. Lindquist personally caused the County to violate the PRA and incur hundreds of thousands of dollars in PRA liability and litigation costs.

119. The fact that the briefs filed in *Nissen* by Lindquist and the County agreed with each other does not establish any common interest between Lindquist and the County. The County's briefs agreed with Lindquist's legal position because Lindquist failed to appoint an independent special prosecutor to represent the County.

119A The County has presented no admissible evidence of a common interest agreement between the County and Intervenor Lindquist.

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120. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA, WSAMA, the Attorney General, and five other amicus groups further undermines the County's claim of a common interest agreement with Intervenor Lindquist.

121. The County's assertion that it had an oral common interest agreement with Intervenor Lindquist is not credible. The Court finds that the County never entered into a common interest agreement with Intervenor Lindquist. Any work product protection for records shared with Lindquist has been waived.

122. The County's exemption log (**Ex. P96**) indicates that the County also asserts that record Nos. 1831-1839 are protected by the attorney-client privilege. These records are redacted emails between Lindquist and the County's appellate attorney, Phil Talmadge. **Ex. P114**. Any attorney-client privilege for these records has been waived because any record shared with Lindquist in his capacity as Prosecuting Attorney was also shared with Lindquist in his capacity as an adverse party, and there is no attorney-client relationship between the County and Intervenor Lindquist.

G. Email Communications and Electronic Records

123. From the outset in April 2015, the County refused to correspond with WCOG's attorney by email despite repeated demands from WCOG. This practice continued until at least May 2016. Even the letter dated May 13, 2016, which announced the County's willingness to make records available on its Filelocker website, was sent by regular mail. **Ex. P95**.

124. During the same time period Lindquist and the County made extensive use of email in the *Nissen* litigation, and there was no actual impediment to using email to correspond with WCOG about the PRA request. The County simply refused to do so.

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125. In contrast to the unhelpful conduct of the Prosecuting Attorney, the Pierce County Human Resources Department was willing and able to respond to PRA requests by email. **Ex. P115, P116**.

126. In light of the County's widespread use of email for legal communications the County's stated reasons for not communicating with WCOG by email are pretextual and not credible.

127. When the Prosecuting Attorney's PRA officer, Joyce Glass, retired in August 2015, the Prosecuting Attorney failed to forward her email or transfer responsibility for her email account to the new PRA officer. **Ex. P78**. This prevented the County from receiving an email from WCOG's attorney, and that this caused additional delays.

128. The County admitted in response to discovery from WCOG that the County had no policy regarding whether the County would respond to PRA requests by email. **Ex. P98**. PCC 2.04.030(D)(1) indicates that a PRA request can be made by delivery, mail or fax, but inconsistently purports to require a PRA requester to provide their email address. Otherwise the provisions of PCC 2.04.030(D)(1) do not address whether the County would respond to PRA requests by email.

129. The County's refusal to correspond by email caused confusion, additional costs, and unnecessary delay in responding to WCOG's PRA request.

130. The first installment of records produced by the County on July 9, 2015, were first electronically redacted using Adobe Acrobat XI Pro. **Ex. P98**. This electronic redaction process resulted in one or more PDF files that could have been provided to WCOG in that format as WCOG had explicitly requested. **Ex. P61**.

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131. The County could have provided the PDF file(s) to WCOG by email, by copying the files onto a CDR (or DVD), or by uploading them to the County's Filelocker website. **Ex. P82, P115, P116**. Instead, the County printed the first installment onto paper and mailed the resulting pile of mostly black paper to WCOG, charging WCOG $88.65. **Exs. P70, P73, P74**.

132. The County admitted in response to discovery from WCOG that the County had no policy regarding how electronic records would be provided to requesters. **Ex. P98**. PCC 2.04.070(C) addresses the cost of copying electronic records but does not address whether or how the County will produce electronic records.

133. The County's refusal to provide the first installment of records in PDF format imposed unnecessary costs and delays on WCOG, and produced records that were less useful than the PDF files would have been.

134. For the second, third, fourth, fifth installments of records the County scanned these records to create redacted PDF files and then provided those files to WCOG on CDRs sent by mail. Exs. **P85, P86, P87, P88, P89, P90, P91, P92**.

135. At that time the County was capable of communicating with requesters by email and of transmitting large electronic documents electronically. In response to a PRA request to the Pierce County Human Resources Department on or about June 3, 2015, the PRA officer for that County department communicated with WCOG's attorney by email and transmitted requested records electronically using the "filelocker" utility on the County's website. **Exs. P115, P116**.

136. The County admitted in response to discovery from WCOG that the County had no policy regarding whether the County would make records available to requesters on its filelocker website. **Ex. P98**. Chapter 2.04 PCC (2007) does not address whether or when the

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County would make records available on the filelocker website. The statement in the County's letter dated May 13, 2016, that the Prosecuting Attorney had "changed" its policy on the use of internet transfer services is false because the County had no policy. **Ex. P95**.

137. The County's refusal to provide the second, third, fourth, fifth installments of records using the County's filelocker website imposed unnecessary costs and delays on WCOG.

II. CONCLUSIONS OF LAW

138. Any finding of fact incorrectly designated a conclusion of law shall be treated as a finding of fact, and vice versa.

138A. The Court rejects the County's interpretation of *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 104 (2014). The actual holdings of *Hobbs* are narrow: (i) no claim for withholding records may be brought where an agency has not actually denied access to the records but rather simply has not yet completed its response, and (ii) no PRA claim based on the manner in which an agency responds to a PRA request may be brought where the agency is still attempting to respond in the manner or format requested. *WCOG's Motion* (5/20/16) at 14; *WCOG's Response* (6/6/16) at 9. These holdings have no application to this case. WCOG's PRA claims are not premature and will not be dismissed.

138B. The County has the burden "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). The County has not presented any legal authority or expert testimony to support its argument that Lindquist did not have a conflict of interest in *Nissen*. Nor has the County cited any authority for the proposition that a

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common interest agreement can be created where an attorney for one party is also an adverse party in the same case.

138C. The Court has discretion to consider the expert opinions of Arthur Lachman and James Smith, and to give those opinions such weight as the Court thinks proper. The Court notes that it has considered these opinions. However, even if the Court ruled that these opinions were inadmissible and gave them no weight, the Court would reach the same result because the County has submitted no legal authority or expert opinion to suggest that the alleged common interest agreement would be lawful or effective.

139. Mark Lindquist had a concurrent, non-waivable conflict of interest in the *Nissen* case for purposes of RPC 1.7(a).

140. Mark Lindquist's conflict of interest was a disability for purposes of RCW 36.27.030, and a special prosecutor should have been appointed in the *Nissen* case.

141. Collateral estoppel applies where (i) an identical issue was decided in a prior adjudication, (ii) there was a final judgment on the merits, (iii) the party against whom estoppel is asserted was a party or in privity with a party to the prior litigation, and (iv) application of the doctrine would not work an injustice. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Collateral estoppel is not applicable to either (i) the decision of the Pierce County Superior Court in *Recall of Mark Lindquist*, No. 15-2-10116-7, dated August 11, 2015 or (ii) the *Order on Motion to Appoint Special Prosecutor* dated December 18, 2015 in the *Nissen* case, because WCOG was not a party (or in privity with a party) to those cases, and because application of the doctrine would be an injustice to WCOG because it has not had an opportunity to litigate the issue of whether Lindquist had a conflict of interest.

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142. Those superior court decisions have no precedential value. Furthermore, neither court actually decided the question of whether Lindquist had a conflict of interest or disability under RCW 36.27.030. Nor was either court aware at the time their decisions were made that Lindquist had sent the August 2, 2011 text message that the County wrongfully withheld from *Nissen*.

143. However, collateral estoppel precludes any argument by the County that the August 2, 2011 text message was not a public record or that Lindquist did not cause the County to violate the PRA in *Nissen*.

144. Lindquist's decision to intervene in the *Nissen* case without appointing a special prosecutor for the County was legally unprecedented. The County has not cited any legal authority for the proposition that it is ever be permissible for a prosecuting attorney, or any other lawyer, to represent an adverse party in a lawsuit to which the prosecutor is also an adverse party. The Court assumes that there is no such legal authority.

145. It follows that there is no legal authority for the proposition that a common interest agreement can be created where an attorney for one party is also an adverse party in the same case. As a matter of first impression the Court concludes that no valid common interest agreement can be created under such unethical circumstances.

146. The purpose of a common interest agreement is to allow two or more parties to share confidential information in pursuit of a common interest. *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 381 P.3d 1202 (2016). There was no need for a common interest agreement between Lindquist and the County because Lindquist was both the County's attorney and the Intervenor in *Nissen*, and therefore all of the County's records in *Nissen* were shared with the Intervenor anyway.

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147. Nor is there any evidence that Lindquist and the County entered into a common interest agreement to share confidential work product. The assertion that Mark Lindquist entered into an oral common interest agreement with himself is not credible.

148. Even if it were possible to form a common interest agreement where an attorney for one party is also an adverse party in the same case the PRA does not allow such an untenable, conflicted relationship to create an exemption for work product under RCW 42.56.290. Narrowly interpreted, RCW 42.56.290 does allow a prosecuting attorney who had a conflict of interest and should have appointed a special prosecutor to create a common interest agreement with himself. To hold otherwise would reward Lindquist and the County for their failure to appoint a special prosecutor.

149. The County has waived any work product protection for any records shared with Mark Lindquist. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

150. Even if Lindquist did not have a conflict of interest in the *Nissen* case the County's claim of a common interest agreement fails because no common interest agreement was ever made.

151. There is no legal or factual basis for the County's assertion that it formed a common interest agreement with the Attorney General, who filed an amicus brief in *Nissen* that disagreed with Lindquist. The fact that the County made this false assertion further impeaches the County's claim with respect to the other amicus groups.

152. The County has waived any work product protection for any records shared with WAPA and/or any of its member prosecutors. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

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153. The County has waived any work product protection for any records shared with WSAMA and/or any of its member attorneys. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

154. The County has waived any work product protection for any records shared with the employee amicus groups and/or their attorneys. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

154A. The Court disagrees with the County's argument that the PRA provides only two causes of action, for wrongfully withholding records and for a reasonable estimate of time. The County has interpreted the PRA narrowly, in violation of RCW 42.56.030. The case law the case law recognizes that the PRA gives courts broad authority to remedy all sorts of violations of the PRA. *See Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 724-25, 261 P.3d 119 (2011) (failure to conduct reasonable search); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 99, 343 P.3d 335 (2014) (failure to properly explain exemptions); *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 446-47, 327 P.3d 600 (2013) (agency may be ordered to adopt rules).

155. The County's exemption logs do not comply with RCW 42.56.210(3), which requires a brief explanation of how an exemption applies to the record withheld. For example, a number of entries in the County's exemption log indicate that records authored by Stewart Estes (Lindquist's personal attorney) are work product but do not explain why. Under *Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014), an exemption log must provide "sufficient explanatory information for requestors to determine whether the exemptions were properly invoked." An exemption claim based on RCW 42.56.290 and the common interest doctrine required the County to explain (i) that a common interest agreement was made, (ii) the

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nature of the common interest and the scope of the agreement, and (iii) the identity of other parties to the agreement. The County failed to provide this information.

156. RCW 42.56.100 requires the County to adopt reasonable rules and regulations to provide full access to public records and to protect public records from damage or disorganization. "Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. Failure to adopt and enforce such rules is a violation of the PRA. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002); *ACLU v. Blaine School Dist.*, 88 Wn. App. 688, 695, 937 P.2d 1176 (1997). Interpreting RCW 42.56.100 to be unenforceable (or meaningless) would be inconsistent with the requirement in RCW 42.56.030 to interpret the PRA liberally to promote and protect the public interest. The Court rejects the unpublished opinion in *Chen v. City of Medina*, 179 Wn. App. 1026 (2014) as unpersuasive because the *Chen* opinion provides no authority or analysis for its statement that there is no separate cause of action for an agency's failure to provide fullest assistance.

156A. It is not necessary for the Court to determine which party has the burden of proof on the issue of whether the County violated RCW 42.56.100. The basic facts are not disputed, and to the extent WCOG had the burden to establish a violation of RCW 42.56.100 it has done so.

157. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding communication with PRA requesters by email.

158. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding scanning paper records or providing existing electronic records to requesters.

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159. Because the County redacted the records electronically and already had the resulting PDF files, the County could have and should have provided those PDF files to WCOG. *Fisher Broadcasting v. Seattle*, 180 Wn.2d 515, 524, 326 P.2d 688 (2014). The County's decision to print the first installment onto paper rather than provide the PDF files as WCOG requested was a violation of the PRA. *Mechling v. Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009), *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 260 P.3d 249 (2011), and *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015), do ***not*** allow an agency to refuse to produce electronic records that already exist in redacted electronic format.

160. Because the County had the ability to make electronic records available over the Internet (via the County's filelocker website) the County could have and should have used that method to transmit records to WCOG. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding the use of its filelocker website.

161. WCOG's claim for an injunction to require the County to adopt rules under RCW 42.56.100 is not before the Court at this time. The County previously argued that WCOG could not pursue its injunction claim unless and until this Court determined that the County had violated the PRA. This order only addresses whether the County's lack of rules is a violation of the PRA. The issue of whether the County should be ordered to adopt new rules will be addressed in subsequent proceedings.

III ORDER

1. Within ninety (90) days of this Order the County shall provide plaintiff WCOG with new copies of all responsive records, including all responsive records not yet produced, at no cost to WCOG. The County shall produce all records that do not require redaction in native electronic form. Email records, including all attachments, shall be produced in a PST (personal

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storage table) file. Paper records shall be scanned 300 DPI black/white PDF files. Paper records shall not be scanned in color except for records that contains color images (other than logos). Records that require redaction shall be redacted using Adobe Acrobat redaction software. Electronic records that require redaction shall first be converted to PDF directly (not printed and scanned) and then redacted using Adobe Acrobat redaction software. All records shall be made available to WCOG by uploading the records to the County's Filelocker web site.

2. As set forth above, the County has waived any claims of work product (or attorney-client privilege with respect to any *Nissen* litigation records shared with Mark Lindquist or any other outside party, and shall not assert such exemptions. Any other exemptions shall be explained as required by RCW 42.56.210(3) in new exemption logs provided within ninety (90) days of this Order.

3. The County shall send all necessary communications to WCOG by email whether or not the County chooses to also send a paper copy by mail.

4. Within ninety (90) days of this Order the County shall file a statement of the actions it has taken to comply with this Order. Within thirty (30) days after receiving the County's statement plaintiff WCOG will file a statement regarding whether the County has complied with this Order.

5. After the Statements are filed the parties shall cooperate to set a date for another scheduling conference before this Court.

6. All remaining compliance issues and all issues of attorney fees and penalties under RCW 42.56.550 are reserved for future determination.

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DATED this _____ day of _____, 2017.

_____
Judge Carol Murphy

Presented by:

s/ William J. Crittenden
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March 22, 2019 - 12:16 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Washington Coalition for Open Government, Appellant v. Pierce County, Respondent (507188)

The following documents have been uploaded:

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