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SUPREME COURT  
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CLERK

NO. 99266-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JOEL ZELLMER,

Appellant,

v.

KING COUNTY DEPARTMENT OF ADULT  
AND JUVENILE DETENTION,

Respondent.

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**RESPONDENT'S ANSWER TO APPELLANT'S  
PETITION FOR REVIEW**

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## **I. INTRODUCTION**

Respondent King County Department of Adult and Juvenile Division (DAJD) submits this Answer in opposition to Appellant Joel Zellmer's (hereinafter "Zellmer") Petition for Review. Zellmer seeks review of an Unpublished Opinion from the Washington State Court of Appeal, Division One, filed on October 5, 2020, granting Respondent's Motion for Summary Judgment and dismissing Zellmer's Public Records Act (PRA) lawsuit. None of the issues in Zellmer's Petition for Review justify further consideration under the criteria found in RAP 13.4; the Court of Appeal's unpublished opinion is not in conflict with existing case law and no significant public interest is implicated.

## **II. STATEMENT OF THE CASE**

### **A. ZELLMER WAS AN INMATE WHEN HE MADE HIS PUBLIC RECORDS REQUEST.**

On April 28, 2010, Zellmer was convicted following a jury trial of Murder in the Second Degree, in King County Superior Court Cause # 07-1-05093-7 SEA, for the death of his three-year-old stepdaughter. *State v. Zellmer*, 175 Wn.App. 1003 (2013). On June 21, 2010, the court imposed an exceptional sentence of 600 months. CP 182. Zellmer is currently serving this sentence and for purposes of this lawsuit is an inmate in the State of Washington. *Id.* CP 187.

**B. ZELLMER'S CIVIL LAWSUIT.**

On August 24, 2010, Zellmer filed a civil cause of action (United States District Court Case #C10-1288) against King County and various DAJD staff, alleging excessive use of force. CP 193-198. Geoffrey M. Grindland, counsel with Mills Meyers Swartling, P.S., represented DAJD staff defendants. CP 200-202. Timothy R. Gosselin, counsel with the Gosselin Law Office, represented DAJD Director William Hayes and King County. CP 204-206.

**C. ZELLMER'S PUBLIC RECORDS REQUEST.**

On February 21, 2017, DAJD received a public records request from Zellmer, dated February 14, 2017. CP 155, 159. In his public records request, Zellmer sought all emails between the attorneys representing the defendants that Zellmer was suing in his civil cause of action (Section B above) and their clients. *Id.* More specifically, Zellmer requested: 1) all e-mails between (to or from) the following persons: (a) Kenneth Potts, (b) Robert Lofink, (c) Mark Tomlin, (d) Vernetta Stowers, and staff from Mills Meyers Swartling (Geoffrey Grindland, or Scott Ellerby, or Hunter Jeffers, or Michael Russell), from the period of April 30, 2014 to May 31, 2016, and 2) all e-mails between (to or from) the following persons: (a) Kenneth Potts, (b) Robert Lofink, (c) Mark Tomlin, (d) Vernetta Stowers,

and staff from Gosselin Law Office (Timothy Gosselin), from the period of April 29, 2015 to April 26, 2016. *Id.*

In his request, Zellmer specified that [he was] ‘requesting only e-mails between DAJD staff and staff from Mills Meyers Swartling (Item 1), and e-mails between DAJD staff and Gosselin Law Office (Item 2), not e-mails between DAJD staff and DAJD staff.’ CP 156, 159.

Public records requests for records held by DAJD are handled by DAJD’s public records team. CP 154. Andrea Williams is DAJD’s Records and Information Systems Manager and manages the public records team. CP 152. On February 24, 2017, three days after receiving the records request, Ms. Williams responded to Zellmer, acknowledging receipt of his request, and informing Zellmer that DAJD would begin the process of searching for and reviewing responsive records. CP 156, 161. Zellmer was also informed that a first installment was anticipated to be made by March 24, 2017, and that a better time estimate could not yet be provided given the uncertainty of how many records could be responsive. *Id.*

On March 24, 2017, Zellmer was informed that 228 emails had been reviewed to date and that all were protected from disclosure under the attorney-client privilege. CP 156, 163. Zellmer was informed that the search for and review of responsive records would likely be completed by April 18, 2017. *Id.* Because searching for responsive records is done, in

part, by using search terms, search results often include records that contain the applicable search term but are not responsive to a particular records request (for example, emails that contain the term but are dated outside a desire timeframe, or exchanged between parties other than those requested). CP 156. As such, the 228 emails that were reviewed included one-hundred and fifteen (115) emails that were responsive, and one-hundred and thirteen (113) emails that were non-responsive. *Id.*

On April 18, 2017, Zellmer was informed that 122<sup>1</sup> responsive records had been identified and that all were being withheld because they were exempt under the attorney-client privilege (i.e. the body of each email/the actual communication between the attorney and the client(s) was determined to be privileged). CP 156, 165. Along with the April 18 letter, the following information for each of the 122 responsive records was provided to Zellmer in an exemption log: 1) type of record, 2) date, 3) author, 4) subject matter, 5) page number, 6) recipients (to and cc's), 7) applicable exemption<sup>2</sup>, 8) action taken, and 9) a brief explanation of how the exemption applies. CP 157, 167-175.

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<sup>1</sup> The 122 responsive records included the one-hundred and fifteen (115) email communications and seven (7) email attachments. *Id.*

<sup>2</sup> Andrea Williams cited to RCW 5.60.060(2)(a), RCW 42.56.290, and *Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998).

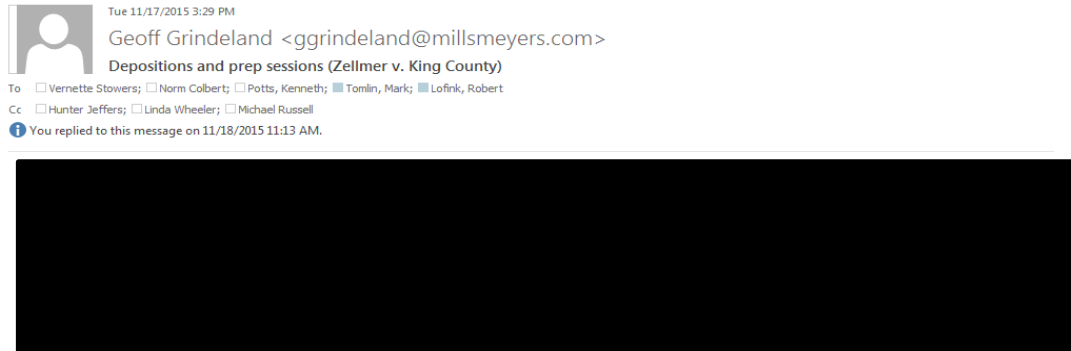


For illustrative purposes, the following is the information that was provided to Zellmer in the exemption log for one random responsive record (*one row cut into two enlarged halves, for better viewing*):

email	11/17/2015	Grindeland, Geoff	Depositions and prep sessions (Zellmer v. King County)	1 email	stowers, vernette; colbert, norm; potts, kenneth; tomlin, mark; lofink, robert; hunter, jeffers, wheeler, linda; russell, michael
RCW 5.60.060(2)(a); 42.56.290; Limstrom v. Ladenburg (Limstrom II), 136 Wn.2d 595, 606, 963, P.2d 869 (1998)			email withheld	Communication between attorney/client regarding legal advice.	

The exemption log provided Zellmer with the type of record, date, author, subject line, page number, recipients, applicable exemption, action taken, and brief explanation of how the exemption was applied for each record.

The following is an illustration of what Zellmer would have received had it been provided as an individually redacted email:



**Geoffrey M. Grindeland** | [Bio](#) | [vCard](#)  
**Shareholder and Attorney (Admitted in Washington, Oregon, and Alaska)**  
 Aviation Law | Police Liability | Product Liability | Civil Litigation

Mills Meyers Swartling P.S.  
 1000 Second Avenue, 30th Floor | Seattle, WA 98104  
 Direct: 206.812.7451 | Cell: 206.499.6230 | Reception: 206.382.1000  
[ggrindeland@millsmeyers.com](mailto:ggrindeland@millsmeyers.com) | [www.millsmeyers.com](http://www.millsmeyers.com)

This e-mail is intended to be private. It may contain privileged or confidential information. If you are not a person for whom the e-mail was intended, please notify me immediately and then permanently delete the e-mail, including any attachments, without copying or forwarding it.

The information provided is the same. What is privileged, and thus not provided to Zellmer in both the exemption log and the redacted email, is the entire privileged communication between opposing attorney and client.

**D. ZELLMER’S PUBLIC RECORDS LAWSUIT AND  
KING COUNTY’S SUMMARY JUDGMENT  
MOTION.**

On April 12, 2018, almost one year after receiving the exemption log from DAJD, Zellmer filed a public records action against the King County Department of Adult and Juvenile Detention in Snohomish County Superior Court. CP 187-191. Zellmer’s *sole (emphasis added)*<sup>3</sup> allegation was that DAJD had violated the Public Records Act (PRA) because DAJD had provided him with the name of the author and recipient(s), date and subject matter of each email (hereinafter the ‘header’ of each email) in an exemption log, instead of providing him with a physical copy of each email with the body/communication between the parties redacted (leaving only the header visible). *Id.*

On June 11, 2019, DAJD filed a Motion for Summary Judgment, alleging that Zellmer failed to state a claim against a proper party, that the evidence demonstrated that DAJD did not violate the PRA, and that

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<sup>3</sup> Zellmer made it clear that he was not attacking “the validity of [DAJD’s] claimed exemption based on the attorney-client privilege” or “the adequacy of [DAJD]’s exemption log.” *See* Appellant’s Opening Brief, pg 12.

alternatively, DAJD did not act in bad faith when responding to Zellmer's PRA request. CP 212-230. On July 12, the Honorable Judge Janice Ellis granted DAJD's Motion for Summary Judgement and dismissed Zellmer's complaint. CP 24-25. The court held that King County did not violate the PRA and, even if it had, did not act in bad faith. *Id.*

On July 22, 2019, Zellmer filed a motion for reconsideration arguing that the Honorable Judge Ellis' ruling was contrary to law and that substantial justice had not been done. CP 13-23. No new legal authority was presented by Zellmer. *Id.* The motion for reconsideration was denied by Judge Ellis on November 30, 2019. CP 10-12, 6-7.

#### **E. COURT OF APPEAL DECISION**

Zellmer appealed the ruling by the Honorable Judge Ellis. The Court of Appeal held that, "while Zellmer is correct that the PRA has been interpreted to require that the portion of records not covered by an exemption must be disclosed to the requester, he ignores that the entirety of the e-mails identified by DAJD, absent the subject line, were covered by an exemption to the PRA here. *Zellmer v. King County Department of Adult and Juvenile Detention*, 2020 WL 5891682, No. 80894-O-I (not reported). There were no nonexempt portions of the e-mails that the DAJD withheld from disclosure." *Id.* The Court of Appeal further held that "Zellmer's argument that the DAJD required to provide a redacted

version of each e-mail is almost identical to the argument rejected in *Block*.” *Id.* “The e-mails Zellmer requested are attorney-client communication and exempt from PRA disclosure.” *Id.* “The information that was provided to Zellmer in the exemption log is the same information that would have been provided to Zellmer had DAJD individually redacted each of the responsive records; the only difference is the format in which it was provided.” *Id.* Zellmer’s Petition for Review followed.

### **III. ARGUMENTS**

This Court should deny Zellmer’s petition for review because the decision of the Court of Appeals does not conflict with decisions of either the Supreme Court or the Court of Appeals and does not involve an issue of substantial public interest, as required under the Rules of Appellate Procedure. RAP 13.4(b).

#### **1. The Court of Appeals’ decision does not conflict with any appellate decisions.**

In his public records request, Zellmer strictly sought emails between the parties that he was suing in a use of force lawsuit and their attorneys; email communications that were protected under the attorney-

client privilege<sup>45</sup>. Importantly, Zellmer neither asserts that the emails were not protected nor that the exemption log that was provided to him by DAJD was inadequate. Instead, Zellmer argues that DAJD had a duty to provide him an exemption log *and* a physical copy of each responsive email with the complete body/communication of each email redacted. This very argument has already been rejected by the Court of Appeal and is not in conflict with prior decisions from the Court of Appeal or Supreme Court.

In *Block*, where review was denied by the Supreme Court (*Block v. City of Gold Bar*, 184 Wn.2d 1037, 379 P.3d 951 (2016)), the City of Gold Bar, in response to a public records request for emails that were protected under the attorney client or the work product privilege, provided Ms. Block with an exemption log that specified the date, author, recipient, subject matter of each document claimed to be exempt, and authority for the exemption. *Block v. City of Gold Bar*, 189 Wn.App. 262, 275, 355 P.3d 266 (2015). The plaintiff filed suit alleging that the City had unlawfully withheld records in their entirety when it responded by way of

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<sup>4</sup> RCW 5.60.060(2), the statute codifying the common law attorney-client privilege, is an 'other statute' exemption under RCW 42.56.070(1). *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004). Under RCW 5.60.060(2), the attorney-client privilege protects information related to obtaining legal advice. *Mechling v. City of Monroe*, 152 Wn.App. 830, 852, 222 P.3d 808 (2009).

<sup>5</sup> DAJD did not assert that all emails were categorically exempt merely because they were from an attorney to a client; the communication within each email was reviewed and individually assessed. CP 156.

an exemption log. *Id.* at 267. Much like Zellmer is arguing in this case, the plaintiff in *Block* argued that the city should have provided her with redacted physical print-outs of the withheld records, that entirely withholding rather than redacting records was ‘presumptively too great a withholding’, and that ‘rarely will every portion of a record be exempt’. *Id.* at 276. The court disagreed. The court held that the exemption log created by the city provided enough information to conclude that the responsive documents (including emails) fell under a valid exemption, and further held that if the plaintiff’s allegation was that the City’s claimed exemptions were invalid, in that non-exempt portions of the records had been improperly withheld, the plaintiff had failed to provide any supporting evidence. *Id.* The ruling in *Block* made it clear that if the entire communication within an email is privileged, providing an exemption log identifying the email with specificity, as done by DAJD, is lawful under the PRA. The Court of Appeals’ opinion in this case does not conflict with the decision in *Block*.

The Court of Appeals’ opinion is also in line with the ruling in *Mechling v. City of Monroe*, 152 Wn.App. 830, 222 P.3d 808 (2009). In that case, the City of Monroe (the City) received a public records request seeking, in part, emails to and from the City Attorney. *Id.* In its response, the City withheld the email messages in their entirety as exempt from

production under the attorney-client privilege, and identified (albeit insufficiently, as determined by the Court of Appeal) the existence of the 15 email messages in an exemption log. *Id.* at 851. After the requesting party filed suit alleging that the City had violated the PRA by improperly withholding, instead of redacting, the responsive email records, the court held that to the extent a portion of the communication or advice contains information not covered by the privilege, the City was required to disclose the portions of the document that contained communication not covered by the privilege. *Id.* The ruling in *Mechling* makes it clear that if the ‘communication’ and ‘advice’ between an attorney and client has been reviewed and deemed to be privileged, the entire document can be withheld (as long as a sufficient exemption log is also provided). In comparison, if, for example, the first of two paragraphs in an email communication between an attorney and a client contains discussions about their weekend adventure and the second paragraph pertains to legal advice, the first paragraph would not be privileged and as a result an agency would be required under the PRA to provide a copy of the email with only the second paragraph redacted. The opinion of the Court of Appeals in this case does not conflict with the court’s decision in *Mechling*.

Zellmer alleges that the Court of Appeals' opinion conflicts with prior decisions. None of the prior decisions that Zellmer cites to however pertain to requests for email communications fully protected by the attorney client privilege (See *Benton County v. Zink*, 191 Wn.App. 269, 361 P.3d 801 (2015)(a county has no an obligation to provide records in electronic format); See also *Resident Council v. Housing Authority*, 177 Wn.2d 417, 300 P.3d 600 (2013) (Grievance hearing decisions are not categorically exempt simply because they contain exempt identifying information); See also *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (County assessor folios are not categorically exempt when portions thereof contain factual data); See also *PAWS v. University of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994)(Unfunded grant proposals are not categorically exempt from disclosure); See also *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997)(State Patrol reports pertaining to officer misconduct are not categorically exempt); See also *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997)(Open and active police investigation files are categorically exempt); See also *Tacoma Pub. Library v. Woessner*, 90 Wn.App. 205, 951 P.2d 357 (1998)(Employee records are not categorically exempt); See also *Seattle Fire Fighter's Union Local No. 27 v. Hollister*, 48 Wn.App. 129, 737 P.2d



1302 (1987) (Retirement disability records of retired police and fire personnel are not exempt).

As stated in the Court of Appeal's opinion in this case, although the cases Zellmer cites have interpreted the PRA to require that the portion of records not covered by an exemption must be disclosed to the requester, "Zellmer ignores the fact that the entirety of the e-mails identified by DAJD, absent the subject line, were covered by an exemption to the PRA[, and that there] were no nonexempt portions of the e-mails that the DAJD withheld from disclosure." Zellmer. Furthermore, the Court of Appeal reiterated that "Zellmer's argument that the DAJD required to provide a redacted version of each e-mail is almost identical to the argument rejected in *Block*." *Id.* "The e-mails Zellmer requested are attorney-client communication and exempt from PRA disclosure." *Id.* Zellmer's claim that the Court of Appeals decision conflicts with established case law is unsubstantiated and does not warrant review.

**2. The Court of Appeals Opinion does not involve an issue of substantial public interest.**

The Court of Appeals Opinion in this case pertains to an issue that has already been addressed by our courts (See *Block*; See also *Mechling*) and which was denied for review by the Supreme Court four years ago (See *Block*). The opinion does not involve a novel issue of substantial

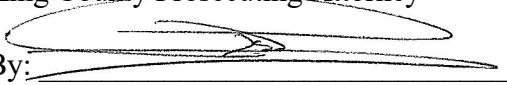
public interest. Zellmer fails to understand that the records that he requested from DAJD were privileged communications between the very party that he was suing and their attorneys. They were not grievance hearing decisions, assessor folios, grant proposals, police reports, or employee records. Zellmer's attempt to apply such case law to attorney-client privileged communications, recognized by Zellmer as such, is misplaced and does not render the issue one of substantial public interest. Zellmer argues that this matter is of the utmost importance simply because it pertains to how government agencies respond to records request and because of the number of public records requests made each year; the same could be said about every single lawsuit filed under the Public Records Act. Mere disagreement with a court's ruling and application of case law does not render an issue one of substantial public interest. Review is not warranted.

#### **IV. CONCLUSION**

Zellmer has failed to meet the requirements of RAP 13.4(b). The Court of Appeals opinion does not conflict with decisions of either the Supreme Court or the Court of Appeals and does not involve an issue of substantial public interest. For these reasons, DAJD respectfully asks this Court to deny Zellmer's Petition for Review.

DATED this 23<sup>rd</sup> day of December, 2020.

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
PASCAL HERZER, WSBA #42944  
Senior Deputy Prosecuting Attorney  
Attorney for King County Department of  
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**Certificate of Service**

I hereby that on December 23, 2020, I caused the aforementioned document to be served on the following party via U.S. Mail:

Joel Zellmer, DOC #343003  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362-8817

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of December, 2020, at Seattle, Washington.



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NATALIE BROWN  
Paralegal, Civil Division

**KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION**

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