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COA II NO. 56457-2-II
COA-II NO. 56427-1-II

WASHINGTON STATE SUPREME COURT

JOHN WORTHINGTON,

Appellant,

v.

WASHINGTON STATE LEGISLATURE ET AL,

Respondents.

AMMENDED PETITION FOR REVIEW

JOHN WORTHINGTON
303 S. 5TH AVE G-53
SEQUIM WA.98382

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A. IDENTITY OF PETITIONER

John Worthington, the Appellant in the Court of Appeals matter, respectfully seeks review of said decision by the Supreme Court.

B. COURT OF APPEALS DECISION

Appellant John Worthington respectfully asks this court to accept review of the Court of Appeals for Division II (COA- II) decision dated October 25, 2022, and December 7, 2022.

A copy of the October 25, 2022, decision, and a copy of the December 7, 2022, decision denying petitioner's Motion for Reconsideration is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the Washington State COA- II erred failing to give effect to the plain meaning of RCW 42.56.100, and impermissibly allowed public officials to avoid the PRA if they no longer worked for the Legislature.

2. Whether this Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the COA- II erred by not ruling certain issues were conceded at the trial court and ruling Worthington did not cite authority in support of those assignments of error.

3. Whether this Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the COA-II erred by not upholding RAP 2.5 (a), RAP 10.3 (a), RAP 10.3 (b), RAP 12.1 (a), and 12.1 (b), case law doctrines in support and by not granting sanctions.

4. Whether this Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the COA- II erred failing to uphold the case law regarding conceding issues on appeal and failing to rule the Legislature et al conceded they did not answer all the issues related to the assignment of error.

5. Whether this Court should accept review under RAP 13.4 (b)(4) because the COA- II failed to uphold the public mandate of applying the PRA to the Legislature.

D. STATEMENT OF THE CASE

1. The PRA Requests

On or around August 28, 2018, Marijuana activist John Worthington submitted a PRA request to Senator Bob Hasegawa, his staff and the House Rules Committee and their staff. CP 319-320.

The Legislature put the PRA request on hold while the Washington courts determined whether the Legislature was subject to the PRA (*Associated Press v. Washington State Legislature et al*.) CP 326, CP 374, CP 585. Meanwhile, the Legislature sent out a "voluntary" request for records under the PRA. CP 262, CP 271, CP 283, CP 292.

On or around January 20, 2020, the legislature requested that Worthington make a new public records request. Worthington refused and requested the legislature honor the August 28, 2018, request. The

Legislature then informed its members that Worthington expected the August 28, 2018, request to be honored. CP 393, CP 573.

On or around January 14, 2020, After the Washington State Supreme Court ruled the Washington State Legislature was subject to the PRA in *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915 (Wash. 2019), the Legislature sent Worthington an email requesting more time to respond because its public records procedures were not compliant with the PRA and stated they were adjusting to "new practices and procedures." CP 581.

On or around August 25 of 2020, the legislature responded that Senator Hasegawa no longer had his cell phone used to conduct business for the people of Washington State. CP 588. Senator Hasegawa admits in declaration number 5 that he was asked to search for texts and phone calls. CP 387.

On November 3, 2020, Worthington requested Senator Hasegawa's phone records to prove his cell phone was destroyed or changed. The Legislature did not respond, made no claims of exemptions and silently withheld those records. CP 575.

2. The Trial Court Proceedings

On December 21, 2020, Worthington filed a public records lawsuit for violations of the PRA. CP 1-10. On January 11, 2021, the Washington State Legislature moved to dismiss the PRA complaint against Senator Hasegawa. CP 27-33. Worthington responded CP 239-255, CP 262-281. During the trial court briefing, Worthington provided proof Senator Hasegawa still had his cell phone. CP 248, CP 259-260, CP 280-281, CP 304-307.

On January 20, 2021, Worthington filed a motion for leave to amend. On February 2, 2021, the motion was granted. CP 86, 89-90. The 2nd amended complaint was signed and served. CP 13-25, CP 35-68, CP 93-106. On February 2, 2020, Worthington filed a motion to strike the motion to dismiss. CP 110-194. The motion was dismissed February 26, 2021. CP 303, 343.

On April 9, 2021, the trial court dismissed PRA violations against Senator Hasegawa. CP 634-635.

On August 20, 2021, Worthington filed an opening brief and a declaration with exhibits attached. CP 463-483, CP 410-440. On

September 17, 2021, The Legislature filed a brief and declarations with exhibits attached. CP 489-500. On September 27, 2021, Worthington filed a reply brief and a declaration with exhibits attached. CP 560-609.

On October 29, 2021, the trial court ruled there were no PRA violations and dismissed the case. CP 633. Worthington timely appealed. CP 635-641.

3. The Appeal Proceedings.

On November 8, 2021, Worthington filed an appeal. On January 28, 2022, Worthington filed his opening brief. In the Opening brief, Worthington assigned the following specific errors:

Worthington argued the trial court erred not striking the motion to dismiss because Senator Hasegawa still had the cell phone he used for legislative business. Worthington later argued the Legislature impermissibly raised the issue that Senator Hasegawa still had the phone number but not the phone for the first time on appeal.

Worthington also argued the trial court erred not finding the Legislature et al conceded the issue when they did not address Worthington's arguments Senator Hasegawa still had his phone at the trial court.

Worthington also argued the trial court erred ruling the Legislature et al did not concede Worthington's PRA request started in 2019 not 2020 and that Senator Hasegawa's phone records were silently withheld in violation of the PRA under the criteria in *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 270, P.2d 592, 607 (1994) ("PAWS II').

Worthington also argued the trial court erred failing to rule the Legislature et al conceded the phone communications and phone records he sought were public records "used" by the Legislature and were "work product" subject to the PRA. Worthington cited *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) as authority.

Worthington also argued the trial court erred ruling the Legislature et al did not concede Worthington's PRA request impermissibly hinged on the whim of public officials who were told PRA compliance was voluntary. Worthington cited *Mead Sch. Dist.*

No. 354 v. Mead Educ. Ass 'n, 85 Wn.2d 140, 145, 530 P.2d 302 (1975).

Worthington also argued the trial court erred ruling the Legislature et al did not concede the onus was on them to submit "reasonably detailed, nonconclusory affidavits" that the legislator or aide searched their files, devices, and accounts and that Legislature et al violated RCW 42.56.100. Worthington cited *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) as authority.

Worthington also argued the trial court erred ruling the Legislature et al did not concede it was impossible for the Legislature to have conducted an adequate search when they did not ask specific legislators and aides for records and rendered RCW 42.56.100 useless. Worthington cited authority in *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011) which held that "failure to perform an adequate search precludes an adequate response and production [and is] comparable to a denial because the result is the same." Id., (emphasis added). Worthington argued that determining an "adequate response and production" per *Neighborhood Alliance* required that a court consider

the PRA "in its entirety" (see Rental Hous., supra), including RCW 42.56.100.

Worthington also argued "Courts may not interpret a statute in a way that renders a portion meaningless or superfluous," Citing *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, P.3d 891 (2018).

Worthington also argued the trial court erred by adding words and meanings to the PRA, rendering RCW 42.56.100, RCW 42.56.030 meaningless and superfluous, leading to an absurd result. Worthington cited authority in *State v. Delgado*, 148 Wn.2d 723,727,63 P.3d 792 (2003), *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9,19,978 P.2d 481 (1999), *State v. J.P.*, 149 Wn.2d 444, 450, 69 P. ld 318 (2003), *Dot Foods, Inc. v. Washington Dept. of Revenue*, 166 Wn.2d 912,920,215 P.3d 185 (2009) and *Densley v. Dep't. of Retirement Sys.,* 162 Wn.2d 210,221, 173 P.3d 885 (2007).

Worthington also argued the trial court erred letting the search be up to the legislature or their aides. Worthington argued that in doing so, the trial court allowed the legislature to get away with a

textbook definition of a perfunctory search for records and allowed the Legislature to skirt the intent of *Hobbs v. State* or *Forbes v. City of Gold Bar*.

Worthington also argued the trial court also erred ruling the Legislature could be excused from compliance with the PRA because several public officials and aides stopped working at the legislature. Worthington argued that without at least asking for those records the Legislature had no chance of complying with the intent of *Hobbs,* and that the trial court erred when it ruled otherwise.

Worthington argued that without compliance with *Nissen* and without direct affidavit's the trial court could not rely on third party hearsay to invoke the criteria in *Faulkner v. Dep't of Corrections*.

Worthington also argued the legislature conceded the hearsay argument in the opening brief, and the trial court erred when it did not accept that concession to Worthington's argument. Worthington also argued that ER 802 did not allow the trial court to consider third party out of court hearsay evidence, and that the trial court erred when it ruled otherwise. Worthington also argued he effectively impeached the credibility of Senator Hasegawa under ER 807, ER 806

Worthington argued all the issues above were conceded at the trial court because they were not addressed. Worthington cited*,* *Yakima County v. Eastern Washington Growth Management Hearings Bd*., 146 Wn. App. 679, 698, 192 P.3d 12 (2008) ("A party abandons an issue by failing to brief the Issue," ellipsis added*), Olson v. Silverling*, 52 Wn. App. 221, 230, 758 P.2d 991 (1988) (citing *Wilson v. Steinbach*, 98 Wn.2d 434,440,656 P.2d 1030 (1982) and RAP 2.5 (a) and 9.12). See also *Adams v. Dept. of Labor & Indus*., 128 Wn.2d 224, 228-229, 905 P.2d 1220 (1995).

Worthington also argued the Legislature et al is barred by the RAP rules and case law from addressing the issues for the first time on appeal.

On October 25, 2022, the Court of Appeals for Division II filed an unpublished opinion in which the court denied the appeal.

On October 28, 2022, Worthington filed a Motion to Reconsider alleging the Washington State Legislature et al did not properly answer all the issues identified in the assignments of error.

Worthington also alleged the decision violated RAP 2.5 (a), RAP 10.3 (a), RAP 10.3 (b), RAP 12.1 (a), and 12.1 (b).

On November 21, 2022, the Legislature et al responded to the Motion to Reconsider and argued their counterstatement argued phone records issues and that they only had to respond to the assignments of error not the issues.

On November 23, 2022, Worthington filed a reply arguing the Legislature's table of contents showed they addressed only the email records and that the Legislature conceded they violated RAP 10.3(b).

On December 7, 2022, the COA- II denied the Motion to Reconsider.

E. Argument Why Review Should Be Accepted

1. Review Should Be Granted Pursuant to RAP 13.4 (b) (1), RAP 13.4 (b) (2) and RAP 13.4 (b)(4).

Worthington respectfully argues the Supreme Court should grant review pursuant to RAP 13.4 (b) (1) RAP 13.4 (b) (2) and RAP 13.4 (b)(4) because: (1) the COA- II decision conflicts with decisions of this Court (2) the COA- II decision conflicts with decisions of the

COA- II and (3) it is of great public importance to apply the public records laws after the public outcry which influenced Governor Inslee to veto the Legislature's attempts to exempt themselves from the PRA.

In this PRA case, it is undisputed at the trial court and on appeal, that eleven public officials working for the Washington State Legislature were never asked for any public records after they were requested by Worthington. This PRA case should have resulted in a public records violation at the trial court based on that fact alone, because the Legislature's "optional" PRA policy made it impossible to comply with RCW 42.56.100.

Review should be accepted because the trial court and the COA- II refused to give effect to the plain meaning of the text of RCW 42.56.100. RCW 42.56.100 does not excuse a public official from responding to PRA requests if that public official no longer works for government. The COA II panel also erred failing to rule the Legislature et al failed provide fullest assistance to the requester, and failed to preserve public records.

Furthermore, review should also be accepted because the COA-II refused to unforce the PRA case law doctrine of *Nissen* which

required "reasonably detailed, nonconclusory affidavits" attesting to the nature and extent of a search for public records.

Worthington also respectfully argues review should be accepted because the Thurston County Superior court and the COA- II erred by: (1) failing to uphold other long-standing case law doctrines and (2) failing to follow Washington State Rules of Appellate Procedure.

2. Review Should be Accepted Because the COA- II Failed to Give Effect to the Plain Meaning of RCW 42.56.100.

The Washington State Legislature alleged they postponed the request until the Washington State Supreme Court ruling in *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915 (Wash. 2019).

However, after the request was made, the legislature did make some inquiries for records but the public records officer made responding to the request "optional." That optional PRA policy made it impossible to comply with RCW 42.56.100.[1]

Furthermore, the Legislature's PRA policy was so "optional" that eleven public officials working for the Washington State

[1] "Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records."

Legislature were never asked for email or phone records after they were requested by Worthington.[2] That is a clear PRA violation if the trial court and COA II would have given effect to the plain meaning of RCW42.56.100.

The limited group of public employees that were asked for records were given the option to respond "voluntarily" and they were never required to provide "reasonably detailed, nonconclusory affidavits" attesting to the nature and extent of their search.

This failure to abide by the text of the RCW 42.56.100, and the case law doctrines established in *Resident Action Council*, *Hobbs*, *Faulkner, Nissen* and the *Associated Press v. Washington State Legislature,* led to a total of 16 specific undisputed PRA violations.

These specific alleged violations which had not been specifically disputed at trial or on appeal are now conceded along with other issues brought up in the issues pertaining to the assignments of error.

[2] Raised in the adequate search response: Despite the fact Worthington listed the wrong committee for the year in which the request was intended, four House of Representatives and at least four House legislative aides were still assigned to the House Rules Committee for which the request was intended. Three other Senate legislative aides working for Senator Hasegawa were also not asked for emails or phone records.

The Supreme Court need read no further. This case should have been over at the trial court and should not be on appeal. It is just not believable that after the decision in *Associated Press v. Washington State Legislature,* that the PRA allows a public official to be excused from the text of the PRA and the case law in *Nissen*. The rulings in this case make the PRA judicial process look fixed or worse jaded against Worthington.

3. **Review Should be Accepted Because the COA- II Erred by Ignoring Case Law and allowed RAP Violations**.

In his opening brief, Worthington brought up nine issues related to his assignment of error. The nature of Worthington's claims of error were clearly disclosed in the issues related to the assignment of error. There could be no doubt Worthington sought review of the following specific issues arguing: (1) the Legislature et al conceded that the trial court impermissibly ruled the PRA request started in 2020 (2) The legislature et al conceded the trial court impermissibly added words and meanings to the PRA and rendering RCW 42.56.030 and RCW 42.56.100 meaningless and superfluous, leading to an absurd result. (3) The Legislature et al conceded that the trial court

impermissibly used hearsay evidence (4) The Legislature et al conceded that cell phone logs would have been a "any form" of communications or records, which is what Worthington requested.

Worthington also clearly alleged: (1) The Legislature et al have admitted they did not conduct an adequate search and violated Nissen. (2) The Legislature et al admitted they had a voluntary public records policy and had to change practices and procedures after the ruling in *Associated Press*. (3) The Legislature et al conceded that the trial court impermissibly ruled the PRA did not apply to public servants who no longer worked for the legislature. (4) The Legislature et al conceded Worthington's request was impermissibly at the whim of the public servant. (5). The Legislature et al conceded they made a perfunctory search for records and did not comply with *Hobbs.*

The Legislature responded by first arguing there was only "one salient issue" whether adequate search was performed in response to Mr. Worthington's 2018 request to locate an email communication originating at 5:34 p.m. on February 26, 2016.

The Legislature et al then proceeded to ignore most of the nine issues raised in the issues pertaining to the assignments of error. Essentially, the Legislature tried to address issues raised at the trial court with issues that were not. (1) There was only “one salient issue” whether the request was just for an email on a specific day and time, (2) Worthington did not “authenticate evidence,” and (3) Worthington’s request was “cloaked” and caused “incongruity”)

After the COA II ruling on October 25, 2022, Worthington filed a Motion to Reconsider arguing the decision violated RAP 2.5 (a) because it allowed new issues on appeal. Worthington cited *Lunsford v. Saberhagen Holdings, Inc.,* 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) and *Smith v. Shannon,* 100 Wn.2d 26, 37, 666 P.2d 351 (1983). "The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." That issue and the case law in support of it were not addressed by the respondent or the COA-II.

Worthington also argued the ruling violated RAP 10.3 (a), RAP 10.3 (b). Worthington argued he assigned and “framed’ at least 11 errors by the trial court and that the Legislature et al could not

possibly address all the assignments of error by bringing up the four new arguments on appeal. Worthington argued the Court of Appeals ruling failed to give effect to the plain language of that RAP Rule RAP 10.3 (a), RAP 10.3 (b). Worthington cited *State v. Otton* which held. "We interpret court rules the same way we interpret statutes giving effect to the plain language." That issue and the case law in support of it were not addressed by the respondent or the COA- II.

Worthington also argued the ruling violated RAP 10.7, when the appellate court did not sanction the Legislature et al pursuant to RAP 10.7 for violating RAP 10.3 (b). Worthington argued the COA-II failed to uphold its own decision in *Mulder v. Cabinet Distribs., Inc*. No. 45667-2-II (Wash. Ct. App. Feb. 10, 2015) (*citing Iverson v. Snohomish County,* 117 Wn. App. 618, 624, 72 P.3d 772 (2003). Worthington argued for sanctions under RAP 10.7 and RAP 18.9. (a).

The COA-II ruling denying sanctions was made quickly and without explanation.

Worthington also argued the ruling violated RAP 12.1 (a), (12.1 (b) because the decision violated the RAP language that the appellate court would decide a case only on the basis of issues set forth by the

parties in their briefs. Worthington argued the basis set forth by the Legislature et al was that there was only “one salient issue on appeal” regarding whether Worthington requested only email records and failed to authenticate evidence. Worthington also argued the COA- II decision went far beyond the basis of the two parts “one salient issue” theory and put forth all the arguments pertaining to phone records on behalf of the Washington State Legislature et al. Worthington also argued the Appellate court impermissibly decided to "comb the record with a view toward constructing arguments for counsel.” Worthington cited *Spice v. Pierce Cnty., Corp*. No. 45476-9-II, at *15 (Wash. Ct. App. Nov. 28, 2018) quoting " *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) at 532 ; see also *Hardin v. Lofgren* 3 Wn. App. 2d 1024 (Wash. Ct. App. 2018). That issue and the case law in support of it were not addressed by the respondent or the COA- II.

Worthington also argued Washington Supreme Court rulings took an even firmer tone by holding, “It is not the function of trial or appellate courts to do counsel's thinking and briefing." Worthington cited Supreme Court ruling *Orwick v. City of Seattle.* 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

Both the trial court and COA II made arguments for opposing counsel who made it a pattern and practice to avoid most of the issues raised by Worthington.

Review should be accepted to address those issues and the case law in support of them.

Worthington also argued the decision that Worthington did not cite the record or cite authority was not factually correct. Worthington argued he properly quoted the record and properly cited authority and provided the citation to the clerk's papers and pages in his opening brief. That issue and the case law in support of it were not addressed by the respondent or the COA-II.

In Response to the Motion to Reconsider, the Legislature conceded they argued for the first time on appeal: (1) there was only the "one salient issue," (2)Worthington did not "authenticate evidence" , and (3) Worthington's request was "cloaked" and caused "incongruity." The Legislature et al then argued the Counterstatement of the issues showed they addressed the phone records issues. They also argued they were only required to address the assignments of error and not the issues related to the assignments of error.

In reply, Worthington argued the counterstatement only addressed the email records and offered the table of contents for the respondents opening brief as proof. Worthington also argued the Legislature et al impermissibly brought up new arguments Worthington cited *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post- Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Worthington also argued the respondents admitted they failed to address all the assignments of error**.** Worthington cited *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); *Heaverlo v. Keico Indus.*, Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996). That issue and the case law in support of it were not addressed by the COA II panel.

Worthington thus respectfully argues review should be accepted because the decision meets the criteria in RAP 13.4 (b) (1), because the ruling conflicts with previous Supreme Court decisions regarding giving effect to the plain meaning of a statute, rendering portions of a statute superfluous, adding words to a statute, requiring affidavits from public employees in PRA cases, conducting perfunctory searches, failing to address assignments of error, assignments of error

found in the body of the opening brief, being sanctioned for not addressing the assignments of error, bringing up new issues on appeal, and doing counsel's thinking and briefing. The Supreme Court cases lin alphabetical order are: *Adams v. Dep't of Labor* Indus., 128 Wn. 2d 224 (Wash. 1995), *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915 (Wash. 2019), *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC* 422 P.3d 891 (Wash. 2018), *DeHeer v. Seattle Post-Intelligencer*, 60 Wn. 2d 122, 126 (Wash. 1962), *Densley v. Department of Retirement Systems*, 162 Wn. 2d 210 (Wash. 2007), *Dot Foods, Inc. v. Dept of* Revenue, 166 Wn. 2d 912 (Wash. 2009*),* *Elec. Contractors Ass'n v. Riveland,* 138 Wn. 2d 9 (Wash. 1999), *In re Marriage of Schneider*, 173 Wash.2d 353, 363, 268 P.3d 215 (2011), *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013), *Lunsford v. Saberhagen Holdings,* 166 Wn. 2d 264 (Wash. 2009), *Mead School Dist. v. Mead Education*, 85 Wn. 2d 140 (Wash. 1975*), Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 726-27, 261 P.3d 119 (2011), *Nissen v. Pierce Cnty*. 183 Wash. 2d 863 (Wash. 2015), *Orwick v. Seattle*, 103 Wn. 2d 249 (Wash. 1984), *Resident Action Council v. Seattle Housing Authority*, 177 Wash. 2d

417 (2013*), Rest. Dev., Inc. v. Cananwill, Inc*., 150 Wn.2d 674, 682, 80 P.3d 598 (2003), *Schmidt v. Cornerstone Invest.* , 115 Wn.2d 148, 795 P.2d 1143 (1990), *Smith v. Shannon*, 100 Wn. 2d 26 (Wash. 1983), *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015), *State v. Chapman,* 140 Wn.2d 436, 998 P.2d 282 (2000), *State v. Delgado* 148 Wn. 2d 723 (Wash. 2003), *State v. Gregory*192 Wn.2d 1, 427 P.3d 621 (2018), *State v. Hawkins,* 181 Wn.2d 170, 332 P.3d 408, (2014), *State v. J.P,* 149 Wn. 2d 444 (Wash. 2003), *State v. Otton,* 185 Wash. 2d 673 (Wash. 2016), *State v. WWJ Corp*.138 Wn.2d 595, 980 P.2d 1257 (1999), *Wilson v.* Steinbach 98 Wn. 2d 434 (Wash. 1982),

Review should be accepted pursuant to RAP 13.4 (b) (*2*), because the decision conflicts with previous COA- II rulings on giving effect to the plain meaning of a statute, rendering portions of a statute superfluous, adding words to a statute, requiring affidavits from public employees in PRA requests, conducting perfunctory searches, failing to address assignments of error, assignments of error found in the body of the opening brief, being sanctioned for not addressing the assignments of error, bringing up new issues on appeal, conceding issues at the trial court, doing counsel's thinking and

briefing, and abandoning an issue by failing to brief the issue. The COA-II cases in alphabetical order are: *Allen v. State*, 19 Wn. App. 2d 895, 498 P.3d 552 (2021), *Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App. 2d 637, 428 P.3d 389 (2018), *Blue Spirits Distilling, LLC v. Wash. State Liquor & Cannabis Bd.,*15 Wn. App. 2d 779, 478 P.3d 153 (2020), *Clark County v. Public Utility District No. 1*, 49 Wn. App. 1026 (Wash. Ct. App. 1987), *Fishburn v. Pierce County Planning & Land Servs. Dep't,* 161 Wn. App. 452, 250 P.3d 146, (2011), *Grays Harbor Energy, LLC v. Grays Harbor County,* 175 Wn. App. 578, 307 P.3d 754, (2013), *Hardin v. Lofgren*, 3 Wn. App. 2d 1024 (Wash. Ct. App. 2018), *Health Pros Nw., Inc. v. State*, 449 P.3d 303 (Wash. Ct. App. 2019), *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006), *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998), *In re Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008), *In re Pers. Restraint of Martinez*, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018), *In re Pers. Restraint of Williams*,18 Wn. App. 2d 707, 493 P.3d 779 (2021), *Iverson v. Snohomish County* 117 Wn. App. 618 (Wash. Ct. App. 2003), *Karanjah v. Dep't of Soc. & Health Servs.,*199 Wn. App. 903, 401

P.3d 381 (2017), *Mulder v. Cabinet Distribs., Inc*. 185 Wn. App. 1053 (2015), *Muller v. Petersen (In re Estate of Muller)* 197 Wash. App. 477 (Wash. Ct. App. 2016), *Nissen v. Pierce County*, 183 Wash. App. 581, 333 P.3d 577 (2014), *Sound Inpatient Physicians, Inc. v. City of Tac*oma, 21 Wn. App. 2d 590, 507 P.3d 886 (2022), *Spice v. Pierce Cnty., Corp*. No. 45476-9-II, at *15 (Wash. Ct. App. Nov. 28, (2018), *State v. Burdette*, 178 Wn. App. 183, 313 P.3d 1235 (2013), *State v. Chester*, 82 Wn. App. 422, 918 P.2d 514 (1996).

4. Review Should be Accepted Pursuant to RAP 13.4 (b) (4) Because the Issue is of Great Public Importance.

In 2018, Prior to the Washington State Supreme Court ruling in Associated Press v. Wash. State Legislature, 194 Wash. 2d 915 (Wash. 2019), the Legislature took legislative action to exempt the Legislature from parts of the PRA. After a huge public outcry, Governor Jay Inslee vetoed the bill.

As a result of the Governor's veto the public was given the impression the Legislature would be subject to the PRA.

Worthington's case shows the PRA is being skirted by the Legislature and has demonstrated the courts will not give effect to the plain meaning of the PRA.

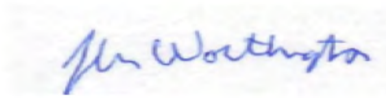
In addition, the evidence in this PRA lawsuit shows the Legislature decided to assign itself cell phones to alleviate the problems associated with legislators using cell phones. However, the record shows that one of the legislators was still using a personal cell phone[3] for legislative business well after the assignment of the legislative cell phone.

Review must be accepted to send a signal to the public that the Legislature is subject to the PRA, even after they stop working there.

F. CONCLUSION

Worthington respectfully requests review be granted because the request meets all of the criteria in outlined in RAP 13.4 (b) (1), RAP 13.4 (b) (2), and RAP 13.4 (b) (4).

Respectfully submitted, this 24th day of December 2022.

By: 

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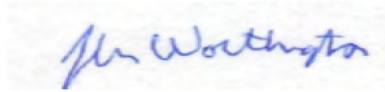
[3] (CP 411-439)

CERTIFICATE OF SERVICE

The undersigned hereby certifies this brief complies with RAP 18.17 (c) (10) with 4,993 words, and, that on this 24^{h} day of December, 2022, he served this Amended Petition for Review via the efiling Portal for the Washington State Appellate Courts:

By: 

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

October 25, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN WORTHINGTON, Appellant, v. WASHINGTON STATE LEGISLATURE, WASHINGTON STATE SENATE, OFFICES OF SENATOR BOB HASEGAWA, WASHINGTON STATE HOUSE OF REPRESENTATIVES, OFFICES OF: Frank Chopp-Chair, Dan Kristiansen-Ranking Minority Member, Joel Kretz-Assistant Ranking Minority Member, Steve Bergquist, Larry Haler, Mark Hargrove, Mark Harmsworth, Jeff Holy, Norm Johnson, Vicki Kraft, John Lovick, Joan McBride, Joyce McDonald, Lilliam Ortiz-Self, Tina Orwall, Eric Pettigrew, Marcus Riccelli, Tana Senn, Larry Springer, Derek Stanford, Pat Sullivan, Gael Tarleton, Luanne Van Werven, J.T. Wilcox, Sharon Wylie, Respondents.	No. 56427-1-II (consolidated with No. 56457-2-II) UNPUBLISHED OPINION

CRUSER, A.C.J. – John Worthington sent a request under the public records act (PRA)[1] to various Washington legislators, seeking communications from a member of the public. The

[1] Ch. 42.56 RCW.

Legislative Defendants[2] provided Worthington with responsive documents, but Worthington was not provided with a specific record that he was looking for.

Worthington filed a lawsuit against the Legislative Defendants, alleging violations of the PRA. One of Worthington's claims was dismissed under CR 12(b)(6), and his other claims were dismissed following hearings on the merits. Worthington appeals the trial court's orders dismissing his claims, arguing (1) the trial court erred by dismissing his claim regarding the destruction of records because Senator Hasegawa was still using the phone he used in 2016; and (2) the trial court erred by dismissing the remainder of his PRA claims because the Legislative Defendants did not show that their searches were adequate.

We hold that Worthington has not shown that the trial court erred by dismissing his PRA claims against the Legislative Defendants. Accordingly, we affirm.

FACTS

I. REQUEST AND INITIAL RESPONSES

On August 27, 2018, Worthington sent the following email, titled "PRA REQUEST," to various Washington legislators:

> Please provide all communications of any form with Joy Beckerman from on [sic] February 26, 2016 5:34 pm, with Senator Hasegawa and his aides and the other members of the House Rules Committee and their legislative aides in 2016, to the list shown below.
>
> All communications would include any personal emails from personal or unknown email accounts and personal phone calls from personal phones and unknown phones.

[2] This opinion uses the term "Legislative Defendants" to refer to all defendants against which Worthington brought his PRA lawsuit, including the Washington State Legislature, the Washington State Senate, the Washington State House of Representatives, and the offices of individual legislators.

The list of legislators on this request is as follows.

Chopp, Frank (D) Chair
Kristiansen, Dan (R) Ranking Minority Member
Kretz, Joel (R) Asst Ranking Minority Member
Bergquist, Steve (D)
Haler, Larry (R)
Hargrove, Mark (R)
Harmsworth, Mark (R)
Holy, Jeff (R)
Johnson, Norm (R)
Kraft, Vicki (R)
Lovick, John (D)
McBride, Joan (D)
McDonald, Joyce (R)
Ortiz-Self, Lillian (D)
Orwall, Tina (D)
Pettigrew, Eric (D)
Riccelli, Marcus (D)
Senn, Tana (D)
Springer, Larry (D)
Stanford, Derek (D)
Sullivan, Pat (D)
Tarleton, Gael (D)
Van Werven, Luanne (R)
Wilcox, J.T. (R)
Wylie, Sharon (D)

Thank you

John Worthington

Clerk's Papers (CP) at 506-07. The list of individuals that Worthington provided apparently was not, in fact, the members of the 2016 House Rules Committee.

On September 4, 2018, the public records officer for the senate, Randi Stratton, sent Worthington a letter informing him that his request was denied at that time due to the legislature's

understanding of its obligations under the PRA. But the letter also noted that there was pending litigation[3] regarding the issue of whether the legislature is "fully subject to the disclosure requirements of the" PRA, so potentially responsive records would be retained pending resolution of the case. *Id.* at 510.

Samina Mays, the public records officer for the house of representatives, similarly informed Worthington that, due to the ongoing litigation, records would only be produced if a member of the legislature voluntarily provided them. In addition, the house sought clarification for Worthington's request. Worthington responded with the following:

> 1. When you specified "5:34 pm", do you only seek communications sent or received at that time?
>
> No just originating at that time.
>
> 2. What do you mean by "unknown"?
>
> address associated with the legislator, the aide or a third party associated with a legislator or aide..

Id. at 526.

On October 2, 2018, Mays informed Worthington that some members chose to voluntarily disclose emails, and that they searched for representatives Stanford, Tarleton, and Harmsworth but found no emails responsive to the request. In addition, Mays explained that they searched using key words "Joy Beckerman," but offered to run another search if Worthington had an email address for Beckerman that they could search for. *Id.* at 533. Otherwise, Mays indicated, there was nothing more they could do.

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[3] *Associated Press v. Washington State Legislature*, 194 Wn.2d 915, 454 P.3d 93 (2019) (plurality opinion).

In addition, shortly after receiving Worthington's request, Stratton emailed Senator Hasegawa and the senator's 2018 legislative assistant. Stratton explained that the records did not currently fit within the definition of public records applicable to the legislature, but that Senator Hasegawa could "voluntarily" produce records if he wished to do so. *Id.* at 514.

II. FURTHER SEARCHES BY THE LEGISLATIVE DEFENDANTS

The supreme court's decision in *Associated Press* was issued in December 2019. On January 14, 2020, the senate sent Worthington a letter stating, "If you would still like us to search for responsive documents, we ask that you submit a new request . . . Otherwise, given the length of time that has passed, we will consider this matter closed."[4] *Id.* at 595. Worthington indicated that he would not submit a new request and that he expected the legislature to respond to his original request.

1. Searches by the House of Representatives

In March 2020, Mays sent Worthington a letter after his request was forwarded from the senate. The house of representatives sought additional clarification on Worthington's request:

> 1. Are you seeking communications that involve **all** of the following parties *together*: Joy Beckerman, Senator Hasegawa, **and** the Members of the House Rules Committee listed above and their Legislative Assistants?
> 2. Or are you only seeking communications between Joy Beckerman and the Members of the House Rules Committee listed above and their Legislative Assistants?

Id. at 542. Worthington responded, "I was looking for chain communications from Joy Beckerman to the House Rules Committee and to Senator Hasegawa." *Id.* at 541.

[4] The letter indicated that, because *Associated Press* "revises the PRA disclosure duties of individual legislators," the legislature was evaluating the case's effect on its current practices and procedures and that this would likely result in a delayed response. CP at 595.

During this time, a public records assistant sent emails with Worthington's request to the members listed in the request and the aides for the listed members who still worked for the legislature. However, by March 2020, seven members (Kristiansen, Haler, Hargrove, Harmsworth, Johnson, McBride, and McDonald) no longer worked for the legislature, and two members (Holy and Stanford) had begun working in the senate. In addition, many of the legislative aides no longer worked for the legislature, and some had begun working for different legislators. In her declaration, Mays explained that she "did not send Worthington's public records request to individuals who did not work for the Legislature in 2020. However, [she] searched the email of former employees." *Id.* at 522.

Mays searched through the emails, calendars, voicemails, and text messages on legislative cell phones for all legislators listed in Worthington's request. She also searched the emails, calendars, and voicemails for all but three legislative aides (Kerns, Gifford, and Trask) who worked for the members listed in the records request in 2016. Text messages were not included because the house of representatives does not issue cell phones to legislative aides. In addition, the house did not issue cell phones to members until 2018.

Following the lawsuit, Mays searched the email for both Kerns and Trask, whose emails had been preserved following their departure from the legislature.[5] Members of the 2016 rules

---

[5] No explanation was given for why Mays never searched the email of Gifford.

committee that Worthington did not specifically list in his PRA were not asked for responsive records.[6]

On June 15, 2020, Mays sent Worthington a letter indicating that no additional responsive records were found beyond records already produced, and that his request was considered closed. In response, Worthington stated, "I have given you the exact day and time [of] a public record I know was sent. I have a copy of it. You have not provided all the records pertaining to this request." *Id.* at 551. Mays responded that they had initially run a search of all house members listed in the request using the keyword "Joy Beckerman" on the date February 26, 2016, but that they would add additional keywords to see if any other responsive documents turned up. *Id.* When Mays told Worthington almost 10 days later that they still had not been able to locate anything, Worthington responded, "They would have come from Beckerman and the people she asked to send emails to the rules committee. If that helps." *Id.* at 550. He then sent a follow-up email stating, "It's Beckerman c'c ing [sic] people her email to the rules committee." *Id.* The public records officer said that they would continue looking.

Mays sent Worthington "19 pages of records that were not specifically responsive to his [ ] request," which included emails from Joy Beckerman to various members, but not at the exact

[6] Worthington's request was for communications with Joy Beckerman, Senator Hasegawa, and "members of the House Rules Committee and their legislative aides in 2016," but the list of individual legislators he specified in his request did not accurately reflect which representatives were on the house rules committee. *Id.* at 506. Mays' declaration listed the members on this committee in the 2016-17 session and 2017-18 session. Worthington's request was not reflective of either list, but it did include many of the members of the 2016 committee. In a brief at the trial court, the Legislative Defendants indicated that they did not contact the members of the house rules committee in 2016 because they followed Worthington's list of legislators that he specifically sought records from.

time Worthington specified. *Id.* at 524. The emails occurred on February 26, 2016 at 2:47pm and March 29, 2016 at 1:12pm.

2. Searches by the Senate

In January 2020, Stratton resent Worthington's request to Senator Hasegawa and the senator's 2020 legislative assistant, stating that the request was from 2018 and that Worthington had "asked [them] to fulfill it." *Id.* at 516. In February, Senator Hasegawa's legislative assistant emailed Stratton, saying: "Senator Hasegawa says that 2016 was 2 cell phones ago, so he doesn't have any phone records from then." *Id.* at 389. Stratton responded that she would draft a declaration for Senator Hasegawa's signature. The declaration ultimately signed by Senator Hasegawa on February 26, 2020 stated:

> 4. In the past, on occasion I used my personal cellphone to conduct Senate-related communication within my official capacity as a Senator.
> 5. I have been asked by the Senate to search any personal devices still in my possession for any texts and/or phone calls that are related to or responsive to the attached Public Records Act request.
> 6. On February 24, 2020 I notified the Senate that since 2016, I have changed cellular devices and therefore have no responsive records for the attached request.

Id. at 387.

Stratton declared that she searched the emails, calendars, and voicemails for Senator Hasegawa and his legislative assistants from the 2016 legislative session. She produced records including emails from Joy Beckerman, but Stratton was unable to find any communication from February 26, 2016 at 5:34pm. In November 2020, Worthington emailed Stratton complaining that he had not been given an accurate timeline regarding Senator Hasegawa's changing of phones. "Regarding the records request for Senator Hasegawa's phone records, . . . The Senate has not

provided a date specific response. They merely claim the phone was destroyed . . . Please provide the date specific time the phone was changed." *Id.* at 575.

III. PRA LAWSUIT

Worthington brought a lawsuit against the Legislative Defendants in December 2020 for alleged violations of the PRA. His second amended complaint included some of the communications with Mays and Stratton regarding his request discussed above. In addition, Worthington included further communications with Stratton regarding Senator Hasegawa's phone. He received an email from Stratton on August 25, 2020 stating:

> We are sorry that our search did not find the particular communication you were looking for. We have looked again, and have confirmed that Senator Hasegawa's office does not have an email from Joy Beckerman dated February 26, 2016.
>
> As you are aware, in December 2019 the State Supreme Court found that individual legislator offices are state agencies for purposes of the public records act. Before that time, it had always been the understanding of the legislative branch that the legislative definition of public records applied to legislator offices.
>
> In early 2018, after the lower court made its initial finding, legislators' emails were put into a litigation hold, meaning that there was no way to delete anything. Those documents existing as of the date of the hold have been retained, but if a document was deleted prior to that time, there is no way to restore it. If Senator Hasegawa's office received the email you are searching for, it is possible that the email was deleted before 2018.
>
> **Over the years some legislators have used their private cell phones for legislative business on occasion. Senator Hasegawa was unable to search his personal device from 2016, as that cell phone was replaced.**
>
> In order to prevent this problem moving forward, legislators were issued legislative cell phones in 2019 and instructed not to use their private devices for legislative business. Senator Hasegawa received his legislative cell phone on April 9, 2019, and we are able to provide texts from that device in response to public records requests.
>
> As you know from working with us on other requests, we are doing our best to retain, search and produce records in an environment where was is a "record" has

> been changing for us. If there's anything else we can do to help you to find what you are looking for, we're happy to do so.

Id. at 98-99. Three days later, Stratton sent Worthington another email stating:

> As we have explained to you in numerous correspondence, Senator Hasegawa previously used a personal cellphone for some official legislative communications during the timeframe at issue in your request. He is no longer in possession of the cellphone he would have used on February 26, 2016. Responsive documents do not exist. Attached is the declaration you received on February 27, 2020, and again on August 18, 2020, to this effect. Senator Hasegawa's texts were not preserved when his personal cell phones changed in the time between 2016 and today, and there are no further details we can provide. As to the portion of request 18AuS-158/118FS-112, seeking public records related to Senator Hasegawa, we now consider this matter closed. . . . Understand we are not denying your request to inspect these records pursuant to a statutory exemption, but rather trying to explain that the records simply do not exist.

Id. at 99.[7] Worthington alleged that he repeatedly requested "phone records confirming the destruction of Senator Hasegawa's phone," but no such records were made available to him. *Id.*

Worthington additionally provided a screenshot of an email showing that not all legislative aides were forwarded an email regarding his records request and, therefore, were not asked for responsive documents.

Worthington's second amended complaint alleged that the Legislative Defendants violated the PRA by failing to conduct an adequate search, silently withholding records, and destroying records before his request was resolved. In addition, Worthington asserted that the legislature, senate, house of representatives, and office of Senator Hasegawa violated the PRA "by failing to provide phone records that show which phone numbers were used by the legislators and when they were discontinued." *Id.* at 101.

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[7] This email also referred to an apparently separate request that partially involved Senator Rivers, which is not at issue in this appeal.

The Legislative Defendants filed a motion to dismiss under CR 12(b)(6). The trial court granted partial dismissal, finding that the facts alleged in Worthington's second amended complaint "do not support a cause of action for destruction of public records, as it relates to the telephone records of Senator Bob Hasegawa." *Id.* at 635. The trial court found that the records did not exist at the time of the request and, therefore, were not destroyed. The court dismissed the cause of action "related to Senator Hasegawa's telephone records that may have existed prior to the public records request of the plaintiff." *Id.*

The trial court then held hearings on the merits regarding Worthington's other claims. The court dismissed Worthington's remaining claims with prejudice, finding that the Legislative Defendants performed an adequate search in response to Worthington's request. Worthington appeals the trial court's orders dismissing his claims against the Legislative Defendants.

DISCUSSION

A. Legal Principles

"The PRA is 'a strongly worded mandate for broad disclosure of public records.' " *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011) (plurality opinion) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). Under the general public records disclosure mandate, public agencies are required to produce all public records upon request unless an exemption applies. RCW 42.56.070(1); *Associated Press v. Washington State Legislature*, 194 Wn.2d 915, 921, 454 P.3d 93 (2019). This general disclosure mandate applies to individual legislators' offices. *Associated Press*, 194 Wn.2d at 917-18. If an agency fails to properly respond to a request under the PRA, the requestor can bring an action against the agency. *See* RCW 42.56.550.

Judicial review under the PRA is de novo. RCW 42.56.550(3); *Bainbridge Island Police Guild*, 172 Wn.2d at 407. When evaluating a PRA claim, we "stand in the same position as the trial court." *Bainbridge Island Police Guild*, 172 Wn.2d at 407; *West v. Port of Olympia*, 183 Wn. App. 306, 311, 333 P.3d 488 (2014). In addition, this court reviews an order dismissing a complaint under CR 12(b)(6) de novo. *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45 (2015). Dismissal under CR 12(b)(6) is proper only when "the plaintiff cannot prove 'any set of facts which would justify recovery.' " *Id.* (internal quotation marks omitted) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)).

B. ANALYSIS[8]

1. Claims Dismissed under CR 12(b)(6)

Worthington argues that the trial court erred by granting the motion to dismiss his claim regarding the destruction of records as to the senate. Worthington asserts (1) that he produced evidence that Senator Hasegawa still had the phone he would have used in 2016, and (2) that he requested phone records to verify that Senator Hasegawa had replaced his phone prior to Worthington's lawsuit, which the senate did not produce. The Legislative Defendants argue that the trial court properly dismissed Worthington's claim regarding destruction of records because there is no cause of action under the PRA for failure to produce records that do not exist—in this

[8] Throughout Worthington's brief, he reiterates arguments he made at the trial court and asserts that the Legislative Defendants did not address the arguments and, therefore, have conceded the issues. However, these statements by Worthington simply repeating what he previously argued do not, by themselves, establish any error on the part of the trial court unless supported by further argument. *See* RAP 10.3(a)(6) (directing appellant to include in their brief "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.").

case, personal phone records showing that Senator Hasegawa began using a new phone. We hold that Worthington has not shown any error in dismissal of his destruction of records claim.

As an initial matter, the evidence that Worthington cites in support of his argument is documentation that Senator Hasegawa had the same phone number both during 2016 and after Worthington filed his PRA request. Setting aside the fact that the evidence Worthington points to was not included in his complaint, all Worthington has shown is that Senator Hasegawa's phone number has remained unchanged. This does not show that Senator Hasegawa still has the same device that he used in 2016. In fact, Worthington's complaint quotes Stratton's emails explaining that Senator Hasegawa "was unable to search his personal device from 2016, as that cell phone was replaced." CP at 98. Accordingly, to the extent that Worthington's argument relies on Senator Hasegawa still using the same device, he has not shown any error in the dismissal of his destruction of records claim.

Second, to the extent that Worthington argues that the senate was required to produce records from Senator Hasegawa's phone service provider in order to show that the phone had been replaced, the senate was under no obligation to produce such records. *See Nissen*, 183 Wn.2d at 882 ("Absent an allegation that the County used the call and text message logs, the logs in this case are not public records.").

We hold that Worthington has not shown error in the trial court's dismissal of his claim regarding the destruction of public records.

2. Claims Dismissed on the Merits

Worthington argues that the trial court erred by dismissing the remainder of his PRA lawsuit because the Legislative Defendants did not show that their searches were adequate, given

that several legislators and legislative aides were not asked to respond to the request, and because the declaration provided by Senator Hasegawa regarding his phone was deficient. The Legislative Defendants argue that Worthington's true request was for a specific email and that an adequate search was conducted in an attempt to find it. We hold that the Legislative Defendants conducted adequate searches and did not silently withhold records.

When responding to a public records request, "[t]he onus is [ ] on the agency—necessarily through its employees—to perform 'an adequate search' for the records requested." *Nissen*, 183 Wn.2d at 885 (quoting *Neigh. All. of Spokane County v. City of Spokane*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011)). To show that the search was adequate, "the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched." *Neigh. All.*, 172 Wn.2d at 721. "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents," evaluated on a case-by-case basis. *Id.* at 720.

a. Adequacy of the Senate's Search

Regarding Senator Hasegawa's phone, Worthington argues that Senator Hasegawa and the senate never explained how the senator now using a new device means that he is unable to access the files or his account. In so arguing, it does not appear that Worthington is referring to communications that may have been on Senator Hasegawa's phone, such as emails that be accessed by logging into an email account. Rather, it appears once again that the "files" or "account" that Worthington refers to are Senator Hasegawa's files or account with his personal phone service provider. *See* Appellant's Amended Opening Br. at 26 (files or account "would still

be accessible for the next five to seven years," and then later saying "most of the cell phone companies hold records 5 years or more"). Again, the senate is not required to produce records from Senator Hasegawa's personal phone service provider. *See Nissen*, 183 Wn.2d at 882.

Alternatively, to the extent that Worthington did argue that Senator Hasegawa should still have been able to access communications from his phone by logging into an account elsewhere, this argument ignores that Senator Hasegawa's accounts actually were searched: Stratton searched Senator Hasegawa's emails, calendars, and voicemails during the relevant time period and produced emails from Joy Beckerman, just not one at the specific time Worthington indicated. Agencies are not required to search "*every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found." *Neigh. All.*, 172 Wn.2d at 720. Although the senate's search would not have uncovered text messages or records of phone calls, Senator Hasegawa's declaration stated that those were not available on any device "still in [his] possession" and, therefore, he had no responsive records. CP at 387. Because the senate was not required to obtain records from Senator Hasegawa's personal phone service provider, the senate conducted an adequate search for responsive records.

Therefore, Worthington has not shown that the senate withheld records and did not perform an adequate search simply because it was unable to search Senator Hasegawa's 2016 device.

b. Adequacy of the House of Representative's Search

Regarding the search performed by the house of representatives, although Worthington's initial request sought "[a]ll communications," the clarifications he made regarding his request to the house of representatives reveal that the communication he sought was an email. *See* CP 538; CP at 550 ("They would have come from Beckerman and the people she asked to send emails to

the rules committee. If that helps."; "It's Beckerman c'c ing people her email to the rules committee."); CP at 541 ("I was looking for chain communications from Joy Beckerman to the House Rules Committee and to Senator Hasegawa."). Mays submitted a declaration that she searched the emails, calendars, voicemails, and text messages on legislative phones for all currently employed legislators listed in Worthington's request. She also conducted a similar search for the currently employed legislative aides who worked for the members listed in the request in 2016 (not including phones because the legislature does not issue phones to aides).

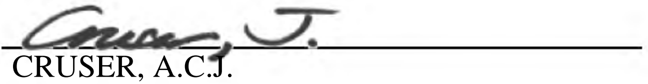
Worthington complains that former employees were not asked for responsive records. Not only does Worthington fail to provide any authority for the proposition that former employees are required to provide responsive records to a PRA request, but the record shows that Mays did search the emails of some former employees. Mays' declaration did not specify the search terms, but she informed Worthington that they had run a search with the keyword "Joy Beckerman" for all house members listed in the request. This search was "reasonably calculated to uncover all relevant documents" and, therefore, was an adequate search. *Neigh. All.*, 172 Wn.2d at 720.

We hold that the trial court did not err by dismissing Worthington's claims that the Legislative Defendants silently withheld records and did not perform adequate searches.

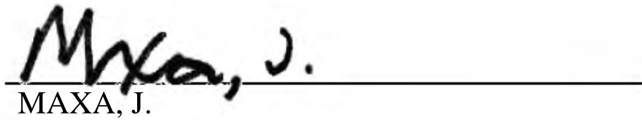
CONCLUSION

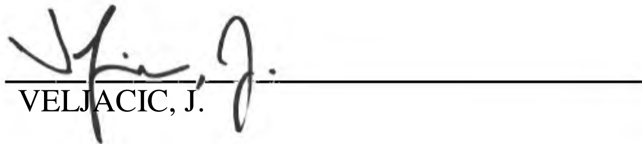
We hold that Worthington has not shown that the trial court erred by dismissing his claim regarding the destruction of records. In addition, we hold that Worthington has not shown that the trial court erred by dismissing the remainder of his claims because the Legislative Defendants performed adequate searches, and Worthington has not shown that any records were silently withheld. Accordingly, 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.


CRUSER, A.C.J.

We concur:


MAXA, J.


VELJACIC, J.

FILED
12/7/2022
Court of Appeals
Division II
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN WORTHINGTON, Appellant, v. WASHINGTON STATE LEGISLATURE, WASHINGTON STATE SENTATE, OFFICES OF SENATOR BOB HASEGAWA, WASHINGTON STATE HOUSE OF REPRESENTATIVES, OFFICES OF: Frank Chopp-Chair, Dan Kristiansen-Ranking Minority Member, Joel Kretz-Assistant Ranking Minority Member, Steve Bergquist, Larry Haler, Mark Hargrove, Mark Harmsworth, Jeff Holy, Norm Johnson, Vicki Kraft, John Lovick, Joan McBride, Joyce McDonald, Lilliam Ortiz-Self, Tina Orwall, Eric Pettigrew, Marcus Riccelli, Tana Senn, Larry Springer, Derek Stanford, Pat Sullivan, Gael Tarleton, Luanne Van Werven, J.T. Wilcox, Sharon Wylie, Respondents.	No. 56427-1-II (consolidated with No. 56457-2-II) ORDER DENYING MOTION FOR RECONSIDERATION

The court’s unpublished opinion in this matter was filed on October 25, 2022. On October 28, 2022 appellant filed a motion for reconsideration. The court called for an answer. An answer and reply were filed. After consideration, it is hereby

ORDERED that appellant’s motion for reconsideration is denied.

PANEL: Jj. Maxa, Cruser, Veljacic

FOR THE COURT:

Cruser, A.C.J.

JOHN WORTHINGTON - FILING PRO SE

December 24, 2022 - 6:04 PM

Filing Petition for Review

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