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STATE OF WASHINGTON  
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102644-7

WASHINGTON SUPREME COURT

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SAN JUAN COUNTY,

*Respondent,*

v.

WASHINGTON COALITION FOR OPEN GOVERNMENT,

*Petitioner.*

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PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER..... 1

II. COURT OF APPEALS DECISION ..... 1

III. ISSUES PRESENTED FOR REVIEW ..... 1

IV. INTRODUCTION..... 2

V. STATEMENT OF THE CASE..... 4

    A. The 2007 legislature enacted RCW 42.56.904 to significantly curtail the application of the attorney-client and work product exemptions to government attorney invoices under the PRA ..... 4

    B. RCW 42.56.904 functioned as intended for thirteen (13) years, with no agency disputing the purpose or effect of that statute. .... 10

    C. WCOG requested San Juan County’s attorney invoices for *Kilduff v. San Juan County*, 194 Wn.2d 859, 862, 453 P.3d 719 (2019)..... 13

    D. The trial court dismissed WCOG’s case without ever explaining how it had interpreted and applied RCW 42.56.904..... 15

    E. The Court of Appeals misinterpreted RCW 42.56.904, adopting an erroneous interpretation that ignores the obvious purpose of the statute and renders the statutory text meaningless..... 19

VI. STANDARD OF REVIEW ..... 21

VII. ARGUMENT .....	22
A. The County’s excessive redactions of attorney invoices do not comply with RCW 42.56.904 .....	22
B. The County’s exemption logs do not comply with RCW 42.56.210(3) and RCW 42.56.904 .....	27
C. The County’s overt consideration of WCOG’s identity as the requestor violates RCW 42.56.080(2) .....	28
D. WCOG requests an award of reasonable attorney’s fees for this appeal pursuant to RCW 42.56.550(4) ..	29
VIII. CONCLUSION .....	30
IX. APPENDIX.....	30

## TABLE OF AUTHORITIES

### CASES

<i>Asotin County v. Eggleston</i> , 7 Wn. App. 2d 143, 432 P.3d 1235 (2019) .....	4, 12-13, 26
<i>Hangartner v. Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004) .....	5
<i>Kilduff v. San Juan County</i> , 194 Wn.2d 859, 453 P.3d 719 (2019) .....	13-14, 23, 28
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998) .....	5
<i>Livingston v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008) .....	28
<i>Progressive Animal Welfare Society v. UW</i> , 125 Wn.2d 243, 884 P.2d 592 (1994) .....	22
<i>State v. Flowers</i> , 154 Wn. App. 462, 225 P.3d 476 (2010) .....	24, 28
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011) .....	4, 12, 26
<i>West v. Thurston Cty.</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012) .....	5

### STATUTES

Chap. 42.56 RCW .....	<i>passim</i>
Laws of 1973, ch. 1, § 31(1)(j) .....	5

Laws of 2007, ch. 391, § 1 .....	3, 6, 8, 23
RCW 42.56.030 .....	22, 24
RCW 42.56.080 .....	2, 16, 28
RCW 42.56.210(3) .....	1-2, 16-17, 27
RCW 42.56.230(5) .....	9
RCW 42.56.290 .....	5, 11, 20, 22-23
RCW 42.56.550 .....	21-22, 29
RCW 42.56.904 .....	<i>passim</i>

## **COURT RULES**

RAP 13.4 .....	4, 26, 28, 30
RAP 18.1 .....	29-30

## I. IDENTITY OF PETITIONER

The Washington Coalition for Open Government (WCOG) seeks review of the Court of Appeals decision designated in Part II.

## II. COURT OF APPEALS DECISION

WCOG seeks review of the unpublished opinion in *San Juan County v. Washington Coalition for Open Government (WCOG)*, No. 84941-7-I, dated November 13, 2023. Appendix A.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the County violated RCW 42.56.904 in response to WCOG's PRA request for attorney invoices by excessively redacting the invoices to withhold all descriptions of attorney work performed.

2. Whether the County's exemption logs, which merely recited redaction codes to explain the County's blanket redactions of all work performed, violated RCW 42.56.210(3) and RCW 42.56.904.

3. Whether the County's overt consideration of WCOG's identity as the requestor as a basis for withholding public records from WCOG violates RCW 42.56.080(2).

#### IV. INTRODUCTION

Petitioner WCOG seeks review of the unpublished opinion which affirmed the trial court's dismissal of WCOG's action against respondent San Juan County for violations of Public Records Act, Chap. 42.56 RCW ("PRA"). The County violated the PRA by (A) excessively redacting attorney invoices contrary to RCW 42.56.904, and (B) failing to explain how exemptions were applied to redacted records in violation of RCW 42.56.210(3) and RCW 42.56.904. The lower courts' rulings are based on an erroneous interpretation of RCW 42.56.904, a statute enacted by the 2007 legislature to significantly curtail the application of the existing attorney-client and work product privileges to government attorney invoices under the PRA. That section provides:

**Intent—2007 c 391.**

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. **It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.** The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants. (Emphasis added).

Laws of 2007, ch. 391, § 1; RCW 42.56.904.

The Court of Appeals erroneously upheld the County's blanket redaction of all descriptions of work performed in attorney invoices. The Court of Appeals' erroneous interpretation of RCW 42.56.904 contradicts the language and underlying policy of the statute, and renders the statutory language meaningless in violation of well-established principles of statutory construction.



This Court should grant review under RAP 13.4(b)(1) and (2) because the unpublished opinion below directly conflicts with this Court's opinion in *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 797, 246 P.3d 768 (2011) and the Court of Appeals' opinion in *Asotin County v. Eggleston*, 7 Wn. App. 2d 143, 432 P.3d 1235 (2019). This Court should also grant review under RAP 13.4(b)(4) because the correct application of RCW 42.56.904 is an issue of substantial public interest that needs to be resolved by this Court.

## V. STATEMENT OF THE CASE

**A. The 2007 legislature enacted RCW 42.56.904 to significantly curtail the application of the attorney-client and work product exemptions to government attorney invoices under the PRA.**

The PRA requires all state and local agencies to produce public records upon request by any person, subject to various exemptions codified in the PRA and other statutes. The original 1972 Public Disclosure Act incorporated the work product doctrine as a PRA exemption as follows:

(j) Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

Laws of 1973, ch. 1, §31(1)(j); former RCW 42.17.310(1)(j); *see Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998). The same exemption is now codified at RCW 42.56.290. Under *Hangartner v. Seattle*, 151 Wn.2d 439, 451, 90 P.3d 26 (2004), the attorney-client privilege is also incorporated into the PRA as an exemption and subject to redaction. Prior to 2007 attorney invoices were subject to redaction as work product under RCW 42.56.290.

In 2006 Thurston County refused to produce invoices for private attorneys who spent more than \$250,000 on the defense of a discrimination lawsuit brought by deputy prosecutors. *See West v. Thurston County*, 168 Wn. App. 162, 168, 275 P.3d 1200 (2012). In 2007, the legislature responded by enacting RCW 42.56.904 to limit the application of the existing work product exemption to attorney invoices. The legislature clarified that

public attorney invoices are important public records, and set forth specific requirements for redacting such invoices.

The complete text of the RCW 42.56.904, separated into one-sentence paragraphs for readability, is as follows:

**Intent—2007 c 391.**

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter.

It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.

The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

Laws of 2007, ch. 391, § 1; RCW 42.56.904.

SHB 1897 was supported by, *inter alia*, the Washington Attorney General, WCOG and the Allied Daily Newspapers of

Washington. SHB 1897 House Bill Report (2007); **Appendix B** at 3-4. Supporters of increased transparency explained that the public has the right to know how government legal fees are spent, that attorney invoices can be disclosed without harming agencies in litigation, and that lawyers representing agencies are not acting as private attorneys but as government officials. *Id.* at 3.

Opposition to SHB 1897 was limited to a small group of private, for-profit defense attorneys who represent government agencies, including attorney Jeff Myers, who is the attorney for San Juan County in this case. SHB 1897 House Bill Report; **Appendix B** at 3. These private defense attorneys testified against SHB 1897 precisely because the bill would require agencies to disclose information in attorney invoices that these defense attorneys asserted would have been privileged or work product under existing common law:

(Opposed) The amount of the attorney invoices should be disclosed. That is accountability. The concern with the bill, however, is that the Public Records Act is not intended to create an advantage to one side in litigation involving government

entities. This bill tilts the playing field in favor of those suing government by narrowing the scope of what courts have considered to be work product. This bill only includes a portion of what is typically considered work product. The best place to determine what is work product is in the courts. The entire sentence, starting at the end of line seven should be deleted from the bill. Or, the bill should be amended to include the entire definition of work product.

*Id.*; **Appendix B** at 3.

The original bill, HB 1897 (1/31/07), did not include the phrase “or are otherwise exempt under chapter 391, Laws of 2007 or other laws.”<sup>1</sup> However, at the hearing the committee became aware that attorney invoices might contain exempt information other than privileged communications or work product., such as credit card numbers. **Appendix B** at 34-35. Supporters explained that such information could also be redacted. *Id.* Consequently, after the hearing, SHB 1897 amended the bill to include the phrase “or are otherwise exempt

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<sup>1</sup> Available online at <https://lawfilesexternal.wa.gov/biennium/2007-08/Pdf/Bills/House%20Bills/1897.pdf#page=1> (last visited May 29, 2023).

under this act or other laws” to incorporate PRA exemptions

*other than* privilege and work product:

It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney’s mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under this act or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.<sup>2</sup>

CP 312. This amendment incorporated other PRA exemptions, such as credit card numbers under RCW 42.56.230(5), that might apply to attorney invoices.<sup>3</sup>

The 2007 legislature rejected the self-serving concerns of private defense attorneys and enacted SHB 1897 by overwhelming majorities of 94 to 2, and 44 to 4. *Id.* at 1. In other words, the handful of private defense attorneys, at whom

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<sup>2</sup> Available online at <https://lawfilesexternal.wa.gov/biennium/2007-08/Pdf/Bills/House%20Bills/1897-S.pdf#page=1> (last visited May 29, 2023).

<sup>3</sup> For example, attorney Myers’ invoice dated December 31, 2020 (above) included his law firm’s corporate tax ID number, which was redacted. CP 86. WCOG does *not* object to narrow redaction of this sort of exempt information.

the bill was aimed, decisively lost their anti-PRA policy arguments sixteen years ago.

**B. RCW 42.56.904 functioned as intended for thirteen (13) years, with no agency disputing the purpose or effect of that statute.**

Since 2007 virtually all state and local agencies have understood RCW 42.56.904 means exactly what it says: descriptions of attorney work performed are *not* exempt from disclosure under the PRA, except in narrow circumstances where they disclose attorney mental impressions, privileged advice, or information subject to another PRA exemption. Here is an example of an invoice from attorney Jeff Myers that WCOG obtained from the Washington Counties Risk Pool (WCRP) for a case in which attorney Myers was representing respondent San Juan County, appropriately disclosing most of the descriptions of work performed:

LAW, LYMAN DANIEL, KAMMERER & BOGDANOVICH, P.S. ATTORNEYS AT LAW		Billing Address: 70 West 118th Olympia, WA 98501		Washington Counties Risk Pool		Page 2 January 31, 2016 Client ID: WCRP-023 Statement No: 4	
3100 COMMERCIAL SUITE 1000 2548 19th Avenue West Dr. Suite 100 Tacoma, WA 98409		2570 9th Avenue East 2nd Fl Tacoma, WA 98512		Administrative Services and Finance Offices Claims # 522015009249 Event date 01/22/15 Orthopedic S. Linn			
Suzanne Linn Washington Counties Risk Pool 2548 19th Avenue West Dr. Suite 100 Tacoma, WA 98409		Page 1 January 31, 2016 Client ID: WCRP-023 Statement No: 4				Rate Hours	
Abilities vs San Juan County and Marshall Gaylord Claim # 522015009249 (Jan 15) EL (2) Event date 01/22/15 Christopher S. Linn		WCRP FEB 02 2016 RECEIVED \$4,688.79					
Prepaid Balance		Rate		Hours			
1/15/2015	JM	215.00	1.40	261.00			
1/15/2015	JM	215.00	3.40	339.00			
1/15/2015	JM	215.00	2.95	317.00			
1/15/2015	JM	215.00	0.88	1,204.00			
1/15/2015	JM	215.00	0.21	45.00			
1/15/2015	JM	215.00	1.80	322.00			
1/15/2015	JM	215.00	0.50	107.00			
1/15/2015	JM	215.00	0.40	83.00			
Total Fees				42.50		11,212.00	
Expenses							
1/15/2015	JM	215.00	0.30	63.00			
1/15/2015	JM	215.00	0.30	1,204.00			
1/15/2015	JM	215.00	0.79	1,225.00			
1/15/2015	JM	215.00	0.80	1,247.00			
1/15/2015	JM	215.00	0.00	90.00			
1/15/2015	JM	215.00	0.40	1,216.00			
1/15/2015	JM	215.00	2.70	898.00			
1/15/2015	JM	215.00	2.40	712.00			
1/15/2015	JM	215.00	2.80	774.00			
1/15/2015	JM	215.00	0.40	370.00			
1/15/2015	JM	215.00	0.30	187.00			
1/15/2015	JM	215.00	0.21	43.00			
1/15/2015	JM	215.00	0.50	107.00			
Relates Due						811,099.00	
Billing History							
Rate	Hours	Expenses	Advances	Finance Charge	Payments		
26,136.00	151.00	468.00	380.75	0.00	18,328.88		

CP 117.<sup>4</sup>

RCW 42.56.904 functioned as intended for thirteen (13) years, with no agency or court disputing the obvious purpose and legal effect of that statute. In 2011, this Court correctly noted that RCW 42.56.904 restricted the application of the work product doctrine in RCW 42.56.290 to attorney invoices:

[T]he legislature enacted RCW 42.56.904 as a result of the *West/Broyles* litigation to clarify that discovery rules, as they applied to attorney fees paid

<sup>4</sup> WCOG does *not* concede that even the limited redactions in this WCRP invoice were appropriate under RCW 42.56.904, but WCRP is not the defendant agency in this case.



by a public agency, do not exempt attorney fee invoices in their entirety under the PRA.

*Yakima County*, 170 Wn.2d at 797. The unpublished opinion directly conflicts with this Court's decision in *Yakima Herald* by allowing blanket redaction of attorney invoices.

In *Asotin County*, 7 Wn. App. 2d 143, the county brought a lawsuit against the requestor seeking to enjoin the release of its own attorney invoices. But the County merely provided the unredacted invoices to the trial court without suggesting any particular redactions. *Id.* at 147. After the trial court ordered the county to propose specific redactions to its invoice the County finally complied with RCW 42.56.904 by narrowly redacting its invoices:

[T]he County's redactions are very narrowly tailored to prevent the disclosure of only those minimal references from which one could conceivably deduce an attorney's mental impressions, legal advice, theories, or opinions.

*Id.* at 149. On appeal, the trial court reversed the trial court's erroneous determination that the requestor was not the prevailing

party for purposes of attorney's fees and penalties, noting that RCW 42.56.904 "could hardly be clearer" and that:

Mr. Eggleston consistently allowed for the possibility that the county's invoices might contain legitimately exempt information. He opposed (1) the county's attempt to enjoin any production and (2) its failure to undertake a good faith effort to redact exempt information until ordered to do so by the court.

*Id.* at 155. The unpublished opinion in this case, allowing blanket redaction of attorney invoices, is directly contrary to Division III's opinion in *Asotin County*.

**C. WCOG requested San Juan County's attorney invoices for *Kilduff v. San Juan County*, 194 Wn.2d 859, 862, 453 P.3d 719 (2019).**

In 2015 San Juan County enacted an invalid local ordinance that purported to require PRA requestors to exhaust "administrative remedies" before bringing a lawsuit under the PRA. In *Kilduff v. San Juan County*, 194 Wn.2d 859, 871-872, 453 P.3d 719 (2019) this Court held 9 to 0 that the County had no legal authority to modify the PRA by local ordinance. WCOG, represented by undersigned counsel, appeared as amicus

curiae in *Kilduff*, correctly explaining that the County had no authority to enact the regulation.

Rather than having deputy prosecutors defend the county's ordinance, the prosecutor hired outside counsel, paying more than \$100,000 to unsuccessfully defend the County's illegal attack on the PRA. CP 54-77. After this Court's *Kilduff* opinion was published, WCOG sought to investigate San Juan County's wasteful use of outside counsel in PRA cases.

In April 2020 WCOG made a PRA request for invoices and other public records relating to the *Kilduff* case:

All invoices, contracts, correspondence, notes, bids, proposals, records relating to conflicts of interest, meeting minutes, and any other records relating to the County's use of outside counsel in *Kilduff v. San Juan County* (in any court).

CP 7, 51-53. In response, the County produced, *inter alia*, eighty-one (81) pages of excessively redacted invoices from the *San Juan County v. Kilduff* case. The County redacted *all* of the narrative descriptions of work performed by the attorneys, replacing such descriptions with the code "1C, 2:"



this lawsuit seeking a declaratory ruling that the County was not required to produce emails in a PST file (even though it could easily have done so).<sup>5</sup> WCOG brought this PRA case as a counterclaim against the County for excessively redacting the invoices in violation of RCW 42.56.904 and for failing to produce adequate exemption logs. CP 22-30

WCOG moved for partial summary judgment that the County violated the PRA by (i) excessively redacting attorney invoices contrary to RCW 42.56.904, and (ii) failing to explain how exemptions were applied to redacted records in violation of RCW 42.56.210(3). CP 34-43. In response, the County (i) ignored the actual language of RCW 42.56.904, (ii) took bits of legislative history out of context, (iii) cited numerous inapplicable non-Washington authorities, (iv) complained about WCOG in direct violation of RCW 42.56.080(2), and (v) falsely

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<sup>5</sup> WCOG chose to not litigate the PST email issue that caused San Juan County to sue WCOG in the first place. CP 22. Only WCOG's PRA counterclaims are at issue in this case.

asserted that the application of RCW 42.56.210(3) to attorney invoices had already been addressed in an earlier unpublished opinion involving WCOG. CP 260. The County repeated the same self-serving policy arguments, using the exact same tropes about “unfair advantage” and “uneven playing field,” that the 2007 legislature rejected sixteen (16) years ago. CP 152.

The County also submitted a declaration in which its prosecutor admitted that all the descriptions of work performed were redacted from the invoices by a clerk pursuant to pre-existing instructions, and that such blanket redactions were based, *not* on RCW 42.56.904 (2007), but on what the prosecutor claimed to have learned more than thirty (30) years ago as a private attorney representing private clients. CP 223-230. It is undisputed that the review and redaction explicitly required by RCW 42.56.904 was never performed.

In reply, WCOG explained that the County’s interpretation of RCW 42.56.904 rendered the statutory text

meaningless, in violation of basic principles of statutory construction:

The County's assertion that this statutory text allows blanket redaction of all descriptions of work performed—blanket redactions performed by a clerk without any actual review of the content by an attorney—is absurd. If the County were correct then the statutory text highlighted above would be meaningless.

CP 266.

In February 2022 the trial court issued orders (i) denying WCOG's motion for partial summary judgment and (ii) ordering *in camera* review over the County's objections. CP 316-319. Neither order explained how the trial court had interpreted and applied RCW 42.56.904. *Id.*

In September 2022 the trial court erroneously upheld the County's redactions, issuing an order, drafted by the County, that again made no attempt to explain how RCW 42.56.904 had been interpreted and applied by the trial court. CP 359.

WCOG moved for reconsideration, again explaining that the County's interpretation of RCW 42.56.904 rendered that

statute meaningless. CP 367-368. The County made no attempt to argue otherwise, cited the same irrelevant cases as before, and repeated the same policy arguments that the 2007 legislature had already rejected. CP 396-400, 407.

The trial court denied reconsideration. The trial court's order did not even cite 42.56.904, much less explain how the trial court had interpreted that statute to uphold the County's blanket redactions of the County's invoices. CP 414.

**E. The Court of Appeals misinterpreted RCW 42.56.904, adopting an erroneous interpretation that ignores the obvious purpose of the statute and renders the statutory text meaningless.**

WCOG appealed, explaining in its opening brief that the trial court's erroneous interpretation of RCW 42.56.904 rendered the actual language of the statute meaningless. *App. Br.* at 17-25. Once again the County's brief ignored the issue of proper statutory construction, relying instead on inapplicable cases and policy arguments that the 2007 legislature had already rejected in enacting RCW 42.56.904. *Resp. Br.* at 8, 30, 44-48. WCOG's reply brief noted that the County was "unable to explain how its



interpretation [of RCW 42.56.904] gives any effect to the statutory text.” *Reply Br.* at 15.

The Court of Appeals affirmed in an unpublished opinion that ignored the plain language, legislative history and obvious purpose of RCW 42.56.904. The Court of Appeals failed to understand that RCW 42.56.904 is *not* a separate PRA exemption, but was merely intended to restrict the application of the pre-existing work product exemption in RCW 42.56.290 to attorney invoices. The Court of Appeals erroneously concluded that RCW 42.56.904 was “plain on its face,” and misinterpreted the phrase “other laws” to allow the County to redact all descriptions of work performed under RCW 42.56.290. *Unpublished Opinion* at 10.

Like the trial court and the County, the Court of Appeals made no attempt to explain how its interpretation of RCW 42.56.904 gave any actual effect to the language of the statute. Making matters worse, the court erroneously stated that WCOG had made its statutory construction for the first time at oral

argument. *Id.* In fact, WCOG repeatedly made this statutory construction argument in both the trial court and in its appellate briefs, and the County repeatedly ignored the issue. CP 266, 367, 404; *App. Br.* at 17, 21-25; *Reply Br.* at 14-16.

The Court of Appeals' unpublished opinion is so obviously erroneous that neither the County nor any other public agency moved the Court of Appeals to publish that opinion. As a result, after sixteen (16) years of RCW 42.56.904 functioning as the 2007 legislature intended, that statute is now effectively unenforceable in San Juan, Island, Whatcom, Skagit, Snohomish and King Counties.

## VI. STANDARD OF REVIEW

The County has the burden to prove that it has complied with the PRA. RCW 42.56.550(1). As the requestor, WCOG was not required to submit any evidence whatsoever. Nonetheless, the undisputed evidence establishes that the County's blanket redactions of attorney work performed do not comply with RCW 42.56.904.

This Court engages in *de novo* review of the documentary evidence in the record, the trial court ruling, and the unpublished opinion of the Court of Appeals. *Progressive Animal Welfare Society v. UIW*, 125 Wn.2d 243, 252-253, 884 P.2d 592 (1994) (PAWS II); RCW 42.56.550(1). More importantly, this Court— itself a body of attorneys accustomed to preexisting work product and attorney-client privileges—must disregard the interests of government attorneys and construe RCW 42.56.904 liberally in favor of public disclosure. *Id.*, at 260; RCW 42.56.030.

## VII. ARGUMENT

### A. The County's excessive redactions of attorney invoices do not comply with RCW 42.56.904.

The Court of Appeals misunderstood the relationship between the existing work product exemption in RCW 42.56.290 and the 2007 legislature's clarification in RCW 42.56.904 of how that work product exemption should be narrowly applied to attorney invoices. The court misinterpreted the phrase "or other laws" in RCW 42.56.904 as merely incorporating the existing

work product exemption in RCW 42.56.290 into a new exemption for attorney invoices. *Unpublished Opinion* at 6-7.<sup>6</sup>

But RCW 42.56.904 is *not* a new, separate PRA exemption. That statute is merely an expression of the legislature's "**INTENT**" to curtail the application of the existing work product exemption in RCW 42.56.290. That is why the entire 2007 legislation (SHB 1897) consists of only one section clearly labeled "**INTENT**" and includes no other operative language. *See* Laws of 2007, ch. 391. That is why the legislature's "intent" was codified at the very end of Chapter 42.56 RCW rather immediately after existing PRA exemptions.

The Court of Appeals erroneously agreed with the County that the phrase "otherwise exempt under this act or other laws" in RCW 42.56.904 incorporates RCW 42.56.290 and all the existing case law on privilege and work product under which

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<sup>6</sup> The work product exemption in RCW 42.56.290 is *not* limited to cases that are still pending. The irrelevant assertion that the *Kilduff* case was still being "actively litigated," *Unpublished Opinion* at 7, indicates that the Court of Appeals did not understand how RCW 42.56.290 works.

descriptions of work performed in invoices are exempt as work product. WCOG repeatedly explained that this interpretation of RCW 42.56.904 renders the underlined text meaningless:

It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.

If the phrase “otherwise exempt” included the preexisting PRA exemptions for privilege and work product—allowing blanket redaction of all descriptions of work performed without any particular justification—then the underlined language (above) would be pointless and ineffective. Such an interpretation is impermissible under the PRA and as a matter of statutory construction. RCW 42.56.030; *State v. Flowers*, 154 Wn. App. 462, 466, 225 P.3d 476 (2010).

Like the County and the trial court, the Court of Appeals made no attempt to respond to WCOG's point or to explain how its interpretation of RCW 42.56.904 actually gave effect to all

the language of the statute. Instead, the court erroneously asserted that its interpretation of the statute was based on the “plain” language of the statute. *Unpublished Opinion* at 9-10. The court also ignored the legislative history of RCW 42.56.904 based on its erroneous interpretation of the statute. *Id.* at 9.<sup>7</sup>

The Court of Appeals erroneously concluded that WCOG’s correct, narrow interpretation of RCW 42.56.904 would require the disclosure of privileged materials and/or allow WCOG to “decipher” the County’s litigation plans. *Unpublished Opinion* at 8. On the contrary, the 2007 legislature was aware that attorney invoices might require narrow redactions to protect actual attorney mental impressions, theories and strategy. RCW 42.56.904 specifically permits agencies to redact descriptions of work performed but “only if they would reveal an attorney’s mental impressions, actual legal advice, theories, or opinions.” The Court of Appeals erroneously second-guessed the 2007

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<sup>7</sup> The Court of Appeals correctly ignored the litany of irrelevant work product cases repeatedly cited by the County. *See Resp. Br.* at 44-53.

legislature on the policy issue of what should be redacted from attorney invoices where such invoices are paid with tax dollars. Like the County, the Court of Appeals was unable to explain why the narrow redactions actually permitted by RCW 42.56.904 were not sufficient to protect the County's legal interests.

This Court should grant review under RAP 13.4(b)(1) and (2) because the unpublished opinion, which interprets RCW 42.56.904 to have no legal effect whatsoever, directly conflicts with this Court's opinion in *Yakima County*, 170 Wn.2d 775, and the Court of Appeals' opinion in *Asotin County*, 7 Wn. App. 2d 143 which correctly note that RCW 42.56.904 significantly restricted the redaction of attorney invoices under the PRA. This Court should also grant review under RAP 13.4(b)(4) because the correct application of RCW 42.56.904 in the six counties in Division One is an issue of substantial public interest that needs to be resolved by this Court.

**B. The County's exemption logs do not comply with RCW 42.56.210(3) and RCW 42.56.904.**

In addition to RCW 42.56.210(3), which requires agencies to explain in writing why records are redacted or withheld, RCW 42.56.904 imposes a specific additional restriction on the redaction of attorney invoices, requiring agencies to “justify each redaction and narrowly construe any exemption to full disclosure.” That statute, combined with RCW 42.56.210(3), required the County to actually explain the necessity of each individual redaction. Repeatedly citing the same redaction code does not comply with RCW 42.56.904 whether or not such codes would comply with RCW 42.56.210(3).

The Court of Appeals (i) erroneously asserted that WCOG only challenged the County's compliance with RCW 42.56.210(3) and (ii) completely ignored the specific redaction requirement in RCW 42.56.904. *See Unpublished Opinion* at 11-13. The cases relied on by the Court of Appeals do not address RCW 42.56.904.



This Court should grant review under RAP 13.4 because the Court of Appeals' interpretation of the specific redaction requirement in RCW 42.56.904 renders the statutory text meaningless, in violation of basic principles of statutory construction. *See Flowers*, 154 Wn. App. at 466,

**C. The County's overt consideration of WCOG's identity as the requestor violates RCW 42.56.080(2).**

The PRA explicitly prohibits consideration of WCOG's identity as requestor or the purpose of its request. RCW 42.56.080(2); *Livingston v. Cedeno*, 164 Wn.2d 46, 186 P.3d 1055 (2008). In this case the County prosecutor admitted that his decision to withhold the *Kilduff* invoices was based, at least in part, on the fact that WCOG and its undersigned counsel were involved in the *Kilduff* case. CP 229-230. The prosecutor even suggested that WCOG's relationship with the plaintiff in *Kilduff* required the Court to treat WCOG differently from other requestors. *Id.*

The Court of Appeals held that the County did not violate RCW 42.56.080 for two reasons, both of which are erroneous as

a matter of law. First, the court stated that the County “appropriately” redacted the invoices. *Unpublished Opinion* at 11. The court erroneously assumed that the County was **required** to redact all descriptions of work performed and/or that the County would not have waived some or all of its work product exemptions if WCOG were not the requestor. Second, the court improperly shifted the burden of proof to WCOG, stating that “WCOG produced no evidence” that the County would have treated another requestor differently. Under RCW 42.56.550(1) WCOG had no obligation to prove that the County improperly discriminated against WCOG. On the contrary, the County had the burden to prove that it treated WCOG the same as any other requestor but admitted that it had not done so.

**D. WCOG requests an award of reasonable attorney’s fees for this appeal pursuant to RCW 42.56.550(4).**

Pursuant to RAP 18.1 and RCW 42.56.550(4) WCOG requests an award of reasonable attorney’s fees for this appeal, including the attorney’s fees reasonably incurred by WCOG in the Court of Appeals. WCOG will provide the affidavit required

by RAP 18.1(d) if and when the Court awards appellant attorney's fees for this appeal.

### **VIII. CONCLUSION**

In sum, the Court of Appeals' interpretation of RCW 42.56.904 is erroneous as a matter of law. This Court should grant review under RAP 13.4(b)(1),(2) and (4), reverse the lower courts, award WCOG its reasonable attorney's fees for this appeal, and remand this case to the superior court for further proceedings.

### **XI. APPENDICES**

**Appendix A** Unpublished Opinion (11/13/23)

**Appendix B** SHB 1897 House Bill Report (2007)

This brief contains 4608 words (or less), excluding the parts of the brief exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 13th day of  
December, 2023,



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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 13th day of December, 2023, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF):

Jeffrey S Myers  
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William John Crittenden, WSBA No. 22033

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SAN JUAN COUNTY, a municipal  
corporation of the State of Washington,

Respondent,

v.

WASHINGTON COALITION FOR  
OPEN GOVERNMENT, a Washington  
non-profit corporation,,

Appellant.

No. 84941-7-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, C.J. — The purpose of the Public Records Act (PRA), ch. 42.56 RCW, is to protect the public’s interest in open and accountable government. In 2020, the Washington Coalition for Open Government (WCOG) made a PRA request of San Juan County. San Juan County sued WCOG when it sought unredacted attorney invoices in a format that the County did not regularly use, concerning payments made to outside counsel representing the County in litigation concerning the PRA. San Juan County provided the invoices but redacted all descriptions of the work provided. Following an *in camera* review, the trial court concluded that San Juan County appropriately redacted the invoices.

On appeal, WCOG contends that (1) San Juan County inappropriately redacted the invoices in violation of RCW 45.26.904; (2) that the County violated RCW 42.56.080(2) by considering WCOG’s identity; (3) that the County’s

explanations of redactions were insufficient in violation of RCW 42.56.210(3); and (4) that WCOG is entitled to attorney fees. We find no error and affirm.

## FACTS

### Background

In 2015, Edward Kilduff sued San Juan County alleging that a local ordinance, which created an additional administrative exhaustion procedure to the PRA violated it.<sup>1</sup> During litigation, Kilduff was represented by a board member of the Washington Coalition for Open Government (WCOG) and San Juan County hired outside counsel.<sup>2</sup> Our state Supreme Court ultimately concluded that San Juan County did not possess the authority to add an administrative exhaustion requirement to the PRA and remanded the case for further proceedings.

### Present Litigation

In April 2020, while Kilduff was on remand, WCOG made a public records request seeking invoices of the outside counsel San Juan County had hired in Kilduff. Worried that San Juan County was misappropriating funds, WCOG requested “all invoices, contracts, correspondence, notes, bids, proposals, records relating to conflicts of interest, meeting minutes, and any other records relating to [San Juan] County’s use of outside counsel in Kilduff v. San Juan

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<sup>1</sup> The underlying facts are set forth in Kilduff v. San Juan County, 194 Wn.2d 859, 453 P.3d 719 (2019).

<sup>2</sup> See Kilduff v. San Juan County, 194 Wn.2d 859, 453 P.3d 719 (2019). (Michele Lynn Earl-Hubbard, board member of WCOG, listed as counsel for Edward Kilduff).

County.” A month later, San Juan County provided the invoices, which were heavily redacted, but included the hours and total dollar amounts billed.

As part of their PRA claim, WCOG requested the documents in a format that San Juan County did not typically use. In response to the request, the County sued WCOG,<sup>3</sup> seeking a declaratory judgment that it need not provide the records in an electronic format incompatible with its tracking system. WCOG later withdrew the formatting piece of their PRA request, instead filing a counterclaim asserting that San Juan County’s invoices were improperly and excessively redacted.

During discovery, WCOG sought information about how San Juan County responded to its original PRA request, as well as all attorney invoices that dealt with any PRA requests starting on January 1, 2018. The County objected, arguing that the requests were overly broad and sought documents protected by work product and attorney-client privilege. WCOG then sought those same records through the PRA.

When San Juan County propounded discovery requests to WCOG, it similarly sought production of WCOG’s invoices relating to the PRA request, its current suit, and its participation in Kilduff. WCOG objected, arguing that such a request called for protected work product and exceeded the scope of discovery.

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<sup>3</sup> San Juan County initially named William Crittenden as respondent in the suit as Crittenden made the request without disclosing that WCOG was his client. Once San Juan County determined that WCOG was the true requestor, it modified the complaint to name WCOG.

In January 2022, WCOG moved for partial summary judgment, arguing San Juan County's production of the redacted invoices violated the PRA. Relying on invoices it had obtained from other agencies in separate PRA requests, which were less heavily redacted, WCOG asserted San Juan County had excessively redacted the invoices in violation of the PRA. WCOG asked the court to compel the County to produce "properly redacted records" and also sought *in camera* review of the documents. The County then cross-moved for summary judgment on the grounds that the documents were relevant to an ongoing controversy and thus, exempt under the PRA.

The court denied both parties' motions for summary judgment, concluding that issues of fact still existed, but granted WCOG's motion for *in camera* review. Following *in camera* review of the redacted documents, the court found that the redacted material was work product protected by privilege. The court stated that "the descriptions of the work performed by attorneys on the invoices could be redacted in its entirety and that [San Juan] County was not obligated to go line by line to select portions for more limited redaction."

The court denied WCOG's counterclaim and dismissed the matter with prejudice. The court then denied WCOG's motion for reconsideration. WCOG appeals.

#### ANALYSIS

WCOG raises four issues on appeal, including whether San Juan County's invoice redactions complied with RCW 42.56.904, whether San Juan County violated RCW 42.56.080(2) by taking WCOG's identity into account, whether San



Juan County's explanations of the redactions satisfied RCW 42.56.210 (3), and whether WCOG is entitled to attorney fees. We address each in turn.<sup>4</sup>

Standard of Review

"Agency action taken or challenged under the PRA is reviewed de novo." RCW 42.56.550(3); Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (PAWS). "[T]he appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." PAWS, 125 Wn.2d at 252.

RCW 42.56.904

WCOG contends that San Juan County violated RCW 42.56.904, which prohibits redacting attorney invoices in their entirety and limits redactions to specific exemptions, by redacting all descriptions in the invoices it provided, regardless of whether they contained attorney mental impressions, legal advice, theories, or opinions. We conclude that the invoice descriptions were exempt under RCW 42.56.290.

Our Supreme Court has consistently reinforced the notion that "the [PRA] 'is a strongly worded mandate for broad disclosure of public records.'" Soter v. Cowles Publishing Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). "We liberally

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<sup>4</sup> WCOG appeals both the Findings, Conclusions, and Order Upon In Camera Review and the Order on Reconsideration. As we find no error with the *in camera* findings, there is no error on the trial court's part for denying the motion for reconsideration.

construe the PRA in favor of disclosure.” RCW 42.56.030; Soter, 162 Wn.2d at 731. “The PRA requires a government agency to disclose any public record upon request; however, an agency lawfully withholds production of records if one of the PRA’s enumerated exemptions applies.” RCW 42.56.070(1); Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). “The PRA’s numerous exemptions protect certain records from disclosure and the PRA also incorporates any ‘other statute’ that prohibits disclosure of records.” Dep’t of Transp. v. Mendoza de Sugiyama, 182 Wn. App 588, 597, 330 P.3d 209 (2014) (quoting RCW 42.56.070). Because we narrowly construe the PRA’s exemptions in favor of disclosure, the burden is on the agency to establish that an exemption applies. Mendoza de Sugiyama, 182 Wn. App at 597; RCW 42.56.030; RCW 42.56.550(1). “In construing the PRA, we look at the Act in its entirety in order to enforce the law’s overall purpose.” Rental Hous. Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). And when interpreting a statute, the court, if possible, must “ ‘harmonize and give effect to all of the relevant statutory language.’ ” State v. Peterson, 198 Wn.2d 643, 647, 498 P.3d 937 (2021) (quoting State v. Cyr, 195 Wn.2d 492, 502, 461 P.3d 360 (2020)).

There are two sections of the PRA at issue here. The first, RCW 42.56.904, provides that attorney invoices may not be “withheld in their entirety” and that “specific descriptions of work performed be redacted only if they would reveal an attorney’s mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other

laws.” The burden is on the public entity to justify each redaction and narrowly construe any exemption to full disclosure. RCW 42.56.904.

The second, RCW 42.56.290, is one such “other law.” John Doe v. Wash. State Patrol, 185 Wn.2d 363, 373, 374 P.3d 63 (2016). RCW 42.56.290 establishes the “controversy exemption,” which provides that “[r]ecords that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.” “This is a categorical exception” that “applies to any materials that would not be discoverable in the context of ‘a controversy under the civil rules of pretrial discovery.’” Mendoza de Sugiyama, 182 Wn. App at 597 (internal quotation marks omitted) (quoting Soter, 162 Wn.2d at 731). “Our Supreme Court has held that the controversy exemption applies to the work product doctrine and the attorney-client privilege.” Mendoza de Sugiyama, 182 Wn. App at 597. Attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain privileged communications. Soter, 162 Wn.2d at 745. Similarly, work product extends to documents and tangible things prepared in anticipation of litigation or for trial. CR 26(b)(4).

Here, WCOG sought access to attorney invoices from a case being actively litigated and in which both WCOG and San Juan County had a stake.

Looking first to work product, the invoices were created “by or for” San Juan County to use in the Kilduff litigation with the County’s expectation that they be privileged during trial. The invoices documented the actions the attorneys

took, the hours spent, and the amount charged for the ongoing Kilduff case. As a result, they constitute work product under CR 26(b)(4) and are not discoverable. Neither party makes any arguments about waiver and WCOG has made no assertion of undue hardship.

As to attorney-client privilege, the unredacted records detail exactly the activities counsel took in furtherance of the litigation. This includes communications between attorney and client and highlights documents that contain privileged communications. These are privileged materials. In conjunction with the time and money spent, it could be relatively easy for opposing counsel to decipher San Juan County's litigation plan and its communications with its attorneys.

Because the descriptions are privileged under work product and attorney-client privilege and are therefore not subject to pre-trial discovery, they are similarly not subject to the PRA under RCW 42.56.290. WCOG fails to acknowledge that the PRA exempts non-discoverable information for pending controversies and that it sought such records. Moreover, it ignores that San Juan County did not redact the invoices in their entirety—neither the hours spent nor the amounts billed were redacted from the invoices. RCW 42.56.290 is directly applicable because WCOG sought information that is not discoverable during on-going litigation.

WCOG's reliance on redacted invoices from other matters is unpersuasive. Attached as exhibits to WCOG's counsel's declaration, WCOG points to copies of invoices issued by San Juan County's attorney in other cases.

WCOG cites no authority for the proposition that redactions must look like those cases. And in those cases, WCOG sought invoices for work performed post-trial, as opposed to work performed while the parties were actively litigating. The invoices WCOG seeks in the present case concern pretrial matters protected by attorney-client privilege and the work product doctrine. Why the County may have spent a certain amount of money to pursue one legal theory over another is information that is protected while the litigation is ongoing. Moreover, we note that WCOG received the information it ultimately sought: the total amount of money San Juan County paid outside counsel to litigate the Kilduff matter.

We note that both parties dedicate a substantial portion of their briefing and oral argument to the legislative history of RCW 42.56.904. But the statute is unambiguous and therefore we need not consider the legislative history.

“Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent.” Rental Hous. Ass’n, 165 Wn.2d at 536. Only when a statute is ambiguous do we “resort to aids of construction, including legislative history.” City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

RCW 42.56.904 states,

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden

upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.

The statute specifically includes exemptions under “other laws.” As noted, “other laws” includes other provisions of the PRA. As the language of the statute is plain on its face, we do not look to the legislative history.

At oral argument, WCOG claimed that reading RCW 42.56.290 as exempting work product would render the entirety of the PRA meaningless because RCW 42.56.904 was meant to limit redactions of attorney invoices as allowed by earlier sections of the statute.<sup>5</sup> But again, the language of the statute is plain on its face and specifically includes exemptions provided by “other laws.” RCW 42.56.904. We have previously held that RCW 42.56.290 is one such other law and the rules of statutory interpretation do not require us to dig deeper to find an ambiguity.

Because the invoices were properly exempt under RCW 42.56.290, we conclude that San Juan County’s redactions complied with RCW 42.56.904.

RCW 42.56.080

WCOG next contends that San Juan County violated RCW 42.56.080(2), which prohibits distinguishing among persons requesting records, by using WCOG’s identity as the requestor to justify withholding public records. We conclude that San Juan County did not violate the statute.

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<sup>5</sup> Wash. Court of Appeals oral argument, San Juan County v. WCOG, No. 84941-7-I (Sept. 26, 2023), at 02:33, 03:15, 03:55, audio recording by TVW, Washington State’s Public Affairs Network, <https://twv.org/video/division-1-court-of-appeals-2023091214/?eventID=2023091214>.

RCW 42.56.080(2) states that “agencies shall not distinguish among persons requesting records.” A requestor’s use of information may not be the basis for denying a request. DeLong v. Parmelee, 157 Wn. App. 119, 146, 236 P.3d 936 (2010). Rather, an agency “must respond to all public disclosure requests without regard to the status or motivation of the requestor.” Livingston v. Cedeno, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008).

Here, San Juan County responded to WCOG’s request. WCOG argues that the County excessively redacted the invoices in response to WCOG’s identity but this argument is unpersuasive because as discussed, the County appropriately redacted the invoices. And apart from being an adverse party in Kilduff, WCOG provides no evidence that the County would have, or did, treat them differently than any other requestor. We conclude that San Juan County did not violate RCW 42.56.080(2).

RCW 42.56.210(3)

WCOG also asserts that San Juan County failed to provide sufficiently detailed explanations of how each exemption applied to withheld or redacted records, in violation of RCW 42.56.210(3). Because the explanations were sufficiently detailed but high level enough to protect the privileged information, we conclude that the County’s explanations satisfy the statutory requirement.

RCW 42.56.210(3) states that “agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” The brief

explanations “need not be elaborate, but should include the type of record, it’s date and number of pages, and, unless otherwise protected, the author and recipient. . . Where use of any identifying features would reveal protected content, the agency may designate the records by a numbered sequence.”

PAWS, 125 Wn.2d at 608 n.18. “Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency’s response.” WAC 44-14-04004(5)(b). These codes allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption. Rental Housing Ass’n, 165 Wn.2d at 539.

Here, San Juan County inserted codes for each claimed exemption into the portion of record redacted under that exemption. The County redacted only the descriptions of work. Because the rest of the documents remained unredacted, the type of record and the dates and number of pages were all accessible. The County provided the following brief explanations, coded as either “1C” or “2”:

- 1C. RCW 42.56.290 exempts from disclosure records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts. The referenced records are relevant to a controversy to which San Juan County is a party and would not be available under the civil rules of discovery.
2. RCW 5.60.060(2)(a) and RCW 42.56.070(1) exempt from disclosure communication made by a client to an attorney, or the attorney’s advice given thereon in the course of professional employment. The referenced information is a confidential attorney-client communication that is exempt from



disclosure. See, Hangartner v. Seattle, 151 Wn.2d 439 (2004); Sanders v. State, 169 Wn.2d 827 (2020).

These coded explanations track directly to the Washington Administrative Code (WAC) requirements. The explanations, in conjunction with the documents themselves, provide enough information that the requestor can make a threshold determination as to whether the information was appropriately redacted. To require more detailed explanations or further identifying features would have revealed content protected under attorney-client privilege and work product. We conclude that San Juan County's brief explanations satisfied the statutory requirement.

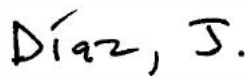
Attorney Fees

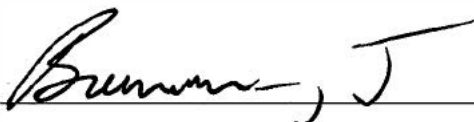
WCOG requests attorney fees under the PRA, which provides that “[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.” RCW 42.56.550(4). Because WCOG does not prevail on appeal, we decline to award it fees.

We affirm.

WE CONCUR:

  
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# HOUSE BILL REPORT

## SHB 1897

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### As Passed Legislature

**Title:** An act relating to disclosure of attorney invoices.

**Brief Description:** Expressing the legislature's intent that public disclosure requirements do not allow attorney invoices to be exempt in their entirety.

**Sponsors:** By House Committee on State Government & Tribal Affairs (originally sponsored by Representatives Williams and Hunt).

**Brief History:**

**Committee Activity:**

State Government & Tribal Affairs: 2/23/07, 2/27/07 [DPS].

**Floor Activity:**

Passed House: 3/13/07, 94-2.

Passed Senate: 4/12/07, 44-4.

Passed Legislature.

<h3>Brief Summary of Substitute Bill</h3>
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- |   |
|---|
| <ul style="list-style-type: none"><li>• Declares that it is the intent of the Legislature to clarify that attorney invoices from private legal counsel are not exempt from disclosure under the Public Records Act.</li></ul> |
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### HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Hunt, Chair; Appleton, Vice Chair; Chandler, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Green, Kretz, McDermott, Miloscia and Ormsby.

**Staff:** Alison Hellberg (786-7152).

**Background:**

The Public Records Act (Act) requires that all state and local government agencies make all public records available for public disclosure unless they fall within certain statutory

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exemptions narrowly in order to effectuate a general policy favoring disclosure.

Records that are relevant to a controversy to which an agency is a party that would not be discoverable to another party under the superior court rules of pretrial discovery are exempt from disclosure under the Act. Specifically exempt from disclosure is an attorney's work product. The definition of work product includes "factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions." *Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998).

The attorney-client privilege also exempts certain public records from disclosure. The attorney-client privilege, however, is a narrow privilege and protects only "communication or advice between attorney and client in the course of the attorney's professional employment." *Hangartner v. City of Seattle*, 151 Wn.2d 439 (2004).

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**Summary of Substitute Bill:**

The Legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditures of public resources upon private legal counsel or private consultants.

It is the intent of the Legislature to clarify that no reasonable construction of the Public Records Act has ever allowed attorney invoices to be withheld in their entirety by a public entity. It is further the intent of the Legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, opinion, or are otherwise exempt under this act or other laws. The burden is on the public entity to justify each redaction and narrowly construe any exception to full disclosure.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:**

(In support) The public has a right to know the costs of outside legal counsel retained by governmental agencies. It is also essential that the attorney-client confidences be protected. This bill is designed to strike a balance between these two important competing interests. It is important that the public know how much government is spending on legal costs. This is also the case where risk pool costs increase on account of government liability.

Elected county commissioners in Thurston county are spending hundreds of thousands of tax dollars defending against sexual discrimination and retaliation. Taxpayers have a right to

know what is being spent and for what services. The Olympian has asked for this information in a public records request. The attorney that the commissioners hired to defend the county is refusing to share any information beyond the \$250,000 deductible, on the basis that it is between the insurance company and the county's attorney. The implication that a document needs to be in an agency's possession to be disclosable is wrong. This could result in agencies storing documents elsewhere to avoid disclosure. Full disclosure of the acts creating liability will better deter future liability. Attorneys being paid by taxpayer money should not be allowed to hide public records.

Other government agencies, such as the Seattle Monorail Authority, handed over similar information with numerous redactions. Nothing was released that would have harmed them in litigation. Also, under the bill, a government agency would be able to redact anything that is work product or would violate the attorney-client privilege. Current law already requires that this information be disclosed. This bill is merely a clarification.

When an attorney represents a public entity, he or she is not acting as a private attorney. There is a large body of caselaw that says that an attorney representing a public entity has a duty of conscientious service. That attorney must consider the public's concerns. This bill does not go far enough because what exists right now is a system of shadow government. Attorneys are working for associations or groups, like the risk pool, which are agencies in the twilight. There are no cases in point regarding this issue in Washington State.

(Opposed) The amount of the attorney invoices should be disclosed. That is accountability. The concern with the bill, however, is that the Public Records Act is not intended to create an advantage to one side in litigation involving government entities. This bill tilts the playing field in favor of those suing government by narrowing the scope of what courts have considered to be work product. This bill only includes a portion of what is typically considered work product. The best place to determine what is work product is in the courts. The entire sentence, starting at the end of line seven should be deleted from the bill. Or, the bill should be amended to include the entire definition of work product.

The bill also creates an incentive for public sector lawyers to be more ambiguous in their billing statements. This would be a disservice to the public.

Attorney invoices tell a story on how a lawyer develops a case. They serve as a roadmap to litigation. This bill creates an unfair advantage because a public sector attorney cannot ask the same of the other side. It will be very problematic for those who have to defend state and local governments. Public entities should be treated the same way as private litigants. Governments have the right to competent counsel. Guidance in this area could come from how the Bar Association (Bar) looked at billing generally. The Bar decided that in situations where an insurer hires counsel for the insured the dollar amounts are not confidential. The rest of the information is confidential.

**Persons Testifying:** (In support) Representative Williams, prime sponsor; Vickie Kilgore, The Olympian; Greg Overstreet, Office of the Attorney General; Andrew Cook, Building Industry Association of Washington; Judy Endejan, Washington Coalition for Open

Government; Arthur West; and Rowland Thompson, Allied Daily Newspapers of Washington.

(Opposed) Jeffrey Myers, Law Lyman Daniel Kamerrer & Bogdanovich PS; Mel Sorensen, Washington Defense Trial Lawyers; Charlie Brown, Puget Sound School Coalition; and Dan Lloyd, Lee Smart Cook Martin & Patterson.

**Persons Signed In To Testify But Not Testifying:** None.

**WILLIAM JOHN CRITTENDEN**

**December 13, 2023 - 11:36 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 84941-7  
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**Superior Court Case Number:** 20-2-01095-9

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