No. 444984-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST

Appellant,

vs.

DEPARTMENT OF LICENSING

Respondent

APPELLANT ARTHUR WEST'S OPENING BRIEF

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I. INTRODUCTION

This is a Public Records Act Case. Mr. Arthur West, Plaintiff and Appellant, made a public records act request to the Washington State Department of Licensing seeking records relating to the fuel tax refund amounts made to Washington's Indian Tribes from moneys collected by the States. The Department responded by asserting, improperly, an exemption that rightly applies to information provided to the State by the tribes, not to records of fuel tax refund amounts issued by the Department. Further, the Department missed its own deadlines, refused to produce simple records, and produced the most readily available, most clearly responsive records after the Trial Court dismissed Mr. West's case on summary judgment at the show cause hearing.

This could have been a relatively simple case focused on the propriety of the exemption claimed – information received from the tribes – and whether it applied to records of money refunded to the tribes by the Department, had the Department acted in good faith to respond to Mr. West's request in a timely fashion. Instead, this case demonstrates an agency complicating and confusing the issue of whether very simple lists and indexes of money paid to the tribes are actually exempt as "information received from the tribes."

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The Trial Court erred in concluding that the Department of Licensing properly redacted or withheld records pursuant to statutory exemption. *When the statutes exempt "information from the tribe or tribal retailers received by the state" from public inspection and copying, do those statutes exempt disclosure of amounts of money refunded by the state to tribes? No.*
2. The Trial Court erred in concluding that the Department responded to Mr. West's record requests in a timely manner. *Where the Department waited until after the show cause hearing in this matter before it disclosed records to Mr. West that the Department had previously produced to other requestors, and that the Department had already compiled and available since a date preceding Mr. West's request, was that response in a timely manner? Where the Department's own records indicate that the Department did not begin its search for certain responsive records until after Mr. West filed this lawsuit and began conducting discovery, was that response in a timely manner? No.*
3. The Trial Court erred in concluding that Mr. West's lawsuit was unnecessary to compel the Department to produce the records he

had requested. *Is not the correct legal question for deciding whether a requestor is the prevailing party whether the records should have been disclosed on request? Where the Department's records show that it conducted its searches for responsive records after Mr. West filed his lawsuit and began conducting discovery, was not Mr. West's lawsuit reasonably necessary? Where the Department silently withheld records from Mr. West until after the show cause hearing in this matter, was not Mr. West's lawsuit reasonably necessary? Yes.*

4. The Trial Court erred in denying Mr. West's motion for reconsideration. *Where the newly discovered evidence – the records that the Department silently withheld until after the show cause hearing – was material and could not have been discovered with reasonable diligence by Mr. West, should not the Trial Court have granted Mr. West reconsideration? Yes.*

III. STATEMENT OF THE CASE

Mr. Arthur West, Plaintiff and Appellant, made a public records act ("PRA") request to Defendant and Respondent the Washington State Department of Licensing, seeking records related to the Department's fuel tax program, a program where the Department refunds fuel tax money to federally recognized Indian tribes within Washington, pursuant to

agreements between the state and the tribes. The Department improperly responded.

A. Background Facts

Our Supreme Court, in Automotive United Trades Organization v. State, 175 Wn.2d 214, 285 P.3d 52 (2012) ("AUTO"), described the factual background of the Department's fuel tax program that is at the heart of Mr. West's public records request:

> To avoid taxing Indian tribes or their members in Indian Country, in 2007 the legislature amended and added laws relating to the administration of fuel taxes. S.B. Rep. on S.B. 5272, 60th Leg., Reg. Sess. (Wash. 2007). This legislation authorizes the governor or her delegate to enter into agreements with any federally recognized Indian tribe within the state "regarding motor vehicle fuel taxes included in the price of fuel delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on reservation or trust property." RCW 82.36.450(1), (5). Such agreements "may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax." RCW 82.36.450(1).
>
> Pursuant to this authorization, the State has entered into fuel tax compacts with various tribes. Under most of these compacts, the tribes have agreed to comply with certain statutory requirements in exchange for the State's refunding 75 percent of the state fuel taxes on fuel purchased by the tribes or tribal retailers.

AUTO, 175 Wn.2d at 220.

Of the federally-recognized tribes in our State, 17 of them have entered into a "75-25 agreement" with the State. CP 1202-1203. Under these 75-25 agreements, a tribe sends the Department invoices for the purchase of fuel – typically records from those selling fuel to the tribes – and a tribe will often also send the Department a summary document of what the tribe believes the refund should be, pursuant to agreement, for any given month. CP 1202-1203. The tribes are also required to send the Department an annual audit of the tribe's fuel records, conducted by an accounting firm. CP 1203. Thereafter, the Department will issue a refund to these tribes in the amount of "75 percent of the state fuel taxes on fuel purchased by the tribes or tribal retailers." AUTO, 175 Wn.2d at 220. Most refunds are issued on a monthly basis.

Besides the 75-25 agreements, there are also "computational agreements." CP 1204. Six tribes in Washington have entered into this kind of agreements. Instead of reporting a tribe's purchases of fuel and the taxes they have paid, the tribe will report the number of enrolled tribal members to the State. Then the Department's Prorate and Fuel Tax program will multiply that figure by an "average consumption figure for annual use of fuel for Washington residents" (promulgated by the Department of Transportation) and again multiply it by the amount of gas tax for the current period, in order to determine the amount of the refund.

CP 1204. Again, thereafter the Department will issue a refund in the amount of "75 percent of the state fuel taxes on fuel purchased by the tribes or tribal retailers" to those tribes who have entered into the computational agreements with the State. AUTO, 175 Wn.2d at 220. Most refunds are issued on a monthly basis.

B. Facts Specific to this Case

On January 12, 2012, Mr. West made a PRA request to the Department. CP 89-90. The Department received it on January 23. Mr. West sought:

> (1) All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present;
>
> (2) All audit reports concerning the expenditure of such funds; and
>
> (3) All communications concerning the disclosure or withholding of such records, or the propriety of disclosing or withholding such records, [J]anuary of 2011 to present.

CP 89. Ms. Hannah Fultz, the Department's Public Records Officer, responded to Mr. West within 5 working days of receiving Mr. West's request. She sought clarification. CP 93. Mr. West emailed his clarification to her and Ms. Fultz replied, explaining to Mr. West that she expected to make the first installment of records available to him on

March 9, more than two months after the Department received Mr. West's request. CP 98.

Mr. West wrote back immediately, saying:

> ...as far as the total amounts of money paid to the tribes are concerned, this information is not voluminous and should be available immediately, especially since it is probably kept in a computer file to begin with. Please realize that this request has been pending since January 12, and for simple records like a one or two page accounting of funds paid to the tribes, the additional period of time is unreasonable, especially in light of the long time consumed in the department's response and 'clarification' process.

CP 97. Mr. West specifically asked:

> Please let me know if the Department is actually willing to disclose the dollar amounts paid to the tribes....

CP 97. Mr. West also made a second request for disclosure of "any indexes of public records maintained by the department that encompass the gas tax refund amounts, and any applicable retention and destruction schedules." CP 97. Ms. Fultz responded within five business days, acknowledging Mr. West's additional request. CP 95.

Just as Mr. West thought, it was not hard for the Department to find records of the total amounts paid to the tribes. As early as February 17 – one week after Mr. West's email! – the Department had compiled responsive records to part 1 (records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present) and to part 2

(all audit reports concerning the expenditure of such funds) of Mr. West's request. "Hey, Hannah, just a reminder that I have the Refund amount spreadsheets and Audits in hard copy ready for pick-up," wrote a Department employee on February 17. CP 114. But the Department did not give those records to Mr. West.

Instead, three weeks later, on March 7, Ms. Fultz wrote to Mr. West, making the Department's first *partial* disclosure, while still *withholding* all the records. She wrote: "Records responsive to items #1 and #2 ["All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present" and "All audit reports concerning the expenditure of such funds"] are exempt from disclosure. Please see the attached Exemption/Redaction Log for details." CP 129; CP 133-138.

The exemption log listed "Agreement Compliance Audits" that the Department was withholding in their entirety. CP 133-138. But even this exemption log was not complete. The Department refused to even identify certain records, save to tell Mr. West that it was withholding them. "Please note that pages #000001 to 000020 aren't listed on the log. The Department is currently working with our attorneys to determine whether or not these pages are exempt, either in whole or in part. Pending their review, and adding in a short time to appropriately document this outcome

for you, I expect to report the outcome to you by March 16, 2012." CP 129.

Finally, as to item #3 ["All communications concerning the disclosure or withholding of such records, or the propriety of disclosing or withholding such records, January of 2011 to present"], Ms. Fultz wrote: "The Department continues to search for and review records responsive to item #3. We expect to provide these to you no later than March 23, 2012, and in installments as they become available." CP 129.

Frustrated with the DOL's inadequate response and with its blanket statement that the records responsive to his first two items were "exempt from disclosure," Mr. West filed this PRA lawsuit on March 8, 2012. CP 5-7.

The next day, Ms. Fultz again wrote to Mr. West, responding to his February request for indexes and for retention and destruction schedules. CP 165. She wrote: "The outcome of our search and research is there aren't any responsive identifiable public records to the first component of your request seeking: 'Any indexes that encompass gas tax refund amounts.'" She described that in the fuel tax refund system, "indexes are system generated and used by the system to locate records in a quick manner." She also wrote; "It is not something we can provide (as an identifiable public record) because it is an operating system controlled

function." CP 165. Ms. Fultz also provided Mr. West with the retention and destruction schedules that encompass the gas tax refund amounts. They included: "Fuel Tax Federal Report and Monthly Statistics Reports," "Prorate/Fuel Tax Imaging Source Documents and Imaged Refund Invoice Packet," Monthly Refund Statistics Reports," "Special Fuel Tax Returns," and "Fuel Tax Returns." CP 165.

After this last letter, the Department sent no more communications or disclosures to Mr. West for three months. It was as if the Department had simply abandoned its response to Mr. West's PRA request. The Department did not write to him by March 16 (*see* CP 129) to tell him whether it had determined that exemptions existed for pages #000001 to 000020, or even to identify those pages in an exemption log pending a decision on whether the Department would claim exemptions. The Department did not write to Mr. West by March 23 (*see* CP 129) to provide him with records or installments of records in response to his request #3 (communications concerning withholding or disclosure of fuel tax refund records). Nor did the Department write to Mr. West to tell him that it needed more time. It simply ignored, without explanation, its own self-imposed deadlines.

Meanwhile, Mr. West, represented by counsel, moved to amend his complaint and filed an amended complaint. He also promulgated

discovery requests and noted up deposition of Ms. Fultz, Mr. Patrick Robinson (the applications manager of the Department's Information Systems Department), and Ms. Karla Laughlin (the administrator of the Department's Prorate and Fuel Tax Program).

In her deposition, Ms. Laughlin identified categories of records that were responsive to Mr. West's request for "All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present," like "a summary document that the refunds unit will produce. That document will basically confirm or validate the information that the tribe has provided, and then it will document what the refund should be" (CP 1207); and "a report that we give to the Department of Transportation" that lists "the monthly refund by tribe, as well as total refunds for that period of time" (CP 1209).

In her deposition, Ms. Fultz stated that the Department had completed its search for records responsive to items #1 and #2, and had disclosed all the records, except for the pages that were still under discussion with the Department's counsel: "We conducted a search, which is our normal process, reviewed the records, had consultations and discussions about those records. The records were exempt, and we produced an exemption/redaction log, except for, I believe, 21 or 22 pages, which are still under discussion with counsel." CP 1086. Ms. Fultz

testified that she expected the Department would make a decision within two weeks (that is, by June 4 – the Department had originally told Mr. West it would have an answer by March 16; *see* CP 129) of whether those pages -- pages #000001 to #000020 – were exempt. CP 1098.

On June 4, 2012, three full months after the Department's last communication to Mr. West, Ms. Fultz wrote to Mr. West. She provided a revised exemption log that eliminated an improperly-claimed exemption (but disclosed no additional records), and informed Mr. West that she would not yet be able to disclose records #000001-000020. Finally, Ms. Fultz informed Mr. West that she anticipated making another installment on June 11, 2012. CP 140.

June 11 came and went. More than a month later, on July 6, another Department employee, Ms. Sara Crosby, wrote to Mr. West. She provided him with an exemption log (that included both withheld records and redacted records) and an installment of heavily redacted records. CP 209-240. The Department did not disclose records #000001-000020. Ms. Crosby did the same on July 10 and July 23. CP 241-259; CP 262-323. The Department did not disclose records #000001-000020. All the records disclosed in the exemption log or produced with heavy redactions ostensibly pertained to item #1 of Mr. West's requests. The redactions

were such that the records are entirely useless; all dollar amounts of refunds made to the tribes by the Department were completely redacted.

Finally, on July 26, the Department disclosed records #000001-000020. The Department produced heavily redacted copies of records #000001-000020, as well as an exemption log. CP 1246-1265; CP 1244. On pages #000001-000020, all monthly refund amounts to the tribes had been redacted. The only dollar amounts that appeared were the total sums of money refunded to multiple tribes. CP 1246-1265. Even these are staggering. The Department refunds tens of millions of dollars of gas tax money to the tribes each year. CP 1246-1265.

The Department wrote again to Mr. West on 17 occasions between July and October. CP 350-383; CP 385-492; CP 494-549; CP 551-613; CP 615-650; CP 652-670; CP 672-682; CP 684-692; CP 694-716; CP 718-737; CP 739-748; CP 750-753; CP 755-793; CP 795-847; CP 849-901; and CP 903-1067. The Department disclosed the existence of tens of thousands of pages of records to Mr. West in exemption logs and in heavily redacted form.

The vast majority of them were ostensibly in response to Mr. West's item #1 of his January request. Roughly half of them appear to be redacted records created by the various tribes either requesting refunds or in support of their refund requests. That is, roughly half of the records

appear to **not be responsive** to Mr. West's request, since he sought records "showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present." A document created by a tribe containing a refund request, or a refund calculation, does not show an amount of gas tax money actually given or refunded. Roughly half were responsive, since they were created by the Department in processing the tribes' refund requests and showed – before redactions – the refund amounts. In all of these records, the amounts that were refunded to the tribes were redacted.

The Department also wrote to Mr. West on November 8, where it included the first installment of records that were responsive to item #3 of Mr. West's request – communications related to withholding or disclosure of records showing the fuel tax refund amounts. CP 1269-1270. The Department estimated "we hope to complete your request by the end of this month [November 30]." CP 1269. The Department wrote again on November 30, again producing records responsive to item #3 of Mr. West's request and again revising its prediction, estimating that production would be complete by "January 11, 2013." CP 1272-1273.

The show cause hearing date was set for December 14. Mr. West made a request for a CR 56(f) continuance because the Department had not yet completed its production. CP 1285-1286. At the hearing, the

Department argued, with respect to Mr. West's challenge of the tribal information exemption found in RCW 82.36.450:

> This exemption require the Department to exempt from public inspection and copying information from the tribe or tribal retailers received by the state or open to state review. Mr. West acknowledges in his pleadings that that exemption clearly applies to, for example, the number of gallons of fuel that a tribe reports to the Department of Licensing.
>
> Where the dispute lies is when the Department then also redacts the monetary amount, so you have a number of gallons of fuel times a percentage that equals monetary value. And Mr. West argues, well, that's not the information received from the tribe. However, such an interpretation would swallow the exception.
>
> The exception requires the Department or allows the Department to exempt from public disclosure tribal information. And by simply – if the Department were to disclose the value, the monetary amount, all a requester would have to do is solve for X. There would be no exception. There would be – the Department would not be protecting the information received from the tribe.

RP at 14-15, ll. 5-25; l. 1. The Trial Court granted summary judgment to the Department at the show cause hearing, denied Mr. West's CR 56(f) request for a continuance, and dismissed Mr. West's lawsuit with prejudice. RP at 26, ll. 8-25. The order signed by the Trial Court accurately reflected the Trial Court's ruling. CP 1339-1340.

Not two weeks after the show cause hearing, the Department made on last production to Mr. West. This production included records responsive to #3 of Mr. West's requests – communications concerning

disclosure or withholding of records with the fuel tax refund amounts – and records that had been silently withheld and that were responsive to #1 of Mr. West's request, including records that were most sought by Mr. West and that he had particularly requested from the Department:

> Finally, as far as the total amounts of money paid to the tribes are concerned, this information is not voluminous and should be available immediately, especially since it is probably kept in a computer file to begin with.

CP 97.

The production on December 27 included a 2008 Fuel Tax Refund Summary (excerpts are at CP 1581-1588); a 2009 Fuel Tax Refund Summary (excerpts are at CP 1590-1623); the Correspondence Computations and Refunds records that the Department produces that show the dollar numbers of the refunds [redacted] that the Department makes to the tribes (excerpts are at CP 1625-1632); Permit Inventory System records, organized by tribe, that show the dollar numbers of the refunds [redacted] that the Department makes to the tribes (excerpts are at CP 1635-1686; the warrant requests that the Department makes to General Accounting so that the fuel tax refunds could be properly accounted, that show the dollar numbers of the refunds [redacted] (excerpts are at CP 1688-1698; 1700-1708; and 1710-1717); the Department's September 15, 2011 response to the public records request made by KOMO's Tracy

Vedder (a date that *preceded* Mr. West's request) (excerpts at CP 1719, 1721-1728; and 1730-1785); and correspondence and refunds records (excerpts at CP 1815-1834). These late disclosed records contained within them lists of documents that themselves encompassed fuel tax refund amounts, like the Official Agency Payment Register that listed payments by warrant number and also included [redacted] fuel tax refund amounts. CP 1714-1715. In other words, this list of documents is an *index*.

Mr. West made a CR 59 Motion for Reconsideration to the Trial Court, arguing that the Trial Court should reconsider its grant of summary judgment under CR 59(a)(4) "newly discovered evidence" and CR 59(a)(7), that the decision was "contrary to law." The Trial Court denied Mr. West's Motion for Reconsideration. CP 1835-1836. The Trial Court denied the Motion for Reconsideration based on a Local Rule that is no longer good law: "Local Civil Rule 59 specifies as follows: 'Motions for Reconsideration are disfavored. The court will ordinarily deny such motions in the absence of showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." CP 1836. However, Thurston County LCR 59 had been amended effective September 1, 2011, and deleted the very language that the Trial Court quoted.

This appeal followed.

IV. ARGUMENT

A. The Standard of Review is De Novo

This Court reviews questions of law de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review de novo the Trial Court's rulings that the Department properly redacted or withheld records pursuant to statutory exemption, that the Department responded to Mr. West's record requests in a timely manner, and that Mr. West's lawsuit in this matter was unnecessary to compel the Department to produce the records that Mr. West had requested.

And as to the Trial Court's denial of Mr. West's motion for reconsideration, this Court should review it de novo as well, because the Trial Court was not deciding questions of fact, but making rulings as to the law.

> An appellate court will not reverse an order granting or denying a new trial motion, except when the trial court has abused its discretion. Detrick v. Garretson Packing Co., 73 Wn.2d 804, 812, 440 P.2d 834 (1968). However, this principle is subject to the limitation...that, when such an order is predicated upon rulings as to the law, no element of discretion is involved. Worthington v. Caldwell, 65 Wn.2d 269, 278, 396 P.2d 797 (1964).

State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). But even if abuse of discretion were the correct standard – which it is not – Mr. West would still prevail because a trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004).

B. The Department Improperly Withheld and Redacted Records Pursuant to Statutory Exemption

The Trial Court erred in failing to find that the Department improperly withheld and redacted records pursuant to statutory exemption. "I furthermore find that the Department properly identified every exemption." RP at 26, ll. 19-20. "[T]he Department properly redacted or withheld records pursuant to statutory exemption." CP 1340.

The Department's claimed tribal information exemption is not supported by law. The exemption claimed by the Department is found in two places:

> Information from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement shall be deemed to be personal information under [RCW 42.56.230(4)(b)] and exempt from public inspection and copying.

RCW 82.36.450(4).

> The following personal information is exempt from public inspection and copying under this chapter:....(4)

> Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would:....(b) violate the taxpayer's right to privacy.....

RCW 42.56.230. Because information from the tribe or tribal retailers received by the state under the terms of an agreement is deemed by the terms of the statute to "violate the taxpayer's right to privacy," it is exempt under the PRA from public inspection and copying.

Mr. West's request sought, among other records, "All records showing the total amounts of gas tax money given monthly to each Indian Tribe, 2008 to present." The Department has exempted all amounts of gas tax money given or refunded monthly to each Indian Tribe – and this on the records that were created by the DOL itself, not by any tribe – on the argument that these amounts of money contained "Information from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement." RCW 82.36.450. Now, *information received from the tribe* – is, indeed, "deemed to be personal information" under RCW 42.56.230(4)(b) and exempt from public inspection and copying.

But the amounts of gas tax money *given* or *refunded* to the tribes are fundamentally different from the amounts of gas tax money requested by the tribes, or from any other figures (numbers of gallons of gasoline, for example) that the tribes used in computing their requests. One figure –

the amount of gas tax money refunded to the tribes – answers a factual inquiry: how much money has the State refunded to the tribes? The other figure – the amounts of gas tax money requested by the tribes, or the numbers of gallons of gas that go into the calculation, or the numbers of tribal members – answers a completely different factual inquiry: what information have the tribes provided the State in requesting refunds? While the numeric figures may end up being identical – imagine for the sake of argument that the Tulalip Tribe requested a gas tax refund in the amount of $323.48 and the State issued a gas tax refund in the amount of $323.48 – the fact is that one numeric figure answers one question and the other numeric figure answers a completely different question. One figure of $323.48 is exempt under the PRA and the other figure of $323.48 – the amount of money the State gave back to the tribe – is not.

As the Department's argument at the show cause hearing showed, the Department redacted the gas tax refund amounts given to the tribes reasoning that a public records requestor could work backwards and figure out information that was provided by the tribe to the Department. If you do the math, for example, you could figure out how many gallons of fuel for which a particular tribe was claiming the refund – "solve for X" – or you could exercise a little logic and conclude that if the State refunded the

hypothetical figure of $323.48 – let us call this figure "Y" – that a tribe probably requested $323.48, or "X".

Here, the case of Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 417-18, 259 P.3d 190 (2011), is on point. There, a police officer who had been accused of misconduct sought an injunction against the production of the report concerning him, arguing that disclosure of the entire report would disclose his identity (which was protected) to persons who could figure it out. "We recognize that appellants' request under these circumstances may result in others figuring out Officer Cain's identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while Officer Cain's identity is exempt from production under former RCW 42.56.230(2), the remainder of the [requested records] is nonexempt." Bainbridge Island, 172 Wn.2d at 417-418.

While it is proper for the Department to redact information that was provided *by the tribes* – like the number of gallons of fuel, for example – it is *improper* for the Department to redact the amounts actually refunded to the tribes. These amounts were the product of the Department's own mathematical computation, and reflect the cold hard

fact that the State of Washington refunded "Y" amount of dollars to a particular tribe. Even though a public record requestor could work backwards and figure out some information provided by the tribes, that does not make the amount the State paid out exempt.

> The PRA is "a strongly worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. RCW 42.56.030. Therefore, the PRA is to be "liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." *Id.*

Bainbridge Island, 172 Wn.2d at 408.

The Department attempted to distinguish Bainbridge Island in several respects. CP 1318-1320. It argued that the statutory exemption in Bainbridge Island necessitated an analysis of whether the disclosure of the personal information violated a right of privacy, but here, disclosure of information received from the tribes is deemed by statute to violate a right of privacy. Actually, that does not seem to be a basis for distinguishing Bainbridge Island; instead, that is a basis for finding Bainbridge Island on point. There, the *personal* information at issue – Officer Cain's name in connection with allegations of misconduct – would violate a right of

privacy if released, and here, the "personal" information at issue – information received from the tribes under the fuel tax agreements – would also violate a right of privacy if released.

The Department also argued that the Court's analysis in Bainbridge Island rested on the fact that an agency should look to the content of the document and not on the knowledge of third parties when deciding if a record should be exempt because of a privacy right. Here, the same applies. This Court should look at the content of the document. Mr. West is not challenging the Department's redactions of *information received from the tribes*; he is challenging the Department's redactions of the amounts of money the State refunded to the tribes.

The Department's argument amounts to urging the Trial Court to consider the knowledge of third parties, because "if the Department were to disclose the value [of the amounts of money it refunded to the tribes], the monetary amount, all a requester would have to do is solve for X." RP at 14, ll. 21-24. That is, the Department acknowledges that the numerical figure of the amount of money that the State refunds to the tribes is **different** than the information received by the tribes, because a requestor would have to perform the mathematical operation of "solving for X." "X" is the information received from the tribes; the numerical figure of the amount of money that the State refunds to the tribes is something else.

The Department also argued that other than Officer Cain's name, the remainder of the records in Bainbridge Island were required to be produced because the public had a legitimate interest in how police departments respond to and investigate allegations. Here, too, the public – Mr. West – has a legitimate interest in knowing how much money the State is refunding to the tribes. Records concerning this money constitute "official public records" within the meaning of RCW 40.14.010 ("all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use, and disposition of all public property and public income from all sources whatsoever"). Information *from the tribes* is exempt, certainly, but information *from the Department* is not.

Finally, the Department argued that Bainbridge Island is distinguishable because "the redacted or withheld records **derive** from information received from the tribes, and the information itself is private and exempt from disclosure." CP 1319 (emphasis added). That is simply it. The numerical figures of the monetary amounts that the State refunds to the tribes **derive** from the information received from the tribes, but they are qualitatively different from that information.

This distinction is material. Even though the *information from the tribes* – like the number of gallons sold, or the identities of fuel stations, or

even the requested amount for a refund – is exempt, the amount of money paid out by the State, though derived from exempt information, is not itself exempt. Bainbridge Island is on point: even though the "previously existing knowledge of a third party [someone who knows the fuel tax formula], paired with the information in a public records request [the amount of the fuel tax refund], reveals more than either source would reveal alone [information from the tribes." Bainbridge Island, 172 Wn.2d at 417-418.

Finally, when this Court construes the statutory exemption found in RCW 82.36.450 and RCW 42.56.230(4)(b), this Court should consider the legislature's intent.

> The court's objective when construing a statute is to determine the legislature's intent. In re Pers. Restraint of Cruze, 169 Wn.2d 422, 427, 237 P.3d 274 (2010). The plain meaning is to be discerned from the ordinary meaning of the language, as well as the context of the statute where that provision is found, related provisions, and the statutory scheme as a whole. *Id.*

Bainbridge Island, 172 Wn.2d at 421. Here, this Court should consider RCW 42.56.270(15), which exempts financial information provided to the Department of Licensing, "except information disclosed in aggregate form that does not permit the identification of information related to individual fuel licensees." Here, the information in the records sought by Mr. West was not information provided *to* the Department, but rather – in

"aggregate form" monthly amounts of fuel tax refunds *from* the Department. The legislature intended to exempt the disclosure of information received from the tribes that would identify individual fuel licensees or other information provided by the tribes – it did not intend to exempt the disclosure of the amounts of refunds *from* the State *to* the tribes.

The Trial Court erred in finding the redactions of the amounts of refunds *from* the State *to* the tribes to be proper. This Court should reverse and remand to the Trial Court.

C. Mr. West's Lawsuit Was Necessary to Compel the Department to Produce the Records He Requested

The Trial Court found that Mr. West's lawsuit was unnecessary to compel the Department to produce the records he requested. "This is a lawsuit that, in the court's conclusion, was not necessary for Mr. West to file." RP at 26, ll. 10-12. "Plaintiff's lawsuit in this matter was unnecessary to compel the Defendant to produce the records Plaintiff had requested." CP 1340. This was error.

Under the PRA, a requesting party may file an action when it believes that a government agency has not complied with the act. RCW 42.56.550. Here, Ms. Fultz told Mr. West in her March 7 letter that the records responsive to parts #1 and #2 of his request were exempt from

production or were subject to redaction. As argued above, the fuel tax refund amounts – reflecting money paid out by the State, not information provided by the tribes – is not exempt and not subject to redaction.

Further, at the time that Mr. West filed his lawsuit, he knew that the Department possessed records #000001 through #000020, but that the Department was refusing to disclose the records to him, either through production to Mr. West or inclusion in a proper exemption log. The Department did not tell Mr. West what kind of records they were or what exemptions might apply. The Public Records Act "treats a failure to properly respond as a denial." Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 750, 174 P.3d 60 (2007). It was a per se violation of the PRA to fail to cite an applicable exemption and provide a brief explanation of the withholding. RCW 42.56.210(3). *See* Citizens for Fare Share v. Dep't of Corrections, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (withholding agency "violated the Public Records Act by failing to name and recite to [requestor] its justification for withholding" portions of records and therefore finding requestor to be prevailing party).

That is, Mr. West knew that the Department was resisting disclosure of requested records. A lawsuit is necessary when an agency, by resisting disclosure of requested records, forces a requester to file an action. Spokane Research and Defense Fund v. City of Spokane, 155

Wn.2d 89, 103-04, 117 P.3d 1117 (2005). A lawsuit may not be necessary when, despite uncertainty about the time it may take to produce the requested records, an agency never indicates that the requested records will not be forthcoming and the agency never fights to prevent disclosure or is otherwise obstinate in responding to the request. Limstrom v. Ladenberg, 98 Wn. App. 612, 617, 989 P.2d 1257 (1999). Here, in contrast, the Department indicated early on that it would not release unredacted records to Mr. West that showed the amounts of the fuel tax refunds from the State to the tribes.

Finally, the question before the Trial Court and before this Court is not whether Mr. West's lawsuit was *necessary*; whether the requestor is the prevailing party "relates to the legal question of whether the records should have been disclosed on request. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." Spokane Research, 155 Wn.2d at 103.

This Court should conclude, first, that Mr. West's lawsuit was reasonably necessary, and second, that since the records should have been disclosed to him on request, that Mr. West is the prevailing party. This Court should reverse and remand to the Trial Court.

D. The Department Did Not Respond To Mr. West's Record Requests in a Timely Manner

The Trial Court concluded that the Department responded to Mr. West's record requests in a timely manner. "The Department has timely responded to all the requests of Mr. West." RP at 26, ll. 12-13. "[T]he Department responded to Plaintiff's record requests in a timely manner...." CP 1340. This is error (Mr. West does not assign error to the Trial Court's conclusion that the Department was entitled to produce records in installments).

Where an agency has provided a timeframe for responding, the agency should be allotted that time to perform. Limstrom, 98 Wn. App. at 617. Here, again and again, the Department ignored its own deadlines, failing to provide justification to Mr. West for its unilateral extension of time in which to respond. Absent such justification, this Court should bind the Department to its original time estimate. *See* Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 570-71, 59 P.3d 109 (2002) (agency's failure to produce records 14 days after estimate lapsed violates PRA, making requestor "prevailing party"). Allowing extension of time without justification effectively would condone unwarranted delay, contrary to the requirement that agencies promptly provide requested records. RCW 42.56.520.

After Mr. West filed his lawsuit, for all intents and purposes the Department appeared to have abandoned its response. It was not until Mr. West conducted discovery and took depositions where the deponents described categories of records responsive to his request that the Department resumed its response to Mr. West's January request. Even while the Department may have been working on its response to Mr. West while failing to communicate with him, it ignored the PRA's mandate that agencies provide the "fullest assistance to enquirers." RCW 42.56.100. Mr. West does not expect that the Department should have responded on March 7 with thousands of responsive records, he does expect that the Department should not have implied to him that the entire universe of responsive records to Items #1 ad #2 existed solely of 35 disclosed records and the 20 pages of as-yet-undisclosed records. An improper response is treated as a denial. Soter, 162 Wn.2d at 750.

Frankly, Mr. West does recognize the tremendous effort that the Department put forth in its belated – post lawsuit – response to his request. But it is a largely misguided one. The basic problem with the Department's response is that they refused to provide what was requested and instead embarked upon an unnecessary review of thousands of non-responsive records (records created by the tribes in seeking refunds). The search that the Department launched does seem to have been adequate. It

was not, however, timely. It was conducted in response to Mr. West's lawsuit and his discovery requests, not in response to his record requests.

The most striking evidence that the Department's response to Mr. West was untimely was its December 27 production, after the show cause hearing. The Department had and refused to provide to Mr. West the very records he requested: monthly amounts of gas tax refunds paid to each tribe. These records were known to and available to the Department; there is no rational basis for their being silently withheld from Mr. West for nearly a year (while the Department produced tens of thousands of pages of non-responsive records actually generated by the tribes and not containing fuel tax refund amounts), until after the show cause hearing.

Rather than make a good faith effort to locate and provide the requested records, the Department acted in bad faith to silently withhold the actual records requested while conducting a pre-textural "search" for any and all records for which it actually had a reasonable and lawful exemption claim to make (as to the records generated by the tribes; it is undisputed that the information contained thereon would be "information received from the tribes" and subject to a lawful claim of exemption).

Further, Mr. West's request #3 sought communications concerning the propriety of withholding or releasing records that contained the fuel tax refund amounts. The responses to previous record requestors – like to

KOMO's Sue Vedder – were responsive to this request. The Department had compiled and sent out its responses *before* Mr. West made his request. The responses and privilege logs relating to Ms. Vedder of KOMO and other records requestors were thus readily available to the Department and could have been provided within days of Mr. West's request, or, at most within the period of time originally necessary to provide them to the original requestors! It appears, for example, that the Department took only four months to respond to Ms. Vedder's request, while it took a full year to send Mr. West a copy of its response to Ms. Vedder.

This December 27 production also contained indexes. Recall that the Department early on told Mr. West that it possessed no indexes of public records that encompassed the fuel tax refund amounts. For the Department to withhold the very indexes and lists of the actual amounts paid to the tribes for nearly a year, while arguing to the Trial Court that it had acted in good faith to produce a plethora of mostly unresponsive records, demonstrates a very real obstruction of the policy underlying the Public Records Act, that the people be informed of the activities of their government. Rather than simply produce the records that the Department had previously produced to other requestors making similar requests, the Department acted to obstruct and complicate the disclosure process by finding, redacting, and producing tens of thousands of non-responsive

records. Then the Department argued that it had complied with the Act by producing these tens of thousands of pages, while all the time – *until after the show cause hearing* – the Department had silently withheld the very simple indexes and lists of money paid to the tribes.

While the procedural posture of this case at present is an appeal of the dismissal of the case on summary judgment (at the show cause hearing), it is worth noting that the Yousoufian factors (Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 467, 229 P.3d 735 (2010), properly applied during the penalty phase of a Public Records Act Case, include the consideration of whether an agency has procedures in place to track and account for public records requests. It is not reasonable to conclude that the Department's public records officer was unaware of the Department's previous responses to records requests that involved the very indexes and records that Mr. West sought here.

This Court should conclude that the Department did not respond to Mr. West in a timely fashion, and indeed, that had the Department produced the last installment – the December 27 installment – before the show cause hearing, that the evidence would have been unfavorable to the Department. "[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the

only inference which the finder of fact may draw is that such evidence would be unfavorable to him." Pier 67, Inc. v. King County, 89 Wash. 2d 379, 385-86, 573 P.2d 2 (1977). In fact, the record now affirmatively demonstrates that the Department deliberately withheld records known to them and which had been produced to previous requestors, and there is a very strong possibility that it did so in order to bolster their argument that no responsive index or records existed, and that the Department had acted in good faith to produce records to Mr. West, when in fact the Department had not yet produced the actual records and indexes requested.

This Court should conclude that the Department did not respond to Mr. West's record request in a timely fashion, and should reverse and remand to the Trial Court.

E. The Trial Court Erred in Denying Mr. West's Motion for Reconsideration

The Trial Court erred in denying Mr. West's Motion for Reconsideration. First and foremost, the Trial Court applied the wrong legal standard to denying the motion for reconsideration. The Trial Court applied the standard of "Motions for Reconsideration are disfavored" (CP 1836), when Thurston County amended its local rules to delete that provision back on September 1, 2011. The Trial Court was engaged in deciding questions of law, not fact, in deciding Mr. West's Public Records

Act case and Mr. West's Motion for Reconsideration. Accordingly, this Court reviews the denial of Mr. West's Motion for Reconsideration de novo, not for abuse of discretion. But even if this Court were to review the Trial Court's denial for an abuse of discretion, Mr. West would prevail, because a trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128. Applying the wrong legal standard is basing a decision on untenable grounds.

But as to the substance of Mr. West's motion for reconsideration, Mr. West put before the Trial Court a great mass of late-produced responsive records, which could have and should have been produced to Mr. West long ago. These were material records that would have and should have changed the result at the show cause hearing.

> If it is material testimony, it can only be material because it would tend to strengthen the applicant's case, and probably lead to different results; and if it is material, and applicant could not have discovered it with reasonable diligence, common justice demands that he should have the benefit of it. It is true that applications of this kind are directed largely to the discretion of the court, and great weight must be given to the judgment of the court with reference to them. Still, if this court thinks that, under all the circumstances of the case, substantial justice has been denied to the applicant, as we think it has in this case, we will not hesitate to reverse the ruling.

State v. Stowe, 3 Wash. 206, 209-10, 28 P. 337 (1891). Substantial justice has been denied to Mr. West. This Court should reverse the ruling.

F. Request for Attorney Fees

This is a public records case. This Court should reverse the Trial Court and conclude that Mr. West was entitled to the unredacted records he sought, in a timely fashion, and that Mr. West is the prevailing party. Mr. West requests an award of attorney fees and costs under RCW 42.56.550(4) and RAP 18.1.

V. CONCLUSION

The Public Records Act is a strongly worded mandate that the people are entitled to remain informed about the activities of their government. The Department of Licensing refunds tens of millions of dollars to the tribes in gas tax money every year. Mr. West sought to inform himself about the gas tax refunds; the Department denied his request in substance while paying lip service to the Act in style. The Trial Court erred in dismissing Mr. West's case. For the foregoing reasons, this Court should reverse and remand.

Respectfully submitted this 10th day of July, 2013.

/s/ *Stephanie M. R. Bird*

Stephanie M. R. Bird, WSBA #36859

CERTIFICATE OF SERVICE

On this 10h day of July, 2013, the undersigned caused the foregoing document to be filed with the Court of Appeals, Division II, and served in the manner indicated on the following parties:

Dionne Padilla-Huddleston Bruce L. Turcott Attorney General's Office Licensing & Admin Law Division 800 5th Ave., Suite 2000 Seattle, WA 98104 DionneP@ATG.WA.GOV BruceT1@ATG.WA.GOV	X U.S. Mail ____ Legal Messenger X Facsimile/Electronic Mail ____ Hand Delivery

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

SIGNED at Olympia, Washington this 10th day of July, 2013.

/s/ Rhonda Davidson
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July 10, 2013 - 9:20 AM

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