No. 45756-3-II

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

MIKE BELENSKI,

Appellant

v.

JEFFERSON COUNTY,

Respondent.

OPENING BRIEF OF APPELLANT

Mike Belenski, Appellant
P.O. Box 1132
Poulsbo, WA 98370
(360) 437-9808

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I. INTRODUCTION

This case concerns four public records requests the Appellant ("Mr. Belenski") submitted to Respondent Jefferson County (hereinafter the "County") under the Public Records Act (hereinafter the "PRA"), RCW 42.56.

A. Public Records Requests for Internet Access Logs

Two of Mr. Belenski's public records requests were for Internet Access Logs (hereinafter "IAL"). The first public records request for IAL was submitted September 27, 2010 (for the time frame of February 1, 2010 to September 27, 2010) and the County responded that it had no responsive records. A second request for IAL was submitted to the County on November 2, 2011 (for the time frame of January 1, 2011 to November 1, 2011) and the County responded that it had records.

Taken as a whole, the IAL contain information relating to the conduct of government and/or performance of a governmental function, because the IAL contain information which shows how county employees are spending their work hours, what they are working on, what information they are accessing, evaluating and retrieving from the internet in performing governmental tasks, and how county resources such as computers and internet connection are being utilized.

The Internet Access Logs requested by Mr. Belenski clearly fit the definition of "public record" as defined by the PRA and Mr. Belenski respectively asserts that the ruling of the trial court, that the IAL were not "public records" because there is "no nexus between the information contained in the IAL's and the County's governmental function", is clearly in error.

B. Public Records Request for Electronic Copies of Every Electronic Record for which Jefferson County Information Services does not generate a Backup

The third of these public records request was for inspection of all records that the County did not back up. The County contended and the trial court agreed, that Mr. Belenski's request was not a public records request, because it did not make a request for identifiable public records. The County's records are permanently and repeatedly lost because of catastrophic hard drive failures, which is contrary to the PRA mandate to protect public records from damage and disorganization. RCW 42.56.100.

C. Public Records Request for Records Involving Chris Grant

At the heart of this public records requests, was a request for contact information for Chris Grant. Mr. Grant had been involved in Mr. Belenski's first request for IAL (Sept. 2010), but had left the employment of the County prior to the litigation Mr. Belenski filed in November 2012. Mr. Belenski had hoped to contact Mr. Grant, so he could ask him some

questions about what transpired regarding his Sept. 2010 public records request for IAL. Subsequent to the trial court issuing summary judgment in favor of the County, Mr. Belenski discovered that the County had silently withheld records responsive to this request.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

A. Assignment of Error

The trial court erred in (1) issuing the Memorandum Opinion of May 15, 2013; (2) issuing the Order denying Motion for Reconsideration of August 23, 2013; (3) issuing the Order granting Defendant's Motion to Lodge and Seal of September 13, 2013; (4) issuing the Order granting Defendant's Motion for Partial Summary Judgment of September 17, 2013; (5) issuing the Memorandum Opinion on Summary Judgment RE: Request No. 5 of November 7, 2013; (6) issuing the Order Granting Defendant's CR 56 Motion for Summary Judgment of November 22, 2013; and (7) issuing the Memorandum & Order RE Motion for Reconsideration of December 6, 2013.

B. Issues Presented

1. Whether the Internet Access Logs are Public Records.

2. Whether Mr. Belenski's public records request for "electronic copies of every electronic record for which Jefferson County Information Services does not generate a backup" was a request for identifiable public records.

3. Whether the records, or portions thereof, responsive to Mr. Belenski's public records request involving Chris Grant properly withheld from disclosure and/or production.

4. Whether the County provided a brief explanation for the exemptions claimed in the exemption logs.

5. Whether the County silently withheld records from Mr. Belenski.

III. STATEMENT OF THE CASE

A. Public Records Request for Internet Access Logs

On September 27, 2010, Mike Belenski submitted a public records request to Jefferson County requesting inspection of the Internet Access Logs (IAL) from February 1, 2010 to September 27, 2010. The request clearly states it is a request for public records pursuant to the Public Records Act (PRA). (CP 211). In response to that records request, Mr. Belenski received a letter dated October 4, 2010, from County Public Records Officer Lorna Delaney, stating that there were "no responsive records" to Mr. Belenski's request. (CP 214). A follow up conversation involving this request occurred in the basement of the Jefferson County Courthouse on March 21, 2011, between Mr. Belenski and Jefferson County Deputy Prosecuting Attorney David Alvarez. During this conversation DPA Alvarez advised Mr. Belenski that the reason he did not

receive the Internet Access Logs (IAL) was because "we don't use them for anything so we don't have to keep them" (CP 194, 631).

After researching the legal validity of DPA Alvarez's comment, and possible civil actions involving the deliberate destruction of public records, Mr. Belenski made an additional public records request for IAL on November 2, 2011. (CP 194). This request for IAL was for the time frame of January 1, 2011 to November 1, 2011, inclusive (CP 221). This request clearly states it is a request for public records pursuant to the PRA, RCW 42.56. (CP 221).

The County acknowledged receipt of Mr. Belenski's public records request on November 11, 2011 and provided a reasonable estimate of the time needed to search for records. (CP 194, 223-224). Subsequently, on December 7, 2011, Mr. Belenski amended his November 2, 2011 and requested electronic copies of the IAL, rather than inspection of the IAL. (CP 195, 226-228).

The County advised Mr. Belenski on December 9, 2011 that a catastrophic hard drive failure had occurred (CP 195, 233) and that good archive data prior to 11-10-2011 could not be provided, but that "miscellaneous text files from sporadic dates can and will be provided" (CP 234).

A meeting was held on January 3, 2012, between Mr. Belenski, County Information Services employee David Shambley, and others to determine what would be included regarding Mr. Belenski's November 2, 2011, request for IAL. As soon as Mr. Belenski entered the meeting room, he asked Mr. Shambley why he had not received the IAL pursuant to his September 27, 2010 public records request and Mr. Shambley replied that "Chris Grant decided that you didn't have the software to look at them." Neither Chris Grant, nor any other County employees had contacted Mr. Belenski and asked him what software he owned or had access to. (CP 195-196). Note too, that Mr. Belenski's September 27, 2010 public records request (CP 211) does NOT request IAL in electronic form, so any question about what software might have been available at that time to Mr. Belenski was irrelevant to the County's ability to fulfill the request.

A few weeks later, on January 19, 2012, the County provided Mr. Belenski with a DVD. The DVD did not contain any of the IAL that he had requested in his September 27, 2010, or November 2, 2011, public records requests. The DVD contained only a WebSpy "Analysis Report" which summarized IAL data for various days (CP 196). The Webspy report included summary information from numerous days, including many from the time frame of February 1, 2010, to September 27, 2010,

which was the time frame requested in Mr. Belenski's first request for IAL on September 27, 2010. (CP 196, 260-261). However, Mr. Belenski had been advised by Jefferson County that there were "no responsive records" for his September 27, 2010, public records request. (CP 214).

What is important to note is that the Webspy software relies on log files for its source of data; the purpose of the Webspy is to analyze existing log file records. Webspy does not create log file records (e.g. IAL). (CP 76, 56, 64). The County used the IAL to as the source of input data to Webspy. (CP 76, 56, 62).

Example random pages from the WebSpy summary report provided to Plaintiff on January 19, 2012, show the websites visited, along with the cumulative time spent at each website and other information. (CP 76, 56, 65-67). The websites visited include both government and non-government sites. Also of interest is the "Time of First Hit". Plaintiff made his first request for IAL on September 27, 2010 and there are several "First Hits" prior to that date, indicating that IAL existed prior to Plaintiff making his request and that those existing IAL were used to create the WebSpy report.

The County has admitted to having retained more than 300 million records on one or more hard disks. (CP 123, 129). Also included on the DVD containing the WebSpy summary report was a word document titled

"Sonicwall Reports.docx" showing Reports from existing Sonicwall Syslog files, further evidencing that the County has retained the IAL. This word document shows the number of records contained on which drive and the dates of the records contained on each drive. (CP 57, 68). The total number of records is about 300 million.

County Administrator Phillip Morley advised the Jefferson County Board of Commissioners on March 12, 2012, that he would "follow up" with Mr. Belenski about questions he had regarding his September 27, 2010 request for IAL, but Mr. Morley never followed up. (CP 124-125).

Lastly, in the County's response to a subsequent public records request from Mr. Belenski dated August 30, 2012, in which Mr. Belenski requested contact information involving Chris Grant, Mr. Belenski discovered additional information that at least some of the IAL responsive to his September 27, 2010 did exist at the time he made his request, but Jefferson County did not disclose the existence of those IAL to him. (CP 125, 138-140). Subsequently, Mr. Belenski filed this litigation on November 19, 2012.

B. Public Records Request for Electronic Copies of Every Electronic Record for which Jefferson County Information Services does not generate a Backup

On December 18, 2011, Mr. Belenski made a public records request to Jefferson County employee David Shambley for "electronic

copies of every electronic record for which Jefferson County Information Services does not generate a backup." Mr. Belenski's request clearly states it is a request for public records. (CP 240). Rather than provide the records requested, on December 20, 2011, Mr. Shambley denied Mr. Belenski's request stating that Mr. Belenski needed to make a "request for identifiable public records". Mr. Shambley went on to state that no exemption log was required nor would one be provided to Mr. Belenski. Mr. Belenski responded stating that Mr. Shambley was withholding records in their entirety and by doing so required Mr. Shambley to provide Mr. Belenski with an exemption log. Jefferson County has failed to provide the records requested or an exemption log. (CP 197-198, CP 161-162, CP 237-238, 246).

C. Public Records Request for Records Involving Chris Grant

On August 30, 2012, Mr. Belenski made a public records request for records involving Jefferson County Information Services employee Chris Grant. Mr. Belenski's request clearly states it is a request for public records. (CP 198, 248).

The County Auditor responded on September 7, 2012, providing Mr. Belenski with an exemption log claiming Chris Grant's home address was exempt pursuant to RCW 42.56.250(2), but failed to provide a brief

explanation of how the exemption applied to the record withheld. (CP 198, 250-251); RCW 42.56.210(3).

Also, on September 7, 2012, the office of the Jefferson County Board of County Commissioners (BoCC) provided Mr. Belenski with an exemption log claiming various exemptions, but the seven-item exemption log did not contain any brief explanations of how the claimed exemptions applied to the records that were withheld in their entirety (items 1 through 4) or how the claimed exemptions applied to the records from which information was redacted (items 5 through 7). (CP 198-199, 253, 255-259); RCW 42.56.210(3).

About a week after this litigation was filed, the County provided Mr. Belenski with revised exemption logs from the County Auditor and BoCC. (CP 657-658).

During oral argument regarding sealing the records, Mr. Belenski discovered that the records under consideration for sealing contained information that had not been disclosed to him (CP 414-415, 444).

In the end, the trial court ruled that the PRA exemptions claimed by the County were valid and signed an order that sealed the records. (CP 282-285,),(Sub 62, sealed records).

IV. ARGUMENT

RCW 42.56.030 contains the Legislature's mandate regarding how

the PRA must be construed:

> "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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."

Therefore the definition of "public record", as well as any other interpretation of the PRA by a court, must be liberally construed to conform with legislative mandate.

Further, the PRA "'is a strongly worded mandate for broad disclosure of public records.'" Soter v. Cowles Publishing Co., 162 Wn.2d 716, 730, (2007) (quoting Hearst Corp v. Hoppe, 90 Wn.2d 123, 127, (1978)). The provisions of the PRA are "liberally construed and its exemptions narrowly construed. (RCW 42.56.030). Exemptions are only recognized under the PRA if they are specifically created by statute. (RCW 42.56.070(1)).

A. Standard of Review and Burden of Proof

The standard of review for an appellate court under the PRA and on a trial court's decision on a motion for summary judgment is *de novo*. Sanders v. State, 169 Wn.2d 827, 845 (2010); Soter 162 Wn.2d at 731;

(RCW 42.56.550(3)). In reviewing a PRA request, the appellate court stands in the same position as the superior court. Lindeman v. Kelso School District No. 458, 162 Wn.2d 196, 200 (2007). Where the record consists of only affidavits, memoranda of law, and other documentary evidence, the superior court's factual findings on disputed issues do not bind an appellate court. Delong v. Parmelee, 157 Wn. App 119, 143, (2010).

The burden of proof is on the County to prove the IAL are NOT public records. Concerned Ratepayers Association v. PUD #1 of Clark County, 93 Wn. App 219, 229 (1998) ("[t]he agency has the burden of establishing that disclosure of requested records is not required."); RCW 42.56.550(1). The County has not met its burden.

B. Public Records Requests for Internet Access Logs

The central issue involving Mr. Belenski's public records requests for IAL, is whether or not the IAL are public records. Mr. Belenski position is that the trial court erred when it determined that in order for the IAL to satisfy prong #2, of the definition of public record, there needed to be a "nexus" between the information contained in the IAL and the County's decision making or governmental function (CP 295).

The definition of a public record (RCW 42.56.010(2)) specifically states that it is (1) any writing, (2) containing information relating to the

conduct of government or the performance of any governmental or proprietary function (3) prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

It is undisputed that the IAL satisfy prong #1, and are a "writing" as defined by the PRA. (RCW 42.56.010(3)).

The County made several arguments involving prong #3, (CP 470-477), which Mr. Belenski rebutted (CP CP 71-77, 172-176).

Ultimately, the trial court held that the determinative issue involving the IAL, was prong #2, i.e. any writing "containing information related to the conduct of government or the performance of any governmental or proprietary function". (CP 291).

Most people would agree the public has a legitimate interest in investigating the County's use of the internet. The IAL, among other things, contain information relating to the conduct of government involving the use of internet, how much time is being spent on the internet, what information the government is reviewing, evaluating and retrieving, and how County resources like computers and the internet connection itself are being utilized, etc. Further, when public employees use the internet as part of their assigned tasks, they are performing a "governmental function" and the IAL contain information relating to the execution of those assigned tasks, which also satisfies prong #2.

Mr. Belenski respectfully submits that the trial court erred in ruling that the IAL are not public records when the court concluded that there is no "nexus" between the information contained in the IAL and the County's decision making or governmental function (CP 295). "A court's goal is to carry out the legislature's intent giving meaning to every word of the statute." Rental Housing Association v. City of Des Moines, 165 Wn.2d 525, 542 (2009).

If the intent of the Legislature was to limit the definition of "public record" to only those records for which there is a "nexus" between the information contained in the record and an Agency's decision making process, it could have easily done so. As the Supreme Court stated in O'Neill v. City of Shoreline, 170 Wn.2d 138, 147 (2010) ("In sum, 'public record' is defined very broadly, encompassing virtually any record related to the conduct of government.")

Since the meaning of the statute (RCW 42.56.010(2)) is plain on its face, the trial court's inquiry was at an end. There was no need for the trial court to analyze whether there was a "nexus" between the information contained in the IAL and the County's decision making or governmental function. The trial court was required to interpret and construe RCW 42.56.010(2) to give effect to all the language used and it failed to do so by overlooking the plain language of prong #2. Mechling v. City of

Monroe, 152 Wn. App. 830, 845, (2009) ("In determining legislative intent, we first look to the plain language and ordinary meaning of the statute. If the meaning of the statute is plain on its face, our inquiry is at an end. We must interpret and construe statutes to give effect to all the language used, rendering no portion meaningless or superfluous." (citations omitted)).

Using the plain language of prong #2, Plaintiff has established that the IAL contain "information relating to the conduct of government or the performance of any governmental or proprietary function". It is uncontroverted that the IAL contain information relating to the conduct of government because they contain information about user (County employee) access to the internet. The IAL contain one or more records per user interaction per webpage, including internet host names (not merely IP addresses, which can be dynamic or simply reassigned over time), users' identities, internet addresses (URLs) of specific webpages accessed, dates/times of such accesses, etc. (CP 91-92).

Further, the County admits that the IAL contain a record of every single contact between a county-issued personal computer ("PC") and the World Wide Web. (CP 361); the County also admits, that at a minimum, an individual IAL record contains the date, time, user, full name of the URL reached (rather than just the IP address), and the category of the

URL (news, sports, retail, etc.). (CP 368). This testimony is further supported by the County's response to Interrogatory #89, in which the County provided data from a typical UDP file:

> <134>id=firewall sn=0017C5169F10 time="2012-12-04 23:55:15 UTC" fw=X.X.X.X pri=6 c=1024 m=97 usr="DOMAIN\username" src=X.X.X.X:9999:XO dst=X.X.X.X:80:Xl proto=tcp/http sent=1221 dstname=oascentral.yellowpages.com arg=/RealMedia/ads/Creatives/default/empty.gif Category="News and Media"
>
> (CP 341).

Date = "2012-12-04", **Time** ="23:55:15 UTC", **URL name** = "oascentral.yellowpages.com", **Category** = "News and Media".

Since County employees utilize the internet to obtain information to perform work tasks (CP 363-364), what County employees are accessing on the internet clearly relates to the conduct of government and execution of a governmental function. Access to this type of information by the Public is the purpose and intent of the PRA.

1. **The Internet Access Logs are Public Records**

The definition of a public record (RCW 42.56.010(2)) specifically states that "(1) it is a writing, (2) containing information relating to the conduct of government or the performance of any governmental or

proprietary function (3) prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."

The trial court held that the determinative issue involving the IAL, was prong #2, i.e. any writing "containing information related to the conduct of government or the performance of any governmental or proprietary function". (CP 291).

Ultimately, the trial court ruled that the IAL were not public records, as defined by the PRA, because there was "no nexus between the information contained in the IAL's and the County's governmental function." (CP 295) and granted partial summary judgment to the County (CP 278-281).

The trial court erred in several respects in reaching this decision.

First, the County raised the issue of "nexus" for the first time in its Second Reply Brief; therefore, the issue was not appropriate for consideration on summary judgment. (CP 8). This conduct deprived Mr. Belenski of the opportunity to perform Discovery regarding this issue. The County claims it brought up the "nexus" issue in its MSJ in December 2012, but the County actually only argued that IAL did not satisfy the second prong of the definition of public record, it did not make any mention of the "nexus" principle found in Concerned Ratepayers Association v. PUD #1 of Clark County, 138 Wn.2d 950 (1999) or

Dragonslyer, Inc. v. Washington State Gambling Commission, 139 Wn. App. 433 (2007). (CP 521).

Second, the County has provided no evidence regarding prong #2. The burden is on the County to prove the IAL are not "public records" and it has not done that. (CP 11-12). The trial court relied on inadmissible evidence and did not rule on Mr. Belenski's Motion to Strike (CP 41-54).

Third, Mr. Belenski respectively asserts that the trial court misapprehended the "nexus" principle found in both Concerned Ratepayers and Dragonslayer. (CP 18-24). Rather than applying the plain language found in prong #2 to the IAL, the trial court applied the "nexus" principle to the IAL. Both Concerned Ratepayers and Dragonslayer are easily distinguishable from Mr. Belenski's requests for IAL, and this court should rule that the plain language found in prong #2 should be applied to the IAL to determine whether they are 'public records", rather than the "nexus" principle.

Fourth, the trial court stated that the IAL were "Collected only as an unwanted function of the County's purchased software program, the IAL are not reviewed, evaluated or used by anyone in county government and have no impact on any public function" (CP 295). Mr. Belenski respectively asserts that it is irrelevant whether the IAL were reviewed, evaluated or used by anyone in county government. Prong #2 only

requires that the record contain information relating to the conduct of government or the performance of any governmental or proprietary function. Prong #2 of the PRA does not require that there be a "nexus" between the information contained in the record and an Agency's governmental function. It is also irrelevant that the IAL were "collected only as an unwanted function of the County's purchased software program" because the PRA makes no distinction between records prepared voluntarily or involuntarily, and the Supreme Court has declined to read nonexistent provisions into the PRA. PAWS v. UW, 114 Wn.2d 677, 688 (1990) ("In construing statues, courts may not read into the statute matters with are not there."); See also Kleven v. City of Des Moines, 111 Wn. App. 284, 291 (2002) ("We will not read language into a statute that is not there."). (CP 174)

Further, it appears the trial court overlooked the content of Jefferson County Resolution 17-98, which requires the County's Information Services department to maintain the IAL. (CP 128, 151-152). The purpose of providing internet access to County employees is to give them "tools to perform their job functions" and Network and Internet Access is provided to county employees as a research and communication tool to assist in conducting county business." (CP 28, 30). The IAL are

maintained under Resolution 17-98 to help ensure that County employees are using those "tools" appropriately and as intended. (CP 9).

If the admission by Mr. Shambley that the County basically ignores the information found in the IAL is true (CP 292), that makes it even more paramount that the public be provided access to the IAL to ensure that Public resources are being properly utilized because they have been improperly used in the past.

As an example, county resources and internet connection have been utilized to listen to Seattle Mariner baseball games on the internet (CP 305, 353) and the Washington State Auditor's Office found that this violated County policy since it was not related to County business and impacted system resources (CP 305, 354-355).

Additionally, County employee Mr. Gary Rowe provided Mr. Belenski with a list of internet websites that the County had blocked access to (CP 29, 33). Mr. Belenski sent Mr. Rowe a letter questioning the County's use of the internet (CP 29, 31).

The County's resources and internet connection have been used to play games on the internet for hours on end, as well as other questionable purposes, and Mr. Belenski sent a letter to the County Commissioner representing his District. (CP 305, 356-357). County Administrator John Fischbach found Plaintiff's letter credible enough to prompt him to send a

letter to Elected Officials and Department Heads, admonishing them to counsel their employees and once again reinforce the County's Internet Policy (CP 29, 34).

Eight years after the State Auditor's Office investigation, internet bandwidth congestion was still occurring and current Network Administrator, Todd Oberlander, was directed to review internet activity to ensure that it was addressing a critical business need (CP 29, 35-37)

Currently, under Mr. Shambley's administration, the County uses Dell SonicWall CFS to control County employee access to a broad range of internet sites (CP 29, 38). The County has also specifically blocked access to 29 websites, almost all of which do not appear to be relevant to conducting government business. (CP 29, 39-40). Given the County's history of bandwidth congestion and its employees' use of the internet for actions other than County business, the fact that the County now subscribes to a service to control what websites can be accessed from County computers and also has specifically blocked access to websites like Ebaumsworld.com (internet gaming site), Gossipcenter.com (celebrity gossip site) and Slacker.com (internet music site), as well as social media sites *Facebook.com and Myspace.com*, strongly suggests that the County has used / reviewed / evaluated the IAL in order to decide what internet sites to block access to. The County has presented no evidence to show

that it has used any information other than the IAL to construct its own supplemental list of blocked websites, and under the PRA the burden of proof is on the County The County has attempted to dismiss their past conduct involving the internet as speculative allegations by Mr. Belenski (CP 520). But there is no speculation regarding the County's conduct involving the internet, only fact.

A fact finder, from the above information, could easily determine that the information contained in the IAL was used in decision making regarding employee access to the internet and/or that the information contained in the IAL related to a governmental function (monitoring internet usage to ensure compliance with the County Internet Policy). There has been no Discovery regarding whether there is a "nexus" between the IAL and County decision making. The County's Declarations are full of conclusions and inadmissible evidence. The County should not benefit from their gamesmanship. When construing the facts and all reasonable inferences in the light most favorable to the Plaintiff, there is doubt as to whether the County was being truthful when it told the trial court that it did not use information in the IAL for decision making or a governmental function, making summary judgment inappropriate.

Fifth, it is important to note that whether or not the information in the IAL was used by the County in decision making or a governmental

function is particularly within the knowledge of Mr. Shambley, which makes summary judgment inappropriate. Riley v. Andres, 107 Wn. App. 391, 398, (2001) ("When knowledge of material facts is particularly in the possession of a party moving for summary judgment, it is especially important that trial be held to give the nonmoving party an opportunity to disprove such facts by cross examination."); Michigan National Bank v. Olsen, 44 Wn. App. 898, 905 (1986) ("And where, as here, the material facts are based solely upon the moving party's affidavits, credibility is especially important. In such a case, the nonmoving party should have the opportunity to expose the moving party's demeanor while testifying at trial.") An issue of credibility exists if the party opposing summary judgment comes forward with evidence which contradicts or impeaches the moving party's evidence on a material issue. Dunlap v. Wayne, 105 Wn.2d 529, 536 (1986). Mr. Belenski has been denied the opportunity to investigate and determine whether Mr. Shambley knows information that would rebut the County's claims involving the "nexus" principle, and Mr. Belenski would like that opportunity.

2. The County Silently Withheld Records

The trial court found that the "no responsive records" response to Mr. Belenski complied with the requirements of the PRA (CP 295-296). Mr. Belenski respectfully submits the trial court erred. (CP 24-26). The

PRA clearly and emphatically prohibits silent withholding public records relevant to a public records request. (CP 24-25). The County had IAL responsive to Mr. Belenski's September 27, 2010 request for IAL (CP 124-125, 138-140), but rather than disclose the existence of these IAL to Mr. Belenski, it chose to silently withhold them. Further, a County email specifically advises Mr. Belenski "Additional logs found – included all Internet Access Logs found in system dates September 6, 2010 to January 11, 2012, in attached report". (CP 123, 129). Mr. Belenski first request for IAL was September 27, 2010, so this email further documents that the County had Internet Access Logs that were responsive to his request prior to September 27, 2010, but that they were silently withheld.

A court determines whether a record is a Public Record, not the County. The County has no lawful discretion to determine what is or is not a public record. RCW 42.56.550(3) states that a court shall not defer to any determination made by the agency but shall review the matter *de novo*. See Servais v. Port of Bellingham, 127 Wn.2d 820, 834-35 (1995) (agencies not allowed to define the scope of statutory rule making or policy). Also, See Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131 (1978) ("leaving interpretation of the act to those it was aimed would be the most direct course to devitalization"). (CP 77-78). The silent withholding of records denies the requester of the opportunity to go to court and challenge

the withholding of the records, and is contrary to the mandates of the PRA.

C. Public Records Request for Electronic Copies of Every Electronic Record for which Jefferson County Information Services does not generate a Backup

The contention of the County is that this public records request was not a public records request, but rather a request for information. To the contrary, Mr. Belenski's request clearly states it is a request for public records pursuant to RCW 42.56. (CP 240). Mr. Belenski argued that he provide a reasonable enough description to enable any competent County employee to at least search for some records responsive to his request. (CP 179-181).

The County's explanation in denying Mr. Belenski's request was that (1) that electronic records are not listed, compiled, separated out or categorized by whether or not they are "backed up" (CP 483) and (2) that since the County does not generate an index of their public records, the County doesn't know what records it has, (CP 485) and (3) Mr. Belenski failed to inform the County where to search. (CP 486). The failure of the County to list, compile, separate out, categorized, or generate a records index of their public records, does not prevent the County from conducting a search for the records that Mr. Belenski requested. As for Mr. Belenski failing to inform the County where to search, how is Mr. Belenski

supposed to know what records the County has and where to look, when the County by their own admission doesn't know what records they have? ("an applicant need not exhaust his or her own ingenuity to "ferret out" records through some combination of "intuition and diligent research") (Daines v. Spokane County, 111 Wn. App. 342, 349 (2002).

The PRA does not permit the County to ignore a request for public records because it does not categorize its public records or maintain an index of its public records, and surely does not mandate that a public records requester be required to advise the County where to look for the records in order to obtain them. These reasons presented by the County evidence more that the search for the requested records will be more difficult because the records are not categorized and there is no index, than that Mr. Belenski failed to make a request for identifiable records.

Mr. Belenski's request was for identifiable public records because he provided a reasonable description enabling a government employee to locate the requested records. "An identifiable public record is one in which the requester has given 'a reasonable description enabling the government employee to locate the requested records.' " Wood v. Lowe, 102 Wn. App. 872, 878 (2000) (citing Bonamy v. City of Seattle, 92 Wn. App. 403, 410 (1998)). See also, Hangartner v. City of Seattle, 151 Wn.2d 439, 447

(2004) (A person seeking documents must identify or describe the documents with reasonable clarity to allow the agency to locate them.)

Mr. Belenski provided a reasonable description of the records he requested which would have enabled any competent County employee to at least search and find some records responsive to his request.

What is interesting is the County's claim (CP 462) that it lawfully processed more than 1000 public records requests in the last 3 years, and the County was able to lawfully process all those requests, without a records index, which was the primary obstacle in responding to Mr. Belenski's public records request (identified as #4). "The primary obstacle to responding to Request #4 is the County's decision to opt out of generating or maintaining an index of its records, electronic or otherwise." (CP 485). The County fails to point to any legal authority that relieves the County from searching for records because it has made the conscious choice to fail to list, compile, separate out, categorized, or generate a records index of its public records.

Further, the County claimed that "Information Services does not back up any electronic records.". (CP 484). Mr. Belenski later discovered that Jefferson County Resolution 77-07 provides for a safe deposit box as a repository for Information Services back up files for the Computer Network. (CP 144-145). These backed up records would provide a

starting point to begin the search because records that were not on these backup tapes, would be some of those responsive to Mr. Belenski's request.

There is nothing in the record to show that the County even attempted to search for records responsive to Mr. Belenski's request, let alone perform an adequate search for them as required by the PRA.

The trial court ruled Mr. Belenski's public records request was a request for information "about public records" and that Mr. Belenski did not make a request for a specific record (CP 298). The PRA does not require a requester to know the name of the specific records he or she is requesting. Allowing an Agency to ignore a public records request because the requester does not know the names of the records he or she is requesting, is not providing the fullest assistance to a requester (RCW 42.56.100) and is contrary to the mandates of the PRA to liberally construe its provisions.

The trial court concluded that Mr. Belenski had no idea what records might exist and that he was the asking the County to search its records in a blind attempt to identify records that might fit within a certain class or category and that such a request was overbroad. (CP 299).

Most public records requesters probably do not know what records exist that would be responsive to their request, so why Mr. Belenski would

be required to know what records might exist that would be responsive to his request, in order for the County to respond to it is perplexing. There would be nothing "blind" about the County searching for records that were not backed up. The County could easily identify a record or record series, determine if it was on the backup tape that goes to the safety deposit box (or some other backup media) and then repeat the process. Maybe not all the records requested by Mr. Belenski could be identified, but some would be. The County should have at least searched those places where the records would reasonably be found. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 720, (2011) ("This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is reasonably likely to be found.").

It is also important to recognize that the PRA requires the County to protect it records from damage and disorganization (RCW 42.56.100). There is likely no damage more severe than the loss of original records for which there is no back up. The public has a right to know what electronic public records are at risk of permanent loss because they are not backed up.

Lastly, while it is disputed whether Mr. Belenski made a request for identifiable records, if this court decides that Mr. Belenski did make a

request for identifiable public records, RCW 42.56.080 does not allow agencies to deny a request for identifiable public records solely on the basis that the request is overbroad.

D. Public Records Request for Records Involving Chris Grant

The dispute involving this public record request is the contact information involving Jefferson County Information Services employee Chris Grant. Mr. Belenski respectively asserts that the trial court erred because the sealed records (Sub 62, sealed records) contain non-exempt information, and at least some of the records that were withheld in their entirety, should have had exempt information redacted and the remainder of the record provided to him. (CP 182)

Also, the trial court ruled that the "revised" exemption logs were sufficient to allow Mr. Belenski to vet the claimed exemptions (CP 276). Mr. Belenski believes the trial court erred because basically the "revised" exemption logs are the same as the original exemption logs except another statute (RCW 42.56.250(3)) was added and the claimed exemptions are still unexplained, which violates the PRA (CP 182).

Additionally, Mr. Belenski believes that since Mr. Grant is neither an "employee" nor an "applicant" of the County, the exemptions claimed by the County, RCW 42.56.250(2) and RCW 42.56.250(3) are invalid.

Lastly Mr. Belenski argues that the County silently withheld records responsive to his request.

In response to this public records request, the County Auditor provided Mr. Belenski with an exemption log claiming Chris Grant's home address was exempt pursuant to RCW 42.56.250(2), but failed to provide a brief explanation of how the exemption applied to the record withheld. (CP 198, 250-251); RCW 42.56.210(3). This record was withheld in its entirety.

The office of the Jefferson County Board of County Commissioners (BoCC) also provided Mr. Belenski with an exemption log claiming various exemptions, but the seven-item exemption log did not contain any brief explanations of how the claimed exemptions applied to the records that were withheld in their entirety (items 1 through 4) or how the claimed exemptions applied to the records from which information was redacted (items 5 through 7). (CP 198-199, 253, 255-259); RCW 42.56.210(3).

About a week after this litigation was filed in November 2011, the County provided Mr. Belenski with revised exemption logs from the County Auditor and BoCC. (CP 657-658).

1. **Were the Records, or Portions thereof, Responsive to Mr. Belenski's Public Record Request involving Chris Grant Properly Withheld from Disclosure and/or Production ?**

The trial court ruled that the PRA exemptions claimed by the County in the revised exemption logs were valid and signed an order that sealed the records. (CP 282-285).

However, during oral argument involving this public records request, the trial court commented while analyzing the revised exemption log from the County Auditor (the "one page screen shot"), that it contained an address, and that it **also** contained an employee number and a time of 11:48 am. (CP 414-415, 444). This revised exemption log made no mention that any other information other than Chris Grant's address was being withheld from Mr. Belenski and the County did not claim any exemptions for the employee number or time.

Mr. Belenski argued that the failure of the County to identify all the information contained this record, in an exemption log, denied him of the ability to assess the validity of the County withholding the entire record. (CP 451-453, 657).

The court ruled that the newly discovered information could have been discovered prior to the summary judgment proceeding, but fails to explain how that would be possible. (CP 268-269). The duty is on the County to identify exempt information in public records and then claim

the appropriate exemptions (RCW 42.56.210(3)), it is not on Mr. Belenski to double check the accuracy and validity of the County's exemption logs.

There were also problems with the revised exemption log provided by the BoCC. (CP 453-455, 658). Mr. Belenski asserted that the County was withholding records in their entirety that should have been redacted and released to him. The trial court's decision (CP 268-269) did not address whether any of the sealed records (Sub 62, sealed records) contained information that would violate personal privacy or vital government interests. (RCW 42.56.210(1); RCW 42.56.050) There was also no ruling by the trial court that the exemptions claimed by the County were necessary to protect personal privacy or a vital government interest. (RCW 42.56.210(2)).

2. Did the County Provide a Brief Explanation for the Exemptions Claimed in the Exemption Logs ?

Mr. Belenski asserted that Mr. Grant is not an "applicant" for which RCW 42.56.250(2) would apply (CP 181-184), and believes that Chris Grant is not an "employee" for which RCW 42.56.250(3) would apply. Mr. Grant severed employment with the County on September 7, 2011, (CP 199, 258) and the County has not provide any explanation as to how the exemption for an "applicant" (RCW 42.56.250(2)), or

"employee" (RCW 42.56.250(3)), apply to Chris Grant because he is neither.

3. The County Silently Withheld Records

After finding out that the "one page screen shot" contained information that had likely been silently withheld from him, Mr. Belenski submitted a public records request for the County's response to his August 30, 2012 request for contact information for Chris Grant to confirm the County's response to this request. (CP 415, 445). In a conversation with staff, Mr. Belenski subsequently learned that both his August 30, 2012 request and November 6, 2013 request had only been sent to only 3 entities, Auditor/Payroll, Central Services, BoCC/HR. (CP 415, 445). Persons wishing to request access to public records of Jefferson County can send their public records requests to jeffbocc@co.jefferson.wa.us. (CP 646), which is where Mr. Belenski sent both of his requests. (CP 248, 420-421).

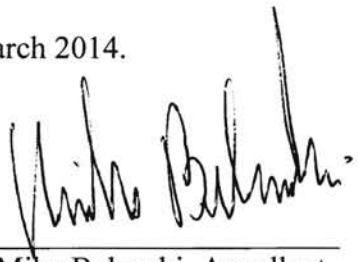
Mr. Belenski discovered numerous records responsive to his requests that had not been provided to him (CP 415-418, CP 420-441) and subsequently argued (CP 443-455) that records had been silently withheld from him. The trial court determined that Mr. Belenski could have discovered the information prior to the summary judgment proceeding. (CP 268-269), but does not explain why the County should benefit from

their deceit. The PRA has no provisions that require a requester to double check the completeness or validity of an Agency's response to a PRA request. Upon learning that the County sent his request to only 3 entities, Mr. Belenski did not delay in contacting other County entities to determine if they had records responsive to his requests. For the County to benefit from failing to provide Mr. Belenski with the records he requested, and which might have changed the result of his case, is contrary to the PRA. The County likely knew that the reason Mr. Belenski wanted Chris Grant's contact information was to find him and ask what he knew about Mr. Belenski IAL requests, so it benefited the County by failing to disclose to Mr. Belenski the existence of the records.

V. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Mr. Belenski respectively asks this Court to find (1) that the IAL are public records, (2) that his request for electronic records that are not backed up, was a request for identifiable public records, (3) that the sealed records contain non-exempt information involving Chris Grant (4) that the County failed to prove a brief explanation of how the exemptions applied to the records withheld involving Chris Grant, and (5) that the County silently withheld records from Mr. Belenski, and remand this litigation back to the trial court for a ruling consistent with this court's ruling.

Respectfully submitted this 24th day of March 2014.



Mike Belenski, Appellant
P.O. Box 1132
Poulsbo, WA 98370
(360) 437-9808

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

MIKE BELENSKI, Plaintiff, -vs- JEFFERSON COUNTY, a Washington State political subdivision, Defendant.	NO. 12 – 2 – 01065 – 2 PROOF OF SERVICE

TO: Clerk of the Superior Court of Clallam County

TO: Clerk of the Court of Appeals, Division 2 (**COA Cause No. 45756-3-II**)

AND: Mr. David Alvarez, Chief Civil Deputy Prosecuting Attorney
Jefferson County Courthouse
P.O. Box 1220
Port Townsend, WA 98368

AND Mr. Jeffrey Myers, Associated Counsel
Law, Lyman, Daniel, Kamerrer and Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508

I, Mike Belenski, on the 24th day of March, 2014, put in the US mail to DPA Alvarez one (1) copy of the following:

1. First Supplemental Designation of Clerk's Papers
2. Modified First Supplemental Designation of Clerk's Papers
3. Second Supplemental Designation of Clerk's Papers

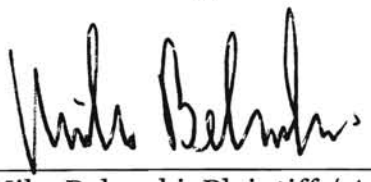
Additionally, I, Mike Belenski, on the 6th day of March, 2014, served DPA David Alvarez (1) copy of Item #1 above, via the email address dalvarez@co.jefferson.wa.us and on the 6th day of March, 2014 served associate counsel Jeff Myers with (1) copy of Item #1 above, via the email address jmyers@lldkb.com.

Further, I, Mike Belenski, on the 7th day of March, 2014, served DPA David Alvarez (1) copy of Item #2 above, via the email address dalvarez@co.jefferson.wa.us and on the 7th day of March, 2014 served associate counsel Jeff Myers with (1) copy of Item #2 above, via the email address jmyers@lldkb.com.

Lastly, I, Mike Belenski, on the 17th day of March, 2014, served DPA David Alvarez (1) copy of Item #3 above, via the email address dalvarez@co.jefferson.wa.us and on the 17th day of March, 2014 served associate counsel Jeff Myers with (1) copy of Item #3 above, via the email address jmyers@lldkb.com.

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

Dated this 24th, day of March, 2014 at Mats Mats, Washington.



Mike Belenski, Plaintiff / Appellant
P.O. Box 1132
Poulsbo, WA 98370
(360) 437-9808

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 2

MIKE BELENSKI, Appellant, -vs- JEFFERSON COUNTY, a Washington State political subdivision, Respondent.	NO. 45756-3-II PROOF OF SERVICE

TO: Clerk of the Court of Appeals, Division 2

AND: Mr. David Alvarez, Chief Civil Deputy Prosecuting Attorney
Jefferson County Courthouse
P.O. Box 1220
Port Townsend, WA 98368

AND: Mr. Jeffrey Myers, Associated Counsel
Law, Lyman, Daniel, Kamerrer and Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508

I, Mike Belenski, on the 24th of March, 2014, put in the US Mail to DPA David Alvarez one (1) copy of the following:

1. Opening Brief of Appellant

Additionally, I, Mike Belenski, on the 24th day of March, 2014, served DPA

David Alvarez (1) copy of each of the above listed pleadings, via the email address dalvarez@co.jefferson.wa.us and on the 24th day of March, 2014 served associate counsel Jeff Myers with (1) copy of each of the above listed pleadings, via the email address jmyers@lldkb.com.

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

Signed and dated this 26th, day of March, 2014 at Mats Mats, Washington.

Mike Belenski, Appellant
P.O. Box 1132
Poulsbo, WA 98370
(360) 437-9808