No. 332411

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

Kittitas County Superior Court Cause No.13-2-00074-4

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington

Plaintiff/Respondent

v.

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.

Defendants/Appellants

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Kittitas County unlawfully denied Sky Allphin access to requested public records. The County sued Mr. Allphin, and he filed counterclaims, alleging records-specific violations of the Public Records Act ("PRA"). The superior court erred when it granted the County blanket immunity for its PRA violations based on the superior court's erroneous conclusion that the County's search for records was "reasonable." Mr. Allphin respectfully requests that the superior court's grant of summary judgment for the County be reversed, Mr. Allphin's cross-motion for summary judgment be granted, the records submitted for in camera review be released, and this matter be remanded for a penalties hearing.

This appeal requires *de novo* review of two envelopes of contested records submitted for *in camera* review. The superior court incorrectly concluded that these emails constitute attorney work product and that the County and the Washington State Department of Ecology ("DOE") were on the same "legal team."

This appeal also requires *de novo* review of the parties' motions for summary judgment. The superior court erred when it concluded that the County had conducted a reasonable search and therefore granted summary judgment to the County on all of Mr. Allphin's records-specific claims i.e. claims based on actual records that were identified and

withheld mostly by way of the County's voluminous exemption logs. No Washington Court has ever applied a "reasonableness" standard as a blanket defense to records-specific claims, and the perpetuation of such would fundamentally change the express provisions of the PRA, its caselaw, and its policy to promote open government.

Mr. Allphin does not agree that the County's search was reasonable, as exhibited by the facts that underlie his counterclaims. The County delayed its response over more than 16 months, withheld exculpatory records, flooded Mr. Allphin with duplicate copies and unresponsive records, obtained an ex parte restraining order without notice to Mr. Allphin's counsel of record, abused judicial processes of in camera review and sealing of records, and refused to move the case toward resolution. The superior court erred when it applied the "reasonable search" theory to the records-specific counterclaims raised by Mr. Allphin.

II. ARGUMENT

A. This Court reviews the superior court's conclusion on *in camera* review and summary judgment *de novo*, and the County bears the burden to prove the withheld records are exempt from the PRA's broad mandate of disclosure.

Judicial review is *de novo* when agency action is challenged under the PRA. RCW 42.56.550(3). The County bears the burden of proof to establish that a particular public disclosure exemption applies, RCW

42.56.550(1), *Soter v. Cowles Pub. Co.*, 162 Wash.2d 716, 731, 174 P.3d 60 (2007), and bears the burden to prove that its estimate of time to respond to a public records request is reasonable, RCW 42.56.550(2).

The County argues in its response brief that the more deferential substantial evidence standard applies. The County is wrong; the standard is "*de novo* review." RCW 42.56.550(3). The obscure language cited for the County's argument, *Soter v. Cowles Publ'g. Co.*, 131 Wn.App. 882, 891, 130 P.3d 840 (Div. III 2006), was not adopted or applied by the Supreme Court. See *Soter*, 162 Wash.2d at 731, 174 P.3d 60 ("Judicial review of agency action taken or challenged under RCW 42.56.030 through .520 shall be *de novo*").

Even *Soter*, 131 Wn.App. 882, 130 P.3d 340 (Div. III 2006) does not conclude that in camera review of records or summary judgment decisions, as we have here, should not be reviewed *de novo*. Rather, that decision involved a dispute over the "definition of work product". *Id.* at 891, 893, 130 P.3d 340. Further, that decision relied on *Dawson v. Daly*, 120 Wash.2d 782, 792, 845 P.2d 995 (1993) (also not concluding that a substantial evidence standard applied for such decisions).

Finally, the superior court's conclusion here that the sealed records constitute work product does not constitute a finding of fact. The superior court's orders do not designate "findings of fact" pursuant to CR 52. The

appellate court is in the same position as the superior court to review the records *in camera* and apply the law, consistent with the *de novo* review standard for appellate practice. *Progressive Animal Welfare Soc. v. University of Washington* ("PAWS"), 125 Wash.2d 243, 252-253, 884 P.2d 592 (1994) (restating that the "appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence" and that under "such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues")(internal citations omitted).

B. The superior court incorrectly sealed two envelopes of public records because (1) the records do not constitute work product and (2) the County and DOE are not on the same legal team.

The County sued Mr. Allphin for requesting public records and then left it to Mr. Allphin to identify challenged records from the County's voluminous exemption logs and move for *in camera* review, CP 699-712, CP 1431-32. Of the hundreds of records withheld by the County, Mr. Allphin challenged only a small category of denied records: those emails that had been shared with the DOE and withheld under claim of attorney client privilege or attorney work product. *Id.* Mr. Allphin's first challenge to the denial of such records included 50 emails listed on the County's 4/2/13 exemption log. Mr. Allphin's second challenge combined 21 emails withheld pursuant to various exemption logs under the same erroneous

claim of work product. The superior court reviewed the records in camera and incorrectly concluded that the challenged emails (1) constitute attorney work product and (2) the protection had not been waived because the County and DOE were on the same "legal team."

First, Mr. Allphin has reason to believe that these sealed records do not contain attorney notes, memoranda of legal strategy, attorney mental impressions, or the kind of writings protected by the work product doctrine. Mr. Allphin has been able to review the nature of communications over which the County had initially asserted the work product protection, see e.g. CP 557-563, which included the County's withholding of non-privileged communications, CP 1767-72, such as "My calendar is clear tomorrow. What time do you want to meet?", CP 1760, yet the County claimed this communication exempt as work product. CP 1742. See additional examples at CP 1469.

Even if the emails do contain attorney[1] work product, the protection was waived when the County shared the emails with the DOE. CP 2236-2479. The DOE was not a member of the County's "legal team." *Soter,* 162 Wash.2d at 734, 739, 174 P.3d 60. The DOE has repeatedly

[1] Records No. 2 and 21 of the February 27, 2015 list, CP 2973, were not sent or received by an attorney at all, but transferred between non-attorney staff. On its face, no basis exists to withhold these staff emails as attorney work product, and they should be released.

declined to claim the emails as work product, leading to the County's suit against the DOE to restrain its release of the records. CP 2186 (DOE's 2014 Reply admitting "it did not and does not currently assert" the work product exemption). There exists no joint prosecution agreement. CP 1467, 1499. Both the County's former attorney and the DOE's attorney concluded that an attorney and client relationship does not exist. CP 1467, 1499-1500. The County's former attorney (Ms. Lowe) even agreed on the record that waiver would result if a County attorney disclosed work product to the DOE. RP 18:20-19:1. The County's disclosure of the emails, even if work product, resulted in waiver. *Sitterson v. Evergreen School Dist. No. 114,* 147 Wash.App. 576, 584, 196 P.3d 735 (Div. 2 2008). The County's exemption logs provide no explanation of how the claimed exemption applies to these records, which further violates RCW 42.56.210(3), as discussed below at page 12 to 14.

Additional grounds[2] support reversal and release of the first envelope of records: the superior court erred in not releasing the records as

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[2] CR 26(b)(4) provides further grounds for release. The County erroneously argues that Mr. Allphin failed to argue for release under CR 26(b)(4). County's Resp. Br. 48, fn. 11. Mr. Allphin has so claimed. See Allphin Opening Br. 28 and CP 1440 (both citing CR 26(b)(4) and *Soter,* 162 Wash.2d at 760, 174 P.3d 60 (Johnson, C., Johnson, J.M., Sitterson, Chambers, JJ., dissenting) ("Work product is not an absolute protection from disclosure, particularly in the context of the broad mandate for public access to agency documents").

a sanction for the County's inexcusable abuse of two highly-sensitive judicial processes: *in camera* review and sealing of public records.

On September 9, 2013, the County misrepresented that it was submitting only eleven (11) discretely identified emails for *in camera* review. CP 781, RP 215:23-216:12. The superior court issued a memorandum decision and order that repeatedly recites that the envelope contained only "eleven (11) emails". CP 971, 972, 974; CP 965. The "eleven (11) emails" defined the scope of the TRO.

Only when new counsel appeared did the County admit that the envelope in fact contained additional and different records and excluded one of the so-called "eleven (11)" identified records entirely. CP 1038-1099; CP 1041-42, ¶¶ 4, 6-7, 11.[3] The misrepresentations were not excusable, inadvertent, or reasonable. Though the superior court found the County's abuse of the process "very, very troubling," RP 267:17-19, the superior court stated that it would "solve this problem [...] at a later time," if the parties could not settle. RP 280:22-24: RP 280:7-12.

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[3] The County correctly relays, County's Resp. Br. 21, n. 2, that Mr. Allphin commended its new counsel's "honesty", but fails to recite the remainder of the letter. (CP 1585-86, stating "I admire your honesty...I think you should go one step further and release all the records that were in that envelope. The County has abused the judicial process here, which, given the circumstances, cannot be explained away by mere inadvertence.")

As the County points out in its response brief, pp. 16-17, 19, Mr. Allphin's counsel and the superior court asked the County why it only submitted the eleven (11) emails. See RP 216-220. Upon this additional inquiry, the County affirmed that it only sought review of the eleven (11) specifically listed. RP 219, see also RP 215:23-217:23. The County cannot now recast this hearing as one where mutual mistakes were made. Mr. Allphin made every inquiry possible to confirm that the sealed envelope contained only eleven (11) of the 50 withheld records. The County's submission of the eleven (11) emails specifically identified each email by author, recipient, date, and time. CP 781. The index contained no other numbering system or indication that embedded email chains were included. CP 781. Mr. Allphin's counsel specifically made the point that prior to the hearing there were 32 emails restrained and demanded the County confirm that it only sought protection of the eleven (11). RP 216-220. There was no "state of confusion", County's Resp. Br. 19.[4]

[4] The County repeatedly casts its PRA violations in this case as a result of Mr. Allphin or the DOE's "mistakes" or "confusion." See e.g. County's Br. 1, 49, 50. However, the record demonstrates that Mr. Allphin was persistent and precise with his claims, each supported by documented facts and legal authority. See e.g. CP 1461-1987. Mr. Allphin's only mistaken assertion accompanied his December 9, 2013 filing, seeking a timeline and penalties for the wrongly denied records. CP 1461-6, 1466-71. Mr. Allphin can hardly be discredited for this "mistake", as Mr. Allphin relied on the County's false representation that it had placed the eleven (11) identified records in the envelope.

This Court will find that the envelope of records sealed by the superior court does not contain those eleven (11) records listed on its cover index. Cf. CP 3059-3219 with CP 781. If for none of the above stated reasons, the contents of the envelope should be released as a sanction for the County's inexcusable violation of the *in camera* review and sealing processes. The Court has inherent power to control the conduct of judicial proceedings, RCW 2.28.010(3), including to preclude the County from benefiting from the judicial processes that it abused.

C. The superior court erred when it granted the County's motion for summary judgment and denied Mr. Allphin's motion for summary judgment.

The superior court erred when it concluded that the County did not deny wrongly Mr. Allphin access to public records. The County bears the burden of proof to show that its denials are "in accordance with a statute that exempts" release, RCW 42.56.550(1), and, that its estimate of time to respond is reasonable, RCW 42.56.550(2). Mr. Allphin's counterclaims for summary judgment relate to specific records as follows:

(1) Mr. Allphin prevailed in obtaining the release of records withheld pursuant to the County's 3/27-28/13 and 4/2/13 exemption logs.

The County withheld records and denied Mr. Allphin access when it claimed exempt records listed on the County's 3/27-28/2013 and 4/2/2013 exemption logs. CP 1468. When challenged by Mr. Allphin, the

County released 41 of the 50 records from the 4/2/2013 exemption log and six challenged records from the 3/27-28/13 exemption log. CP 2231-32, 2236-2479. Review of the actual records demonstrates that they lacked any privileged communications. *Id.* The County released these records to "cut its losses" when Mr. Allphin defended in these court proceedings and insisted on release of the records. CP 1467-69, ¶¶ 6-6.2; see also earlier motion at CP 791-98, 825-937.

a) No valid exemption claim supports denial of six emails on the County's 3/27-28/2013 exemption log.

Mr. Allphin's efforts in the lawsuit resulted in the recovery of six emails withheld pursuant to the County's 3/27-28/2013 exemption log, which were withheld under a claim of "attorney-client communications between legal counsel and client", despite no attorney being involved with the emails. CP. 1469, 1566-67, 1569-70. The County has never provided an explanation for this wrongful, but apparently obtained summary judgment based on its broad "reasonable search" defense. This makes no sense, and the conclusion should be reversed and summary judgment granted for Mr. Allphin as to these six records.

b) No valid exemption claim supports denial of emails on the County's 4/2/2013 exemption log.

Similarly, the County denied Mr. Allphin access to 50 records pursuant to its 4/2/2013 exemption log under the claim of attorney work

product, but subsequently released 41 of those records. Mr. Allphin prevailed as to these 41 records, which entitles him to RCW 42.56.550's statutory relief. The County defends only that its claimed exemptions as to these records were proper at the time withheld, and, therefore it could not have violated the PRA by subsequently releasing the records. County's Br. 36 (citing *Sanders v. State,* 169 Wn.2d 827, 849, 240 P.3d (2010)). However, unlike those subsequently relinquished records in *Sanders,* these 41 records were not protected work product in the first place and should never have been denied from Mr. Allphin's access. *See* 41 records at CP 2231-32, 2236-2479. Even if the records contained attorney work product, the protection was waived, as discussed at page 5 to 6. The County's attempt post facto to raise the common interest protection also fails, as discussed at page 13 to 14. The record indisputably demonstrates that the County wrongly withheld these 41 records on 4/2/2013 and subsequently released the 41 emails to stop the per diem penalty.

The requester is the "prevailing party" even if the agency "voluntarily" provides the records after the lawsuit has commenced. *Spokane Research & Defense Fund v. City of Spokane,* 155 Wash.2d 89, 102, 117 P.3d 1117 (2005); see also *Neighborhood Alliance of Spokane Co. v. Co. of Spokane,* 172 Wash.2d 702, 726-27, 261 P.3d 119 (2011); Attorney General's *Open Government Internet Deskbook,* "Ch. 1: Public

Records Act", §1.7(E). Also, the County did not "voluntarily" releases most of the records, but was ordered to do so. RP 84:10-24; CP 2207, CP 562-63; CP 1476-77.[5] Regardless, the County violated the PRA when it improperly denied the records.[6] The statutory award applies in "any action". RCW 42.56.550. Otherwise, an agency could "resist disclosure of records until a suit is filed and then disclose them voluntarily to avoid paying fees and penalties," which "release strategy", would "flout the purpose of the PDA." *Spokane Research,* 155 Wash.2d at 103-04, 117 P.3d 1117. The Superior Court's summary judgment ruling should be reversed and granted to Mr. Allphin.

The County also failed to explain its vague claim of exemption as to records listed on the 4/2/2013 exemption log, violating RCW

[5] Despite the superior court's order that the DOE release all records not listed on the 4/2/13 exemption log, the County continued to withhold and obtain the sealing of emails between the DOE and the County, including the 10/18/2012 email chain. CP 2724.

[6] The superior court's final ruling is inexplicable on this point. The superior court earlier stated that "respondents [Mr. Allphin] in this case have prevailed more than the plaintiffs," RP 245:11-12, because the County had only succeeded in sealing seven of the 50 records withheld on the 4/2/2013 exemption log, roughly a 14% success rate. CP 1470-71. The other two records from the original 50 (41 were released and 7 were sealed) exposes another great frustration for Mr. Allphin. CP 1470-71. After denying access to these two on 4/2/2013 (under representation that the County was ready to produce them for *in camera* review), the County refused to submit them on 9/9/2013 and refused to release them or submit them *in camera* until the December 23, 2014 hearing and pursuant to the superior court's second *in camera* review.

42.56.210(3). *City of Lakewood v. Koenig,* 182 Wash.2d 87, 94-95, 343 P.3d 335 (2014) (stating that the "plain language of RCW 42.56.210(3) and our cases interpreting it are clear that an agency must identify 'with *particularity*' the specific record or information being withheld and the specific exemption authorizing the withholding")(emphasis in original). The County's exemption logs fail to provide an explanation. CP 2484 et seq. Every record on the 4/2/13 exemption log was withheld without explanation, but cites only "attorney work product" and a long string cite of statutes, civil rules, and cases. See CP 1468, CP 1505-1512. The logs lack explanation, let alone in sufficient detail. *Sanders,* 169 Wash.2d at 846, 240 P.3d 120 ("[c]laimed exemptions cannot be vetted for validity if they are unexplained"); *Adams v. Wash. St. Dep't of Corr.*, __ F.3d __, 2015 WL 5124168, p. 11 (Div. 3 2015)("improper under the PRA to provide exemption information in such vague terms that 'the burden [is] shifted to the requester to sift through the statutes cited . . . and parse out possible exemption claims.'")

The County now raises the "common interest rule." County's Resp. Br. 46. The County did not state that doctrine as grounds for exemption, or provide such explanation, on any of its many exemption logs, public records release letters, or pleadings. See CP 2234, 2484-2553. The County cannot raise the "common interest" theory post facto. Even if

it could, the "common interest rule" is not a statutorily-listed exemption. It is not a statutory privilege. Nor is it an extension of the work product doctrine. The rule "is merely a common law exception to waiver of privilege that applies when parties share a common interest in litigation." *Sanders,* 169 Wash.2d at 853-54; 240 P.3d 120. The DOE and the County did not share an interest in litigation, just as they were not on the same "legal team". The common interest theory does not apply here, and the Court, when constructing exemptions narrowly to promote release, should not broaden this doctrine to apply here.

Furthermore, a subset of the 50 records withheld on 4/2/2013 involves the additional PRA violation of over-redaction. RCW 42.56.210; *Amren v. City of Kalama,* 131 Wash.2d 25, 32, 929 P.2d 389 (1997). Compare emails CP 1722-41 (redacted) with 1743-1769 (unredacted). The nine emails in this series, CP 1722-41, show complete, block-style redactions, without even attempting to comply with the minimal redaction requirement of the PRA. *Freedom Foundation v. Wash. State Dept. of Transp.,* 168 Wash.App. 278, 297-98, fn. 19, 276 P.3d 341 (Div. 2 2012) (penalties appropriate against agency that initially redacted records over-broadly and subsequently provided records with narrower redactions).

(2) The County intentionally delayed its records response, unlawfully distinguished Mr. Allphin's request, and failed to provide fullest assistance.

The County violated multiple provisions, and the underlying policy, of the PRA requiring prompt responses when the County delayed its response over more than 16 months.[7] CP 799-824. RCW 42.56.100; RCW 42.56.080; RCW 42.56.520; RCW 42.56.550; WAC 44-14-08004; *Limstrom v. Ladenburg,* 136 Wash.2d 595, 603-604, 963 P.2d 869 (1998). Mr. Allphin filed a motion pursuant to RCW 42.56.550(2) on December 9, 2013, requesting the County finish its response to his October 17, 2012 request. CP 799-824. The motion was denied "without prejudice" for other reasons, CP 963, RP 250:11-17, giving the County the opportunity to quit its delay tactic, which it did, the following month, by finally closing its response. CP 1464; CP 1494-95.[8]

The record demonstrates that the County was using the installment process to extend serially the County's response. For example, the County

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[7] The County now asserts its letter of March 14, 2014, CP 1200, did not in fact close its response. County's Resp. Br. 36-37. The County's theory that it can indefinitely and artificially hold open a records response as a shield for liability runs contrary to the PRA and would encourage every agency to hold open artificially a response, shift the burden on the requester to object or identify missing records, and chill a requester's right to request and receive public records.

[8] The County provided one additional installment of January 13, 2014, containing 219 individual emails, 211 of which were duplicates, demonstrating that the County was holding open artificially its installment responses. CP 1464. In fact, the County's installments over the last 7 months contained very few new records, with the November installment containing just 7 records, CP 1112-13, CP 1492, CP 1494, CP 1489-90.

delayed its response with duplicate records. The County again holds out as significant that it produced over 20,000 pages of records, County's Br. 8, but does not refute that the number contains great duplication and non-responsive materials. CP 1497; see Allphin Opening Br., 37-38. The County also continues to misrepresent that it spent over 437 hours by March 22, 2013 on this records request, see County's Br. 11, despite the fact that its contemporaneous time records fail to substantiate that inflated number, see CP 2232; 2554-2665, and that much of the time spent was a consequence of its own internal policies and "cumbersome" technology complications, CP 2232, citing CP 1105-07, 1389.[9]

By further irrefutable example of delay, after obtaining its amorphous ex parte TRO on April 4, 2013, allegedly for purposes of seeking *in camera* review, the County refused to advance the lawsuit or submit records for review. The County did not advance the proceedings until it retained new counsel in 2014. CP 1038-39. The County's intentions with the TRO were made apparent by its contemporaneously filed contempt proceedings in the related action, which contempt order it

[9] Further example of the County's post facto attempt to inflate its efforts: the County holds out that Mr. Sander handled nearly 90 PRA request in 2013 and worked on this request in a consistent manner. County's Resp. Br. 11. The County omits that Mr. Allphin's request was the only non-criminal law record request that Mr. Sander worked on in 2013. CP 1475-76 (chronicling the County's discriminate treatment).

obtained, when Mr. Allphin was restrained from using the exculpatory records. CP 1474; Allphin Opening Br. 14. The TRO never served, and was never intended to serve, a legitimate purpose under the PRA.

The County strikingly now asserts that "CSE can hardly dispute that such cooperative dialogue in fact took place," County's Resp. Br. 39, despite the indisputable record's demonstration that the County failed to respond promptly or provide fullest assistance. The County's proffered examples of "cooperative dialogue" only occurred in 2014 after it associated "outside counsel", County's Resp. Br. 36, after it "closed" its public records request, *Id.* at 36-37; CP 1200, and after the parties were engaged in discovery under the Civil Rules. The County cites no examples of "engaging in a cooperative process" that occurred in the first 16 months of its response, other than the serial production of delayed installments and filing a lawsuit against Mr. Allphin. County's Resp. Br. 38.

Further demonstration that the County intentionally delayed its records response comes from the County's employees' time logs, which show that the County's search for records in the Health Department was complete as early as March or April 2013. CP 1390, 1403; see also CP 2555-56, CP 2587, CP 2591. The Fire Marshall's time records indicate that all records had been provided by October 24, 2012. CP 2556, CP 2614. If the County's staff had finished their search for public records, by

early 2013, and the County had the time and resources to launch a lawsuit against Mr. Allphin by February 22, 2013, then the County had time to release the requested public records by early 2013. CP 1463. "Providing the 'fullest assistance' to a requestor would mean providing a readily available record as soon as possible." WAC 44-14-04004.

The County's delayed installments effectively denied Mr. Allphin's right to access public records. Records delayed are records denied. *See Soter*, 162 Wash.2d at 750, 174 P.3d 60 (stating, that the PRA "treats a failure to properly respond as a denial", citing RCW 42.56.550(2)); *Neighborhood Alliance,* 172 Wash.2d at 721, 261 P.3d 119 (statutory penalties appropriate where PRA violation equated to records denial); *Hobbs v. State*, 183 Wash.App. 925, 936, 335 P.3d 1004 (Div. 2 2014)(denial occurs "when it reasonably appears that an agency will not or will no longer provide responsive records"). No justification exists for the County to have delayed its response over 16 installments, with installments containing as few as seven emails. The County disregarded its PRA duties to provide a prompt and timely response, to provide fullest assistance, and treat Mr. Allphin's request as it did others. The date that the County sued Mr. Allphin, February 22, 2013, marks a reasonable starting date for assessing the per diem penalty as to all records denied by delay.

(3) After "closing" its response in 2014, the County continued to release records but admits to having deleted "about 20".

Mr. Allphin objected and notified the County that it had failed to release many records known to exist. CP 1471-73, ¶ 8, Ex. M-1 to M-3.[10] Mr. Allphin knew or believed these records to exist because he had possession of many of them.[11] CP 1472. Mr. Allphin suspected that employees of the County were "silently withholding" records with similar characteristics. CP 1471-72. "Silent withholding" is the forbidden practice of not disclosing a withheld record to a requester. *PAWS,* 125 Wash.2d at 270, 884 P.2d 243 (citing *Wash. St. Phys. Ins. Exchange v. Fisons Corp.*, 122 Wash.2d 299, 350-55, 858 P.2d 1054 (1993)); *Zink v. City of Mesa,* 162 Wash.App. 688, 711-12, 256 P.3d 384 (Div. 3 2011); *Resident Action Council v. Seattle Housing Authority,* 177 Wash.2d 417, 439-40, 327 P.3d 600 (2013). The County released some of the records identified by Mr.

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[10] The County had failed to provide a staff report and relevant documents, as required by Kittitas County Code 1.10.013, in the related proceedings, some of which were exculpatory records that Mr. Allphin obtained only through the PRA request.

[11] As stated in *Haines-Marchel v. State, Dept. of Corrections*, 183 Wash. App. 655, 673, 334 P.3d 99 (Div. 2 2014), "our Supreme Court has made clear that '[t]he fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties.'" (citing *Neighborhood Alliance,* 172 Wash.2d at 727, 261 P.3d 119).

Allphin, CP 1471-73, ¶ 8, but claims others no longer existed. CP 1472, 1605-06, 1610-12.

a) Mr. Allphin prevailed as to those records he identified as missing and the County subsequently released.

Upon Mr. Allphin's notice and demand for release, the County provided 8 records on April 28, 2014, one on May 14, 2014, one on July 25, 2014, and 16 on January 13, 2015.[12] CP 1463, 1468, 1471-73, 2738-2742. The County violated the PRA by silently withholding these records until Mr. Allphin specifically notified the County of the records. The County's only response as to these wrongful withholdings is based on a misreading of *Hobbs,* 183 Wn.App. 925, 335 P.3d 1004 (Div. II 2014). *Hobbs* involved "premature litigation" where the agency was acting diligently and was not afforded ample time to coordinate its response

[12] Further, the 9/20/12 email had been partially released with undisclosed omissions in its chain of emails. See CP 2734-39, 2786-87 (omitting embedded 10:33 a.m. emails to hide statement that Mr. Allphin will "fight this," when in fact Mr. Allphin had only sought evidence of the alleged spill). The County listed the email chain on its 4/26/13 exemption log, removing the embedded email. CP 2537. Again, the County submitted the record without disclosure of the altered email chain on 12/23/14. CP 2722-24, No. 3. The County and DOE both withheld this email, and a similarly altered "9/24/12; 11:26 a.m. Peck to Rivard, Lowe" email, CP 2790-91, until just hours after the 12/23/14 summary judgment hearing, when the DOE finally released them, with the County's release, in turn, on January 13, 2015. CP 2734-39. Mr. Allphin remains unable to know whether the embedded emails were subject to review. The alterations shows the County's bad faith.

before being sued. CP 2862-67 (explanation of critical factual and legal distinctions between this case and *Hobbs*). *Hobbs* does not condone an agency's 16+ month delayed and obstructed response and then permit an agency the "right to cure" wrongly withheld records that are only produced thereafter during civil discovery.

b) Mr. Allphin prevailed as to those records he identified as missing and the County admits it has lost or destroyed.

The County admits that it failed to release "about 20" responsive records that it lost or destroyed. CP 2881; see also CP 1473, 2732-33. The County's failure to retain and provide these records suggests that other unknown records have existed and similarly been withheld, destroyed, or lost. Mr. Allphin cooperated with the County, provided actual examples of missing County records, and communicated his concern that certain former County employees were altering, deleting, and withholding responsive records. Mr. Allphin, as a taxpayer of Kittitas County, is not enthused about being sued under the PRA, or the County's disregard of its PRA duties, particularly to provide those records that should exist (but do not) to substantiate the County's shut-down of his business.[13] Though Mr.

[13] Though the County recites its own allegations of "major violations of state and federal statutes" at Mr. Allphin's facilities, see e.g. County's Resp. Br. 2, the County has still not produced records, reports, or pictures to substantiate its allegations.

Allphin may never know what other records were deleted or secreted away, the "about 20" should be the subject of a per diem statutory penalty from the date of the request until the date of judgment. CP 1471-73. These are specifically identified emails, known to exist, known to have been in the County's possession, and known to be subject to the County's retention policy. CP 1774, 1824, 1830. Further, the County retained similar records possessed by the same staff, during the same time period, and with the same subject matter. No excuse exists for the County to have destroyed selectively these records.

The County's only response to this claim has been an awkward attempt to shoehorn this lawsuit into a "reasonable search" case. The superior court erred when it followed the County's lead on this theory, CP 2981, which stems from recently developed caselaw. *See Neighborhood Alliance,* 172 Wash.2d 702, 261 P.3d 119. Mr. Allphin did not allege a "reasonable search" claim, though he strenuously contested the defense when the County raised it on summary judgment. See CP 1453. The County errors and the superior court erred when it relied on that line of caselaw to absolve the County of all liability for Mr. Allphin's actual, record-specific claims raised and litigated in this lawsuit. No appellate Washington court has ever applied a "reasonableness" defense to records-

specific violations of the PRA.[14] Such a "reasonableness" defense would undermine the PRA's own terms and its policy of construction in favor of records disclosure and open government.

(4) The County withheld the "Smoking Gun Memorandum" due to its exculpatory nature.

The County failed to release the "smoking gun memorandum" to Mr. Allphin until July 25, 2014 (646 days after his request). CP 1983, 1985-87. The County argues now that it did not possess the record at the time of Mr. Allphin's 2012 public records request, County's Resp. Br. 34, despite the fact that the record was scanned and transmitted from the County's copy machine to a County employee's (Mr. Rivard) email and then forwarded from the County employee (Mr. Rivard) to a DOE employee (Mr. Granberg) in 2011. CP 1993-94, 2050-53. As stated to in the federal lawsuit, Mr. Granberg "provided", CP 1966, or "gave", CP 1975, the handwritten notes to Mr. Rivard in 2011. CP 1996-97, 1954-80.

Finally, the County's explanation that the scanned and emailed record contained only two pictures and not the smoking gun memorandum is belied by the fact that the memorandum references the pictures and only

[14]The County does not respond to or refute the reality that Mr. Allphin did not raise a "reasonable search"-type claim in his counterclaims, discovery, or motions for relief.

makes sense if transmitted as one record.[15] In an odd and provoking twist of the facts, the County goes so far as to blame Mr. Allphin for its use of the smoking gun memorandum in the federal lawsuit against Mr. Allphin. County's Resp. Br. 32, fn. 4. Given the County's use of the record against Mr. Allphin, the County should be judicially estopped from now disclaiming possession of the record. *Rushlight v. McLain*, 28 Wash.2d 189, 182 P.2d 62 (1947); *Johnson v. Si-Cor Inc.*, 107 Wash.App. 902, 28 P.3d 832 (Div. 3 2001); *King v. Clodfelter*, 10 Wash.App. 514, 518 P.2d 206 (Div. 1 1974). The superior court's incorrect summary judgment as to this record should be reversed and summary judgment granted for Mr. Allphin.

III. CONCLUSION

The superior court's grant of summary judgment for the County should be reversed and summary judgment for Mr. Allphin should be

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[15] The County's assertion of providing "detailed forensic evidence" lacks support in the record. County's Resp Br. 33. The County's "forensic evidence" amounts to a screen shot demonstrating that the cover email and pictures were sent to Mr. Allphin. See CP 1115-16. That is irrelevant. The County intentionally removed the handwritten notes from this email and attachment due to its exculpatory nature, and only released it after the County's then-separate counsel used it against Mr. Allphin in the federal lawsuit. There is no "detailed forensic evidence" or evidence at all that the handwritten notes were a separate record from the pictures referenced in the notes. The County's self-serving explanation of non-possession is not credible, belied by the record, and directly contrary to the County's own sworn statements in the federal lawsuit.

granted for the record-based counterclaims. The County must shift its paradigmatic view of the PRA, which view is evidenced by the County's actions here and carried throughout the tone of the County's Response Brief. The County simply cannot treat citizens and the PRA as nuisances and the PRA as merely an "instrument" that "inflict[s] liability", County's Resp. Br. 2. The PRA is a citizen-initiated expectation that government be operated openly. The County has failed to do so here.

Respectfully submitted this 23rd day of November, 2015.

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No. 332411

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

Kittitas County Superior Court Cause No.13-2-00074-4

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington

Plaintiff/Respondent

v.

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.

Defendants/Appellants

CERTIFICATE OF SERVICE

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I hereby declare under penalty of perjury under the laws of the State of Washington that on the 23 day of November, 2015, I served copies of the following documents:

1. Appellants' Reply Brief

in the matter indicated below:

□ First Class U.S. Mail □ Certified Mail □ Facsimile X Email	Neil Caulkins Kittitas County Prosecuting Attorney Kittitas County Courthouse - Room 213 Ellensburg, WA 98926 neil.caulkins@co.kittitas.wa.us angela.bugni@co.kittitas.wa.us
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DATED this 23 day of November, 2015.

Nicholas J. Lofing