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Supreme Court No. 95946-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 34760-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

vs.

SKY ALLPHIN, ABC HOLDINGS, INC., and
CHEM-SAFE ENVIRONNEMENTAL, INC.,
Appellants,

THE WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Respondent.

APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Sky Allphin, ABC Holdings, Inc., and Chem-Safe Environmental, Inc., petition for review of the Court of Appeals' decision identified in Section II below. Consistent with the Court's decision, this Petition refers to the Petitioners collectively as "Mr. Allphin."

II. COURT OF APPEALS DECISION

Mr. Allphin seeks review of the published portion of the decision terminating review in *Kittitas Cty. v. Allphin*, 2 Wn. App. 2d 782, 413 P.3d 22 (2018), issued by Division III of the Court of Appeals on March 13, 2018 (copy attached as Appendix A). Mr. Allphin timely moved for reconsideration, which was denied on May 8, 2018 (copy attached as Appendix B).

III. ISSUE PRESENTED FOR REVIEW

This case involves an incorrect interpretation of the Washington Public Records Act's 'show cause' statute, RCW 42.56.550, which provides a procedure exclusively to private citizens to seek judicial relief against public agencies that improperly deny access to public records. Here, a private citizen (Mr. Allphin) requested multiple public records from a public agency (the Washington Department of Ecology) related to a second public agency's (Kittitas County) determination that his business was a public nuisance.

Mr. Allphin's simple records requests became complicated when the County sued to enjoin Ecology's production of records it contended were protected by attorney-client and work product privilege. The dispute escalated further when Mr. Allphin counterclaimed and cross-claimed respectively against the County and Ecology. Prior to completion of discovery, Ecology brought—and the superior court granted—a show cause motion under the PRA's show cause statute, requiring Mr. Allphin to show cause as to why Ecology was not in compliance with the PRA. At the conclusion of the hearing on Ecology's motion, the superior court held that Mr. Allphin failed to meet his show cause burden and dismissed his crossclaims against Ecology. The Court of Appeals affirmed. This affirmation gives rise to the following issue:

Is a show cause action under RCW 42.56.550 improper when initiated by a public agency that has denied access to public records when such an action runs contrary to the Legislature's express intent that only private citizens may bring a PRA show cause action? Restated in the affirmative, may only a PRA-requesting party who has been denied access to public records bring a show cause action pursuant to RCW 42.56.550?

For the reasons set forth in Section V of this Petition, this issue warrants review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

Mr. Allphin's Chem-Safe business is a hazardous waste facility located in Kittitas County. In 2011, and after working for two years in conjunction with the Washington Department of Ecology, Kittitas County issued Chem-Safe a Notice of Violation and Abatement, requiring Chem-Safe to halt operation until it obtained permits and equipment that the County contended were necessary for future operations. CP 1778–89. Mr. Allphin appealed the Notice, which a hearing officer affirmed. The officer's affirmation was later affirmed by both the Superior Court and the Court of Appeals (*see ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 348 P.2d 1222 (2015)).

Prior to and while the Notice was under consideration by the Court of Appeals, Mr. Allphin issued a number of PRA document requests to Ecology related to the County's issuance of the Notice. *See, e.g.*, CP 543–45, 550–552. One of Mr. Allphin's requests asked for 19 records that the County contends are attorney-client or work-product privileged communications and therefore exempt from production under the PRA. CP 545–46. Mr. Allphin requested additional records from Ecology that Kittitas did not contend were privileged. CP 225–49, 543–45, 550–552.

At the County's request, Ecology delayed production of the 19 allegedly privileged records so that the County could seek an injunction

preventing their disclosure. CP 233–34, 270–77. Ecology did not produce the actual records to Mr. Allphin but instead produced a list of the 19 records in February of 2013. CP 545–46. Ecology also did not produce the additional, non-privileged records Mr. Allphin requested. *See* CP 546–47.

The County filed an action for declaratory relief and injunction against Mr. Allphin and Ecology on February 22, 2013, to (a) prevent production of the 19 records and (b) to enjoin the use of records previously delivered to Mr. Allphin. CP 1–8. The superior court eventually determined that 11 of the 19 records were privileged documents and on December 20, 2013, sealed the records and permanently enjoined their use. On May 17, 2018, this Court affirmed the superior court’s determination. *Kittitas County v. Allphin*, No. 93562-9, 2018 Wash. LEXIS 336, at *2 (Wash. May 17, 2018).¹

Mr. Allphin moved in 2014 to amend his answer in the County’s declaratory judgment action to include counterclaims against the County

¹ This Court’s Opinion in Cause No. 93562-9 did not resolve the question of whether it was improper for Ecology to refuse production of the documents that the County did not allege were privileged. Nor did the Opinion resolve the conflicting factual conclusions reached by the Court of Appeals regarding whether or not Ecology produced the privileged documents, thereby waiving privilege. *See* 5/15/17 Ecology Resp. Brief at 5, n. 6 (“The County’s initial request focused on 19 e-mails, and was reduced to 11 by the time the court granted the permanent injunction, in part because Ecology had already inadvertently released some of the documents.”) (citing CP 148–72)). Accordingly, the Opinion in Cause No. 93562-9 does not moot this immediate Petition; a justiciable controversy remains. *See Lee v. State*, 185 Wn.2d 608, 616–18, 374 P.3d 157 (2016) (discussing elements of justiciable controversy).

and crossclaims against Ecology. CP 25–27, 37–44. The superior court granted Mr. Allphin’s motions. *Id.* Mr. Allphin then embarked on discovery. *See* CP 97–98, 455–56, 457–63.

While discovery was still ongoing, Ecology—rather than filing for CR 56 summary judgment—brought a “Motion to Show Cause,” requiring Mr. Allphin prove a negative: that Ecology had not complied with the PRA. CP 99–132; *see also* 5/17/17 Resp. Brief at 11 (expressly describing Ecology’s motion as “a motion to show cause”). Ecology based its motion on the PRA show cause statute, RCW 42.56.550, arguing the statute “expressly permits a show cause hearing.” CP 102, 109. Mr. Allphin presented argument against Ecology’s motion on procedural grounds, which the superior court rejected. CP 528–41, 1085–1107. The court granted Ecology’s motion, holding that Mr. Allphin had failed in his burden to “challenge ... Ecology’s redactions,” and presented insufficient evidence to show “bad faith by Ecology” or “discrimination against Mr. Allphin.” CP 2656. The court then dismissed Mr. Allphin’s crossclaims against Ecology. CP 2656–57.

On March 13, 2018, the Court of Appeals affirmed the superior court’s dismissal of Mr. Allphin’s crossclaims, holding that the procedure employed by Ecology to obtain dismissal was proper and did not prejudice Mr. Allphin. The Court based its affirmation on three premises:

1. The show cause procedure Ecology employed struck the appropriate balance between a PRA requesting citizen’s right to access public records and a PRA responding agency’s right to be free from “indefinite” litigation. *Kittitas Cnty.*, 2 Wn. App. 2d at 793.

2. Agencies such as Ecology have the same right to proceed under the Rules of Civil Procedure as do private citizens. *Id.* at 789–90.

3. Ecology’s motion was not one to show cause under RCW 42.56.550; but rather a hybrid CR 7 motion combined with a motion to shorten time, which the Court of Appeals concluded were equivalent because the employed procedure did not prejudice Mr. Allphin. *Id.* at 791–92.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals’ affirmation via published opinion of Ecology’s show cause motion creates a new procedure by which a public agency responding to a PRA request can seek relief in the courts through a procedure that inappropriately shifts the burden of persuasion from the responding agency to the PRA-requesting citizen. By definition, an agency-filed show cause action requires the nonmoving, requesting citizen to demonstrate why the moving agency should produce the requested documents—directly contrary to the Legislature’s intent that the burden at

all times be on the PRA-responding agency to demonstrate why the requested records are exempt from production and/or why the agency's search for the requested records was reasonable.

The Court of Appeals justifies its affirmation of this new procedure on grounds that the procedure protects the right of responding agencies to be free from protracted litigation. Washington law already protects that right. CR 56 provides the appropriate balance between the right of the responding agency not to be burdened by protracted litigation and the right of the requesting party to hold accountable those agencies that do not comply with the PRA.

The Court of Appeals' Opinion tips the Legislative balance between the rights of the PRA requester and the PRA responder too far in favor of the PRA responder. If not corrected, the Court of Appeals' Opinion will prejudice future PRA requesters like Mr. Allphin and will have a chilling effect on the PRA request process. The Court should accept review to correct the Court of Appeals' adoption of this new, ersatz procedure.

A. The Legislature intended the PRA show cause action to be available only to private citizens whose PRA requests have been denied by a responding agency.

The Public Records Act "is a strongly worded mandate for broad disclosure of public records" *Progressive Animal Welfare Soc'y v. Univ. of*

Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994). “[F]ree and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” *John Doe v. Dep’t of Corr.*, 190 Wn.2d 185, 191, 410 P.3d 1156 (2018). Thus, the Legislature (and this Court) mandates that the PRA’s provisions must be construed liberally to promote full access to public records and exemptions to production must be narrowly construed. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1996).

To advance its “mandate for broad disclosure of public records,” the Legislature enacted a show cause procedure, providing a method by which a PRA requesting party can take a PRA responding agency to task to “show cause why it has refused to allow inspection or copying of a specific public record or class of records.” RCW 42.56.550. During the show cause procedure, the burden of proof at all times “shall be on the agency” to establish that its denial of production is warranted. *Id.*

Here, the Court of Appeals’ Opinion correctly acknowledges that the plain language of RCW 42.56.550 “expressly makes a show cause procedure available to public records requesters” and not to responding agencies. *Kittitas Cty. v. Allphin*, 2 Wn. App. 2d 782, 789, 413 P.3d 22, 25 (2018). Limiting availability of PRA show cause actions only to citizen requesters furthers the purpose of the show cause action (and its associated

monetary penalties) to “deter improper denial of access to public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). The statute therefore makes no mention of fees for the responding agency in the event it prevails on the show cause action. Indeed, lobbying efforts to lessen responding agency liability have failed. *See, e.g.*, 2017 Bill Text WA S.B. 5710 (failed in first committee) (attempting to limit the penalty for “good faith” denials of production to \$5,000). The Legislature intended the PRA show cause action to be available to requesting parties only. Nothing in the PRA authorizes the show cause action taken by Ecology and approved by the Court of Appeals.

B. Show cause actions are creatures of statute and are not contemplated by the Rules of Civil Procedure. A responding agency does not have a right to a show cause motion.

The Court’s Opinion correctly states that “Washington courts have not placed limits on civil rule procedures that are available in PRA actions” and that “Agencies and objectors to disclosure have the same right to proceed under the civil rules as do record requesters.” *Kittitas Cty.*, 2 Wn. App. 2d at 789–90. Based on these legal premises, the Court of Appeals concluded that Ecology’s show cause motion was procedurally proper. The Court’s conclusion is incorrect.

As the Court of Appeals acknowledges, show cause actions are proceedings that require the non-responding party to appear before a court

and persuade that court to act in some way other than how it is otherwise inclined to act:

A show-cause motion essentially asks a district court to issue an order requiring the nonmovant to show the court by a certain date why the court should not take some other action.

See id. at 790. (quoting 7th Circuit discussion in *United States Sec. & Exch. Comm'n, v. Hyatt*, 621 F.3d 687, 695 (7th Cir. 2010)).

These actions necessarily place the burden of persuasion on the nonmoving party. *See id.* (must “show the court ... why”). In contrast, motions brought under the Rules of Civil Procedure place the burden of persuasion on the moving party. Show cause actions therefore are “not contemplated” in the Civil Rules² and are instead creatures of statute. *Id.*

For example, the Legislature included a show cause procedure in the Residential Landlord Tenant Act, whereby a tenant in jeopardy of eviction can appear and explain why the court should not enter a writ of restitution restoring to the landlord possession of the premises. RCW 59.18.370. A similar action is available in replevin. RCW 7.64.020.

The rationale for show cause actions in real and personal property disputes is analogous to show cause actions under the PRA. Just as a real or personal property owner has a statutory right to demand return of

² Other than in CR 60(e)(2), as the Court of Appeals correctly notes. *Id.* at 790.

property unless the current possessor of that property can show otherwise, a citizen requesting records under the PRA has a statutory right to receive all requested public records unless the responding agency can demonstrate that those records are exempt from disclosure or nonexistent. RCW 42.56.550; *see also* RCW 42.56.030 (“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 process to seek relief in all three instances is not by the Civil Rules, but by the statutory show cause action. For RLTA actions, it is RCW 59.18.370. For replevin actions, RCW 7.64.020. And for PRA requests, RCW 42.56.550. Nowhere in these show cause statutes does the Legislature provide for the party in possession of the property or the public records to seek relief via a show cause order. And nowhere in the Civil Rules (other than CR 60) is there a right to proceed under a show cause posture. Ecology did not have a right to proceed with its show cause motion under either the PRA or the Civil Rules. The Court’s Opinion to the contrary is error: courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (internal quotation omitted).

C. PRA show cause actions and CR 7 motions are not equivalent.

Recognizing the well-worn maxim that courts cannot add to statutory language, the Court of Appeals' Opinion characterizes Ecology's motion not as one for show cause brought under RCW 42.56.550, but as one for hearing on shortened time brought under CR 7(b). *Kittitas County*, 2 Wn. App. 2d at 791–92. However, the Opinion also acknowledges that Ecology's Motion—even if brought pursuant to CR 7—was still brought “to parallel the procedure used when judicial review is sought by a requester under RCW 42.56.550(1) and (2).” *Id.* at 792. The Court's Opinion also acknowledges that the superior court relied on this procedural “parallel” when it denied Mr. Allphin oral argument at the show cause hearing:

The PRA expressly authorizes the trial court to “conduct a hearing based solely on affidavits” as the trial court did here. RCW 42.56.550(3).

Id.

The Court of Appeals resolves these incongruities by couching the two actions as interchangeable: “Whether a record requester makes a show cause motion under RCW 52.56.550(1) or (2) or an agency makes a motion for judicial review under CR 7(b), the nature of the hearing is the same.” *Id.* at 792. The logical flaw in the Court of Appeals' reasoning here is that Mr. Allphin, the “record requester,” did not bring the PRA

show cause action; Ecology did. An otherwise proper CR 7 motion brought by a responding agency—where the agency bears the burden of persuasion—cannot be conflated with a show cause action that shifts the burden to the requesting citizen in a manner not contemplated by the Legislature.

Further, CR 7 merely describes the *process* to bring a motion before a superior court; it is not a *basis* for relief. *See* CR 7(b)(1) (“An application to the court for an order shall be made by motion.”). The moving party must still “state with particularity the grounds therefore” in order to have the motion heard. *Id.*

Although the Court of Appeals contends that the burden of proof in Ecology’s show cause action remained with Ecology (*Kittitas Cnty.*, 2 Wn. App. 2d. at 792), the unpublished portion of Court’s Opinion demonstrates otherwise. There, the Court of Appeals held that Mr. Allphin and Ecology bore equivalent burdens regarding Ecology’s withholding of a requested “annotated sampling plan” document. The Court’s Opinion begins by correctly stating that “By statute, Ecology bears the burden of proving the application of an exemption to a document being withheld” and “of demonstrating that it provided a reasonable estimate of a response time.” *Kittitas County v. Allphin*, No. 34760-6-III, 2018 Wash. App. LEXIS 544, at *29 (Wn. App. March 13, 2018)

(unpublished portion) (citing RCW 42.56.550(1), (2)).

But the Court then incorrectly states that Mr. Allphin bore the burden “to prove that Ecology possessed but withheld a copy of the annotated sampling plan” and that Mr. Allphin’s “evidence” was “insufficient” to meet that burden. *Id.* The Court placed this burden on Mr. Allphin based on “the general proposition of law that the burden of proving a position is upon him who asserts it,” citing to a 1927 case, *In re McKachney’s Estate*, 143 Wash. 28, 30, 254 P. 455 (1927). Not only does *McKachney’s Estate* predate the Legislature’s adoption of the PRA by some 46 years (*see* Laws of 1973 ch. 1 (Initiative 276)), but Mr. Allphin—as the nonmoving party—did not “assert” any “proposition.” Rather, he was forced to “show cause” as to why Ecology was not in compliance with the PRA.

A show cause motion, whether brought under RCW 42.56.550 or as a hybrid CR 7(b) Motion as the Court’s Opinion suggests, is a burden-shifting device. *United States Sec. & Exch. Comm’n v. Hyatt*, 621 F 3d 687, 695 (7th Cir. 2010) (show cause motion provides “notice to the nonmoving party of **what he must do to avoid some other court action**”) (emphasis added); *also Kittitas Cnty.*, 2 Wn. App. 2d at 790 (citing *Hyatt*). Under the PRA show cause statute, the burden that would normally be on the moving party based on the “general proposition of law that burden of

proving a position is upon him who asserts it” (*McKachney’s Estate*, 143 Wash. at 30) shifts to the nonmoving party. And per the express language of the PRA show cause statute, the nonmoving party can only be the public agency. RCW 42.56.550(1) (“burden of proof shall be on the agency”). The Court of Appeals’ Opinion constitutes an end-run around Legislative intent and the plain language of the statute. This is not a case of ambiguity; the statutory language should control.

D. CR 56 summary judgment is the appropriate procedure for a responding agency to test its belief that it properly responded to a PRA request.

The Court of Appeals’ Opinion seeks to balance a PRA-requester’s right to “broad” access to public records with a PRA-responder’s right to avoid “indefinite” litigation.³ *Kittitas Cnty.*, 2 Wn. App. 2d at 793. No new procedure is necessary to effectuate the balance sought by the Court: CR 56 summary judgment provides the appropriate, balanced procedure.

On January 26, 2016, when Ecology desired “to resolve the matter with a determination by the court that it had not violated the PRA” (*Id.* at 787), Ecology should have sought CR 56 summary judgment adjudication of the issue. This procedure would have required Ecology to submit evidence into the court record (including allegedly privileged documents

³ The Court’s Opinion provides no support for using a requesting agency’s right to avoid indefinite litigation as foil for a requesting citizen’s right to open access to public records.

subject to *in camera* review) sufficient to put Mr. Allphin on notice that he could no longer rely on his pleadings and would be required to submit affidavits of his own to establish a genuine issue of material fact for trial. CR 56(e).⁴

Only then would the burden have shifted to Mr. Allphin to demonstrate that issues of fact required resolution by trial. And in the event that Mr. Allphin lacked sufficient evidence to meet this burden due to ongoing discovery, he could have sought relief for additional time under CR 56(f). Instead, Ecology sought relief via a show cause motion with no recognized analogue in Washington law.

One day after Mr. Allphin filed his Motion for Reconsideration of the Court of Appeals' Opinion, the Court of Appeals issued its opinion in *Zabala v. Okanogan County*, 3 Wn. App. 2d 156, 414 P.3d 585 (2018). The posture in *Zabala* demonstrates the proper procedure Ecology should have employed to seek dismissal of Mr. Allphin's crossclaims. In *Zabala*, a PRA requesting citizen sued a PRA responding agency, alleging failure to produce records in accordance with the PRA. *Id.* at 157–60.

⁴ A summary judgment posture would also require Ecology to explain why the R. Johnson Declaration (CP 225–249) contains conflicting statements. In paragraph 29, Mr. Johnson declares that he withheld 19 documents from production. CP 234. Mr. Johnson also declares in paragraph 76 that he compiled “three compact discs containing all documents that [he] had so far provided to Mr. Allphin.” CP 248. These discs contain 7 of the 19 documents Mr. Johnson declares he withheld. Failure to address this material issue resulted in inconsistent court rulings that could have been avoided at summary judgment.

Rather than seek dismissal via an improper agency-initiated PRA show cause action, the agency properly filed a CR 12(b) motion to dismiss. *Id.* at 160. The court, under CR 12(b)(7), converted the motion into one for CR 56 summary judgment based on the fact that the agency submitted declarations in support of its motion. *Id.* The court dismissed the requesting party’s suit and the Court of Appeals affirmed. *Id.* at 165.

Here, the Court of Appeals correctly noted that responding agencies have access to the same “right to proceed under the civil rules” as do requesting parties. *Kittitas Cty.*, 2 Wn. App. 2d at 789–90. CR 12 and CR 56 motions (both filed in accordance with CR 7) are recognized Rules of Civil Procedure and therefore are ‘rightfully’ employed by responding agencies. No new, hybrid procedure is necessary or available under the Court Rules or the PRA.

E. The Court of Appeals’ Opinion Interprets the PRA too broadly and thereby risks Legislative intervention.

The Court of Appeals’ affirmation of Ecology’s action tips the Legislative balance between the “competing social interests” of the PRA requester and the PRA responder too far in favor of the latter. “The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing social interests. It is not the function of the judiciary to tip that balance when it is so inclined, even

when it believes that the Legislature is wrong.” *Roberts v. Dudley*, 140 Wn.2d 58, 83, 993 P.2d 901 (2000) (Madsen, J., dissenting) (quoting *Burkart v. Harrod*, 110 Wn.2d 381, 385, 755 P.2d 759 (1988)).

In *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), *superseded by statute as stated in John Doe v. Wash. State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016), this Court interpreted the PRA broadly to imply a general personal privacy exemption not specifically provided by the PRA statute. *Id.* at 611–14; *see also Doe*, 185 Wn.2d at 372 (discussing *Rosier*). The Legislature “responded swiftly” to the *Rosier* Court, “rejecting a broad reading of the PRA” and making “it very clear,” that it “did not want this Court creating exemptions where there were none.” *Doe*, 185 Wn.2d at 372.

The Legislature’s “swift” response was its enactment of RCW 42.17.255 (1987) (*recodified as RCW 42.56.050*, effective July 1, 2006). The express intent of the statute was to “restore the law relating to the release of public records to that which existed prior to [*Rosier*]” and to “make clear” that agencies responding to records requests may only rely “upon statutory exemptions or prohibitions” for refusal to provide public records. Laws of 1987 ch. 403. Stated otherwise, the Legislature made

clear that the PRA was not open to judicial interpretation.⁵

Here, the Court of Appeals' Opinion risks similar Legislative intervention. The Opinion establishes that the PRA's show cause action is available to both the requesting citizen and the responding agency. This "broad reading" of the PRA is likely to be rejected by the Legislature.

F. This Court should grant review under RAP 13.4(b)(4) to reestablish the Legislatively-imposed balance between the rights of PRA requesting citizens and responding agencies, which is an issue of substantial public policy.

There are few rights that the Washington citizenry holds more sacred than the right of access to the records of those it empowers to act on its behalf. *See* RCW 42.56.030 ("The people insist on remaining informed so that they may maintain control over the instruments that they have created."). To protect this right, the Legislature enacted the PRA to express a "strongly worded mandate for broad disclosure of public records." *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 251. And to deter improper denial of access to public records, the Legislature enacted the PRA's show cause statute, RCW 42.56.550, which (a) places the

⁵ In *Lyft, Inc. v. City of Seattle*, this Court recently held that responding agencies could not employ CR 65's more liberal, "general" injunction standard to avoid production of public records and instead may only rely on the PRA's "stringent" exemptions for production. *Lyft, Inc.*, No. 94016-6, 2018 Wash. LEXIS 350 (May 31, 2018). Here, the Court's reliance on CR 7 is equally unavailing. Accepting review and reversing the Court's Opinion will further deter responding agencies who seek to rely on the Civil Rules' more liberal standards, which could in the future include attempts to rely on CR 26 standards of production rather than the "stringent standard[s]" of the PRA.

burden at all times on the responding agency to demonstrate that its denial of access to public records was proper and (b) penalizes a responding agency unable to so demonstrate. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978) (“award of fees and fines” “discourage improper denials of access to public records”). Thus, access to public records is “an issue of substantial public interest.” RAP 13.4(b)(4).

Here, the Court of Appeals’ Opinion improperly impedes the public’s right to near-unfettered access to public documents, providing a right to responding agencies never contemplated by the Legislature. This Court should grant review of this case under RAP 13.4(b)(4) to restore the balance between the rights of PRA requesters and PRA responding agencies that the Court of Appeals upset when it approved via published opinion of Ecology’s PRA burden-shifting, show cause action.

G. CONCLUSION

This Court should grant review, reverse the Court of Appeals, and remand this matter to the superior court for further proceedings consistent with RCW 42.56.550 and CR 56.

Respectfully requested and submitted this 7th day of June, 2018.

Jeffers, Danielson, Sonn & Aylward, P.S.

By


H. Lee Lewis, WSBA #46478

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2018, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Court's Portal electronic filing System. Notice of this filing will be sent to the parties listed below by operation of the Court's e-filing system. Parties may access this filing through the Court's system.

Mr. Michael Bradford Mr. Jay Johnson Davis Arneil Law Firm 617 Washington Street Wenatchee, WA 98801-2600	Mr. H. Lee Overton Assistant Attorney General P.O. Box 40117 Olympia, WA 98504-0117
Mr. Kenneth W. Harper Menke Jackson Beyer, LLP 807 N. 39 th Avenue Yakima, WA 98902	Mr. Leslie A. Powers Powers & Therrien P.S. 3502 Tieton Drive Yakima, WA 98902

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

DATED at Wenatchee, Washington this 7th day of June, 2018.



H. Lee Lewis, WSBA # 46478

APPENDIX A

Kittitas County v. Allphin

Court of Appeals of Washington, Division Three

October 19, 2017, Oral Argument; March 13, 2018, Filed

No. 34760-5-III

Reporter

2 Wn. App. 2d 782 *; 413 P.3d 22 **; 2018 Wash. App. LEXIS 544 ***

KITTITAS COUNTY, *Plaintiff*, v. SKY ALLPHIN ET AL.,
Appellants, THE DEPARTMENT OF ECOLOGY, *Respondent*.

Notice: PUBLISHED IN PART

Subsequent History: Reconsideration denied by
[Kittitas County v. Allphin, 2018 Wash. App. LEXIS 1100](#)
[\(Wash. Ct. App., May 8, 2018\)](#)

Prior History: [***1] Appeal from Kittitas Superior Court. Docket No: 13-2-00074-4. Judge signing: Honorable Scott R. Sparks. Judgment or order under review. Date filed: 09/08/2016.

[Kittitas County v. Allphin, 195 Wn. App. 355, 381 P.3d 1202, 2016 Wash. App. LEXIS 1895 \(Aug. 9, 2016\)](#)

Counsel: *Nicholas J. Lofing* (of *Davis Arneil Law Firm LLP*), for appellants.

Robert W. Ferguson, Attorney General, and *Harold L. Overton, Assistant*, for respondent.

Judges: Authored by Laurel Siddoway. Concurring: Rebecca Pennell, George Fearing.

Opinion by: Laurel Siddoway

Opinion

[*784] [**23]

¶1 SIDDOWAY, J. — In this Public Records Act¹ (PRA) appeal, Sky Allphin challenges the trial court's (1) rejection of his objections to a show cause motion made by the Washington State Department of Ecology, (2) denial of his request for an in camera review, and (3)

findings, conclusions, and judgment determining that Ecology did not violate the PRA.

¶2 In the published portion of the opinion, we hold that an agency can rely on [CR 7\(b\)\(1\)](#) to move for judicial review under [RCW 42.56.550\(3\)](#), and the “show cause” character of Ecology's motion, while not the procedure provided by that rule, did not prejudice Mr. Allphin.² We address his remaining assignments of error in the unpublished portion of the opinion. Finding no error or abuse of discretion, we affirm. [***2]

FACTS AND PROCEDURAL BACKGROUND

¶3 At relevant times, Chem-Safe Environmental Inc. operated a hazardous waste transport and transfer facility in Kittitas County (County). ABC Holdings Inc. is Chem-Safe's parent company. Sky Allphin is the president of both companies.

¶4 This is the most recent appeal in a lawsuit commenced in February 2013 by the County. For a couple of years before 2011, the County's Public Health Department, [*785] assisted by hazardous and solid waste specialists from Ecology, tried without success to bring Chem-Safe into compliance with waste-handling licensing regulations. On January 27, 2011, having determined that operations at the Chem-Safe facility were a public nuisance, the County issued a notice of violation and abatement requiring that all operations be suspended until a solid waste permit was obtained. During Chem-Safe's unsuccessful administrative appeals and the judicial review that followed,³ Mr. Allphin made a number of public record requests to the County and Ecology, seeking records pertaining to the

² Mr. Allphin was the record requester, although ABC Holdings Inc. and Chem-Safe Environmental Inc. were named defendants below and collectively asserted the cross claims whose dispositions are appealed. For simplicity, we refer to the three parties collectively as “Mr. Allphin.”

³ See [ABC Holdings, Inc. v. Kittitas County, 187 Wn. App. 275, 284-85, 289, 348 P.3d 1222](#), review denied, [184 Wn.2d 1014, 360 P.3d 817 \(2015\)](#).

¹ [Ch. 42.56 RCW](#).

waste facility litigation. He began with similar, broad requests that he served on both agencies on October 17, 2012.

¶5 Roger Johnson, the public [***3] records coordinator at Ecology's Central Regional Office, handled Ecology's response. He indicated in his initial response that it would take until November 19, 2012, for Ecology to complete its response, although he later realized and notified Mr. Allphin that it would take longer. Ecology ultimately released over 14,000 pages of records to Mr. Allphin in three installments.

¶6 On November 15, 2012, Mr. Johnson produced records from staff members in the Waste 2 Resources Program and the Hazardous Waste and Toxics Reduction Program. Ecology's Southwest Regional Office provided Mr. Allphin with its responsive records that day by providing a hyperlink to an Ecology file transfer protocol (FTP) site from which he could download documents.

¶7 On January 11, 2013, Mr. Johnson provided Ecology's first set of Toxics Cleanup Program records, which was by far its largest installment of production. This production was also made by providing a hyperlink to an FTP site from which Mr. Allphin could download documents.

[*786] [**24]

¶8 On February 26, 2013, Mr. Johnson provided a small third installment of responsive records to Mr. Allphin's lawyer.

¶9 During the period Mr. Johnson was responding to the request, he was contacted [***4] by Kittitas County Deputy Prosecutor Zera Lowe, who was concerned that Ecology might have records in its possession that the County considered attorney-client privileged or work product. She asked Mr. Johnson to provide her with any Chem-Safe related correspondence located at Ecology that was between the County's legal counsel and Ecology staff. Mr. Johnson obliged. Ms. Lowe later notified Mr. Johnson of 19 records she believed were exempt from disclosure and asked that Ecology defer its production to Mr. Allphin to give the County the opportunity to seek an injunction preventing their release.

¶10 In producing Ecology's third and otherwise final installment of records in February 2013, Mr. Johnson provided Mr. Allphin's lawyer with a list of the 19 records that the County was asking the superior court to review for their exempt status. In a declaration filed below, Mr.

Johnson testified that with the third installment, "I had disclosed to Mr. Allphin or his attorney everything yielded by the Central Regional Office's search for documents responsive to the October 17, 2012 request, except for the 19 documents withheld pursuant to the County's request." Clerk's Papers (CP) at 234.

¶11 The County's decision to seek [***5] a determination of the exempt status of the 19 records led to its commencement of the action below. On February 22, 2013, the County sued Mr. Allphin, his companies, and Ecology to enjoin Ecology's production of the 19 records. The temporary restraining order requested by the County was entered on May 6, 2013, and was extended thereafter so that the trial court could review the 19 records in camera. On December 19, 2013, the court permanently enjoined Ecology from releasing 11 of the 19 records. Ecology produced the 8 records that were not [*787] subject to the injunction on December 30, 2013. Mr. Allphin appealed the injunction and other rulings involving the County, and this court affirmed.⁴ A petition for review was granted in part by the Washington Supreme Court and is pending.

¶12 During the four months Ecology was collecting and producing records in response to the October 2012 request and in the years thereafter, Mr. Allphin submitted dozens of additional requests. Ecology identifies a total of 28 requests by Mr. Allphin that were either for additional public records, for assistance, for duplicates, or for expedited disclosure. Mr. Allphin's assignments of error in [***6] this appeal involve only one other public record request, however: a request made on January 8, 2014, which is discussed in more detail below.

¶13 In March 2014, the trial court granted Mr. Allphin leave to amend his original answer to the County's declaratory judgment action. The court was persuaded that Mr. Allphin always wanted affirmative relief from the County, but pleaded unartfully in his answer filed on March 20, 2013. It allowed him to amend to assert counterclaims against the County.

¶14 On November 3, 2014, Mr. Allphin filed a second amended answer, this time adding cross claims against Ecology. He then embarked on discovery. By December 2015, he had served two sets of interrogatories and requests for production on Ecology and deposed five

⁴ See *Kittitas County v. Allphin*, 195 Wn. App. 355, 381 P.3d 1202 (2016), review granted in part, 187 Wn.2d 1001, 386 P.3d 1089 (2017).

Ecology employees. Ecology had responded to the discovery and produced thousands of pages of records in response to the requests for production.

¶15 On January 26, 2016, Ecology, wanting to resolve the matter with a determination by the court that it had not violated the PRA, filed a motion for an order to show cause. It originally noted the hearing for March 10, 2016, but [*788] renoted it for April 1, 2016, at Mr. Allphin's lawyer's request. The hearing was [***7] delayed further as a result of objections and motions raised by Mr. Allphin and by the court's own schedule.

[**25]

¶16 When the show cause motion was ultimately heard in August 2016, Mr. Allphin advanced claims of PRA violations he had asserted in a cross motion "for partial relief," but simultaneously objected to Ecology's show cause motion as unlawful procedure. CP at 2194. Essentially, he contended that a few issues could be resolved in his favor but otherwise, unless summary judgment was appropriate, discovery should continue until *he* was ready to move for an order to show cause under [RCW 42.56.550\(1\)](#). He also asked the court to review in camera a large number of Ecology documents.

¶17 The trial court rejected Mr. Allphin's objections to the show cause procedure, refused his request to conduct further in camera review, found that Ecology had not violated the PRA, and entered judgment in Ecology's favor. Mr. Allphin appeals.

ANALYSIS

¶18 Mr. Allphin makes five assignments of error. We address them in the order he presents them.

Assignment of Error 1: The trial court erred when it granted Ecology's motion to show cause and dismissed Chem-Safe's cross claims

¶19 Mr. Allphin contends that the trial court's disposition of Ecology's show [***8] cause motion was error for two reasons: first, because "no statute, rule, or case authorizes an agency to use a show cause hearing to dispose of a requester's claims" and, second, because discovery was "admittedly incomplete and due to the requester." Appellants' Opening Br. at 4.

[*789] Illegal procedure

¶20 [RCW 42.56.550\(1\)](#) and (2) expressly make a show

cause procedure available to public record requesters wishing to require an agency to demonstrate why it refuses to allow inspection or copying, or why its estimated response time is reasonable. In support of his "illegal procedure" argument, Mr. Allphin points out that the provisions authorize a show cause procedure upon the motion "of any person" who has "been denied an opportunity to inspect or copy a public record by an agency" or who "believes that an agency has not made a reasonable estimate of the time that the agency requires to respond." [RCW 42.56.550\(1\), \(2\)](#). Because the provisions speak of motions by only requesters, not agencies, he argues that an agency does not have the same right to note a hearing for judicial review of its action.

[1-3] ¶21 Not to put too fine a point on it, but there was no *statutory* basis for the cross claims Mr. Allphin asserted against Ecology. That is not a problem [***9] because, as our Supreme Court held in 2005, actions under the PRA are not special proceedings, so a party can proceed in any manner provided by the Civil Rules. "[A]ctions under the [PRA] are not [statutorily defined]. The statute simply does not define a special proceeding exclusive of all others." [Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 105, 117 P.3d 1117 \(2005\)](#). For that reason, the show cause procedure provided by [RCW 42.56.550\(1\)](#) and (2) "is discretionary, not mandatory," *id. at 106*, and a party can initiate an action by a complaint in intervention even though that procedure is not addressed by the PRA. *Id. at 105*.

[4, 5] ¶22 Washington courts have not placed limits on Civil Rule procedures that are available in PRA actions. See, e.g., [Neigh. All. of Spokane County v. Spokane County, 172 Wn.2d 702, 715-16, 261 P.3d 119 \(2011\)](#) (discovery is available to a requester under the Civil Rules, even though discovery is not addressed by the PRA). Agencies and [*790] objectors to disclosure have the same right to proceed under the Civil Rules as do record requesters. E.g., [City of Lakewood v. Koenig, 160 Wn. App. 883, 889-90, 250 P.3d 113 \(2011\)](#) (Civil Rules permitting discovery apply, and "there is no authority in the civil rules to limit their application to plaintiffs"); [Rufin v. City of Seattle, 199 Wn. App. 348, 360-63, 398 P.3d 1237 \(2017\)](#) (agency may make a [CR 68](#) offer of judgment in a PRA action), *review denied, 189 Wn.2d 1034, 407 P.3d 1154, 407 P.3d 1154 (2018)*; [John Doe G v. Dep't of Corr., 197 Wn. App. 609, 629, 391 P.3d 496 \(2017\)](#) [**26] (objectors to disclosure of records under the PRA can be certified as a class under [CR 23](#)), *rev'd, 190 Wn.2d 185, 410 P.3d 1156, 410 P.3d 1156 (2018)*.

[6] ¶23 It [***10] is true that the use of a show cause procedure is not contemplated in the Civil Rules except for the reference in [CR 60\(e\)\(2\)](#) to the procedure used in vacating a judgment. 9 DAVID E. BRESKIN, WASHINGTON PRACTICE: CIVIL PROCEDURE FORMS AND COMMENTARY § 7.45 author's cmt. at 145 (3d ed. 2000). Like the Federal Rules of Civil Procedure, our Civil Rules provide generally that the application to the court for an order shall be by motion under [CR 7\(b\)\(1\)](#). The distinct characteristics of a "show cause" motion have been described by the Seventh Circuit Court of Appeals:

Show-cause motions historically served two purposes: First, the motion was a way to bring matters to the district court more speedily than other methods of presentment prior to the Federal Rules of Civil Procedure. See 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1195 (3d ed. 2004). Second, the granting of a show-cause motion provided notice to the nonmoving party of what he must do to avoid some other court action, such as the issuance of an injunction or writ. *Id.* A show-cause motion essentially asks a district court to issue an order requiring the nonmovant to show the court by a certain date why the court should not take some [***11] other action In other words, the show-cause order satisfies the due-process notice requirement by giving the nonmoving party notice of his opportunity to respond before the substantive request for relief is entertained.

[*791] [U.S. Sec. & Exch. Comm'n v. Hyatt, 621 F.3d 687, 695 \(7th Cir. 2010\)](#).

¶24 As explained by the Wright and Miller treatise, the drafters of the federal rules "apparently felt that the historical and technical procedures surrounding [use of orders to show cause] did not comport with the philosophy of simplifying procedure underlying the federal rules." 5 WRIGHT & MILLER, *supra*, § 1195, at 70. As the authors further explain, under civil rules a party can obtain the same "show cause" result by filing a motion and obtaining an order to shorten time within which the motion will be heard. *Id.* at 70-71. As a result, "a request for a show cause order usually will be entertained and treated as a motion, if doing so will not prejudice the opposing parties." *Id.* at 71 & n.5 (collecting cases).

[7, 8] ¶25 In requiring that applications for court orders be by motion and providing a process for hearing a motion on shortened time, [Federal Rules of Civil](#)

[Procedure \(FRCP\) 7\(b\)](#) and [6\(c\)\(1\)\(C\)](#)⁵ are substantively the same as [CR 6\(d\)](#) and [7\(b\)](#), so we may look to decisions and analysis of the federal rules for guidance. [Am. Disc. Corp. v. Saratoga W., Inc., 81 Wn.2d 34, 37, 499 P.2d 869 \(1972\)](#). We find persuasive [*792] the federal cases in which a show cause [***12] procedure that has not prejudiced a responding party is reviewed as if the moving party had followed court rules. *E.g., Marshall v. Weyerhaeuser Co., 456 F. Supp. 474, 477 n.2 (D.N.J. 1978)* ("While the Federal Rules of Civil Procedure do not specifically recognize an Order to Show Cause, federal courts have uniformly acknowledged and treated it similarly to the typical motion but for its preferential place on the court's docket.").

¶26 Entertaining Ecology's show cause motion and treating it as if it had been properly brought under [CR 7\(b\)](#) did not prejudice Mr. Allphin. Ecology did not seek an expedited hearing. It provided more than the [**27] notice required for a motion under the Civil [***13] Rules even before it honored Mr. Allphin's request to defer the hearing by 3 weeks. Almost 3 years had passed since Ecology had completed virtually all of its document production and the County had sued. Over 2

⁵ *Hyatt* points to [FRCP 7\(b\)](#) and [6\(c\)\(1\)\(C\)](#) as authorizing the equivalent of show cause procedure. [621 F.3d at 695](#).

[FRCP 7\(b\)](#) provides:

MOTIONS AND OTHER PAPERS.

(1) *In General.* A request for a court order must be made by motion. The motion must:

- (A) be in writing unless made during a hearing or trial;
- (B) state with particularity the grounds for seeking the order; and
- (C) state the relief sought.

[FRCP 6\(c\)](#) provides:

MOTIONS, NOTICES OF HEARING, AND AFFIDAVITS.

(1) *In General.* A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

...

- (C) When a court order—which a party may, for good cause, apply for ex parte—sets a different time.

years had passed since the trial court resolved the County's claim of exemption. Over 14 months had passed since Mr. Allphin had amended his answer to assert his cross claims. As discussed below, there had been a full opportunity for discovery. Ecology appears to have brought a show cause motion simply to parallel the procedure used when judicial review is sought by a requester under [RCW 42.56.550\(1\)](#) and [\(2\)](#).

[9] ¶27 Whether a record requester makes a show cause motion under [RCW 42.56.550\(1\)](#) or [\(2\)](#) or an agency makes a motion for judicial review under [CR 7\(b\)](#), the nature of the hearing is the same: [RCW 42.56.550\(3\)](#), authorizing hearings based solely on affidavits, applies to “[j]udicial review of all agency actions taken or challenged under [RCW 42.56.030 through 42.56.520](#).” Contrary to the suggestion of Mr. Allphin, Ecology never contended that by bringing a show cause motion it had shifted the burden of persuasion to him. See, e.g., CP at 109 (Ecology's motion). The trial court properly held Ecology to its burden. CP at 2654 (trial court's finding of fact 2).

[*793]

¶28 The PRA is a “strongly worded mandate for broad disclosure of [***14] public records.” [Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 \(1978\)](#). But the legislature did not intend that disputes over whether an agency has complied with its important obligations under the PRA should drag on indefinitely. Cf. [RCW 42.56.550\(6\)](#) (establishing a one-year statute of limitations for PRA actions against agencies). As with other civil disputes, parties have means under the Civil Rules for moving a dispute toward an orderly resolution. The trial court did not proceed illegally by engaging in judicial review at the request of Ecology.

¶29 Affirmed.

¶30 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to [RCW 2.06.040](#), it is so ordered.

Incomplete discovery

¶31 The section of Mr. Allphin's argument addressing his allegation that “discovery is admittedly incomplete and due to the requester” includes no citation to the record in support of that assertion. Br. of Appellant at 18; see also *id.* at 18-21. We have also reviewed Mr. Allphin's statement of the case for any support and find only four relevant record citations, none helpful to his

argument.

¶32 His first relevant record citation is to the entire [***15] 75 pages of his February 11, 2016 motion and affidavit for an order compelling discovery and the second is to the trial court's March 22, 2016 letter ruling in which his motion to compel “is denied entirely.” Br. of Appellant at 6-7 (citing CP at 438-513, 933).

¶33 The third is to the court's handwritten discovery order dated June 3, 2016, and its attached handwritten list of discovery requests. The order is explained in a submission by Ecology:

To bring finality to this public records case, the Court on June 3, 2016, granted a final round of discovery to [Mr. Allphin], directing [him] to present, on that very day, one last set of production requests to [Ecology], with a copy to the court. [Mr. Allphin] submitted 12 requests.

CP at 1529. The court's order set a date by which Ecology should respond to the 12 final requests, a date by which Mr. Allphin should reply, and set a July 8, 2016 telephonic conference to “deal with any remaining issues.” Br. of Appellant at 7 (citing CP at 1523-25).

¶34 Mr. Allphin's fourth and last relevant record citation is to the trial court's July 13, 2016 order that evidently resolved disputes over Ecology's responses to his final 12 discovery requests, stating, “Discovery has been completed and the Court [***16] is now ready to hear oral argument on [Ecology's] Motion to Show Cause and Chem-Safe's Motion for Relief.” Br. of Appellant at 7 (citing CP at 2191).

¶35 None of Mr. Allphin's four *relevant* record citations support his contention that discovery was incomplete.

Assignment of Error 2: The trial court erred when it denied Chem-Safe's motion to review records in camera

¶36 On August 4, 2016, one week before Ecology's January 2016 show cause motion was finally scheduled to be heard, Mr. Allphin filed a motion asking the court to conduct an in camera review of a large number of Ecology records. Under [RCW 42.56.550\(3\)](#), courts may review in camera any record that an agency claims is exempt from the PRA. “This court reviews the trial court's decision on whether or not to conduct an in camera review for abuse of discretion.” [Forbes v. City of Gold Bar, 171 Wn. App. 857, 867, 288 P.3d 384 \(2012\)](#). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds

or untenable reasons.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

¶37 Mr. Allphin's motion was based, first, on a contention that Ecology had records that had been “secreted away from [him]” at a “separate location or site.” CP at 2203. He received a record in April 2016 that referred to documents that were on “the AG Secure Site Chem Safe Log—Exempt.” [***17] *Id.* He complained that Ecology “should not be able to make records disappear from the public by ‘uploading’ them to its special website.” CP at 2204.

¶38 Ecology presented evidence that it maintains an electronic site for the purpose of facilitating attorney general review of Ecology documents. In its response to Mr. Allphin's motion for in camera review, Ecology's lawyers explained that any records on the secured site that were related to Chem-Safe

are there only because Ecology put them there in a communication with its attorney. *In order to put them in that communication medium Ecology must possess these documents independently of that medium.* Ecology has already fully searched and provided all documents outside of that medium that were responsive and not enjoined.

CP at 2350-51 (emphasis added). In short, the records were explained as being digital copies of records that were searched in responding to Mr. Allphin's PRA requests and produced where appropriate. For convenience of the attorney general and the agency, copies simply reposed in this mutually accessible site. The court did not abuse its discretion in refusing to conduct what would have been a very time-consuming review for which no good reason was [***18] offered.

¶39 Mr. Allphin also complained in his motion for in camera review that records produced on May 20, 2016, by Jackie Cameron, who had by then replaced Mr. Johnson as Ecology's records custodian, were redacted, in some cases heavily, with no accompanying exemption or redaction log.

¶40 The subject records dated back to April 1, 2013. On or before that date, Kittitas County Deputy Prosecutor Lowe evidently asked Ecology's lawyers to provide copies of the 19 documents it was withholding from Mr. Allphin at the County's request. Janet Day, a legal assistant to an Ecology lawyer, transmitted the documents being withheld to the County on the

afternoon of April 1, 2013 in five installments.⁶ Ms. Cameron's May 20, 2016 e-mail to Mr. Allphin stated she was transmitting the five e-mails, but on May 27, Mr. Allphin claimed he had not received the first. On May 31, Ms. Cameron responded by e-mail, apologizing and stating she was “providing the April 1, 2013 email with attachments that was inadvertently dropped during the review process.” CP at 2145.

¶41 One of the 12 final discovery requests that the trial court allowed Mr. Allphin to submit to Ecology on June 3, 2016, was for

[t]he five separate emails from Ms. Day [***19] to the County 4/1/2013 as partially provided by Jackie Cameron on 5/20/2016. [A]ll five emails and each attachment is requested. The emails and attachments are requested in native format.

CP at 1525.

¶42 In Ecology's response to this discovery request that was filed with the court on June 20, it said:

Chem-Safe already has the documents responsive to this request. It received them from Ecology. Chem-Safe possessed them at the time it represented to this Court that it did not, on the basis of which the Court granted a continuance.

This discovery request is related to a follow-up to a PRA request that was made outside this litigation. Cameron Decl. ¶ 5, Ex. F. Not only is this an improper basis for delaying this case, but Chem-Safe was in possession of these records at the time of making these repeated requests on June 3,

⁶ The documents as produced to Mr. Allphin in May 2016 are out of order in the record. The first of Ms. Day's e-mails appears at CP 2147, bears a transmission time of 2:52 PM and by its terms, was forwarding seven documents, numbered 01.pdf to 07.pdf.

The second e-mail appears at CP 2090, bears a transmission time of 2:55 PM, and was forwarding a single “large” document, numbered 08.pdf.

The third appears at CP 2093, bears a transmission time of 2:56 PM, and was forwarding three documents, numbered 09.pdf to 11.pdf.

The fourth appears at CP 2087, bears a transmission time of 2:58 PM and was forwarding three documents, numbered 12.pdf to 14.pdf.

The fifth appears at CP 2084, bears a transmission time of 3:01 PM and was forwarding five documents, numbered 15.pdf to 19.pdf.

2016, having received them from Ecology. CP at 1536. Ecology's response was supported by a declaration of Ms. Cameron, who pointed out that her production of the e-mails on May 20, 2016, followed up on a public record request to Ecology made by Mr. Allphin in April 2016 that was not at issue in this lawsuit.

¶43 As previously recounted, the trial court ruled on July 13, 2016, that discovery was complete, [***20] so the trial court evidently denied this final discovery request by Mr. Allphin. He has not obtained and filed a verbatim transcript of proceedings of the final discovery conference, so we do not know why his discovery request was denied. The fact that Mr. Allphin's communications with Ms. Cameron dealt with a public record request not involved in this case would have been a sufficient reason.

¶44 With that background in mind, we return to Mr. Allphin's challenge to the trial court's refusal to review these same documents in camera. In resisting Mr. Allphin's request for in camera review, Ecology argued that it was a transparent attempt to get around the court's denial of Mr. Allphin's request for discovery of the same documents a month earlier. Ecology reminded the court that the April 2016 public record request to which Ms. Cameron was responding was not at issue in this case. And finally, having gone back through Ecology's production in response to the April 7, 2016 public record request, one of Ecology's lawyers provided a declaration identifying where all of the attachments about which Mr. Allphin was complaining could be found in materials that had been produced to him on May 20 and [***21] 31, 2016.

¶45 As for the redactions and the lack of a log, recall that the 19 attachments were the documents the trial court reviewed in camera in December 2013, finding 11 to be exempt. Ecology's lawyer's declaration stated that the redaction of material in the attachments was done "for the sole purpose of complying with this Court's permanent injunction and Order Sealing Records." CP at 2378.

¶46 The trial court did not abuse its discretion in refusing the request for in camera review.

Assignment of Error No. 3: The trial court erred when it denied Chem-Safe's partial motion for relief as to several categories of records wrongfully withheld by Ecology

¶47 Although objecting to Ecology's show cause motion,

Mr. Allphin attempted to establish several records (or record categories) were unlawfully withheld by Ecology, four of which he argues on appeal: (1) 4 sketches of the location of a waste spill alleged to have occurred at Chem-Safe's facilities, (2) a copy of Chem-Safe's soil sampling plan that Mr. Allphin claims was received and reviewed by Norman Peck, an Ecology employee, (3) "53 emails and nine documents" that Mr. Allphin claims were responsive to his October 2012 request but that he contends were not [***22] produced until December 23, 2014, and (4) records Mr. Allphin claims were responsive to a January 8, 2014 request that were not released until 2016. We first address the 4 sketches and "53 emails and nine documents" before turning to the other two records or record categories.

Four sketches, 53 e-mails, and 9 documents

¶48 Four sketches were prepared by Norman Peck to depict the floor of the Chem-Safe facility so that another Ecology employee could let him know where various chemicals were stored. When deposed, Mr. Peck testified that he provided the sketches to Mr. Johnson in response to Mr. Allphin's October 2012 public record request. This is supported by electronic mail he sent to Mr. Johnson on October 18, 2012, stating "I'll bring down about 4 'hard copy' documents I haven't stored electronically." CP at 2419. Mr. Peck testified that he did not know whether his sketches were digitized by others.

¶49 Ecology's show cause motion was supported by a 25-page, 76-paragraph declaration from Mr. Johnson recounting the history of his records search and document production to Mr. Allphin on behalf of Ecology. In the declaration, he testified that upon receiving the request, he contacted Mr. Peck and other [***23] Ecology employees to obtain any responsive records. He determined that Mr. Peck was the primary person within Ecology's Toxics Cleanup Program with responsive documents. Once he determined which Ecology staff had responsive records, he set up a central repository where staff could place the records provided.

¶50 Mr. Peck provided many of his responsive documents fairly quickly, but then went on a four-week annual leave. For that reason, the Toxics Cleanup Program documents were delayed, as Mr. Johnson explained to Mr. Allphin in an e-mail sent on December 17, 2012. They were not provided until the second, January 2013 installment of records that was made available for Mr. Allphin to electronically download with a FTP link.

¶51 On June 9, 2014, in response to a later e-mail from Mr. Allphin questioning the completeness of Ecology's production, Mr. Johnson attempted to allay his concern, but added, "If you feel there is more in the central file room and staff paper files please feel free to schedule a review at the Yakima office." CP at 419. Six months later, on December 8, 2014, Mr. Allphin requested an opportunity to come to Ecology's office to review its physical Chem-Safe files. Ms. Cameron, who was [***24] by then assisting with record production, scheduled an appointment for Mr. Allphin to review the physical files on December 23, 2014. To assist Ms. Cameron and Mr. Allphin, Mr. Johnson created three compact disks of all the documents he had previously released to Mr. Allphin, intending that Mr. Allphin could take copies of the disks with him.

¶52 Mr. Allphin kept the appointment, the physical files were made available to him, and he identified some documents for copying. Ms. Cameron provided him with the requested copies and also gave him the three compact disks.

¶53 Mr. Allphin claims that upon reviewing the three compact disks he received on December 23, 2014, he identified 53 e-mails and 9 documents that had never before been produced to him by Ecology. But according to Mr. Johnson's declaration, the three compact disks contained only documents previously provided to Mr. Allphin and what Mr. Johnson thought might be helpful documentation of Mr. Johnson's and Mr. Allphin's correspondence.

¶54 On July 20, 2015, Mr. Allphin again requested an appointment to inspect Ecology's physical Chem-Safe files. Ms. Cameron obliged, although she wrote to Mr. Allphin that the physical files had not changed since [***25] they were last made available for his review on December 23, 2014. An appointment was scheduled for his repeat review of the documents on July 28, 2015. Mr. Allphin again identified records for copying. Mr. Allphin claims that it was not until this second inspection of the files on July 28, 2015, that Mr. Peck's four sketches were made available to him. But according to Ms. Cameron's declaration, of the documents Mr. Allphin requested be copied in July 2015, "all ... had been previously provided to Mr. Allphin in response to his public record requests." CP at 194-95.

¶55 The timing of production of the 4 sketches, 53 e-mails, and 9 documents comes down to a credibility issue. The panel confirmed at oral argument that

Ecology did not keep a complete Bates-numbered copy of the documents it produced and when, nor did Mr. Allphin keep a complete record of what he received and when. Ecology argues that other than Mr. Allphin's reported recollection, he has no way of proving that the sketches, e-mails, and documents were not produced electronically by Ecology within the first four months following his October 17, 2012 request and in some cases, also located in the hard copy files that he was offered the [***26] opportunity to review on June 9, 2014. Mr. Peck has testified that he timely produced his sketches to Mr. Johnson, and his e-mail tends to support this. Mr. Johnson has testified that his timely installments of production to Mr. Allphin included everything he received from Ecology employees other than the 19 withheld documents. He has testified that apart from including some helpful documentation of the correspondence between himself and Mr. Allphin, the three compact disks he created contained only the records he had produced earlier. Ms. Cameron has testified that Mr. Peck's sketches were always in Ecology's hard copy files made available to Mr. Allphin, but he did not request copies until his second, July 2015 visit to Ecology's offices.

¶56 The PRA expressly authorizes the trial court to "conduct a hearing based solely on affidavits," as the trial court did here. [RCW 42.56.550\(3\)](#). And when judicial review is based solely on a documentary record, our Supreme Court has held that appellate review of a trial court's findings and conclusions is de novo—unlike where there has been testimony in the PRA proceeding, in which case we review the findings for substantial evidence. [Zink v. City of Mesa, 140 Wn. App. 328, 336, 166 P.3d 738 \(2007\)](#) (citing [O'Connor v. Dep't of Soc. & Health Servs., 143 Wn.2d 895, 904, 25 P.3d 426 \(2001\)](#)).

¶57 The *reason* for the [***27] different standards of review is important and affects our decision on this issue, in this case. As explained in [State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 \(2003\)](#):

[T]he de novo standard is better applied when the appellate court is in the same position as the trial court and may make a determination as a matter of law. The abuse of discretion standard is appropriate when a trial court is in the best position to make a factual determination.

¶58 We are not in the same position as the trial court to make the determination whether Ecology employees or Mr. Allphin are more reliable reporters of what records had been produced. We have a declaration in which Mr.

Allphin claims the sketches, 53 e-mails and 9 documents were not timely produced. We have declarations of Ecology employees that say they were. The trial court was looking at the same declarations, but its findings were further informed by its several year history with the case and the discovery disputes it had been required to resolve. A number of the trial court's findings credit the declarations of Ecology's employees and its other evidence, implicitly finding the Ecology employees credible and reliable. See CP at 2643-45 (Findings of Fact 1-17). Its findings explicitly discount the reliability of [***28] Mr. Allphin's memory, stating, "Mr. Allphin repeatedly conveyed confusion about what documents he possessed and when he obtained them." CP at 2644 (Finding of Fact 8).

¶59 We review this issue de novo but with some deference to a trial court that was "in the best position to make a factual determination" about reliability. We affirm the trial court on this issue.

Annotated Chem-Safe Sample Plan

¶60 In response to a PRA request to Kittitas County, not Ecology, Mr. Allphin received a copy of a sampling and analysis plan Chem-Safe provided to the County that bore handwritten marginal notations and an apparent "sticky note" on its cover. On the sticky note is allegedly hand written,⁷

Chem Safe Sampling Plan with [Toxics Cleanup Program] Norm Peck's comments. He provide [sic] guidance doc for oil sites & ground water testing.

CP at 2441; Br. of Appellant at 26. Mr. Allphin argues that the record received from Kittitas County proves that Mr. Peck received and reviewed the sampling plan and that Ecology must have a copy of the same record in its possession that it failed to disclose. Ecology did not produce a copy of the record in responding to Mr. Allphin's record request. In responding to discovery, it stated that no copy [***29] of the record can be found at Ecology.

¶61 Mr. Allphin's claim that Ecology possessed and is silently withholding the record is unsupported by any testimony from Mr. Peck, any evidence that the handwriting on the record is his, or any testimony that Ecology ever had a copy of the record. Mr. Allphin's

⁷We say "allegedly" because the copy included in the Clerk's Papers is too poor for us to confirm that this is what the note says.

theory about the record's provenance and whereabouts is based entirely on his speculation from the content of the sticky note.

¶62 By statute, Ecology bears the burden of proving the application of an exemption to a document being withheld. [RCW 42.56.550\(1\)](#). It bears the burden of demonstrating that it provided a reasonable estimate of a response time. [RCW 42.56.550\(2\)](#). But when it comes to whether Ecology possessed but withheld the annotated sampling plan, "the general proposition of law that the burden of proving a proposition is upon him who asserts it" applies. [In re McKachney's Estate, 143 Wash. 28, 30, 254 P. 455 \(1927\)](#). The trial court reasonably found Mr. Allphin's evidence insufficient to prove that Ecology possessed but withheld a copy of the annotated sampling plan.

January 8, 2014 request

¶63 Finally, on January 8, 2014, Mr. Allphin requested the following records:

Any and all paperwork correspondence, emails, pictures, and documentation pertaining to ERTS#626393, VCP#CE0371 and Facility/Site [***30] ID #58926155.

CP at 379. Mr. Johnson testified by declaration that he called Mr. Allphin for clarification and, based on that discussion, understood the request to be for records "related to Chem-Safe's recent participation in Ecology's voluntary cleanup program (VCP) that began to be discussed with Ecology's Toxics Cleanup Program a month or two prior to the making of this request." CP at 244. He then produced responsive documents, of which there were about 50 pages, on February 11, 2014. When Mr. Allphin e-mailed to inquire if the production was complete, Mr. Johnson responded, "I have included all responsive documents pertaining to the Toxic Cleanup actions after the Kittitas County hearings." CP at 245. He closed the request after hearing nothing more from Mr. Allphin.

¶64 In discovery served in March 2016, Mr. Allphin made the following request for production of documents:

Please produce all the records created, used, received, and possessed by [Ecology] responsive to Chem-Safe's 10/17/12 request but extending the scope of responsive records to include all responsive [Ecology] records and documents from 10/18/12 to 1/8/14.

CP at 1351. Mr. Allphin asserts that some of the records

produced in response to this discovery request [***31] in April 2016 should have been, but were not, produced in response to his January 8, 2014 public records request. Ecology contends that the 2014 public record request was much narrower. Certainly the two requests were differently-worded.

¶65 The trial court found, “Documents received by Chem-Safe for the first time in 2016 through a separately worded request for discovery, and through separately worded records requests, do not constitute documents responsive to Chem-Safe’s original January 8, 2014 request for records.” CP at 2668. We reject this challenge on appeal for a simpler reason: Mr. Allphin does not identify the records produced in April 2016 that he contends were responsive to his January 2014 request, nor does he provide argument as to why he believes they were responsive to the differently-worded request. This violates [RAP 10.3\(a\)\(6\)](#), which requires a party to support arguments and provide references to relevant parts of the record. Having been provided with no identification of specific records to assist us, we will not sift through the record in an effort to determine which records Mr. Allphin is complaining about. See [Mills v. Park, 67 Wn.2d 717, 721, 409 P.2d 646 \(1966\)](#).

¶66 The trial court did not err when it denied Chem-Safe’s partial motion for relief. [***32]

Assignment of Error No. 4: The trial court erred when it concluded that Ecology’s search for responsive records was reasonably calculated to lead to the discovery of all responsive records

¶67 In *Neighborhood Alliance*, our Supreme Court addressed what constitutes an “adequate search” for records response to a request under the PRA and adopted the standard federal courts have applied to the adequacy of a search under the federal *Freedom of Information Act*, *Pub. L. No. 89-487, 80 Stat. 250 (1966)* (codified as amended at 5 U.S.C. § 552). Citing a number of federal decisions (citations we omit), the Court summarized the standard as follows:

The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not

found.

... Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search [***33] should not be limited to one or more places if there are additional sources for the information requested. Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. 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.

[Neigh. All., 172 Wn.2d at 720](#) (emphasis, citations and internal quotation marks omitted).

¶68 An agency may demonstrate an adequate search by having its employees submit “reasonably detailed, nonconclusory affidavits’ attesting to the nature and extent of their search.” [Nissen v. Pierce County, 183 Wn.2d 863, 885, 357 P.3d 45 \(2015\)](#) (quoting [Neigh. All., 172 Wn.2d at 721](#)). In moving for a determination that it had complied with its obligation to make an adequate search, Ecology submitted 12 such declarations from Ecology employees.

¶69 Mr. Allphin identifies only one basis for his contention that Ecology’s search was inadequate: he argues that Mr. Johnson did not train Ecology employee Gary Bleeker to search his “sent” electronic mail in Microsoft Outlook when responding to a public record request and, as a result, Mr. Bleeker failed to do so.

¶70 Ecology refutes the “failure to train” charge [***34] by pointing to Mr. Johnson’s uncontroverted deposition testimony that it was not his job to provide public records training to anyone, and to Mr. Bleeker’s testimony that as of the time of Mr. Allphin’s record request, he had most recently received public records training on January 18, 2012.

¶71 As for what Mr. Bleeker searched, the spotty deposition testimony on which Mr. Allphin relies contains seemingly inconsistent testimony by Mr. Bleeker that his questioner never clarified. Mr. Allphin emphasizes the question, “And it’s correct that you do not provide—or you did not provide records out of your sent box to Mr. Johnson?” to which Mr. Bleeker responded, “Yes, true.” CP at 2470. But he ignores Mr. Bleeker’s testimony not once, but twice, that he had turned over all of his records related to Chem-Safe. See CP at 2469. Mr. Bleeker also testified repeatedly during

the deposition that he did not normally save “sent” e-mails.

¶72 Ecology filed a more consistent declaration from Mr. Bleeker in support of its show cause motion. Mr. Allphin argues we should ignore the declaration as a “self-serving” effort to “back-fill” deposition testimony that causes problems for Ecology. Reply Br. at 21-22. But we find the declaration [***35] to be a necessary clarification of a point that was left in confusion when Mr. Bleeker was deposed. In the declaration, Mr. Bleeker testifies that in providing records to Mr. Johnson in response to Mr. Allphin's records request, he used a “search all mail items” feature of Microsoft Outlook that would have performed a global search of his entire mailbox, making it unnecessary to perform a separate search of his “sent” items folder. He also testified that if his search produced few “sent” messages related to Chem-Safe, that was probably because when notified in the past by information systems staff that his e-mails were exceeding his allotted storage capacity, his regular response was to empty the contents of his “sent” items folder.

¶73 Ecology demonstrated that its search for documents responsive to Mr. Allphin's record request was adequate.

Assignment of Error No. 5: The trial court erred when it concluded that Ecology did not violate the PRA when it coordinated with a separate agency to conceal and withhold public records

¶74 Finally, Mr. Allphin argues the trial court erred when it concluded that Ecology did not violate the PRA when it delayed release of 19 records at the County's request. [***36]

¶75 [RCW 42.56.540](#) authorizes the superior court to enjoin examination of a public record upon the motion of an agency, a person named in the record, or a person to whom the record specifically pertains if it finds that examination “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” It explicitly gives agencies the option of “notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.” *Id.* Model rules under the PRA authorize an agency that intends to provide such notice to include a reasonable amount of time for notice to the third party in its estimate of how long it will take to

respond to a public record request. [WAC 44-14-04003\(11\)](#). This allows the third party time to “file an action to obtain an injunction to prevent an agency from disclosing it ... [if] the third party ... prove[s] the record or portion of it is exempt from disclosure.” *Id.* (citing [RCW 42.17.330](#); [RCW 42.56.540](#)).

¶76 This court recently held that “the PRA recognizes that an agency may not be able to respond fully to a request if it needs to notify third parties who are affected by the request.” [***37] [Doe v. Benton County, 200 Wn. App. 781, 790, 403 P.3d 861 \(2017\)](#). As it relates to the 19 records whose release was delayed at the County's request, we view Mr. Allphin's argument on this issue as indistinguishable from the arguments this court rejected in *Doe*. The fact that the County notified Ecology rather than the other way around is a distinction that makes no difference.

¶77 Mr. Allphin also identifies two e-mails whose production he claims was delayed until December 23, 2014, as a result of collusion with the County. Here, he is again complaining that some records included on the three compact disks provided to him on December 23, 2014, had been withheld from him earlier. We have already agreed with the trial court's findings and conclusions that records on the compact disks were duplicates of records earlier produced by Ecology.

¶78 We affirm the trial court. Because Mr. Allphin does not prevail, we deny his request for an award of attorney fees and costs under [RCW 42.56.550\(4\)](#).

FEARING, C.J., and PENNELL, J., concur.

Reconsideration denied May 8, 2018.

References

Washington Administrative Law Practice Manual
 Washington Rules of Court Annotated (LexisNexis ed.)
 Annotated Revised Code of Washington by LexisNexis

APPENDIX B

FILED
MAY 8, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

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

Plaintiff,

v.

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

Appellants,

and

THE WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Respondent.

No. 34760-5-III

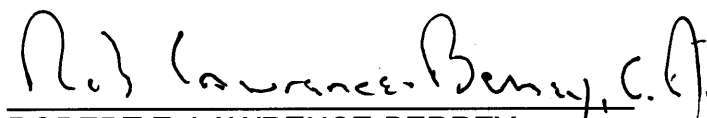
ORDER DENYING MOTION
FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 13, 2018, is hereby denied.

PANEL: Judges Siddoway, Fearing, Pennell

FOR THE COURT:


ROBERT E. LAWRENCE-BERREY,
Chief Judge

JEFFERS, DANIELSON, SONN, & AYLWARD P.S.

June 07, 2018 - 1:42 PM

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