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DIVISION II

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STATE OF WASHINGTON
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No. 35920-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HONORABLE RICHARD B. SANDERS,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent and Cross-Appellant.

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**REPLY BRIEF OF RESPONDENT AND CROSS-APPELLANT
STATE OF WASHINGTON IN SUPPORT OF CROSS-APPEAL**

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I. INTRODUCTION

In his Reply to the State's Cross-Appeal, Justice Sanders fails to rebut the State's position that his Public Records Act ("PRA") lawsuit should have been dismissed because, in July 2004, his attorney agreed to accept the broader BIAW/Tim Ford production on the same subjects, in lieu of requiring the State to perform a duplicative review for Justice Sanders. The AGO has provided sworn declarations of its Public Records Manager evidencing this mutual agreement. Neither the declaration of Justice Sanders' attorney, Kurt Bulmer, nor Justice Sanders' Reply establish a genuine issue of material fact regarding the existence of this agreement.

Justice Sanders attempts to preclude review of the State's cross-appeal by arguing that the State "assigns no error" to findings that it violated the PRA."¹ This argument is without merit. The State's first assignment of error is that

[t]he superior court erred as a matter of law in not dismissing the Complaint, where Justice Sanders' request, as modified, was for all documents that the State produced to BIAW, and the State timely produced exactly those documents to Justice Sanders.

¹ Sanders Reply at 34.

The State seeks summary judgment in recognition that it did not violate the PRA. If summary judgment is entered for the AGO, the fee and penalty award to Justice Sanders must be reversed. Clearly, the State has properly assigned error.²

Moreover, Justice Sanders fails to point to any statutory authorization for an award of penalties when an agency's exemption log discloses every document withheld or redacted and the applicable exemption (plus the date of each document, the subject matter, and the author and recipient), but inadvertently omits a "brief explanation" of how the exemption applies to each document. He cites to several cases in arguing that penalties are authorized where the "brief explanation" is omitted, but none of them provide support for his argument.

If the Washington legislature had intended penalties for omission of the "brief explanation," it would have said so in the PRA. The courts are not authorized to effectively amend a statute by reading into it new substantive provisions. If Justice Sanders were entitled to any fees, costs,

² Even if it had not, dismissal of the cross-appeal would not be warranted here. Under RAP 1.2(a), "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands" See *National Fed. of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 116-17, 939 P.2d 680 (1992) ("technical violations of the rules will not ordinarily bar appellate review, where justice is to be served by such review [W]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [this court] will consider the merits of the challenge.")

or penalties, they should not include penalties for violation of the brief explanation requirement.

Justice Sanders also argues that under *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2005), the trial judge lacked discretion to exclude from its penalty calculation the 562 days that the parties' summary judgment motions were under advisement. *Yousoufian*, however, does not address such delays. The State had no control over the trial court's calendar, and it would be unfair to penalize the State for the period that motions were pending in the trial court.

II. ARGUMENT

A. Justice Sanders' Agreement to Accept the BIAW Production Should Have Been Dispositive of This Action.

The State properly assigned error to the trial court's failure to dismiss Justice Sanders' Complaint because his attorney, Kurt Bulmer, agreed to accept the BIAW production on the same subjects.³ Contrary to Justice Sanders' assertions, the State clearly disputed and appealed the ruling that it wrongfully withheld documents.

Justice Sanders fails to recognize that the State makes two alternative arguments. The State's first position is that this action should be dismissed because Justice Sanders received all the documents he

³ State's Opening Brief at 4 (Assignment of Error No. 1).

requested. “Alternatively, this Court should affirm the Superior Court’s rulings on the applicability of the PRA exemptions.”⁴ Only “if this Court does not remand for entry of judgment in the State’s favor based on Justice Sanders’ acceptance of the BIAW production,” does the State agree with the trial court’s “Opinion regarding the documents and their groupings, [and] the arguments on which each party prevailed and their ‘weights.’”⁵

The Declarations of La Dona Jenson, a Public Records Manager for the State,⁶ establish the existence of agreement between the State and Mr. Bulmer on behalf of Justice Sanders. No genuine issues of material fact were raised by Justice Sanders’ Reply or Mr. Bulmer’s Declaration.⁷ Mr. Bulmer states that he did not agree to “narrowing” Justice Sanders’ request. But as a matter of law, no such “narrowing” was done.⁸ Neither Mr. Bulmer nor Justice Sanders have ever pointed to any part of Justice Sanders’ PRA request that was not encompassed in the BIAW requests.

Mr. Bulmer states that he did not object to receiving “additional documents” as long as nothing was excluded, and it is undisputed that

⁴ State’s Opening Brief at 23 (emphasis added).

⁵ *Id.*

⁶ CP 165-72; CP 1256-61.

⁷ CP 474-76.

⁸ *See* CP 174-75 (BIAW request); CP 181-82 (Bulmer request)

Justice Sanders received exactly what was given to the BIAW. Mr. Bulmer never responded to Ms. Jenson's letter memorializing their agreement that "[p]ursuant to our telephone conversation today, July 8, 2004, you wished to expand your request for documents to those which were disclosed to Tim Ford with BIAW."⁹

In his Reply, Justice Sanders argues that the AGO cannot "unilaterally modify a PRA request," but it did not do so. There was an agreed modification. Justice Sanders also argues that he did not waive the opportunity to contest exemptions on the Entire Document Index ("EDI"), but the State has never argued that Justice Sanders waived his right to challenge the exemptions. In fact, Justice Sanders failed to contest any exemptions until this lawsuit was filed, more than a year after he received the BIAW production.

Justice Sanders also asserts that "[i]f the AGO believed Justice Sanders' PRA request was only for those documents produced to Mr. Ford, there was no reason to provide Justice Sanders the Entire Document Index ("EDI") or any subsequent exemption log."¹⁰ The logic of this argument is elusive; the State produced the EDI to Justice Sanders because

⁹ CP 171, ¶¶ 25-27; CP 187.

¹⁰ Sanders Reply at 4.

it was provided to Ford/BIAW, and subsequent logs reflected clerical and similar revisions.¹¹

This action should have been dismissed under CR 56(c) because Justice Sanders received everything he initially requested through Mr. Bulmer, and more. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665, 667 (1995) (after movant produces evidence suggesting absence of factual dispute, burden shifts to nonmoving party, and if the latter cannot establish factual issues, summary judgment is proper).

B. If the Court Does Not Dismiss This Action Outright, It Should Decrease the Award of Penalties to Justice Sanders.

Justice Sanders fails to rebut the State's argument that if he is entitled to any penalties, they should not include the \$3 day penalty imposed by the trial court for omission of the "brief explanation" requirement, or *per diem* penalties for the period the parties' motions were under advisement in the trial court.

In arguing that "[c]ourts may . . . award penalties for violations of the PRA other than wrongful withholding," Justice Sanders cites to *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008), *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992), and *Kleven v. City of Des Moines*, 111 Wn. App. 284, 44 P.3d 887 (2002).

¹¹ State's Opening Brief, pp. 12-13.

In none of these cases, however, does a court award penalties for violation of the “brief explanation” requirement, or suggest that such penalties would be appropriate. In fact, of the three cases, only *Yacobellis* affirmed a penalty award, and it was for the failure to disclose records, not violation of the “brief explanation” requirement.

O’Neill involved the City’s wrongful withholding of responsive information—the top four lines on an email, and possibly email metadata, although the court remanded the case for a determination of metadata withheld from the requestor. Unlike the State here, the City had conducted an inadequate search. In any case, the *O’Neill* Court did not consider the penalty entitlement; that matter was remanded to the trial court.

The *Yacobellis* court imposed a monetary penalty for the City’s failure to disclose a golf survey. The City had taken the mistaken position that the documents sought were not public records subject to the PRA, and it had destroyed them. In awarding the penalty, Division One specifically relied on the PRA provision that when a party is “denied the right to inspect or copy any public record,” a penalty may be imposed. *Yacobellis*, 64 Wn. App. At 302, 825 P.2d at 329.

In *Kleven*, the Court of Appeals reversed the award of penalties, finding that the City had not violated the PRA when it placed a mistaken

label on an audiotape, or by its responses to a vague request for “each request for public records” received by the City. *Kleven*, 111 Wn. App. at 296-97, 44 P.3d at 893.¹²

Justice Sanders argues that *Kleven* “stat[es] in dicta that penalties would be appropriate for violation of record keeping requirements of PRA” although the relevant statutory provision, RCW 42.17.290,¹³ contains no reference to penalties. The dicta in *Kleven* is based on RCW 42.17.340(4),¹⁴ authorizing penalties for denial of “the right to inspect or copy any public record” or failure to provide a timely response. 111 Wn. App. at 296. The Court held that the “mandate” of .340(4) applied “where a party prevails against an agency . . . for failure to provide access to public records.” *Id.* In the case at bar, omission of a “brief explanation” does not constitute denial of the right to inspect or copy any public record, *i.e.*, failure to provide access to public records.

Justice Sanders argues that *In re In-Store Advertising Secs. Litig.*, 163 F.R.D. 452, 457 (S.D.N.Y. 1995), requires waiver of work product

¹² The trial court in *Kleven* had concluded that the City violated the PRA and was required to pay a \$1,000 penalty because it “maintained a tape of a court proceeding in a disorganized manner inconsistent with RCW 42.17.290” (now RCW 42.56.100) and thus was unable to respond fully to a request for records. 111 Wn. App. at 296. The Court of Appeals disagreed, and the statutory penalty was reversed.

¹³ Currently RCW 42.56.100.

¹⁴ Currently RCW 42.56.550(4).

protection for failure to explain exemptions.¹⁵ The case does not support his argument. *In-Store Advertising* involved New York’s Local Rule 46, which requires a privilege/work product log for documents withheld under State discovery rules.¹⁶ The relevant question was whether work product was waived because Baer Mark had failed to provide a log as required by Rule 46. The court rejected the waiver argument, noting that the demand for a log was belated, and that “the documents at issue are identified and their existence is well known to all of the parties.” *Id.* at 457.

In the case at bar, an exemption log was voluntarily provided from the outset, and supplemented or corrected as necessary. All documents withheld or redacted were described on the log, and the applicable PRA exemptions were identified.

Justice Sanders’ argument under *Citizens for Fair Share v. Department of Corrs.*, 117 Wn. App. 411, 72 P.3d 206 (2003), that “wrongful withholding” and violation of the brief explanation requirement are separate PRA violations and warrant separate penalties, misses the mark. He is not entitled to penalties for violation of the “brief explanation” requirement because they are not authorized by the statute.

¹⁵ Sanders Reply at 25 n.13.

¹⁶ The State cited *In-Store Advertising* as analogous authority supporting its ability to “cure” the initial omission of “brief explanations” on its exemption log.

If the Legislature had intended penalties for violation of the brief explanation requirement, it would have said so. The State should not be subject to additional penalties where it voluntarily provided a log identifying each document withheld as exempt, the specific exemption claimed, a description of the document, its date, and the author and recipients, but inadvertently failed to provide a “brief explanation.”

Justice Sanders also cites to *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005), in arguing for “more than the minimum penalty” of \$5 per day per record, and asserts that penalties should have been awarded for documents produced by the State after his lawsuit was filed.

The facts of *Spokane Research*, however, are wholly inapposite to those in the case at bar. There, the relevant issue was whether a requestor was entitled to fees and penalties under the PRA despite the fact that the disclosure of documents had resulted from a waiver in different litigation. The Washington Supreme Court held that he was, if he succeeded in disproving privilege or any other exemption. *Id.* at 103.

In the case at bar, by contrast, virtually all of the Supplemental Production documents were not subject to compelled disclosure; the trial court rejected the State’s claimed exemptions on only three documents. The State voluntarily produced the Supplemental Production documents

without waiving any exemption. The State should not be penalized for producing documents it wasn't required to produce under the PRA.

Finally, Justice Sanders argues that he is entitled to penalties for the hundreds of days that the summary judgment rulings were under advisement in the trial court, citing to RCW 42.56.550(4). The statute, however, merely states that penalties are to be awarded for "each day [the requester] was denied the right to inspect or copy" public records. When parties are waiting for a court to determine whether exemptions are proper, the State is not "denying" disclosure; it is waiting to see if its good faith judgments are correct. Penalties should be tolled during this period. An agency should not be penalized for delays over which it has no control.

III. CONCLUSION

This Court should reverse the trial court and enter judgment for the State because Justice Sanders received all the documents he requested, or, alternatively, affirm the trial court's exemption rulings but reduce the penalty award.

Dated this 22nd day of October, 2008.

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DIVISION II

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

No. 35920-1-II

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THE HONORABLE RICHARD B. SANDERS,

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Respondent.

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I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 22nd day of October, 2008, I caused a true and correct copy of the Reply Brief of Respondent and Cross-Appellant State of Washington to be served on counsel of record in the following manner:

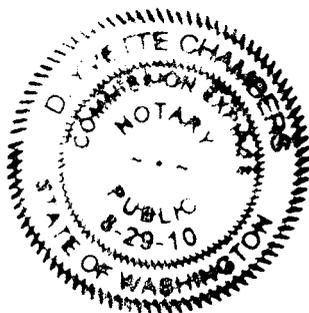
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DATED this 22nd day of October, 2008.


LINDA BLEDSOE

SUBSCRIBED AND SWORN TO this 22nd day of October, 2008.




NOTARY PUBLIC in and for the
State of Washington, residing at
Pyrallop, WA.
My commission expires 8-29-2010