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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a
Washington not-for-profit corporation,

Petitioner,

v.

PAT McCARTHY, in her official capacity as Pierce County Auditor;
PIERCE COUNTY, Washington, a Municipal Corporation,

Respondents.

PETITIONER'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Now, after an exchange of appellate briefs, the central Public Records Act (PRA) issue in this case has come into focus: Pierce County (the Agency) believes there are only two ways to violate the PRA and the Building Industry Association of Washington (the Requestor) asserts there are *three*. The third way is fully analyzed below.

II. ARGUMENT

A. **The Public Records Act Provides a Remedy for the Unlawful Destruction of Later-Requested Non-Exempt Public Records**

The Agency argued to the trial court that since (without any discovery) the Requestor did not provide an example of a destroyed email, the Requestor had not shown a PRA violation.¹ CP 79; 187. As the Agency's counsel concisely put it, "They can't show that they're present. We have in fact shown in fact affirmatively that they are not present. *Ipsa facto, they are not public records.*" Report of Proceedings (RP) 7/20/07 at 20 (emphasis added). It is that simple in the Agency's view—if a public records requestor (without discovery) cannot prove the existence of a deleted email, the Requestor loses a PRA case (and can be countersued). *Ipsa facto*.

¹ Actually, the Requestor did produce examples of emails (the Secretary of State emails) deleted by the Agency which showed a PRA violation. *See* Pet'r Opening Br. at 4, 28.

This “ipso facto” argument puts the burden of proof on the Requestor by claiming, as the Agency’s counsel did, “They can’t show that they’re present.” As previously briefed, the burden of proof is on an agency to prove it did not withhold public records from a requestor (RCW 42.56.550(1)) and the burden of production in summary judgment cannot morph into a burden of proof. *See* Pet’r Opening Br. at 20-21.

The fundamental difference between the parties’ arguments is whether there are two ways to violate the PRA or three. The Agency claims there are only two ways for an agency to violate the PRA: (1) explicit withholding of a record (usually under a claim of exemption), and (2) the destruction of a public record after a request. *See* RP 9/7/07 at 22 (Agency counsel: “the PRA only applies in two situations [1] where you have the records and you’re saying take a hike, you’re not going to get them, or [2] you’ve made a public records request and then they destroy them.”) (bracketed numbers added). The Requestor believes there are three ways to violate the PRA: the first two acknowledged by the Agency and a third way—the unlawful destruction of later-requested non-exempt public records is a “withholding” and therefore a violation of the PRA under *Prison Legal News Inc. v. Dep’t of Corrections*, 154 Wn.2d 628,

115 P.3d 316 (2005). See Pet'r Opening Br. at 1, 2, 19, 37.² That is what this case boils down to: are there only two ways to violate the PRA, or a third way?

Now the Agency's specific arguments in its Response Brief will be analyzed.

1. The Requestor Does Not Argue That Every Single Record Ever Destroyed Violates the PRA

The Agency begins its argument with a premise: under the Requestor's analysis, "government would be liable in perpetuity to everyone who files a request after an agency no longer retains a record." Br. of Resp't at 20. The Agency is mistaken. First, the statute of limitations for a PRA claim is one year (RCW 42.56.550(6)) not "perpetuity." Second, the Requestor has been very clear: "an *unlawful* destruction of later-requested non-exempt public records" violates the PRA. Pet'r Opening Br. at 1, 2, 19, 37 (emphasis added). Not all destructions (just unlawful ones); not all records (just later-requested ones which are not exempt from disclosure). In fact, the Requestor described at

² The Agency claims an agency can withhold a public records without claiming an exemption and cites *Livingston v. Cedeno*, ___ Wn.2d ___, 186 P.3d 1050 (2008). As the Court knows because it recently decided *Livingston*, the agency in that case provided the records—that is, it did not "withhold" them under the PRA—but then seized them under a separate statute (RCW 72.09.530) authorizing the seizure of prison mail. In other words, this Court held in *Livingston* that there was no "withholding" under the PRA. *Id.*, 186 P.3d at 1057-8. Lawfully intercepting mail is far different than unlawfully destroying public records. One is lawful and the other is unlawful. Lawfully not providing the records does not violate the PRA—so unlawfully not providing them should.

length in the trial court the principle that not every record ever created is subject to a PRA claim. CP 731; 793, n.3; RP (9/7/07) at 26.

2. The Public Records Act and Retention Statute Must Be Read Together

The Agency asserts that the PRA (RCW 42.56) and the records retention statute (RCW 40.14) do not operate together and cannot be read together. Br. of Resp't at 14-15. For reasons previously briefed at length, a statute about providing public records and a statute about keeping those records in the first place must be read together. See Pet'r Opening Br. at 15-17. After all, the PRA only works if there are public records left to provide.

The Agency cites *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002) for the proposition that it is "proper to dismiss [a] claim that 'destroying emails after five days violates the state record-keeping provisions outlined in chapter 40.14 RCW' because private litigant 'has no right under chapter 40.14 RCW.'" Br. of Resp't at 15. However, the Requestor expressly and repeatedly has stated it is not making a claim under RCW 40.14. CP 719; 722-23. *Daines* addresses an argument the Agency wishes the Requestor was making, not one it actually is. Similarly, the Agency cites to *Kistap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008). See Br. of Resp't at 15. However,

Smith did not involve a public records request but rather was an agency action against an employee for taking agency documents.

3. The Requestor Does Indeed Describe Why the PRA Provides a Remedy in this Case

The Agency claims the Requestor does not describe how the PRA provides a remedy in this case. Br. of Resp't at 15. The Agency is mistaken. See Pet'r Opening Br. at 17-20 (analyzing *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992) and *Prison Legal News*, 154 Wn.2d 628 and why RCW 42.56 should be read in conjunction with ch. 40.14 RCW). The Requestor submits that the unlawful destruction of later-requested non-exempt public records is a "withholding" and therefore a violation of the PRA under *Prison Legal News*.

The Agency argues that no PRA statutory provision provides that the destruction of public records before a request is illegal. See Br. of Resp't at 17. If looking for specific statutory provisions covering the exact issue in this case is the standard, then the Requestor submits that neither the PRA nor any other law provide that the unlawful destruction of later-requested public records is legal. For example, RCW 40.14 does *not* provide: "Notwithstanding that it is unlawful to destroy records in violation of retention schedules, doing so does not create any PRA

liability.” Given that no PRA (or other statutory) provision specifically addresses the exact question in this case, the Court should interpret the PRA (which, Respondent believes, involves looking at RCW 40.14) and apply PRA case holdings such as *Prison Legal News*. Not every single factual scenario is addressed by a specific statutory provision. That is where courts come in.

The Agency argued below that, while the PRA did not provide a remedy in this deleted-email case, another remedy existed. The Agency argued below that the PRA does not grant Requestor a private right cause of action. According to the Agency, where an individual has violated RCW 40.14, and thereby has committed a crime, a plaintiff has no cause of action but instead could only be prosecuted by a county prosecutor’s office. CP 77-78. However, in this case, this would mean that Pierce County would prosecute itself. Self-prosecution is not a practical remedy. Applying *Prison Legal News* and letting the PRA operate is.

The Agency claims *Yacobellis* involved a request that took place prior to the destruction of the records. According to the Agency, the agency in *Yacobellis* refused to provide the records “presumably while the records were in existence.” Br. of Resp’t at 17, n. 18. The Agency is mistaken. The requestor in *Yacobellis* made a public records request for raw data. 55 Wn. App. at 708. The city refused to disclose the

information. The requestor made numerous other public records requests asking for the same information. *Id.* The agency eventually responded that it discarded the records. The court explicitly stated that it “unknown when this occurred.” *Id.* Thus, the Agency is mistaken in “presuming” that the records were in the city’s possession when the requestor in *Yacobellis* made his original request.

4. The Cases the Agency Cites To Do Not Apply

The Agency cites to *Daines*,³ *Sperr*,⁴ *Kleven*,⁵ and *Smith v. Okanogan County*.⁶ None apply.

The Agency argues the Requestor is wrong to claim this is the first deleted email case because *Daines*, 111 Wn. App. at 346, 348-49 was a deleted email case. Br. of Resp’t at 23-24. (This would be news to the newspaper amici who filed an amicus brief because they too believe this is the first deleted email case in Washington.) However, as the Agency admits later in its briefing, *Daines* involved a requestor “who had previously acquired emails under a PRA request[.]” Br. of Resp’t at 24. So *Daines* involved a situation where the requestor actually *received* the emails via the PRA—the opposite of this case in which the Requestor has not. Quite a difference.

³ 111 Wn. App. 342, 44 P.3d 909 (2002).

⁴ 123 Wn. App. 132, 96 P.3d 1012 (2004).

⁵ 111 Wn. App. 284, 44 P.3d 887 (2002).

⁶ 100 Wn. App. 7, 994 P.2d 857 (2000).

The Agency cites to *Sperr*, 123 Wn. App. at 135-37. Br. of Resp't at 16. *Sperr* does not apply. Unlike this case, *Sperr* did not involve a situation where the agency had admittedly deleted emails. Instead, the documents the requestor in *Sperr* sought simply never existed in the first place. In the case before the Court, there is evidence that some records Requestor sought indeed did exist at one time. CP 47-49.

The Agency implies that the Requestor is arguing that a court can never believe an agency's assertion that a requested record never existed or was lawfully destroyed, no matter how reasonable the assertion is. The Agency is mistaken. In argument to the trial court, Requestor's co-counsel explained:

If this requestor had asked for all records showing a conspiracy between Pat McCarthy and the Queen of England Obviously, that would be something that you could make reasonable inferences that when the County says we don't have any records responsive to that, that that makes sense.

RP (9/7/07) at 18.

In contrast to an agency making a perfectly reasonable claim that no records exist, the Requestor has evidence that responsive public records exist or were unlawfully destroyed. Pet'r Opening Br. at 25-36 (describing remaining genuine issues of material fact).

The Agency's attempt to paint many public records requestors as unrelenting crazies is not accurate. The list of declarants in this case

(State Auditor, State Archivist, numerous newspaper publishers, a peace activist) and amici (newspaper associations and Society of Environmental Journalists) show that a broad range of people care about the outcome of this case. They are not crazies.

The Agency cites to *Kleven*, 111 Wn. App. at 293. This case, unlike the one before the Court now, involved an agency attempting to provide public records, but it apparently mislabeled the records at issue and provided a non-responsive set; there was no allegation in *Kleven* that the destruction was unlawful. In fact, in *Kleven* “the [agency] provided all records responsive to the request.” *Id.* at 295. Here, whole categories of records (*e.g.*, intra-Agency emails (see Pet’r Opening Br. at 26)) have not been provided. *Kleven* involved a simple mistake—not the systematic, unlawful destruction of public records.

Finally, the Agency cites *Smith v. Okanogan County*, 100 Wn. App. at 22 for the proposition that when an agency has “nothing to disclose” its failure to do so does not violate the PRA. Br. of Resp’t at 16. However, *Smith* involved records that obviously never existed (lists of attorneys), not records that were unlawfully destroyed. The Requestor has been clear that records that obviously never existed (or were lawfully destroyed) need not be produced. *See* CP 731; 793, n.3; RP (9/7/07) at 18 & 26.

In sum, *Daines*, *Sperr*, *Kleven*, and *Smith* do not give agencies a green light to unlawfully destroy public records and then escape PRA liability because there is “nothing left to provide.”

B. Dismissal of the PRA Case Was Not Warranted

The Agency argues that there is no evidence “in the record” showing a PRA violation. Br. of Resp’t at 28. The Agency is mistaken for three reasons. First, the record does indeed contain evidence of PRA violations. Second, “the record” was never developed because the Requestor was not allowed to conduct discovery. Third, the record—as incomplete as it is—does indeed show several *unrefuted* genuine issues of material fact.

1. The Record Contains Evidence of PRA Violations

a. The Record Indicates That Additional Emails Exist or Were Unlawfully Destroyed

The Requestor has previously briefed the evidence in the record leading to at least the “reasonable inference” (which is all that is required to defeat summary judgment) that responsive emails and other records exist or were unlawfully destroyed. Pet’r Opening Br. 25-36. For example, the Agency admits that it destroys emails received from an “outside system” but cannot explain what happens to intra-Agency emails—the very emails the Requestor is seeking.

b. “The Record” Was Never Developed

As previously briefed, (see Pet’r Opening Br. at 22-24) and briefed *infra*, p. 14-15, “the record” in this case is one-sided—it contains the Agency’s declarations but the summary judgment proceeding started almost immediately, before the Requestor could conduct discovery.

c. The Agency Does Not Refute at Least Four Genuine Issues of Material Fact

i. The Agency does not refute the genuine issue of material fact that it violated the Voting Rights Act’s retention

The Requestor asserted that the Agency’s apparent wholesale destruction of voter registration records violated the federal Voting Rights Act’s retention requirements. Pet’r Opening Br. at 34-5. This is a genuine issue of material fact because the trial court’s holding was based on the lawfulness or unlawfulness of the destruction of records. RP (9/7/07) at 32. The Agency did not refute the Voting Rights Act retention requirements.⁷

ii. The Agency does not refute the genuine issue of material fact that it “more probably than not” deleted the emails

⁷ The Agency claims that the Voting Rights Act does not matter in this case because the Requestor is not attempting to enforce that law. Br. of Resp’t at 1, n.1. While the Requestor is not attempting to enforce the Voting Rights Act, the Agency did not refute why that statute’s retention requirements are not a genuine issue of material fact given that the trial court held that “unlawful” destruction could lead to a PRA violation. This Court reviews the case de novo so if this Court held that the lawfulness or unlawfulness of the destruction was a factor, a violation of the retention requirements in the Voting Rights Act would be a “material” fact.

The Requestor asserted that the Agency's defense that it "more probably not" deleted the emails in question created a genuine issue of material fact. Pet'r Opening Br. at 36. The Agency did not refute this in its response.

iii. The Agency does not refute the genuine issue of material fact on retention policies and practices

The Requestor asserted that the Agency's retention policies and practices created a genuine issue of material fact. Pet'r Opening Br. at 34. The Agency did not refute this in its response.

iv. The Agency does not refute the genuine issue of material fact on forensic recovery of emails

The Requestor asserted that since the Agency's defense is that it does not "have" the deleted emails, a genuine issue of material fact is whether it is possible to electronically recover them. Pet'r Opening Br. at 36. After all, if the emails were required to be retained, but were not, and a method exists to recovery them, the agency should do so to fulfill its obligations under RCW 40.14 and RCW 42.56. The Agency did not refute this genuine issue of material fact.

C. The Requestor Sought Discovery

The Agency argues that the Requestor did not seek discovery and implies that a CR 56(f) continuance would have solved the problem. The Agency is mistaken.

1. The Requestor Repeatedly Asked the Trial Court to Conduct Discovery

The Requestor asked the trial court numerous times to deny the summary judgment motion and allow discovery. Pet'r Opening Br. at 23 (citing CP 83-84; 93; 96 n.5; 782; 785; 787; 788).

The Agency suggests that the only way to properly seek discovery was to file interrogatories on the same day as the complaint and then begin depositions on the thirtieth day after the complaint. Br. of Resp't at 10. This sets a new standard for what any plaintiff—let alone a public records requestor in a PRA action—must do. The Agency went on offense very quickly in this case, filing a summary judgment motion almost as soon as it could. Pet'r Opening Br. at 23. This meant that responses to interrogatories would have been due the very day the summary judgment motion was granted. *Id.* Depositions, at the very earliest, would have occurred on June 25, 2007, which was seven days after the filing of summary judgment. CP 79. Depositions this early in the case would have been unfocused and the Agency probably would have filed for sanctions for even noting them. So, no, the Requestor did not file any discovery

requests because a summary judgment hearing was already noted, interrogatory responses would have been due on the day of argument, and the earliest depositions could have taken place was seven days after the Agency filed its motion for summary judgment.

2. A CR 56(f) Motion Would Not Solve the Problem in This Case

In this appeal, the Agency asserts that the Requestor should have filed a CR 56(f) motion for continuance to conduct discovery. Br. of Resp't at 11, 26. This argument is the exact *opposite* of the Agency's argument to the trial court. In the trial court, the Agency argued that discovery was "unnecessary." See RP (9/7/07) at 15 ("Discovery, furthermore, Your Honor, is unnecessary because we have submitted sworn declarations of the elected auditor that there are no further documents."). Also in the trial court, the Agency argued that a CR 56(f) motion could not be granted. See CP 190, n.3; RP (9/7/07) at 14.

This Court has held, "We will not erect technical barriers to deny review on the merits when to do so is contrary to the purpose of the [PRA]." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005) (deciding whether intervention is allowed in PRA cases). Accepting the Agency's argument that a requestor must file interrogatories with a complaint or must always file a CR 56(f)

motion (that the agency claims is unnecessary and cannot be granted) would be erecting technical barriers to deny review on the merits in a PRA case.

The trial court could have (and should have) denied the Agency's motion for summary judgment and allowed discovery to proceed. This Court reviews the case de novo and could do what, in the Requestor's view, the trial court should have done: deny summary judgment and remand for discovery.

D. Officials Can Be Sued in Their Official Capacities in PRA Cases

The Agency continues to assert that Auditor McCarthy could not be sued in her official capacity. Br. of Resp't at 34-35. As previously briefed, two Supreme Court cases and six published Court of Appeals cases involve PRA suits against officials in their individual capacities. Pet'r Opening Br. at 41, n.27. Ironically, some of these cases were against the Pierce County Prosecuting Attorney in his official capacity.⁸

The Agency cites *Yakima Newspapers v. City of Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995). The facts in *Yakima Newspapers* are dissimilar to this case. There, the requestor brought an action to compel

⁸ *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Limstrom v. Ladenburg*, 85 Wn. App. 524, 933 P.2d 1005 (1997), *rev'd on other grounds*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 989 P.2d 1257 (1999); *Limstrom v. Ladenburg*, 110 Wn. App. 133, 39 P.3d 351 (2002).

disclosure of a settlement agreement terminating a dispute between the city and the former fire chief. *Id.* at 319. Unlike this case, the former fire chief was not sued in his official capacity. In fact, he was not sued at all. Instead, the former fire chief intervened and appealed the trial court's decision. *Id.* at 321. In this case, like the numerous other cases cited, Auditor McCarthy was sued in her official capacity as Pierce County Auditor.

E. The Requestor Did Not “Abandon” Its CR 11 Claim

The Agency argues that the Requestor “abandoned” its CR 11 claim by not citing to the record or case law on it. The Agency is partially mistaken. The Requestor did, indeed, cite to the record in its briefing of this issue. Pet'r Opening Br. at 48. Moreover, the Requestor should be awarded attorneys' fees under RAP 18.1 based on the Agency's frivolous appeal on its counterclaim.

RESPONSE TO CROSS-APPEAL

I. INTRODUCTION

The Agency appeals the trial court's (1) denial of the Agency's RCW 4.84.185/CR 11 counterclaim against the Requestor, and, (2) denial of the Agency's motion to seal a court record containing an email.

II. FACTS RELATING TO CROSS-APPEAL

A. Agency's Counterclaim

This was a case of first impression: whether an agency violates the PRA by deleting emails that are later requested. The trial court described this case as having “a new twist” and one the court has “[never] seen before.” RP (07/20/07) at 26. In addition, the trial court noted that the issue in the case has never “really been particularly addressed directly.” *Id.* The case presented a debatable and important legal question. Perhaps this is why the State Auditor and State Archivist filed declarations in support of the requestor. CP 789-80; 200-01. Presumably these officials do not file declarations in support of frivolous cases. Rereading the State Auditor’s declaration reminds one of the important issues at stake in this case. CP 789-80.

The Requestor did not lose every part of this case. In fact, BIAW did not lose a very important part of the case, the overarching legal issue of whether the unlawful destruction of public records carried any PRA consequences (discussed below). True, the trial court ultimately dismissed the Requestor’s Complaint, but four facts show that the Requestor was right about some aspect of the case at some point. First, on July 20, 2007 the trial court did not dismiss the Requestor’s Complaint outright. Instead, the trial court ordered additional briefing. This was not a one-sided “blow out” victory for the Agency where one cannot imagine why there was any legal merit to the Requestor’s claims. The court thought there was initial

merit to at least some aspect of Requestor's claims that deserved additional briefing before a final decision. Second, the trial court granted oral argument on a motion for reconsideration which, as the trial court described, it does "rarely." RP (09/07/07) at 30. Third, the Agency maintained that the Secretary of State emails were not "public records." CP 73. The trial court disagreed, holding that they were "public records" but that they need not be retained and produced because of their content. RP (09/07/07) at 37.

Finally, and perhaps most importantly, Requestor did not lose on the underlying legal issue. The Agency argued that an agency could destroy any email and then not produce it under the PRA. CP 73-74. Requestor argued that destruction of retainable and requested emails violated the PRA. CP 94-102. The trial court, on reconsideration, held that requested records destroyed in violation of a retention law would violate the PRA and such behavior was a violation of the public trust. *See* RP (09/07/07) at 31.

The Agency raises the issue of the Requestor's pre-filing inquiry into the factual and legal basis of the case. The Requestor received approximately 565 copies of envelopes sent to suspicious voters turned in by the Association of Community Organizations for Reform Now (ACORN). CP 935-36. Because many of these envelopes were

addressed to the same person, the Requestor only received roughly 287 names. *Id.* However, the *Seattle Times* reported that the Agency was investigating nearly 400 suspicious voter registrations turned in by ACORN. CP 941-42. What about the seemingly missing 113 or so names? Also, the Agency seemed to acknowledge it was deleting requested emails when it wrote, “the fact [the Secretary of State] kept emails does mean that his office have [sic] kept the same emails.” CP 37. The deletion of emails was later confirmed. *See* CP 64-65 (“I deleted those emails ...”); *see also* CP 66-67 (County technology staff describing automatic deletion of many emails).

Moreover, the Agency failed to provide any emails in the Requestor’s first request. CP 935-36. Many of the emails the Agency finally disclosed had been deleted from the staff’s “in-boxes” and were only “discovered” in their “sent boxes.” CP 936. The Agency’s Information Technology Specialist further testified that any emails that were “deleted without being replied to or forwarded, could not be electronically or otherwise recovered by March of 2007,” and that the “backup tapes for the Auditor’s Department would also have been overwritten long before the March 2007 request was received.” CP 66-67.

Regarding Requestor’s legal theory of the case, Requestor’s counsel relied on the Washington State Attorney General’s model rules on

public records describing the retention of public records and the legal consequences for their unlawful destruction. *See* CP 938. When it came to naming the Pierce County Auditor in her official capacity as a defendant, Requestor’s counsel relied on the Washington State Bar Association’s Public Records Act Deskbook and the legal authority cited therein. CP 938. Finally, the Requestor co-counseled with an attorney with extensive public records experience. CP 938; CP 949.

B. Sealing Court Record

The Agency asked the trial court to seal the email under GR 15 because, it alleged, the contents of the email were very confidential. However, the Agency quoted part of the “highly sensitive” email in question in its own publicly-filed pleadings. CP 1032. The Agency also generally described the contents of the email in court filings. CP 1033.

The Agency produced the email in response to a PRA request on October 16, 2007. The Agency claimed attorney-client privilege 134 times in the public records production at issue. Decl. Lori Aguino (10/29/07), Ex. A (attached as Appendix A).⁹ The Agency was required by RCW 42.56.210(3) to provide a withholding log of any withheld records. For a withholding log of claimed exemptions under the PRA:

⁹ The Requestor has designated this in its Supplemental Designation of Clerk’s Papers filed on August 21, 2008.

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 271, n. 18, 884 P.2d 592 (1994) (“*PAWS II*”).

The Agency never provided a detailed withholding log for the email or any other withheld record. *See* Decl. Aguino, Ex. A. (simply asserting 134 were withheld on privilege grounds). The items which must be described in the withholding log (e.g., date) become important below because it shows the information about the email the Agency must disclose, thus making it inappropriate to seal items the Agency must disclose anyway.

Also, the email in question was not labeled “Attorney-Client Privilege” or “Confidential.” As will be described below, the failure to label a document as privileged or confidential is a factor a court can consider.

The Agency claims the email is subject to attorney-client privilege but would not admit that an attorney from the Agency sent the email in question. *See* CP 1032-33 (email “alleged” to be communication between the Agency and their litigation counsel; email “purports” to be from the

Agency's counsel). Even in this appeal, the Agency will only admit that the email is "what [the Requestor] claimed was a communication" between attorney and client. Br. of Resp't at 13. It is unusual for the party with the burden of establishing an attorney-client confidential communication to decline to admit that an attorney sent it.¹⁰

The Agency waited approximately six weeks to try to seal the court record over an email it now claims is very sensitive. The email in question was produced in response to a public records request on October 16, 2007. CP 979. The Agency's counsel knew the record had been produced by at least October 25, 2007, when it was filed as an attachment to a declaration in this case. It was not until December 6, 2007 that the Agency moved to seal the email—six weeks after the email was filed with the trial court.

The trial court found the Agency did not meet "the very high burden required to seal," and further did not even meet the "lower burden of redacting." CP 1066.

III. AUTHORITY AND ARGUMENT

A. The Trial Court Properly Denied the Agency's RCW 4.84.185/CR 11 Counterclaim

¹⁰ Later, the Agency finally argues the email was between an attorney and client. *See* Br. of Resp't at 46.

This brief will describe the very, very high standard for granting RCW 4.84.185 attorneys' fees, which, as described *infra*, is the lack of "any rational arguments." The standard for CR 11 sanctions is also very high—that it is "patently clear that a claim has absolutely no chance of success." The Agency must show that Requestor had no claim whatsoever and that the legal issues in this case were not even "debatable"—which will be hard given the trial court's rulings and request for additional briefing and oral argument. The Agency must also describe why government countersuing or sanctioning public records requestors will not have a chilling effect on records requests—which will be hard given the declarations from the editors of the *Tacoma News-Tribune*, *The Olympian*, *Nisqually Valley News* (Yelm), and a peace activist, all of whom described how countersuits by government will chill their records requests.

The standard of review for a trial court's decision on an RCW 4.84.185 is abuse of discretion. *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 *review denied*, 152 Wn.2d 1029 (2004).

1. The Public Records Act Encourages Requests So Counterclaims Chilling Requests Should Be Discouraged

A long discussion of the importance of the PRA is not necessary; the Court is well aware of the importance. However, a few specific

provisions of the PRA show why this is precisely the kind of case where allowing a countersuit would undermine the underlying cause of action.

Providing public records is hard work for agencies, but it is part of what agencies do. “It has long been recognized that compliance with the [PRA] may impose an administrative burden on an agency entrusted with public records. Yet, administrative inconvenience or difficulty does not excuse strict compliance with the [PRA]. *Hearst Corp.*, 90 Wn.2d 123, 131-32, 580 P.2d 246.” *Zink v. City of Mesa*, 140 Wn. App. 738, 166 P.3d 738 (2007). However, the Legislature decided it is more important that the public can obtain information about its government. RCW 42.56.550(3) provides that “Courts shall take into account the policy of [the PRA] that free 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.” The PRA is exactly the kind of public interest statute in which a court should be the most reluctant to allow counterclaims against citizens.

Allowing government to sue records requestors will inhibit requests. Several declarants describe how government countersuits will chill news reporting in large, medium, and small newspapers. *See* Decl. David A. Zeeck & Karen S. Peterson (*Tacoma News-Tribune*) (CP 957-958); Decl. Vickie Kilgore (*The Olympian*) (CP 961-962); Decl. Keven

Graves (*Nisqually Valley News* (Yelm)) (CP 959-60). A peace activist describes how government counterclaims against records requestors will inhibit his public interest work. *See* Decl. Glen Milner (CP 954-956).

2. The Public Records Act Allows Suits Against Individual Office Holders

One of the bases for the Agency's counterclaim was the Requestor's naming of Auditor McCarthy in her official capacity, which the Agency claimed was "frivolous". CP 72. The reasons why naming Auditor McCarthy was appropriate has been fully addressed. Pet'r Opening Br. at 40.

3. The Public Records Act Provides the Answer to Why the Requestor "Resisted" the Agency's Motion to Dismiss Claims That Were Not Made

The Agency asserts that the Requestor's "resistance" to the motion for summary judgment on the RCW 40.14 claims (that no one made) was frivolous or sanctionable. Br. of Resp't at 45. As previously briefed, the Requestor was concerned that if it agreed to dismissal of claims (it did not make) then the Agency would claim that the Agency "substantially prevailed" on the claim (that no one made). Pet'r Opening Br. at 41-42.

The Agency claims in its Response Brief that the Requestor should not have worried about this because it is now established that the "substantially prevailed" line of case has been overruled by *Spokane*

Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005). Br. of Resp't at 37. The Agency is correct that *Spokane Research* has changed the "substantially prevailed" principle, as the Requestor acknowledged. CP 840. However, merely because a Supreme Court decision like *Spokane Research* meant the Agency would not be the prevailing party in the claim no one made, the Requestor was still concerned that the Agency would try. In all candor, this impression was formed when the Agency—despite two Supreme Court decisions, six published Court of Appeals opinions, and a treatise—claimed (and still claims) that local government officials cannot be named as defendants in PRA cases. Pet'r Opening Br. at 41, n.27. If the Agency would not accept this legal principle, it logically seemed the Agency would not accept the *Spokane Research* principle. Hence the "resistance" to the claim no one made.

4. RCW 4.84.185 Imposes a Very High Standard for a Finding of "Frivolousness" and the Agency Cannot Meet It

The Agency must convince the Court that Requestor's suit was "frivolous and advanced without reasonable cause" RCW 4.84.185. *See also Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200, *review denied*, 132 Wn.2d 1010 (1997), (in appeal of RCW 4.84.185 decision, "all doubts should be resolved in favor" party accused of frivolous action).

A case is “frivolous” only “when it cannot be supported by an[y] rational argument on the law or facts.” *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review denied*, 141 Wn.2d 1010 (2000). The Requestor’s case can be supported by a number of rational arguments on law or facts. They have been briefed in Requestor’s Opening Brief and will not be repeated here.

How low is the “frivolous” standard? A federal court discussing the “frivolous” element of CR 11 sanctions wrote this:

“Frivolous” is of the same order of magnitude as “less than a scintilla.” It is defined in Webster’s Third New International Dictionary (1967) as “of little weight or importance: having no basis in law or fact: light, slight, sham, irrelevant, superficial.” The Oxford English Dictionary (1971) defines it as “[o]f little or no weight, value or importance, paltry, trumpery, not worthy of serious attention, having no reasonable ground or purpose In pleading: Manifestly insufficient or futile.”

Eastway Constr. Corp. v. City of New York, 637 F.Supp. 558, 565 (1986), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987) (quoted in Wright & Miller, FEDERAL PRACTICE AND PROCEDURE CIVIL 3d § 1336). The Requestor had more than a “scintilla” of a reason to believe this case was valid—the Attorney General’s model rules, for example. In addition, the importance and seriousness of this case of first impression—the additional briefing, oral argument on reconsideration, and the declarations of statewide officials—all show that

this case was, indeed, “weighty,” “important,” and “worthy of serious attention.” And the trial court did indeed give the Requestor’s case serious attention. The trial court did not dismiss this case out of hand at its first opportunity (the July 20, 2007 summary judgment hearing); to the contrary, the trial court ordered additional briefing and heard oral argument, and then heard oral argument on reconsideration. Why would the trial court order additional briefing and oral argument when there were not “any rational arguments on law or facts”?

In a related vein, RCW 4.84.185 should not be imposed when the legal issue at stake is “debatable.” In *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wn. App. 690, 723 P.2d 483 (1986), a group advocating separation of church and state sued a government agency challenging funding of religious instruction and ultimately lost the case. The government countersued under RCW 4.84.185. The Court of Appeals held that, even though the party challenging the government action did not prevail, the legal issue presented was “debatable” and therefore the trial court’s decision to not award RCW 4.84.185 attorneys’ fees was not an abuse of discretion. *Id.* at 697. The legal issue of whether an agency can delete emails without any PRA liability was, at a bare minimum, “debatable”; in fact, the trial court noted this case presented “a new twist” and one the trial court had “[never] seen before.” RP (07/20/07) at 26. In

addition, the trial court noted that the issue in the case has never “really been particularly addressed directly.” *Id.*

Moreover, the trial court’s ruling on that legal issue was essentially the one advocated by the Requestor. *Compare* RP (09/07/07) at 31 (trial court ruling) *with* CP 731 (Requestor’s position). The Agency cannot show that the Requestor’s was not even “debatable.”

Similarly, the Agency cannot prove the lack of “reasonable cause” as required by RCW 4.84.185. The Requestor’s pre-filing inquiry showed that the Agency had not originally complied with the PRA by failing to originally disclose emails. CP 935-96. In addition, Requestor’s counsel thoroughly researched the PRA and relied on the Washington State Attorney General’s model rules. CP 938. The Attorney General’s model rules are not a mere memorandum in a file cabinet; they were adopted by formal rulemaking after notice and comment, appear in the Washington Administrative Code, and are specifically intended to be relied on by the public for guidance. *See* WAC 44-14-01001. *See also* RCW 42.56.570(2) (Legislature specifically authorizing Attorney General to adopt model rules on public records). To put it mildly, relying on the Attorney General’s model rules for public records constitutes “reasonable cause” to bring a case.

Once again, it is important to note that the State Auditor and State Archivist filed supporting declarations in this case. Presumably they do not file declarations in cases filed without any “reasonable cause.”

Furthermore, RCW 4.84.185 attorneys’ fees can only be awarded when the “action as a whole” can be deemed frivolous. *Jeckle*, 120 Wn. App. at 387. *Jeckle* is instructive. In that case, a party filed a PRA suit (resisting disclosure, which is different than our case) and other claims. The other claims were, frankly, bizarre. The trial court awarded the defending party RCW 4.84.185 attorneys’ fees. However, the Court of Appeals reversed the trial court and held that granting RCW 4.84.185 attorneys’ fees was an abuse of discretion in part because even though the party lost, some aspects of the case were not lacking “any rational arguments of law and fact.” *Id.* Then, emphasizing that an action “as a whole” must be frivolous, *Jeckle* held, “[u]nder RCW 4.84.185, a court cannot pick and choose among those aspects of an action that are frivolous and those that are not.” *Id.* Given that the Requestor did not lose on some aspects of this case—the broader legal issue of whether an agency violates the PRA by unlawfully deleting a record later requested, for example—this action “as a whole” cannot be deemed “frivolous.”

Yet another hurdle for the Agency is proving that the Requestor “intentionally” brought a frivolous case for the “purpose of harassment.”

See Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 929, 982 P.2d 131, *review denied*, 140 Wn.2d 1010 (1999). *See also Schmerer v. Darcy*, 80 Wn. App. 499, 509, 910 P.2d 498 (1996) (even claims that were “tenuous at best” not sanctionable because no evidence of intent of “delay, nuisance, spite, or harassment”). The pre-filing inquiry made by the Requestor’s counsel has been previously described (Attorney General’s model rule, Deskbook, *Seattle Times* article, and Agency declarations verifying the destruction of some emails). CP 938.

5. CR 11 Imposes a Very High Standard for Sanctions and the Agency Cannot Meet It

Under CR 11, attorneys have three obligations: “(1) the duty to conduct a reasonable inquiry into the facts supporting the document; (2) the duty to conduct a reasonable inquiry into the law, such that the document embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and (3) the duty not to interpose the document for purposes of delay, harassment, or increasing the costs of litigation.” *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992). Each of these three factors is analyzed below. But first some preliminary matters framing the analysis of the three factors should be provided.

First, the burden is on the Agency to prove a CR 11 violation. *See Skimming v. Boxer*, 119 Wn. App. 748, 754-5, 82 P.3d 707 *review denied*, 152 Wn.2d 1016 (2004). Second, casually imposing CR 11 sanctions would significantly deter legitimate legal claims and hinder access to courts. Therefore, merely losing a case cannot be sanctionable—that would make 100 percent of cases sanctionable because someone loses in every case. “The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney’s fees to a prevailing party where such fees would otherwise be unavailable.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). That should be especially true when the case is governed by a statutory scheme specifically awarding fees to only one party but not the other, as the PRA does. *See RCW 42.56.550(4)* (awarding fees only to prevailing requestors, not agencies).

Thus, “To avoid the 20/20 hindsight view, the trial court must conclude that the claim clearly has no chance of success.” *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127, *review denied*, 147 Wn.2d 1021 (2002). *Accord Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 574, 27 P.3 1208 (2003). Another case raises the bar even higher: “[T]he trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.” *Skimming*, 119 Wn. App. at 755

(citations omitted). A standard like “patently clear that a claim has absolutely no chance of success” is an extremely high standard. And one that the Agency cannot meet because the Requestor did not lose, for example, on: (1) the broader legal issue of the possibility of a PRA violation for unlawfully deleting requested emails, and (2) the finding that the Secretary of State emails were “public records” (albeit ones not subject to disclosure).

a. Requestor’s Counsel Conducted a Reasonable Inquiry into the Facts

Requestor’s counsel’s pre-filing inquiry has been described above and is detailed at CP 935-948. The Requestor notes that inquiring into the facts of a case concerning the destruction of records is difficult because the Agency claims the records have been destroyed. The Agency’s position is that it is unreasonable to file a PRA suit when the agency says no records exist. CP 73. That assertion would undermine the PRA by relying exclusively on agencies to adhere to the “honor system” of complying with the Act—without any way of challenging an agency’s claims. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978) (“leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization.”).

Moreover, the Requestor pointed the trial court to the evidence showing that Requestor's counsel had reasonable indications that the Agency might have withheld public records. *See, e.g.*, CP 936-38; *see also* Pet'r Opening Br. 25-36 (discussing nine issues of material fact).

The Court of Appeals' *Wood* case sheds light on the factual inquiry element. *Wood* and the case before the Court are very similar in some respects. In *Wood*, a citizen brought an action under the Open Public Meetings Act alleging that an exchange of emails between school board members constituted an illegal "meeting" under the OPMA. 107 Wn. App. at 555-6. As in the case before the Court, the citizen lost on summary judgment and filed a motion for reconsideration. The CR 11 movant claimed that the citizen did not provide any evidence supporting the motion for reconsideration. The Court of Appeals, applying the principle that losing a motion for reconsideration does necessarily violate CR 11, held:

[The CR 11 movant] asserts that [the citizen's] reconsideration motion was not well grounded in fact because it did not identify facts or controlling legal authority that the trial court had overlooked or had not previously considered in regard to the summary judgment motions. ... [The citizen's] failure to convince the trial court does not entitle [the movant] to CR 11 sanctions.

Wood, 107 Wn. App. at 574-5. The same principle applies here.

b. Requestor's Counsel Conducted a Reasonable Inquiry into the Law

Wood, the previously discussed Open Public Meetings Act case, provides insight into the legal sufficiency element as well. As in the case before the Court, the citizen in *Wood* lost on summary judgment and filed a motion for reconsideration. The legal issue on reconsideration was, in the words of the Court of Appeals, not “clear-cut.” *Wood*, 107 Wn. App. at 574-5. Nonetheless the other side filed for CR 11 sanctions. The Court of Appeals held that merely losing a motion for reconsideration—when the legal issue was not “clear-cut”—did not trigger the extremely high standard for a CR 11 violation. *Id.* If losing a motion for reconsideration where the legal issues are not “clear-cut” prevents a CR 11 violation, then so should losing a motion for reconsideration in this case where the legal issues were, in the words of the trial court, ones that never have “really been particularly addressed directly” and posed a “new twist.” RP (07/20/07) at 26.

The text of CR 11 provides that a “good faith argument for the extension, modification, or reversal of existing law” is a reasonable legal basis for a case. To the extent current law allegedly does not provide any PRA consequences when an agency unlawfully destroys public records,

the Requestor was certainly arguing for that extension. (So are the newspaper amici.) The trial court ultimately agreed with the Requestor.

i. Granting the Agency’s CR 11 Motion Would Have a “Chilling Effect” on Public Records Requestors

The Court of Appeals warns:

CR 11 sanctions have a potential chilling effect. And so the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. The fact that a complaint does not prevail on its merits is not enough.

Skimming, 119 Wn. App. at 755 (citations omitted).

Several declarants attest to the chilling effect of allowing government to sue records requestors. *See* CP 955, 958, 959, 961.

c. Requestor’s Counsel Did Not File Pleadings to “Delay, Harass, or Increase the Costs of Litigation”

The answer to why the Agency cannot meet its burden of proving the Requestor’s counsel filed pleadings to delay, harass, or increase the cost of litigation centers on the pre-filing inquiry the Requestor’s counsel undertook. *See* CP 938. It is noteworthy that the Requestor did not file suit against other elections departments such as King County and the Secretary of State. The reason? King County and the Secretary of State provided records. The Agency did not, hence the suit to obtain them. This demonstrates not an intent to delay, harass, or increase the costs of

litigation—but rather an intent to enforce the public’s rights under the PRA to obtain seemingly unlawfully withheld public records bearing on an important public matter such the registration of valid voters.

The Agency thinks various writings of Requestor’s staff prove the “intent” element. The Agency’s argument is troubling on First Amendment grounds. A government such as the Agency “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *State v. Hamilton*, 24 Wn. App. 927, 934, 604 P.2d 1008 (1979), *review denied*, 94 Wn.2d 1007 (1980) (citations omitted). What the Requestor’s employees say or write about elected officials is protected speech.

The Agency claims that making a subsequent public records request is evidence of the Requestor “harassing” the Agency.¹¹ CP 827. The Agency makes this argument, however, without citing to case law directly addressing the issue of harassment and filing numerous public records: *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007). There the court expressly stated that the PRA “does not place a limit on the number of record requests an individual can make.” *Zink*, 166 P.3d at

¹¹ The Requestor made the subsequent request for Auditor McCarthy’s travel records because she claimed that she only used email in significant quantities when she was out of the office. *See* CP 64. The Requestor sought to test Auditor McCarthy’s assertion by making a public records request.

744. See also *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 26 (2001) (litigant against agency entitled to make PRA requests).

Zink is instructive on the “harassment” issue. In that case, the Court of Appeals dismissed the agency’s claim that the requestors were harassing the city clerk when the requestors made such statements as, “you better do this,” “look this up,” and “if you don’t do this just right, I’m gonna sue ya.” 166 P.3d at 745. This is nothing like the Requestor’s request, which was made after consulting the Attorney General’s model rules and a treatise.

B. The Trial Court Properly Denied the Agency’s Motion to Seal Court Records

The Agency made two arguments to the trial court in its attempt to seal an email that was, in the words of the trial court, “at best innocuous and at worst, embarrassing”: (1) because the trial court granted an evidentiary motion to strike the email in question on attorney-client privilege grounds the email must be sealed in its entirety and forever, and (2) the entire email—produced in response to a PRA request—must be returned.

1. Wash. Const. art. I, § 10 and GR 15 Establish A High Burden for Sealing Court Records

Washington Const. art. I, § 10 requires that “Justice in all cases shall be administered openly” The Washington State Supreme Court

has held that to comply with art. I, § 10 civil litigants must satisfy a five-part test before a court can seal any document filed with a court in connection with any dispositive or non-dispositive motion. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 543-44, 549, 114 P.3d 1182 (2005). The five-part test was originally set forth in the case of *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), and is commonly known as the “Ishikawa test.” *Rufer*, 154 Wn.2d at 543-44, 549.

The *Ishikawa* test requires the party urging sealing to show the following: (1) the clear need for sealing, (2) that interested persons have been given the right to oppose sealing and secrecy, (3) that the relief is the least restrictive means and effective in protecting the interest threatened, (4) the court must weigh the competing interests of the parties and the interests of the public, consider alternatives, and make particularized findings, (5) and the order must be no broader in its application or duration than necessary to serve its purpose. *Ishikawa*, 97 Wn.2d at 37-39; *see also Rufer*, 154 Wn.2d at 543-45. The standard of review is abuse of discretion. *Rufer*, 154 Wn.2d at 550 (if trial court uses proper standard of review abuse of discretion).

GR 15 was amended in 2006 to comply with *Ishikawa* and the mandate of art. I, § 10. The current version of GR 15(c)(2) states:

After hearing, the court may order the court files and records in the proceedings, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record....

GR 15(c)(3) states: “A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.”

2. The Agency Has Failed to Meet Its Burden for Sealing

a. The Agency Has Not Proven a Clear Need for Sealing

The Agency has not stated a clear need for sealing. The trial court agreed. *See* CP 1066 (ruling “Pierce County has not shown the clear need for sealing...”). The Agency has not clearly articulated the threatened harm to the Agency from a failure to seal. “The mere fact that an individual communicates with an attorney, however, does not make his communications privileged.” ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (Paul Rice ed. (West Publishing 1999)) § 2.1 at 6 (citing numerous cases). Attorney-client privilege is a “narrow privilege” and should not be broadly construed. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004). Therefore, the mere fact that the

email seemingly involved attorneys and clients is insufficient. This alone does not show a clear need for sealing.

Both GR 15(c)(3) and *Ishikawa* (element 5) require the court to redact any sealable portions of the record. Wholesale sealing of an entire document without analyzing redactable portions is not permitted. The Agency has not addressed the redaction issue. The following analysis describes why the Agency cannot sustain its burden to seal individual portions of the email.

The identity of lawyer and client are not privileged facts, so the identity of the author and recipient of an alleged “attorney client” email is not a confidential. *See* ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 6:14 at 79 (“The identity of the lawyer is not information that is protected by the attorney-client privilege. ... The client’s identity ... usually is not protected by the attorney-client privilege.”) (numerous citations omitted). Similarly, the date of the communication is not confidential and would need to be listed on a withholding index. *See PAWS II*, 125 Wn.2d at 271, n.18. Therefore, the email header information (the “to,” “from,” “date” and “subject line”) and the cc’s cannot be deemed privileged. Disclosure of such information cannot harm the Agency.

Disclosure of the first line of the reply cannot be held to harm the Agency. The essence of the attorney-client privilege is legal advice. “Confidential communications between an attorney and client are privileged only to the extent that they involve the seeking or rendering of *legal advice* or assistance.” ATTORNEY CLIENT-PRIVILEGE IN THE UNITED STATES § 7:9 at 62 (emphasis in original). The first paragraph of the forwarded email merely reports on the outcome of a public hearing. No legal advice is involved.

The second paragraph was quoted by the Agency in its own publicly-filed briefs. *See* CP 1032. Quoting from an allegedly confidential document can waive the privilege. ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 9:29 at 9-122 (*citing U.S. ex rel. Mayman v. Martin Merietta Corp.*, 866 F. Supp. 1243 (D. Md. 1995)). Even a mere “summary, paraphrase or clear reference to the substance of the communication can waive the confidentiality of that communication.” *Id.* (quoting *Mayman*).

The “P.S.” line in the email is social chit chat about a sporting event. All would agree that wishing a sports team good luck is not legal advice and its disclosure cannot harm the Agency.

The communication as a whole conveys no legal advice, seeks no legal advice, and conveys no facts for the purpose of obtaining legal

advice. The email describes things already known. The one sentence that seems to cause the Agency the most concern (paragraph two of the forwarded email) was quoted by the Agency in its own briefing. CP 1032. Underscoring the fact that the email does not tell anyone anything new, the Agency itself argued in its motion to strike that the email was irrelevant because “the email has no ‘tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable’” CP 1033 (emphasis in original omitted). *See also* CP 1032 (Agency arguing Requestor does not explain how quoted phrase in email “is evidence of anything other than a correct statement of the remedy expressly authorized” by CR 11 and RCW 4.84.185). The email revealed nothing new—as even the Agency admits. The Agency cannot show harm by the disclosure of something it admits revealed nothing new.

Another weakness in the Agency’s claim that the email is confidential is the fact that it was not labeled “Attorney-Client Privilege” or even “Confidential.” The lack of labeling a document as confidential is a factor a court can consider in assessing whether it was confidential. “While the labeling of the documents is not essential for the creation of the privilege protection, the absence of labeling may be a factor influencing whether reasonable precautionary measures were taken to

guard against mistaken disclosures.” ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 9:73 at 9-457 (citing numerous cases). *See also Atronic Int’l, GMBH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160, 164 (E.D. NY. 2005) (counsel “failed to take adequate steps to preserve the confidentiality of the e-mails. For example, counsel failed to label the documents ‘confidential’ or ‘privileged’ so as to put others on notice of their privileged nature.”) (citation omitted).

The Agency has not established that the communication was kept confidential and shared only with attorney and clients. Significantly, the reply is from an individual not listed as a recipient of the original email. Either the communication was forwarded to this individual by someone or there were undisclosed bcc’s on the original message. Either event raises a question of whether any privilege applying to the email was waived and whether there is any clear need for sealing at this point.

b. The Relief is Not the Least Restrictive Means or an Effective Means of Protecting a Threatened Interest

The Agency must show that its requested relief—sealing the email in its entirety and forever—is both the least restrictive means and effective in protecting the interest threatened. The Agency cannot show either. First, the Agency has not described why the entire email must be sealed instead of portions of it redacted. For example, why must the mention of

the sports team be sealed? Second, because the Agency has not identified the precise harm it alleges will occur if the email is not sealed, the Agency has not described how sealing will protect those interests. The email was disclosed to the Requestor in response to a PRA request, and the Agency has not shown that the email was kept confidential between attorney and client. The email had been in a publicly-accessible trial court file for more than six weeks. The Agency described—and even quoted—portions of the email in its own publicly-filed briefs in this case, and the email was the subject of an open court proceeding attended by the public and press. So sealing at the trial court stage—let alone the appellate stage—would be ineffective to protect any interest in the “confidentiality” of the record.

c. The Public’s Interest in Open and Accountable Justice is Not Outweighed by the Agency’s Belated Interest in Sealing

The court must weigh the competing interests of the parties and the interests of the public and find that the parties’ interest substantially outweighs the public’s. *Rufer*, 154 Wn.2d at 544. The Court must further consider alternative methods of protecting the interest and make particularized findings and conclusions which should be as specific as possible rather than conclusory. *Id.*

This Court has explained the public’s interest in access to materials filed with a court:

The open administration of justice is more than just assuring that a court achieved the “right” result in any given case: “We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”

Rufer, 154 Wn.2d at 542 (internal citations omitted). Further:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, in access to trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.

Dreiling v. Jain, 151 Wn.2d 900, 903, 93 P.3d 861 (2004).

Washington citizens have a right and a need to know what their courts are doing. Sealing and secrecy foster mistrust and erode the public’s confidence in the judiciary. Sealing a court record—a portion of which was quoted by the proponent of sealing in publicly-filed court records and which mentions a sporting event—would not enhance the public’s trust.

d. The Agency’s Request for Sealing is Overbroad and Unnecessary

The Agency must show that its proposed order is no broader in application or duration than necessary to serve its purpose. *Rufer*, 154

Wn.2d at 544. “If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing.” *Id.* The Agency proposes a sealing of a document in its entirety and forever. The Agency has not identified the interest or threatened harm requiring sealing, nor has it explained why permanent sealing is required, in direct conflict with the Supreme Court’s mandate that sealing orders be limited in time with a duty to rejustify continued sealing at regular intervals. The Agency has also not explained why the email must be sealed in its entirety rather than just redaction of specific words allegedly containing privileged advice. The Requestor submits that this is because the email contains no such advice and the one sentence apparently most concerning to the Agency was quoted by the Agency in its own brief. This is why the trial court characterized the email as “at best, innocuous and at worst, embarrassing[.]” CP 1066.

e. The Agency Cannot Meet the Mandates of GR 15(c)(2) and (3)

GR 15(c)(2) requires the court to make “written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public’s interest in access to the court

record.” The trial court properly concluded that it could not do so. CP 1066.

GR 15(c)(3) requires that “[a] court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to section (2) above.” The trial court properly concluded that it could not do so. The Agency will not identify *any* portions that can be redacted; it believes every single letter and punctuation mark in the email—including, “P.S. Good luck to ‘your’ baseball team’s success!”—must be sealed from public view forever. CP 982.

Instead, the Agency makes the leap in logic that the trial court’s evidentiary ruling to strike the email means it is privileged in its entirety and must be sealed and returned. The trial court noted that striking “a document in a summary judgment matter...cannot be the sole basis for a court’s later decision to seal a document in its entirety...” CP 1065. *See also* CP 1066 (trial court ruling “The court frequently addresses motions to strike, granting them on a regular basis in appropriate cases. That is not the end of the inquiry, however, when a request is made to seal documents and prevent public access.”). The Agency must still meet its burden under *Ishikawa* and GR 15(c)(2) and (3) to seal the document filed in a court file. Granting the motion to strike the email as inadmissible does not

relieve the Agency of the requirements of *Ishikawa* or GR 15(c). Inadmissibility does not equal sealing. *See Rufer*, 154 Wn.2d at 542 (upholding trial court holding “Everything that passes before this court, whether or not ultimately held to be admissible at trial” relevant to public’s interest in open courts) (quoted by trial court at CP 1066). The Agency has not met its burden for sealing under *Ishikawa* and GR 15, and therefore the trial court did not abuse its discretion in denying the Agency’s motion to seal.

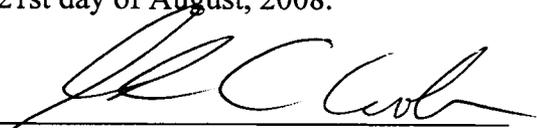
3. The Agency Has Not Shown its Right to Return of a Record Produced Pursuant to the Public Records Act

The Agency argues that this Court should order a person who obtained a record from an agency through a PRA request to return it. The Agency cites no authority for such a proposition other than to cite to a comment to RPC 4.4 that “whether” a lawyer is required to return a document “is a matter of law.” The Agency again makes the leap in logic that the trial court’s evidentiary ruling to strike the email means it is privileged in its entirety and therefore must be returned. Whether or not privileged, the Agency provides no authority for the idea that a record disclosed in response to a public record request can be ordered returned. The Agency’s motion for return—of a record which has been available to the public since October, 2007—should be denied.

IV. CONCLUSION

For all these reasons, this Court should hold that, after de novo review, the trial court erred by dismissing the Requestor's PRA cause of action. This Court should also hold that the trial court did not abuse its discretion by denying the Agency's counterclaim and motion to seal.

Respectfully submitted this 21st day of August, 2008.

By: 

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Attorneys for Petitioner

Appendix A



Pierce County

Auditor's Office

*PDR
file copy*

MEMORANDUM

TO: Andrew Cook

FROM: Pat McCarthy, Pierce County Auditor

DATE: October 16, 2007

RE: Request for Public Information

Pat McCarthy
Pierce County Auditor

Ceri Rawlings-Rooney
Chief Deputy Auditor

Steve Kosche
Information Specialist

Lori Augino
Elections Manager

Michael Rooney
Elections Supervisor

Vickie Chasco
Licensing/Recording
Manager

Patti Shay
Licensing Supervisor

Lisa Drury
Recording Supervisor

REQUEST: As per the attached request for public records.

ANSWER: There are 1,724 documents responsive to your request. Please remit \$258.60 if you would like to pick up the documents or \$269.30 if you would like the documents mailed to you. Payment is payable to the Pierce County Auditor. Send payment to:

Pierce County Auditor's Office
 Attn: Dave Heinemann
 2401 South 35th Street, Room 200
 Tacoma, Washington 98409

134 copies of documents were withheld from this request. They are exempt from release in that they constitute work product and are exempt from disclosure under RCW 42.56.290 and CR 26. These documents are also exempt from disclosure in that they contain attorney client communications and are privilege.

Furthermore, 19 copies of voter registration forms were withheld from release. Original registration forms are considered confidential and are not available for public inspection and/or copying as per RCW 29A.08.710.

Social Security numbers were redacted from the documents and are exempt from public disclosure as per RCW 42.56.050, PAWS v. University of Washington, 125 Wn. 2d 243, 254, 884 P.2d 592, 1994.

Credit card numbers were redacted from the documents.

Public records of Pierce County are provided for inspection and copying subject to the regulations of Chapter 2.04 of the Pierce County Code.

2401 South 35th Street, Room 200 • Tacoma, WA 98409-7481

www.piercecountywa.org/auditor

Administration
P 253.798.3189
F 253.798.3182

Elections
P 253.798.7430
F 253.798.2761
P 800.446.4979

Recording
P 253.798.7440
F 253.798.2623

Licensing
P 253.798.3649
F 253.798.3701

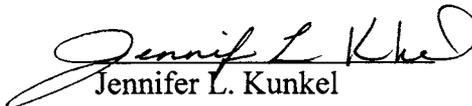
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 21, 2008, I caused the delivery by U.S. mail of a copy of Petitioner's Reply Brief to:

Daniel R. Hamilton
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
(Attorney for Respondent/Cross-Petitioner)

Katherine George
Law Office of Charlotte Cassady
15532 Southeast 25th Street
Bellevue, WA 98007
(Attorney for Media Amici)

Dated this 21st day of August, 2008, at Olympia, Washington.


Jennifer L. Kunkel

ORIGINAL