

*Cross-X-reply*

COURT OF APPEALS  
DIVISION II

NO. 382547

03 SEP 22 PM 2:07

STATE DEPUTY CLERK  
BY *[Signature]*

DEPUTY

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Wash-  
ington not-for-profit corporation, Appellant,

v.

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

---

**REPLY BRIEF OF CROSS APPELLANTS**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
DANIEL R. HAMILTON  
Deputy Prosecuting Attorney  
Attorneys for Respondents

955 Tacoma Avenue South  
Suite 301  
Tacoma, WA 98402  
PH: (253) 798-7746

**ORIGINAL**

## Table of Contents

	<u>Page</u>
I. ANALYSIS.....	1
A. BIAW'S FILING, PURSUIT, AND APPEAL OF PRA SUIT VIOLATES CR 11, RCW 4.84.185, RAP 18.1.....	1
1. FILINGS VIOLATE CR 11 AND RAP 18.1 .....	4
a. Complaint Was Based on Bare Suspicion and Baseless Legal Theories, as Well as Filed for an Improper Purpose....	5
b. BIAW Opposed Summary Judgment Despite Declarations Showing Its Allegations Were Untrue, That It Had All Records, and That Its Suspicions Were Unfounded.....	10
c. BIAW Sought Reconsideration Despite Having "No Evidence To Support" Its Factual Claims .....	11
d. BIAW's Opposition to Dismissal of a Claim It Argued It Never Made Was Not Warranted by Law.....	12
e. Retaliatory CR 11 Motion Contained Personal Attacks.....	14
f. Irrelevant Email Was Filed for an Improper Purpose.....	14
2. FILING AND PURSUIT OF SUIT VIOLATED RCW 4.84.185 .....	15

B.	IRRELEVANT AND PRIVILEGED COMMUNICATION SHOULD HAVE BEEN SEALED .....	18
1.	"CLEAR NEED" IS PROVED BY PRIVILEGED COMMUNICATION .....	18
2.	NO LESS RESTRICTIVE OR EFFECTIVE MEANS IS AVAILABLE .....	20
3.	NO PUBLIC INTEREST IN IRRELEVANT PROTECTED RECORD .....	21
4.	SEALING COMMUNICATION IS NO BROADER THAN NECESSARY .....	22
C.	PRIVILEGED COMMUNICATION SHOULD BE RETURNED .....	23
II.	CONCLUSION.....	25

## Table of Authorities

	<u>Page</u>
<u>Cases</u>	
<i>Bank Brussels Lambert v. Credit Lyonnais</i> , 160 F.R.D. 437, 449 (S.D. N.Y. 1995) .....	19, 20, 24
<i>Bonamy v. City of Seattle</i> , 92 Wn.App. 403, 408-09, 960 P. 2d 447 (1998).....	8
<i>Daines v. Spokane County</i> , 111 Wn.App. 342, 348, 44 P.3d 909 (2002) .....	8, 12, 16
<i>Deja Vu, Inc. v. City of Federal Way</i> , 96 Wn.App. 255, 263, 979 P.2d 464 (1999) <u>rev. denied</u> 139 Wn.2d 1027 (2000) .....	17
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 Wn.2d 861 (2004) .....	18, 20, 21, 22
<i>Escude v. King Cy Pub. Hosp. Dist.</i> , 117 Wn.App. 183, 194, 69 P.3d 895 (2003) .....	16
<i>Georgetown Manor, Inc. v. Ethan Allen, Inc.</i> , 753 F. Supp. 936, 939 (S.D. FL, 1991).....	19, 20, 21, 24
<i>Harrington v. Pailthorp</i> , 67 Wn.App. 901, 912-13, 841 P. 2d 1258 (1992), <u>rev. denied</u> , 121 Wn.2d 1018 (1993) .....	16, 17
<i>Harris v. Drake</i> , 152 Wn.2d 480, 484 & 489, 99 P.3d 872 (2004) .....	24
<i>Jeckle v. Crotty</i> , 120 Wn.App. 374, 85 P.3d 931, <u>rev. denied</u> , 152 Wn.2d 1029 (2004) .....	15
<i>Katz v. Looney</i> , 733 F.Supp. 1284, 1288 (W.D. Ark. 1990).....	14
<i>Kleven v. City of Des Moines</i> , 111 Wn.App. 284, 290-291, 44 P.3d 887 (2002).....	2, 8
<i>Layne v. Hyde</i> , 54 Wn.App. 125, 135, 773 P.2d 83 (1989) .....	16
<i>Manufacturers and Traders Trust Co. v. Servotronics, Inc.</i> , 522 N.Y.S.2d 999, 1006, 132 A.D.2d 392 (N.Y. App. 1987) .....	24

<i>Marine Power &amp; Equip. Co. v. State</i> , 102 Wn.2d 457, 461, P.2d (1984).....	2
<i>Martin v. Shaen</i> , 22 Wn.2d 505, 511 (1945) .....	22
<i>Nast v. Michels</i> , 107 Wn.2d 300, 307, 730 P.2d 54 (1986).....	2
<i>Orwick v. Fox</i> , 65 Wn.App. 71, 91, 828 P.2d 12, <u>rev. denied</u> , 120 Wn. 2d 1014 (1992) .....	5
<i>Peterick v. State</i> , 22 Wn.App. 163, 181, 589 P.2d 250 (1977).....	5
<i>Prison Legal News Inc., v. Dep't of Corrections</i> , 54 Wn.2d 628, 115 P.3d 316 (2005).....	8
<i>Rogerson Hiller Corp v. Port of Port Angeles</i> , 96 Wn.App. 918, 982 P.2d 131, <u>rev. denied</u> , 140 Wn.2d 1010 (1999) .....	17
<i>Schmerer v. Darcy</i> , 80 Wn.App. 499, 509, 910 P.2d 498 (1996).....	17
<i>Sperr v. City of Spokane</i> , 123 Wn.App. 132, 135-137, 96 P.3d 1012 (2004).....	8, 17
<i>Spokane Research &amp; Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 104 n. 10, 117 P.3d 1117 (2005).....	13
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 904-07, 969 P.2d 64 (1998).....	16
<i>State v. Hamilton</i> , 24 Wn.App. 927, 934, 604 P.2d 108 (1979) .....	9
<i>Ultracashmere House, Ltd. v. Nordstrom, Inc.</i> , 123 F.R.D. 435, 437 (S.D.N.Y. 1988) .....	14
<i>Washington State Bar Ass'n v. State</i> , 125 Wn.2d 901, 908-909, 890 P.2d 1047 (1995).....	2
<i>Watson v. Maier</i> , 64 Wn.App. 889, 895, 827 P.2d 311, <u>rev. denied</u> , 120 Wn.2d 1015 (1992) .....	passim
<i>Wood v. Battle Ground Sch. Dist.</i> , 107 Wn.App. 550, 575, 27 P.3d 1208 (2001).....	5

<i>Yacobellis v. City of Bellingham</i> , 55 Wn.App. 706, 708, 780 P.2d 272 (1989).....	8
<i>Zink v. City of Mesa</i> , 140 Wn.App. 328, 166 P.3d 738 (2007).....	9

**Statutes**

RCW 4.84.185 .....	passim
RCW 5.60.060 .....	21
RCW 5.60.060(2)(a) .....	20, 22, 25
RCW 10.14.020 .....	9
RCW 40.14 .....	8, 12
RCW 42.56.290 .....	22, 25
RCW 42.56.550(1).....	8
42 U.S.C. § 1974.....	6, 8

**Rules**

CR 11 .....	passim
CR 56(f) .....	6
GR 15 .....	passim
RAP 10.1(c) .....	1
RAP 10.2(c) .....	1
RAP 18.1 .....	1, 4, 14, 25
RPC 4.4 .....	23, 25
RPC 4.4(b) .....	15, 22, 23
WAC 44-14-00003.....	9

Constitutional Provisions

Const. art. 4, § 1 ..... 2

Other Authorities

[www.thenewstribune.com/opinion/story/133269.html](http://www.thenewstribune.com/opinion/story/133269.html)..... 2

Pursuant to RAP 10.1(c) and RAP 10.2(c), Auditor Pat McCarthy and Pierce County do not respond herein to all factual and legal assertions of BIAW's Reply Brief but only to those related to their cross appeal.

**I. ANALYSIS**

**A. BIAW'S FILING, PURSUIT, AND APPEAL OF PRA SUIT VIOLATES CR 11, RCW 4.84.185, RAP 18.1**

BIAW first asserts that the actual merits of defendants' Rule 11 motion and counterclaim are not determinative because: 1) such suits would chill the filing of PRA requests; 2) two state officials and various members of the press filed "supporting declarations" and they "do not file declarations in cases filed without 'reasonable cause,'" and 3) BIAW retained an attorney with "extensive public records experience" and therefore it could not have acted improperly. See Pet. Reply 20, 23-25, 30, 36.

As to supposedly "chilling" PRA requests, the motion and counterclaim do not concern a PRA "request" but BIAW's factually and legally baseless law suit that it later filed, pursued, and now appeals for improper purposes. The enforcement of the court rules and statute prohibiting such improper litigation cannot "chill" a requestor from making a mere "record request," and no declarant or amicus claims otherwise.<sup>1</sup> See CP 954-962;

---

<sup>1</sup> Not only does no declaration or amicus brief even mention Rule 11, but one of BIAW's media declarants, see CP 957, affirmatively opined in an editorial that "[i]t's fine if the

Amicus Curiae Br. In any case, the PRA nowhere exempts suits from the prohibitions against harassing or factually and legally baseless actions. Rather, Rule 11 expressly applies to "[e]very pleading, motion and legal memorandum," while the legislature broadly makes RCW 4.84.185 applicable in "[a]ny civil action." See also *Kleven v. City of Des Moines*, 111 Wn.App. 284, 290-291, 44 P.3d 887 (2002) (PRA plaintiff is "subject to CR 11 and other sanctions for making false representations to the court").<sup>2</sup>

As to BIAW's next claim that alleged "supporting declarations" of two State officials and members of the press somehow are proof its suit must have facial merit, those declarations nowhere state a belief in the merits of BIAW's claims nor show their authors even were apprised of the actual facts of record so as to have the opinion now ascribed to them by BIAW. CP 200, 789, 954-962. Indeed, that those declarations address non-issues affirmatively show their authors did not know what the actual

---

county convinces a judge that the BIAW's records request and other claims are frivolous or without merit." See [www.thenewstribune.com/opinion/story/133269.html](http://www.thenewstribune.com/opinion/story/133269.html).

<sup>2</sup> In any case, as a matter of law the legislature could not exempt PRA actions from the Court's regulation of its own courtrooms under Rule 11 even if the legislature had tried to do so. See e.g. *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 908-909, 890 P.2d 1047 (1995) ("Where a court rule and a statute conflict" the "court rule will prevail" because the "ultimate power to regulate court-related functions . . . belongs exclusively to this court"); *Marine Power & Equip. Co. v. State*, 102 Wn.2d 457, 461, P.2d (1984) ("It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature."); Const. art. 4, § 1 (all judicial power of the state is vested in the Supreme Court and the various other courts designated in the constitution). *C.f. Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1986) ("the PDA does not apply to court case files").

issues here are. Compare id. with Resp. Br. 13 n. 13 & CP 987-88, 1144-48. Far from being in "support" of BIAW's suit, most of these declarants went out of their way to affirmatively state their declarations expressed "no opinion on the merits of this case." See CP 955, 958, 960, 962.

Finally, as to BIAW's assertion it cannot have acted improperly because its attorney has "extensive public records experience," Pet. Reply 20, it is unprecedented to argue the credentials of a party's attorney is proof of its blamelessness – especially when that attorney is making that argument about himself. In any case, BIAW nowhere explains how its later retention of that attorney would justify either its earlier filing of a factually baseless complaint or earlier opposition to summary judgment despite the undisputed sworn testimony of record. CP 6, 82. Likewise, BIAW nowhere states the advice its new attorney later gave nor claims such was actually followed. See *Watson v. Maier*, 64 Wn.App. 889, 895, 827 P.2d 311, rev. denied, 120 Wn.2d 1015 (1992) (no proof outside law firm recommended action taken or that it was reasonable). Finally, BIAW nowhere explains how its present counsel's "extensive public records experience" excuses either his filing baseless and repeated claims that there were "dozens or hundreds" of destroyed emails, see e.g. CP 721, 724, 730, 791-92, 803, 895-901, or his personal attacks on defense counsel that denigrated him as "emotionally invested," "out of control," "over the top," "ob-

sessed," a "very angry lawyer who has lost his professional judgment" and "lost control of himself," as well as one whose briefing was "not normal" and "very odd behavior." See CP 963-64, 966 n. 1, 969, 971, 973-74.

**1. FILINGS VIOLATE CR 11 AND RAP 18.1**

Quoting *Watson v. Maier*, 64 Wn.App. at 896, BIAW concedes – as it must – that as to each of its filings it had:

(1) [T]he duty to conduct a reasonable inquiry into the facts supporting the document; (2) the duty to conduct a reasonable inquiry into the law; and (3) the duty not to interpose the document for purposes of delay, harassment, or increase the costs of litigation.

Pet. Reply 31. However, BIAW argues that CR 11 "is an extremely high standard" and "merely losing a case cannot be sanctionable." Id. at 31-33.

First, defendants' CR 11 motion was not brought because BIAW lost – plaintiffs regularly lose public records suits against Pierce County, yet over the years it has never before brought a counterclaim in a PRA action. See CP 1222-23. Second, BIAW ignores that *Watson v. Maier* not only found the burden to prove a CR 11 and RAP 18.1 violation was met – but that plaintiff's violation was "egregious" – where he, like the BIAW here, filed: 1) a complaint based on "bare suspicion" that defendant "may have" acted improperly; 2) opposed summary judgment despite defendant's sworn statements showing plaintiff's allegations were untrue, that it had provided all records and explained why plaintiff's suspicions were un-

founded; and 3) sought reconsideration despite the fact it "produced no evidence to support" plaintiff's factual claims. See *Watson*, 64 Wn.App. at 894-97. This is not a case, as in *Wood v. Battle Ground Sch. Dist.*, 107 Wn.App. 550, 575, 27 P.3d 1208 (2001), where there was no CR 11 violation because plaintiff's "failure to convince the trial court" concerned a factual issue "which was not clear cut." Rather here, as in *Orwick v. Fox*, 65 Wn.App. 71, 91, 828 P.2d 12, rev. denied, 120 Wn. 2d 1014 (1992), a CR 11 violation exists because "the dispositive issues" do not turn "on the complexities of" the law but "on well-recognized principles" that "are or should be well recognized by every practicing attorney."

**a. Complaint Was Based on Bare Suspicion and Baseless Legal Theories, as Well as Filed for an Improper Purpose**

BIAW claims as a factual matter it "had reasonable indications that the Agency might have withheld public records," Pet. Reply 34 (emphasis added), because there were "nine" supposed "issues of material fact" that raised questions if emails had been unlawfully deleted. Pet. Br. 34. However, plaintiff ignores these alleged "issues" have been shown based – not on facts as every practicing attorney knew was required – but impermissibly on "bare suspicion" and "argumentative assertions that unresolved factual matters remain . . . ." *Watson, supra; Peterick v. State*, 22 Wn.App. 163, 181, 589 P.2d 250 (1977). Compare Pet. Br. 25-36 with Resp. Br 5

n. 2, 30-34.<sup>3</sup> For example, that BIAW allegedly thought the County PRA response "seemed to acknowledge" it had deleted emails because it had not "kept the same emails" as the Secretary of State, Pet. Reply 19, was no basis to leap to the accusation defendants deleted records in violation of "retention schedules set forth under the act," CP 10 – especially where both local and general statewide retention schedules expressly authorize even "immediate" deletion of such emails. Resp. Br. 5 n. 2. BIAW's excuse "that inquiring into the facts of a case concerning the destruction of records is difficult because the records have been destroyed," Pet. Reply 33, ignores: 1) the record shows no phantom email "ha[d] been de-

---

<sup>3</sup> BIAW then asserts defendants supposedly did "not refute at least four [sic] genuine issues." Pet. Reply 11-12. First, it claims 42 U.S.C. § 1974 somehow makes the deletion of two Secretary of State emails "unlawful" under the PRA if state law does not, id. at 11, but defendants response noted that: 1) BIAW "has no evidence defendants violated 42 U.S.C. § 1974," 2) it offers no legal analysis how federal law – that it admits it has no standing to enforce – somehow creates a PRA claim, and 3) plaintiff conceded "one cannot file a Public Records Act case to obtain records one already has." Resp. Br. 1, 14-21; CP 773-74, 797 n. 8; 9/7/07 RP 10. Second, BIAW alleges that because defendants' declarations assert these two emails were "more probably than not" deleted, there somehow is an issue of whether they were "actually deleted" and not produced. Pet. Reply 11-12, Pet. Br. 36. However defendants noted that sworn testimony attests not only that the two emails were deleted "certainly months prior to receiving the March 2007 BIAW request" but also that all records in the County's possession were repeatedly searched and provided. Resp. Br. 33-34; CP 61, 65. Finally, BIAW lists supposed "unanswered questions" about "what happens to intra-Agency emails," retention policies, and if "forensic recovery" would be possible. Pet. Reply 10, 12; Pet. Br. 34. However, defendants noted: 1) "unanswered questions" as a matter of law cannot create a genuine issue of fact, Resp. Br. 28-29; 2) there is no evidence of an unlawful deletion of any email – much less that such was caused by an unidentified policy defect – and; 3) reversal cannot be granted so BIAW can now try discovery when it had several months to conduct it between filing its May complaint and the September dismissal but never tried, never moved for a CR 56(f) continuance, and never shows as required what genuine factual issue actually would have been created by depositions, interrogatories, or production requests. Id. 25-28, 31 n. 21.

stroyed," Resp. Br. 28-29, 2) BIAW already had the only deleted emails before filing suit, CP 34, 47-51, and 3) a factually difficult case "is all the more reason for counsel to carefully inquire into them before commencing legal action." *Watson*, 64 Wn.App. at 898 (emphasis added). Indeed, filing suit "without the facts to back it up typifies the 'shoot-first-and-ask-questions-later' approach to the practice of law that CR 11 was intended to inhibit." *Id.* BIAW's complaint based on "bare suspicion" defendants "might have withheld public records" violates CR 11 as a matter of law.

As to its pre-filing legal inquiry, BIAW seeks refuge in CR 11's language that "a 'good faith argument for the extension, modification, or reversal of existing law' is a reasonable legal basis for a case." Pet. Reply 35. However, BIAW's only justification for naming Pat McCarthy as a separate PRA defendant is that in the past other plaintiffs also have named officials. *Id.* at 15, 25. However it offers no "good faith" – or any other – legal rationale for separately naming Pat McCarthy as an additional defendant, no decision that has ever held such was proper, and no response to the PRA's actual language that authorizes only suits against "agencies" and not officials. Resp. Br. 34-36. As to its suit against the "agency" Pierce County, BIAW still offers neither: 1) any reason how statutory language can be ignored and precedent overturned to disregard its initial burden of proving it had requested a record that existed at one time that was not pro-

duced,<sup>4</sup> nor 2) any colorable legal rationale how RCW 40.14 – much less 42 U.S.C. § 1974 – can be "read together" with the PRA to create a new "third" type of action for deletion of email for which no request had been made.<sup>5</sup> Compare Pet. Reply 3-7 with Resp. Br. 14-24. Though BIAW

---

<sup>4</sup> BIAW's Reply asserts only that its ground for claiming a PRA plaintiff has no burden of proof was "previously briefed," Pet. Reply 2, and ignores defendants' analysis that shows otherwise. See Resp. Br. 22-24. Hence, no BIAW brief confronts the actual contrary language of RCW 42.56.550(1), the principle that as "a threshold matter" the PRA "only applies when public records have been requested," *Bonamy v. City of Seattle*, 92 Wn.App. 403, 408-09, 960 P. 2d 447 (1998) (emphasis added), or that BIAW's burden of proof argument has been expressly rejected because an agency's burden under the PRA only arises in "the situation where the agency has the records but says, 'we are not going to give them to you,'" and not where a "County said, in effect, 'we do not have these records.'" *Daines v. Spokane County*, 111 Wn.App. 342, 348, 44 P.3d 909 (2002) (rejecting alternative claim under the PRA for destruction of records) (emphasis added).

<sup>5</sup> BIAW's Reply at pages 5-7 gives as its legal justification for suit that: 1) for unexplained reasons, a deletion of a record prior to it being requested somehow is a "withholding" under cases that are not shown to have ever addressed such deletions, see *Yacobellis v. City of Bellingham*, 55 Wn.App. 706, 708, 780 P.2d 272 (1989); *Prison Legal News Inc., v. Dep't of Corrections*, 54 Wn.2d 628, 115 P.3d 316 (2005), and 2) that no PRA provision states deletion "of later-requested public records is legal" because "[t]hat is where courts come in." (Emphasis added.) However, BIAW not only fails even to quote any supporting statutory language or explain how the Court can "come in" to create statutory liability without supporting statutory language, but ignores defendants' analysis showing the actual PRA language, the rules of statutory construction, and public policy all preclude what would be unlimited governmental liability. See Resp. Br. 14-21. Though BIAW does at least attempt to distinguish some of defendants' cited precedent without explaining its relevance, Pet. Reply 4, 7-10, it does so disingenuously. Hence, BIAW asserts *Daines* was a suit under RCW 40.14 that "involved a situation where the requestor actually received the emails" but BIAW "has not." Pet. Reply 4, 7. In fact *Daines* expressly rejected a claim for record destruction under the PRA where plaintiff argued – as does BIAW here – that "every response must cite one of the specific exemptions" of the PRA, 111 Wn.App. at 348, and here BIAW did receive the only deleted emails involved before it brought suit. See CP 34, 47-51. Similarly, BIAW claims in *Sperr v. City of Spokane*, 123 Wn.App. 132, 135-137, 96 P.3d 1012 (2004), the requested records "never existed in the first place." Pet. Reply 8. However, here there is no evidence any undisclosed record ever existed while in *Sperr* there was evidence police at one time possessed a record that plaintiff had been "picked up for prostitution" but dismissal was still granted when police did not have it at the time of the request. Next BIAW claims *Kleven, supra.*, "involved a simple mistake – not the systematic, unlawful destruction of records," Pet. Reply 9, but no "systematic, unlawful destruction of records"

claims its legal theory is based "on the Washington State Attorney General's model rules on public records," Pet. Reply 20-21, those guidelines do not "bind any agency," WAC 44-14-00003, and – in any case – BIAW nowhere shows defendants failed to follow them. Resp. Br. 5 n. 3.

Finally, as to the complaint also demonstrating an additional CR 11 violation that was not present even in *Watson* – i.e., filing for purposes of harassment (e.g., by improperly naming Pat McCarthy as a separate additional party) – BIAW oddly claims that citing its extra-judicial statements to prove intent somehow violates the First Amendment because defendants have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." Pet. Reply 37 (quoting *State v. Hamilton*, 24 Wn.App. 927, 934, 604 P.2d 108 (1979)). Here the CR 11 motion nowhere seeks to "restrict" BIAW's out of court false statements. Rather BIAW's undisputed attacks on Pat McCarthy before, during, and after the complaint's filing, Resp. Br. 9 n. 9, instead are properly used to show the improper purpose behind BIAW's false and baseless allegations in Court – which Rule 11 can and does "restrict."<sup>6</sup>

---

has been shown here either.

<sup>6</sup> BIAW also argues *Zink v. City of Mesa*, 140 Wn.App. 328, 166 P.3d 738 (2007), "directly address[ed] the issue of harassment and filing numerous public records" and found no violation just because the requestors were rude to agency officials. Pet. Reply 37-38. Unlike *Zink*, the issue here is not the requestor's violation of the anti-harassment statute (RCW 10.14.020) by its out of court abusive treatment of an agency's employee (here for

**b. BIAW Opposed Summary Judgment Despite Declarations Showing Its Allegations Were Untrue, That It Had All Records, and That Its Suspicions Were Unfounded**

In *Watson*, evidence of a CR 11 violation included opposition to summary judgment despite sworn statements showing plaintiff's allegations were untrue, that defendant had provided all records, and that explained why plaintiff's suspicions were unfounded. 64 Wn.App. at 894.

Here too, at the time of defendants' summary judgment motion the only evidence of record was that: 1) repeated searches revealed no requested document had been withheld from BIAW; 2) the only records not retained were the two informational emails from the Secretary of State, and such were deleted pursuant to the State-approved destruction authorization; and 3) no other undisclosed responsive emails would have existed because the small Auditor's office does not often use electronic messages for internal communications. CP 59-79, 1157-60. Nevertheless, plaintiff's brief opposing summary judgment offered no evidence showing a genuine issue of fact but misleadingly asserted as if it were fact – without any basis and in conflict with all the evidence – that BIAW somehow had proved a

---

example BIAW counsel's aggressive and rude letters to the auditor, CP 34, 42, or letter to the *Seattle Times* accusing a County attorney of having "lied" CP 1191). Rather the issue here is BIAW's violation of CR 11 by its harassing legal filings. CP 818.

"continued unwillingness to search for and disclose all the public records responsive to BIAW's request . . . ." CP 92. Likewise, plaintiff continued to assert Auditor Pat McCarthy was a proper additionally named defendant despite being confronted with clear statutory language allowing claims only against "agencies." CP 87-90. See also Resp. Br. 34-36.

**c. BIAW Sought Reconsideration Despite Having "No Evidence to Support" Its Factual Claims**

In *Watson*, additional proof of a CR 11 violation was plaintiff's seeking reconsideration despite the fact he "produced no evidence to support" his factual claims. 64 Wn.App. at 895. Here too, despite knowing that summary judgment had been granted because no evidence supported its complaint, CP 881-82, BIAW moved for reconsideration still without any evidence concerning the existence or destruction of any supposed undisclosed record. Rather BIAW without explanation simply made vague claims of "[m]isconduct" by defendants, CP 719 n. 1, and without proof repeatedly and systematically misrepresented that there were "dozens or possibly hundreds" of supposedly deleted relevant emails. CP 721, 724, 730, 791-92, 895-901. Though these baseless factual misrepresentations by BIAW have been documented and briefed to this Court, Resp. Br. 14, 29, 55, BIAW's Reply Brief ignores them. See generally Pet Reply.

**d. BIAW's Opposition to Dismissal of a Claim It Argued It Never Made Was Not Warranted By Law**

BIAW nowhere disputes that its additional brief opposing dismissal of any RCW 40.14 claim also continued to baselessly state as a fact that "dozens or hundreds of emails" had been destroyed or withheld, though it had no evidence such emails ever existed.<sup>7</sup> CP 803. Further, as it continues to do here, supra 8 n. 5, BIAW there misstated both the facts and holding of precedent such as *Daines v. Spokane County*, 111 Wn.App. 342, 348, 44 P.3d 909 (2002).<sup>8</sup> Now BIAW's Reply defends its needless opposition to dismissal of a claim it said it had not made by arguing such was filed solely because it "was concerned that if it agreed to a dismissal of the claims (it did not make) then the Agency would claim that the

---

<sup>7</sup> In this Court BIAW makes similar representations of supposed fact as if such had been proved, despite the absence of any supporting evidence and in disregard of the affirmative evidence to the contrary. For example, in its Reply BIAW baselessly asserts as if it were fact that the authorized deletion of the two Secretary of State emails somehow "showed a PRA violation," that "[h]ere, whole categories of records . . . have not been provided," that here there was "systematic, unlawful destruction of public records," and that somehow "the Agency admits that it destroys emails received from an 'outside system . . .'" Compare Pet. Reply 1 n. 1, 9, 10 with Resp. Br. 5 n. 2, 28-29. See e.g. also examples cited in Resp. Br. 7 n. 5, 9 n. 8, 10 n. 10, 11 n. 11-12, 13 n. 13.

<sup>8</sup> For example, BIAW claimed the *Daines* plaintiff did not argue "the agency had violated the retention schedule," CP 803, when *Daines* actually repeatedly states the plaintiff there had expressly alleged "that destroying e-mails after five days violates the public records retention statutes." 111 Wn.App. at 346 & 349. BIAW likewise claimed *Daines* somehow "ruled that the requestor did not have a cause of action under RCW 40.14" because "the agency in *Daines* followed the retention schedule," CP 803, when in fact *Daines'* analysis of the RCW 40.14 claim nowhere mentions alleged compliance with retention schedules – much less that it was the ground for its ruling. 111 Wn.App. at 349-50.

Agency 'substantially prevailed' on that claim (that no one made)" and thereby later argue that BIAW could not obtain attorneys' fees, costs, and penalties it still hoped to extract despite the earlier dismissal "as to its RCW 42.56" PRA claim in July of 2007. Pet. Reply 25; CP 198. Though BIAW admits *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104 n. 10, 117 P.3d 1117 (2005), had "changed the 'substantially prevailed' principle" under the PRA so that loss on one issue as a matter of law would not deny fees, costs, and penalties to a plaintiff where at least some relief under the PRA was obtained, BIAW claims it "was still concerned that the Agency would try." See Pet. Reply 26.

First, BIAW's supposed "concern" is nowhere mentioned in the actual frivolous filing itself, see generally CP 799-804, but arose for the first time only when a defense to CR 11 was needed on the issue. CP 840. Second, even if for some reason an opponent might "not accept the *Spokane Research* principle," Pet. Reply 26, *Spokane Research* was the law and BIAW's ability to assert it later if somehow necessary did not depend on its submission of what it admits was a useless filing. Third, opposing a motion for no other reason than because plaintiff claims after the fact it was "concerned" defendants might at some future time make a legally baseless argument is not only unprecedented but would excuse all kind of needless anticipatory filings and make Rule 11 impotent. Finally, BIAW

nowhere explains why even now it affirmatively seeks to reverse the order dismissing a claim it says it never made, Pet. Br. 41-42 – much less how such a frivolous appeal avoids violating RAP 18.1. See Resp. Br. 36-37.

**e. Retaliatory CR 11 Motion Contained Personal Attacks**

BIAW does not try to identify a factual basis for its retaliatory CR 11 motion and admits it has provided no supporting legal analysis. Compare Pet. Reply 16 with Resp. Br. 38-40, 45. Similarly BIAW nowhere acknowledges – much less attempts to justify – its personal attacks on defense counsel as being "emotionally invested," "out of control," "over the top," "obsessed," a "very angry lawyer who has lost his professional judgment" and "lost control of himself," as well as one who makes legal arguments that were "not normal" and "very odd behavior." CP 963-64, 966 n. 1, 969, 971, 973-74. See *Katz v. Looney*, 733 F.Supp. 1284, 1288 (W.D. Ark. 1990) ("scandalous, impertinent and libelous statements made by plaintiff against one of the defendants" prohibited by Rule 11); *Ultra-cashmere House, Ltd. v. Nordstrom, Inc.*, 123 F.R.D. 435, 437 (S.D.N.Y. 1988) (Rule 11 implicated by plaintiff filing "papers in this action that indulge in repeated personal attacks on the respondent and its counsel.")

**f. Irrelevant Email Was Filed for an Improper Purpose**

Though BIAW summarily claims its filing of a later obtained email

did not violate the attorney/client privilege, Pet. Reply 40-44, it nowhere denies it did so without first providing notice in express violation of RPC 4.4(b), or that its sole purpose was to prejudice the Superior Court with an irrelevant but "embarrassing" communication. Compare id. with Resp. Br. 46. Indeed, BIAW declines even to defend its frivolous appeal of the order striking its filing. Compare Pet. Reply 1-16 with Resp. Br. 37-38.

**2. FILING AND PURSUIT OF SUIT VIOLATED  
RCW 4.84.185**

Unlike CR 11 – which can be violated by any filing – BIAW cites *Jeckle v. Crotty*, 120 Wn.App. 374, 85 P.3d 931, rev. denied, 152 Wn.2d 1029 (2004), for the proposition that RCW 4.84.185 requires the "action as a whole" be "frivolous and advanced without reasonable cause." Pet. Reply 30. However, in *Jeckle* no violation of RCW 4.84.185 was found because plaintiff had included with his frivolous PRA action a separate claim under the Consumer Protection Act that was not frivolous. 120 Wn. App. at 387-88. Here, only a PRA claim has been brought and defendants have exhaustively documented both how BIAW's complaint and later filings on that claim were frivolous and advanced without reasonable factual or legal cause, and how – after being provided unrefuted proof its suspicions were groundless – BIAW pressed on anyway. See supra at 4-15. As a matter of law the test of RCW 4.84.185 is "easily met" where the initial

"complaint lacks a factual or legal basis," *Harrington v. Pailthorp*, 67 Wn.App. 901, 912-13, 841 P. 2d 1258 (1992), rev. denied, 121 Wn.2d 1018 (1993), or where "by the time of argument" no admissible evidence was available yet plaintiff "decided to press on." *Escude v. King Cy Pub. Hosp. Dist.*, 117 Wn.App. 183, 194, 69 P.3d 895 (2003).

Next, BIAW argues its suit cannot be frivolous because it is a "case of first impression." See Pet. Reply 27. However, a plaintiff cannot avoid RCW 4.84.185 simply by being the first to bring a baseless law suit. See e.g. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 904-07, 969 P.2d 64 (1998) (statute found violated though claim was a "matter of first impression"); *Layne v. Hyde*, 54 Wn.App. 125, 135, 773 P.2d 83 (1989) (though plaintiff claimed suit was "one of first impression," statute was violated because it was "not a case of a creative theory being applied in an unsettled area of law.") In any case, as previously noted, BIAW's suit is not "the first deleted email case in Washington." Compare Pet. Br. 14 with *Daines*, 111 Wn.App. at 346 & 348-49 (plaintiff who also had previously acquired emails under a PRA request and in response to a later request also was told they had been deleted from electronic inboxes, unsuccessfully brought suit alleging the agency "violate[ed] the public records retention statutes" and that the PRA was violated because "every response must cite one of the specific exemptions"). See also *Sperr v. City*

of Spokane, 123 Wn.App. 132, 135-137, 96 P.3d 1012 (2004) (that a record once existed did not preclude dismissal where it did not exist when requested).

Finally, BIAW claims defendants must prove an improper "purpose of harassment" as is seemingly required by Division Three in *Schmerer v. Darcy*, 80 Wn.App. 499, 509, 910 P.2d 498 (1996). See Pet. Reply 31.<sup>9</sup> However, BIAW not only ignores defendants' citation to this Division's contrary rule, see Resp. Br. 42; *Harrington*, 67 Wn.App. at 913 ("No intent to harass [defendant] need be shown"), but also that the record contains evidence of BIAW's improper intent. See e.g. CP 963-64, 966 n. 1, 969, 971, 973-74, 1167-68, 1171-1172, 1191.

As a matter of law denial of a governmental entity's counterclaim will be reversed "if based on untenable grounds," *Deja Vu, Inc. v. City of Federal Way*, 96 Wn.App. 255, 263, 979 P.2d 464 (1999) rev. denied 139 Wn.2d 1027 (2000) (fees and costs properly awarded to state because plaintiff's claim against it was "not supported by any rational argument based on the law or the facts"), and here no ground for dismissal exists.

---

<sup>9</sup> Though BIAW also cites on this issue *Rogerson Hiller Corp v. Port of Port Angeles*, 96 Wn.App. 918, 982 P.2d 131, rev. denied, 140 Wn.2d 1010 (1999), Pet. Reply 30, there the court instead addressed "equitable grounds of . . . 'bad faith'" because RCW 4.84.185 was statutorily "inapplicable to recall petitions" as a matter of law. Id. 927, 929 n. 4.

**B. IRRELEVANT AND PRIVILEGED COMMUNICATION SHOULD HAVE BEEN SEALED**

Though BIAW's Reply apparently abandons sub silentio its appeal of the order striking its filing of an "at best innocuous and at worst embarrassing" communication, compare Pet. Reply 1-16, it resists defendants' cross appeal to seal that document by ignoring or misstating defendants' position, the record, and the law. Id. at 38-49. Hence, BIAW claims defendants' only ground for sealing the irrelevant "embarrassing" communication was that their "evidentiary motion to strike the email in question on attorney-client privilege grounds" had been granted. Pet. Reply 38. Instead, the record shows GR 15's factors for sealing a record were both briefed and met as a matter of law. CP 1232-35; Resp. Br. 48-49.

**1. "CLEAR NEED" IS PROVED BY PRIVILEGED COMMUNICATION**

BIAW first claims defendants have "not stated a clear need for sealing." Pet. Reply 40. However, the Supreme Court in *Dreiling v. Jain*, 151 Wn.2d 900, 93 Wn.2d 861 (2004) – a case repeatedly cited by defendants but ignored by BIAW, Resp. Br. 47-49 – recognizes that protection of privileged attorney-client communications constitutes such a need that justifies sealing a record under GR 15. Id. at 917 (some materials "may be subject to the attorney-client or work product privileges," but case re-

manded for the trial court to determine whether the privilege was waived by its filing by the holder of the privilege and therefore if the otherwise privileged materials could remain sealed under GR 15). See also *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 449 (S.D. N.Y. 1995) (ordering that unintentionally disclosed attorney-client communications be put "under seal"); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 939 (S.D. FL, 1991) (ordering inadvertently disclosed privileged attorney-client communication filed by the opposition be "removed . . . and placed under seal").

BIAW argues the "fact the email seemingly involved attorneys and clients is insufficient," Pet. Reply 41, and seeks an unprecedented "death by a thousand cuts" of the privilege by splitting the communication into its component parts and claiming various lines supposedly either "are not privileged," not "confidential," or its release would not "harm the Agency." Id. 41-43. However, such sophistry does nothing to overcome the face of the communication that: 1) states it is between only defense counsel, his superiors in the Prosecuting Attorney's Office, and agents of his clients, CP 1175, 1197; and 2) exclusively concerns – other than a one line personal "P.S." – legal advice incident to that representation concerning the status of the case, future legal strategy, and factors that might ef-

fect future success. CP 982.<sup>10</sup> Likewise, BIAW's bare assertion that defendants have "not established that the communication was kept confidential and shared only with attorney and clients," Pet. Reply 44, is directly contrary to the actual sworn testimony on that issue. See CP 1175, 1193-1200. BIAW cannot ignore that the factual record and legal analysis confirm both this communication's protected status under RCW 5.60.060(2)(a) and that such constitutes a "clear need" to seal as a matter of law. See also Resp. Br. 37-38, 46-48; CP 1175-76, 1193-1200.

## **2. NO LESS RESTRICTIVE OR EFFECTIVE MEANS IS AVAILABLE**

As to the factor of "whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened," *Dreiling v. Jain*, 151 Wn.2d at 914, BIAW claims: 1) it would be less restrictive to excise the legal advice

---

<sup>10</sup> Though BIAW asserts defendants have never admitted "that an attorney from the Agency sent the email in question," it also contradictorily claims defendants' mention of the email in their motions to strike, seal, and return it somehow amount to a waiver. Pet. Reply 20-21, 44. However, BIAW explains neither how there can be a waiver when it was plaintiff that unilaterally filed the document without the required notice, CP 979, nor how defendants could ever prove a communication was privileged and protect it without mentioning it in their motion. See *Georgetown Manor, Inc.*, 753 F.Supp. at 939 (ordering "removed . . . and placed under seal" inadvertently disclosed privileged attorney-client communication that was filed by the opposition); *Bank Brussels Lambert*, 160 F.R.D. at 449 (in motion to determine existence of privilege, documents were ordered sealed "because the motion papers of [defendants] contain copies of material held to be privileged") (emphasis added). In any case, BIAW's odd waiver claim illustrates why defendants here have so cautiously described the communication at issue.

while retaining the "P.S." concerning a "sports team," and 2) sealing is not effective because it has been publicly accessible since plaintiff unilaterally filed it. Pet. Reply 44-45. First, no part of the privileged communication has been excised, and retention of a mere "P.S." concerning a "sports team" is no reason to deny an otherwise valid motion to seal and thereby eviscerate the attorney/client privilege. Second, BIAW's unilateral filing for public view of an opponent's privileged communication without advanced notice and the trial court's denial of a motion to seal cannot be a ground for rejecting appellate review of the privilege's violation – or else protection of privileged material would never be available when it is filed by the opposition. Indeed, precedent is to the contrary. See e.g. Georgetown Manor, Inc., supra. (privileged attorney-client communication that had been filed by opponent was ordered "removed . . . and placed under seal.") Instead, in the present circumstance, the right to appeal a failure to seal is the only means available to vindicate the interests enshrined in RCW 5.60.060 and to ensure that protected communications are not in the future violated and improperly filed with impunity and without remedy.

### **3. NO PUBLIC INTEREST IN IRRELEVANT PROTECTED RECORD**

As to weighing "the competing interests of the parties and the public," *Dreiling, supra* at 914, BIAW neither claims it has any interest in a

document it was ethically barred from filing without notice, see RPC 4.4(b), nor explains how the public has an interest in an irrelevant document from which it is barred by the PRA and that the Court did not even consider but ordered stricken. Compare Pet. Reply 45-46 with RCW 42.56.290; CP 1060. Indeed, in *Dreiling* the Supreme Court accepted the principle that an order to seal privileged attorney client communications under GR 15 is proper – and therefore presumably that there is no superior public interest in it – so long as there is no waiver. 151 Wn.2d at 918.

#### **4. SEALING COMMUNICATION IS NO BROADER THAN NECESSARY**

Finally, as to the concern that an order "must be no broader in its application or duration than necessary to serve its purpose," id., here nothing more than a single one page document is sought to be sealed. CP 982. Only this narrow order sealing the improperly filed, irrelevant, and stricken privileged communication will serve the purpose expressly protected by RCW 42.56.290 and RCW 5.60.060(2)(a). Though BIAW argues defendants have not "explained why permanent sealing is required," Pet. Reply 47, there is no rational basis for making an order to seal any shorter in time than the duration of the underlying privilege it violated. See *Martin v. Shaen*, 22 Wn.2d 505, 511 (1945) ("privilege does not terminate with the cessation of the protected relationship, but continues

thereafter, even after the death of the person to whom the privilege is accorded, and may be invoked by his personal representative or his heir.")

Without prior notice to defendants as required by RPC 4.4, BIAW unilaterally filed a privileged communication for the sole purpose of prejudicing defendants with the Court. Because the privilege can only be honored – and similar tactics discouraged – by protecting that communication, the trial court erred in failing to order it sealed under GR 15.

**C. PRIVILEGED COMMUNICATION SHOULD BE RETURNED**

BIAW does not dispute that RPC 4.4(b) expressly requires a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender" or that BIAW violated it by not giving prior notice. CP 979. Rather, BIAW argues that – other than the comment to RPC 4.4 that whether it also "is required to . . . return[] the original document, is a matter of law" – there is "no authority" requiring it to return the communication "whether or not privileged." Pet. Reply 49. Such an argument ignores the law and analysis previously and repeatedly provided in defendants' briefing. Resp. Br. 46-47; CP 1230.

First, the Supreme Court has held that privileged material obtained by an opposing party is protected when it is not "knowingly and voluntar-

ily provided." See Harris v. Drake, 152 Wn.2d 480, 484 & 489, 99 P.3d 872 (2004) (excluding from evidence expert report and testimony that was not "knowingly and voluntarily provided" to opposing party). Second, here the record is undisputed that the confidential communication at issue was not knowingly and voluntarily provided to BIAW. See CP 1175-76, 1193. Finally, numerous decisions in such situations hold that unintentionally provided records of attorney/client communications should be ordered returned to the holder of the privilege. See e.g. Manufacturers and Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S.2d 999, 1006, 132 A.D.2d 392 (N.Y. App. 1987) (trial court reversed when it refused to order return of a privileged attorney-client communication that had been unintentionally disclosed); *Bank Brussels Lambert*, 160 F.R.D. at 449 (unintentionally disclosed privileged attorney-client communications ordered returned); *Georgetown Manor, Inc.*, 753 F. Supp. at 939 (ordering "[a]ll copies" of unintentionally disclosed privileged communications "turned over to defendant's counsel").

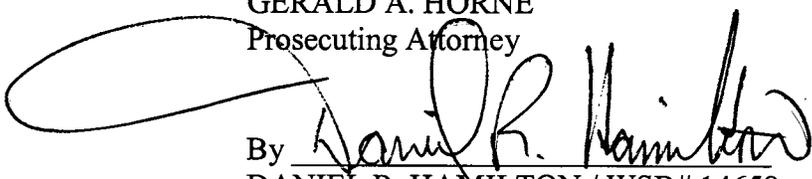
BIAW's Reply Brief is silent as to why it believes it can with impunity both file and retain an irrelevant privileged attorney/client communication that was not willingly and voluntarily provided it – or why it would want to do so other than for improper purposes.

**II. CONCLUSION**

For the above stated reasons, defendants respectfully request this Court uphold the meaning and enforceability of its rules and the legislature's clear enactments by reversing the denial of defendants' Rule 11 motion and RCW 4.84.185 counterclaim, as well as by directing that their motion to seal and return their privileged communication be granted pursuant to RCW 5.60.060(2)(a), RCW 42.56.290, GR 15, and RPC 4.4. Finally, an award to defendants of fees and costs on appeal similarly are warranted under RAP 18.1.

DATED: September 19, 2008.

GERALD A. HORNE  
Prosecuting Attorney

By   
DANIEL R. HAMILTON / WSB# 14658  
Deputy Prosecuting Attorney  
Attorneys for Pierce County  
PH: 253-798-7746 / FAX: 253-798-6713

FILED  
COURT OF APPEALS  
JANISSEN II

09 SEP 22 PM 2:08

STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of REPLY BRIEF OF CROSS APPELLANTS was delivered this 19th day of September, 2008, on the following parties and in the manner indicated:

Andrew C. Cook, Esq.  
Timothy M. Harris, Esq.  
Building Industry Association of Washington  
PO Box 1909  
Olympia, WA 98507-1909

- ABC Legal Messengers, Inc.  
 Via Regular Mail, postage prepaid  
 Via Facsimile

Greg Overstreet  
ALLIED LAW GROUP  
2033 Sixth Avenue, Suite 800  
Seattle, WA 98121-2567

- ABC Legal Messengers, Inc., for next-day delivery  
 Via Regular Mail  
 Via Facsimile

Katherine George  
Law Offices of Charlotte Cassady  
15532 Southeast 25th Street  
Bellevue, WA 98007-6506

- ABC Legal Messengers, Inc., for next-day delivery  
 Via Regular Mail  
 Via Facsimile

  
CHRISTINA M. SMITH