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## I. INTRODUCTION

This appeal arises under the Public Records Act (“PRA” or “Act”), RCW 42.56, and involves the Department of Natural Resources’ (DNR’s) compliance with respect to several public records requests from Appellant Mr. Arthur West over the course of one year. Mr. West contends DNR did not do enough to comply with the Act under a variety of theories. The evidence, however, demonstrates that DNR began providing Mr. West with the requested records soon after receiving his initial request. Despite allocating one and one-half hours per business day to process and provide thousands of pages in response to Mr. West’s initial broad and unclear request for records that he later changed, Mr. West claims DNR should be penalized for not getting him all of the records fast enough and for not providing him with records that did not exist long before he requested them. The records Mr. West claims were wrongfully withheld from him in response to another request were created as a result of Mr. West’s lawsuits and were properly withheld as attorney-client privileged or attorney work product. This Court should conclude that DNR complied with its responsibilities under the Act consistent with the trial court’s orders and evidence of record.

## II. ISSUES PRESENTED

The legal issues in this case are as follows:

1. In November 2007, one month after making a public records request, Mr. West filed a lawsuit. The case was dismissed and not appealed. In June 2008, Mr. West filed the lawsuit that is the subject of this appeal. Should this Court limit its review to PRA violations that allegedly existed at the time of the June 2008 lawsuit?

2. If the Court determines this issue is subject to review, does the PRA provide a remedy to Mr. West when DNR did not strictly comply with the five-day response requirement but the lack of compliance did not affect Mr. West's right to receive a response to his request within a reasonable amount of time, and Mr. West received access to all responsive records? [Appellant's Assignment of Error No. 1]

3. Did DNR respond to Mr. West's request for all of Bob Van Schoorl's e-mails over a two-year period within a reasonable amount of time given the scope of the request, challenges posed by an obsolete e-mail system, PRA workload, and other extenuating circumstances? [Appellant's Assignment of Error No. 1]

4. The PRA requires the production of records that exist at the time of the request for them. Does the PRA provide a remedy to Mr. West

for DNR's failure to provide records that did not exist almost one year before he requested them? [Appellant's Assignment of Error Nos. 2-3]

5. Under RCW 42.56.070, a public record must be made available unless the PRA exempts disclosure. RCW 42.56.290 exempts records that are relevant to a controversy to which an agency is a party and they are not otherwise discoverable. Did the trial court properly hold that the PRA does not require the release of communications between DNR and its attorneys and consultants that were created as a result of and in response to Mr. West's PRA lawsuits? [Appellant's Assignment of Error No. 4]

6. Does Mr. West's general assignment of error to all of the trial court's findings, with little or no factual or legal support, warrant review by this Court? [Appellant's Assignment of Error No. 5]

### **III. STANDARD OF REVIEW**

Where the record consists solely of documentary evidence, the standard of review of a trial court's public disclosure ruling under the PRA is de novo. *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993).

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#### **IV. COUNTERSTATEMENT OF CASE**

##### **A. Factual Background of Mr. West's PRA Requests and DNR's Responses Thereto.**

###### **1. Mr. West Narrowed His First PRA Request in Response to DNR Requests for Clarification.**

In October 2007, Mr. West submitted a broad request to DNR for records that covered a two-year period in eight subject areas ("request" or "first PRA request"). CP 213. DNR acknowledged Mr. West's request in writing on the day it was received. CP 203, 213. On the eleventh business day after receiving the request, DNR provided Mr. West with some responsive records along with a request for Mr. West to clarify what records he wanted. CP 204, 215. Within four days of receiving Mr. West's clarification, DNR mailed over 3,000 pages of responsive records to his request along with a three-week estimate of time when the remaining records would be available for his review. CP 221, 223-24, 209, 265. DNR made the remainder of the responsive records available for Mr. West's inspection three weeks later. CP 206, 226.

###### **2. Mr. West Later Amended His First Request to Enlarge the Scope of the Request.**

When Mr. West inspected the records in February 2008, six weeks after they were available for his review, he requested additional records to include all e-mails to and from DNR's Budget Director,

Bob Van Schoorl (“Van Schoorl”), from 2006 through 2007 (“amended request”). CP 206. With the exception of some 2006 e-mails from Van Schoorl, DNR provided Mr. West with all of the additional records he requested in five batches over the next two months. CP 206, 265.

Because of Van Schoorl’s e-mail retention practice and the upgrade to a new DNR e-mail system, DNR could not find a portion of Van Schoorl’s 2006 e-mails. CP 196-98, 200, 206-07. Van Schoorl’s practice was to retain his e-mail for as long as his e-mail system permitted. CP 200. In 2006, the DNR e-mail system automatically deleted all e-mail that was more than 90 days old. CP 196-97, 200. Van Schoorl believed the deleted e-mail was still available on the backup tapes used by DNR if the e-mail was later needed by DNR to meet a disclosure requirement. CP 200. In late 2006, DNR upgraded its e-mail system from Novell Groupwise to Microsoft Exchange. CP 196-97.

DNR thought some or all of Van Schoorl’s 2006 e-mails were available on the 2006 backup tapes. CP 196-98, 206-07. Because DNR had disposed of the Novell Groupwise server and terminated its license in June 2007, DNR could no longer access the backup tapes for the replaced e-mail system. CP 197. DNR explored several options to access the old backup tapes before it found a consultant who verified Van Schoorl’s e-mail was not on the tape where DNR believed the e-mail was most

likely to be found. CP 197-98. Because DNR had already discarded its Novell Groupwise records, it did not know the exact electronic location (“post office”) of Van Schoorl’s e-mail. CP 198. Therefore, DNR had to individually search all 2006 backup tapes for the entire agency to determine if there were any additional Novell Groupwise electronic “post offices” to restore. CP 198. There were none. CP 198.

DNR spent considerable resources and time to determine whether its computer backup tapes contained the missing e-mails. CP 197-98, 207-208. After DNR confirmed its backup tapes did not contain the e-mails, the remaining 2006 Van Schoorl e-mails DNR could locate from other DNR employees were provided to Mr. West in August and early September 2008. CP 207. A chart summarizing the processing of Mr. West’s request, as later clarified and amended, is provided in the attached Appendix. CP 209, 265-66.

**3. Mr. West Sought Information on How DNR Processed His First Amended Request Through a Second PRA Request.**

In September 2008, Mr. West submitted another PRA request to DNR seeking the records DNR had already provided to him in response to his first and amended requests as well as all records related to the recovery of Van Schoorl’s e-mails (“second request” or “second PRA request”). CP 210, 246. DNR provided Mr. West the non-exempt

records related to the recovery of Van Schoorl's e-mails along with an exemption log identifying the records and portions of records exempt from disclosure as attorney work product or attorney-client privileged or both.<sup>1</sup> CP 210, 267-71. The withheld records were all created after Mr. West filed a PRA lawsuit against DNR regarding his first PRA request. CP 53-54, 209-210, 314-395.

**B. Superior Court Proceedings.**

Mr. West filed a lawsuit over his first PRA request in November 2007, about one month after he submitted the request. CP 53, 209. That lawsuit was dismissed in July 2008 for lack of personal jurisdiction, was not appealed by Mr. West, and is not before the Court. CP 56-57. In June 2008, Mr. West filed a similar lawsuit that is the subject of this appeal. CP 54, 209. The lawsuit generally alleged DNR's failure to properly respond to his initial request or comply with the PRA in a reasonable manner and DNR's unlawful destruction of certain records. CP 3-7. Mr. West amended his complaint in March 2009 to challenge the records withheld from him by DNR in response to his second PRA request. CP 42-45. On the same date, Mr. West moved for a show cause

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<sup>1</sup> One e-mail series (number 9 on the DNR privilege log) references e-mails that fall outside of the scope of Mr. West's request for records. CP 267. The PRA request was received on September 2, 2008, and the e-mails were created after the request was received between September 4-8, 2008.

order to address his allegations of DNR non-compliance with the PRA with respect to his PRA requests. CP 40-41.

After a show cause hearing and an in-camera examination of the records withheld from Mr. West by DNR, the trial judge entered two orders in which he concluded there was no violation of the PRA for which Mr. West was entitled to relief and the records were properly withheld from Mr. West under one of the claimed exemptions. CP 108-30. The trial judge also ordered the sealing of the records that were withheld from Mr. West. CP 173-75.

#### **V. SUMMARY OF ARGUMENT**

The Superior Court properly concluded that DNR complied with the PRA in responding to Mr. West's public records requests. Mr. West argues that he is entitled to relief under the PRA even for records DNR had already provided him by the time he filed his lawsuit. The PRA, however, contemplates the lawsuit is being filed because an agency has not provided the requester access to public records or a response to the request within a reasonable time and must therefore be compelled to do so by a superior court. Here, with the exception of one category of records, DNR provided Mr. West with access to all existing responsive records before he filed his lawsuit. Certain records took longer to find and disclose because of technological problems stemming from the

agency's change to an entirely new e-mail system in the year before Mr. West filed his request. DNR made a diligent search for these records, and DNR's response under these circumstances was both reasonable and timely.

If this Court concludes the issue of timeliness is properly before the court, Mr. West is not entitled to relief because although DNR's initial response to his first request was delayed by a few days, Mr. West received all of the records he requested within a reasonable time. Here, the five-day response was late on his first PRA request only. Although the initial response should occur within five business days of the request, DNR provided a response on the eleventh business day (along with a request that Mr. West clarify exactly what he was asking for). The PRA, however, does not provide a remedy under these circumstances. The cases in which an agency has been penalized for a late five-day response involve not only a late and insufficient response but also a complete failure to provide documents that should have been disclosed. Unlike those cases, DNR provided Mr. West with all documents he requested in a timely manner.

Mr. West also seeks relief because DNR failed to provide documents that did not even exist at the time he filed his records request. The complained-of records were unintentionally lost during DNR's

conversion to a new e-mail program in the year before Mr. West's records request was filed. The superior court properly denied Mr. West's attempt to penalize DNR for failure to disclose non-existent documents.

Mr. West also claims that DNR improperly withheld records as attorney-client privileged communications or work product. The superior court properly interpreted the PRA exemption for such records and correctly concluded the records withheld from production fall within the exemption.

Finally, this Court should not consider Mr. West's Assignment of Error No. 5 because it is nothing more than an effort to make a generalized attack on the superior court's orders and lacks specificity, citations to authority, references to the record, and reasoned argument. It therefore does not comply with the Rules of Appellate Procedure (RAP).

## VI. ARGUMENT

### A. **This Court Should Limit Its Review to Violations of the Public Records Act That Allegedly Existed at the Time the PRA Action Was Properly Filed by Mr. West.**

#### 1. **Mr. West's First PRA Lawsuit Was a Nullity Because He Never Acquired Personal Jurisdiction.**

Soon after submitting his first request, Mr. West filed a lawsuit against DNR alleging DNR violated the PRA in the processing of the

request. CP 53. The lawsuit was dismissed for lack of personal jurisdiction. CP 53, 56-57. When a court lacks in personam jurisdiction over a party, judgment entered against that party is void. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994). Consequently, the first lawsuit filed against DNR was a nullity, and Mr. West cannot use it as a basis to claim relief under the PRA.

Mr. West then filed a similar lawsuit against DNR seven months later in June 2008. CP 53-54, 209. He amended his complaint in March 2009 to challenge records withheld from him in response to his second request for records in September 2008. CP 42-45. Mr. West did not move for a show cause order on his first request for records until March 2009 when he claimed DNR failed to respond promptly as required by law and unreasonably delayed disclosure of information to him. CP 40-41.

**2. The PRA Does Not Provide for Judicial Review of Allegations of Noncompliance That Do Not Exist at the Time the Action Is Filed.**

The PRA provides for judicial review and a remedy for any person who (1) has “been denied an opportunity to inspect or copy a public record by an agency” or (2) “believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a

public record request.” RCW 42.56.550(1), (2). Penalties and costs are awarded the prevailing party as defined by the statute:

*Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.*

(Emphasis added.) RCW 42.56.550(4).

With the exception of certain 2006 Van Schoorl e-mails, Mr. West was provided access to all existing records responsive to his first and amended request before he filed his lawsuit. CP 204-06, 209, 265-66 (Appendix). The PRA does not provide relief to a plaintiff who had the records in hand or was provided an opportunity to inspect them before the lawsuit was filed. *Daines v. Spokane County*, 111 Wn. App. 342, 348, 44 P.3d 909 (2002). In other words, the PRA does not provide relief to a requester when compliance with the Act is achieved before an action is filed. This means that the only issues now before this court are whether (1) DNR provided the remaining Van Schoorl e-mails to Mr. West in a reasonable amount of time after he filed his action; (2) the PRA provides a remedy to Mr. West for records that did not exist almost

one year before he requested them; and (3) DNR properly withheld records from Mr. West in response to his second PRA request.

**B. DNR Reasonably Complied With the Public Records Act's Initial Response Requirement.**

If the Court determines this issue is subject to review, the PRA does not provide a remedy to Mr. West for DNR's lack of strict compliance with the five-day response requirement when the lack of compliance did not affect Mr. West's right to receive a response to his request within a reasonable amount of time and he was provided with all responsive records.<sup>2</sup> RCW 42.56.520 states in pertinent part:

*Within five business days of receiving a public record request, an agency ... must respond by ... acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; .... Additional time required to respond to a request may be based upon the need to clarify the intent of the request.... In acknowledging receipt of a public record request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking.*

(Emphasis added.)

DNR provided Mr. West with a written acknowledgment of his request on October, 19, 2007, the same day he delivered it to DNR. CP 203, 213. Given Mr. West's unclear and extensive request for

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<sup>2</sup> This issue only applies to Mr. West's first PRA request. DNR complied with the five-day response requirement when Mr. West amended his request in February 2008. CP 230.

records, DNR needed clarification of the request and to research what responsive records it may have before it could provide a reasonable estimate of time it would require to respond to the request. CP 204, 213, 215, 217, 219. The PRA administrator was working on a backlog of 50 PRA requests when she received Mr. West's request. CP 207. Nevertheless, the PRA administrator provided Mr. West some of the records on November 5, 2007, the eleventh business day after receipt of his request, along with a request for Mr. West to clarify what records he wanted. CP 204, 215. The trial court found DNR could not have provided Mr. West with a reasonable estimate of time necessary to respond to the entire breadth of his request without seeking clarification from Mr. West. CP 123.<sup>3</sup> The trial court further found DNR began to consider the clarification it would need as soon as the request was received. CP 123.

On November 21, 2007, DNR sent another letter to Mr. West asking him for further clarification and advising him that two of the categories of records he requested would be available for review by December 6, 2007. CP 204, 219.

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<sup>3</sup> The facts found by the trial judge are either unchallenged or improperly challenged by Mr. West and therefore are verities on appeal. *Estate of Lint*, 135 Wn.2d 518, 533, 957 P.2d 755 (1998).

**1. DNR's Lack of Strict Compliance With the Five-Day Response Requirement Did Not Affect DNR's Response to Mr. West's Request Within a Reasonable Time.**

As part of his request, Mr. West asked for all communications sent by Van Schoorl over a two-year period. CP 213. Mr. West provided clarification on November 26, 2007, that he only wanted those communications between Van Schoorl and the Port of Olympia. CP 206, 221. Four days later, DNR provided Mr. West with over 3,000 pages of responsive records, a description of the records DNR then knew did not exist, and a three-week estimate for when he could inspect the remaining large number of records. CP 206, 223-24, 265 (Appendix). DNR provided Mr. West with the records or the right to inspect all responsive records to his request no later than December 21, 2007. CP 206, 226. Mr. West did not inspect the records until six weeks later. CP 206, 230.

Mr. West argues that DNR failed to identify exempted records in its initial response to his first records request and cites cases that address silent withholding. (BR 15-17.) Mr. West provides no citation to the record to support this argument because there is none. DNR provided Mr. West with all the records responsive to Mr. West's first request — none were withheld. CP 206-07, 213, 265-66 (Appendix).

In sum, DNR provided Mr. West with a written acknowledgment of his request for records on the date it was received. DNR provided

Mr. West with a reasonable estimate of the time it would take DNR to respond to his request within four days of obtaining the necessary clarification of Mr. West's unclear request. Any delay in providing an estimate of the time by which the records would be available was caused by the need to clarify exactly what Mr. West was asking for as authorized by RCW 42.56.520. Mr. West did not challenge the reasonableness of any estimate of time provided to him. To the extent there were any irregularities in DNR's initial response, they did not affect Mr. West's access to the requested records or DNR's response within a reasonable time. CP 204-06, 265. The trial court correctly found: (a) DNR acted in a reasonable and timely manner to understand the scope of Mr. West's request and to seek clarification; and (b) the lack of procedural compliance with the five-day rule did not affect Mr. West's rights under the PRA. CP 124-25.

**2. The PRA Does Not Provide for a Stand-Alone Remedy for the Failure to Strictly Comply With the Five-Day Response Requirement.**

Mr. West cites to no authority to support a penalty for minor irregularities in meeting the five-day response requirement. Previously reported cases that address penalties for violation of the five-day response requirement were not based on procedural violations but on a lack of any substantive response from the agency coupled with a denial of access to

records that should have been disclosed to the requester. *See Doe v. Wash. State Patrol*, 80 Wn. App. 296, 299, 908 P.2d 914 (1996), (Washington State Patrol provided no written response to requester and withheld investigative reports until a court ordered disclosure seven months after filing of PRA request.) *Smith v. Okanogan County*, 100 Wn. App. 7, 16-17, 994 P.2d 857 (2000) (penalties for violation of the five-day response requirement because the only response provided was a letter indicating receipt of the request for records that should have been released.)

The PRA does not expressly provide a remedy for a violation of the five-day response requirement unless it is accompanied by a violation of the requester's right to access records or to receive a response to the request within a reasonable time.<sup>4</sup> In general, an agency must provide the requester with one or more of the following responses: (a) provide the record; (b) acknowledge that the agency has received the request and provide a reasonable estimate of the time the agency will require to respond to the request; (c) deny the request; or (d) ask the requester to

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<sup>4</sup> The remedies section of the PRA states that a prevailing party in an action "seeking the right to inspect or copy any public record or the *right to receive a response to a public record request within a reasonable amount of time*" is entitled to costs and reasonable attorneys' fees. RCW 42.56.550(4) (emphasis added).

clarify what information the requester is seeking. RCW 42.56.520. Here, DNR was unable to provide a complete response to Mr. West's request until it obtained clarification of the request and determined if such records existed within DNR. CP 204-06, 215. DNR's response on the eleventh business day, providing Mr. West with a portion of the records he requested, and asking for clarification of other records he wanted, did not impact his timely access to the remaining records. CP 209, 215. There is no evidence of a violation of Mr. West's right to receive a response to his first request within a reasonable amount of time given the circumstances.<sup>5</sup>

The PRA expressly authorizes penalties only for denials of the right to inspect or copy public records. RCW 42.56.550(4); *Sanders v. State*, 2010 WL 3584463 (Wash. Sept. 16, 2010), at \*19. The right to inspect or copy a record turns on whether the document is actually exempt from disclosure, not whether the five-day response requirement was met. *Sanders*, 2010 WL 3584463, at \*19-20. While lack of strict

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<sup>5</sup> The trial court found:

Given the scope of Mr. West's public records requests, which resulted in production of over 13,000 pages, and the events that occurred after the November 5, 2007 request for clarification when the parties exchanged information clarifying and defining the scope of the request, the court finds that it was unreasonable to expect State to respond within five days to a request of this nature and the State acted in a reasonable and timely manner to understand the scope of this request.

CP 124-25.

compliance with the PRA may aggravate the penalty for wrongfully withholding public records, there was no withholding of records in Mr. West's first request, much less a wrongful withholding of such records. CP 206, 209, 265-66 (Appendix). RCW 42.56.550(4); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010).

**C. DNR Provided Mr. West With a Response to His Request for Van Schoorl's E-Mails Within a Reasonable Time.**

**1. Mr. West Provides No Factual or Legal Basis for His Allegation of Unreasonable Delay In Responding to His Request.**

By his failure to provide a factual or legal basis for his claim of unreasonable delay, Mr. West did not properly preserve this issue for appeal. However, even if the court considers this issue, Mr. West's arguments fail. In his briefing, Mr. West refers to DNR's unreasonable delay in responding to his request for records and "unlawful withholding and a delay of nearly an entire year." BR 9, 19. Yet, Mr. West provides no citation to the record to indicate what records he is referring to or why DNR's disclosure of those records was unreasonably delayed. Nor does Mr. West provide any legal authority supporting his claim.

Mr. West also argues, without citation to the record, that a portion of the records from Van Schoorl would not have been recovered but for

his lawsuit. BR 22. There is no factual basis for his argument. DNR began searching for these records right after Mr. West requested them in February 2008 and provided the records within a reasonable time as described in subsection C.2. below. Again, without citation to the record, Mr. West repeatedly argues DNR admitted in its response to the show cause order that the lawsuit was “arguably necessary” to compel disclosure. BR 12 n.1 and BR 13. Mr. West is incorrect. In fact, DNR argued the opposite.

Mr. West’s lawsuits did not cause DNR to provide Mr. West with the Van Schoorl 2006 e-mail it could find. Arguably, *the lawsuits caused DNR to exceed the PRA requirements* for searching backup tapes to determine if any responsive e-mail existed on the tapes.

CP 253-54 (emphasis added).

RCW 42.56.520 expressly contemplates that additional time may be required to provide records based upon the need “to clarify the intent of the request” and “to locate and assemble the information requested.” Prompt disclosure under RCW 42.56.080 is required only after the agency identifies the record and ascertains that it is not subject to any exemptions. Further, an agency may make public records available on a piecemeal basis if, under the circumstances, it is reasonable to do so. *Ockerman v. King County*, 102 Wn. App. 212, 219-20, 6 P.3d 1214 (2000); RCW 42.56.080. Finally, RCW 42.56.550(2) provides a remedy

if the agency has not given a reasonable time estimate. The requester may seek an order for the agency to show cause, and the agency then has the burden of proving that its estimate is reasonable. RCW 42.56.550(2); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 615 n.1, 989 P.2d 1257 (1999). Here, Mr. West never challenged DNR's time estimate under RCW 42.56.550(2) at a time when the court could have ordered DNR to produce the records earlier. The record of DNR's due diligence in responding to Mr. West's requests indicates he would not have obtained such an order had he sought one. CP 265-66 (Appendix). Mr. West should be precluded from making such an argument now.

**2. DNR Responded to Mr. West's Request Within a Reasonable Time Given the Circumstances.**

The requester is entitled to a response within a reasonable amount of time. RCW 42.56.550(4). Whether the time was reasonable depends on the circumstances. The record demonstrates that DNR actually provided Mr. West with access to all of the records at least six months before his motion for DNR to show cause as to why the records were allegedly not made available. CP 40-41, 203-47, 265-66 (Appendix). The record clearly shows that no document was withheld from Mr. West for anywhere near one year as he claims. CP 265-66 (Appendix), 285-86. If the promptness of DNR's response to his PRA request was a concern to

Mr. West, he would not have waited for almost nine months after he filed his lawsuit, and six months after he received all of the records, to move for a show cause order to address this issue. CP 40-41, 265-66 (Appendix).

In February 2008, while inspecting records responsive to his first PRA request, Mr. West verbally requested copies of all of Van Schoorl's e-mail communications for 2006-2007 along with other records. CP 206, 230. DNR viewed Mr. West's request for the additional records as either a new request or an amendment to his initial request. CP 206.

With the exception of some of Van Schoorl's e-mails from 2006, all responsive records to Mr. West's amended request were provided to Mr. West in a series of mailings within approximately two months of his request for them. These records included over 9,200 pages of e-mails and attachments either received or sent by Van Schoorl. CP 206, 232, 234, 236, 238, 240, 242, 265 (Appendix).

**a. DNR Responded to Mr. West's PRA Request Within a Reasonable Time Despite Problems Arising From the Agency's Change to an Entirely New E-mail System.**

DNR transitioned to a new e-mail system in late 2006. Van Schoorl relied on the DNR e-mail system and the backup tapes to retain his e-mail and, because of the change to a new e-mail system, it

took DNR several months to determine that some of the 2006 e-mails were no longer available for recovery from the backup tapes and to produce the remaining e-mails to Mr. West. CP 50-41, 196-98, 200-01, 206-07.<sup>6</sup>

Between May and August 2008, the DNR Information Technology Division spent over 40 staff hours and \$5,000 on a consultant in an unsuccessful effort to recover some of Van Schoorl's e-mail from 2006. CP 198.

In August 2008, when the PRA administrator learned Van Schoorl's e-mail was not recoverable from the backup tapes, she asked DNR employees for copies of any e-mail they may have sent to or received from Van Schoorl in 2006. CP 207. This search took another month due in part to one employee's lack of availability. CP 207. Approximately 34 of Van Schoorl's e-mails obtained from the other DNR employees were provided to Mr. West soon thereafter, with the last installment provided to him on September 8, 2008, when Mr. West's amended request was closed out. CP 207, 244, 246-47.

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<sup>6</sup> See IV.A.2. of the brief for a more detailed recital of the facts (pp. 5-6).

**b. DNR Responded to Mr. West's Public Records Request Within a Reasonable Time Despite the Agency's Response to a High Volume of Other PRA Requests at the Same Time.**

When Mr. West's first request was received, DNR already had a backlog of 50 other PRA requests. CP 207. The PRA administrator and her one assistant were primarily responsible for responding to such requests and gathering records for discovery in outstanding litigation and agency record reviews. CP 207. While Mr. West's request was processed, DNR was experiencing an unprecedented number of other PRA record requests with a peak of 90 active requests. CP 207. The PRA administrator was working overtime at a rate of 60 hours per week for much of the time Mr. West's request was processed. CP 207.

**c. DNR Responded to Mr. West's Request Within a Reasonable Amount of Time Given the Significant Resources Devoted to Processing the Request.**

DNR spent an estimated 250 hours searching and responding to Mr. West's request for Van Schoorl's e-mails and \$5,000 for a consultant to determine if any of Van Schoorl's 2006 e-mail was available on its backup tapes. CP 50-51, 198, 208. This amounts to over 1.5 hours per business day devoted to fulfilling Mr. West's request for the e-mail alone. In addition to the large volume of records Mr. West inspected, DNR sent Mr. West over 13,000 pages of records in hard copy or on CD, at no

expense to Mr. West, in the course of 11 mailings from November 5, 2007, to September 8, 2008. CP 208, 265-66 (Appendix). There is no evidence of a single record that was disclosed to Mr. West in an unreasonable amount of time. Under the circumstances, Mr. West was provided with timely access to all existing records that were responsive to his amended request.

**D. The PRA Does Not Provide a Remedy to Mr. West for Records That Did Not Exist Almost One Year Prior to His Request for Them.**

**1. The Search for 2006 Van Schoorl E-Mails Was Legally Sufficient, and There Is No Evidence to the Contrary.**

Given the record in this case, there can be no doubt DNR performed a good faith, diligent search for all of the 2006 Van Schoorl e-mails requested by Mr. West before DNR concluded some of them were lost in DNR's change to a new e-mail system. CP 50-51, 196-98, 206-07.

Without reference to the record, Mr. West argues DNR should be compelled to do more to forensically recover Van Schoorl's lost e-mails. BR 23-25. The PRA does not require DNR to search for electronic records DNR has already determined, after a diligent search, do not exist. There is no evidence to suggest any remaining e-mail responsive to Mr. West's request exists. To the contrary, the record contains evidence

that the e-mails were stored on a server and lost when the e-mail system was upgraded in late 2006. CP 50-51, 196-98, 200-01, 206-07. The old e-mail server was disposed of through surplus. CP 197. Van Schoorl did not retain any e-mail on the hard drive of his personal work computer. CP 200, 279. Furthermore, Van Schoorl had his computer replaced in late 2007 or early 2008. CP 279. The hard drive from the personal computer he used in 2006 was sent to surplus and wiped clean. CP 279. Any additional search for such records now would be futile.

**2. DNR Did Not Violate the PRA When It Failed to Provide Mr. West With Records That Did Not Exist Almost One Year Before Mr. West Requested Them.**

There is no right to relief under the PRA for failing to provide records that do not exist at the time of the request. *Smith v. Okanogan County*, 100 Wn. App. at 13-14 (an agency has no duty to create or produce a record that is nonexistent). Mr. West argues the destruction of Van Schoorl's e-mails violates the PRA and therefore he is entitled to relief under the Act. BR 17-18. Mr. West provides no legal or factual support for this position. The only provision of the PRA that regulates destruction of records requires agencies not to destroy or erase a record that exists at the time a request for such record is made. RCW 42.56.100. That provision was not triggered under the facts of this case. The same is true for the PRA's show cause provision. RCW 42.56.550(1) authorizes

only those having been denied an opportunity to inspect or copy a public record by an agency to require the responsible agency to show cause why it has refused to provide access to the record. Accordingly, there is no DNR action to review under the Act where DNR did not deny Mr. West access to the requested records that did not exist at the time of the request. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

With the exception addressed in the prior paragraph, the Records Retention Act, chapter 40.14 RCW, not the PRA, governs the preservation and destruction of public records. Mr. West's citation to *Yacobellis v. Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), does not advance his argument. In that case, Yacobellis made at least three requests to inspect and copy the public records *prior to* their being destroyed by city officials. *Yacobellis v. Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992).<sup>7</sup> Here, the 2006 e-mail was lost in DNR's transition to a new e-mail system almost one year before DNR even received Mr. West's request for the e-mails. CP 50-51, 196-98, 200, 206-07.

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<sup>7</sup> The court in *Yacobellis*, 55 Wn. App. 706, remanded the case back to the trial court to determine appropriate penalties and costs for violations of the PRA. In this appeal, Yacobellis appeals the trial court's amount of a discretionary award in his favor on remand.

**E. All of the Records Withheld From Mr. West's Second PRA Request Were Properly Exempt Under RCW 42.56.290 as Either Attorney-Client Privileged Communications or Attorney Work Product.**

**1. The Only Records Withheld From Mr. West Were Attorney-Client Privileged or Attorney Work Product Created in Anticipation of Litigation.**

As part of his second PRA request, Mr. West asked DNR for an opportunity to inspect “[a]ll records related to the recovery of the 2006 Van Schoorl E-mails” he had asked for in his first amended request. CP 210. DNR timely provided Mr. West the non-exempt requested records along with an exemption log identifying the records and portions of records exempt from disclosure as either attorney work product or attorney-client privileged in accordance with RCW 42.56.290 and RCW 5.60.060(2)(a). CP 151-52, 210, 267-71.<sup>8</sup> Here, the withheld records would not exist but for Mr. West’s lawsuit regarding his first PRA request as later amended.<sup>9</sup> CP 47-48, 53-54, 209-10. Mr. West’s lawsuit caused DNR to seek legal advice on how to process Mr. West’s first PRA request, as later amended, to include the extent of DNR’s

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<sup>8</sup> DNR’s exemption log mistakenly references RCW 5.60.060(2)(a) as “RCW 5.60(2)(a).”

<sup>9</sup> Mr. West’s first lawsuit was filed in November 2007 and dismissed in June 2008 when Mr. West filed a similar lawsuit. CP 53, 54, 56-57, 209. Both lawsuits involved Mr. West’s first PRA request. CP 3-7, 53, 209. “Lawsuit” as used in this section D of the argument may refer to either one or both of these lawsuits. The withheld records were created between April 29, 2008, and September 8, 2008. CP 210.

obligation to search for the lost Van Schoorl e-mails. CP 47, 53, 209-10, 326-95.

All the records withheld or partially withheld from Mr. West fall into one or more of the following categories: (a) attorney-client advice requested by or given to DNR employees acting in the performance of their duties by assistant attorneys general (AAGs) in response to the lawsuits filed by Mr. West and the underlying PRA request; (b) prepared or caused to be prepared by DNR employees and their consultants in furtherance of the legal advice provided; or (3) AAG requests for information from DNR on the implementation of the legal advice, the progress of the e-mail recovery process, and DNR's defense against the lawsuit. CP 47, 53, 209-10, 326-95.

The DNR employees who created the records were aware of Mr. West's PRA lawsuits and the attorney-client relationship between the AAGs and DNR. CP 47, 53, 209-10. The DNR communications with their AAGs were transmitted in confidence. CP 47, 53, 209-10. The small portion of records exempt as attorney work product or a combination of attorney-client privilege and attorney work product were relevant to Mr. West's lawsuit and could either individually or collectively reveal mental impressions, conclusions, opinions, or legal

theories of the AAGs who represented DNR or DNR's consultants.  
CP 47, 53, 209-10, 381-85, 387-95.

**2. None of the Records Withheld From Mr. West Would Be Discoverable In His Lawsuit Against DNR Under the Civil Rules of Pretrial Discovery.**

Any records that would not be discoverable in the context of a controversy to which the agency is a party under the civil rules of pretrial discovery are exempt from public disclosure under RCW 42.56.290. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007). If the records are protected under Washington's Civil Rule (CR) 26 work product protection or its incorporation of attorney-client privilege, then the documents are not subject to public disclosure. *Soter*, 162 Wn.2d at 733-34.

Under CR 26(b)(1), privileged materials are not otherwise discoverable, and CR 26(b)(4) provides that the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney, consultants, or other representatives of a party concerning the litigation.

The attorney-client privilege applies to any information generated by a request for legal advice. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 903, 130 P.3d 840 (2006), *review granted*, 158 Wn.2d 1029, 152 P.3d 1033, *affirmed*, 162 Wn.2d 716, 174 P.3d 60 (2007).

Documents created by clients in anticipation of litigation with the intention of communicating information to their attorneys are protected by the attorney-client privilege. *Soter*, 162 Wn.2d at 747. Factual written statements gathered by the attorney are also protected as attorney work product under CR 26(b)(4). *Soter*, 162 Wn.2d at 740.

All of the records withheld from Mr. West would not be discoverable in his civil action against DNR because the documents are privileged attorney-client communications or attorney work product or both.

**3. Mr. West's Arguments Regarding the Inapplicability of RCW 42.56.290 to the Records Withheld by DNR Are Without Factual or Legal Basis.**

Mr. West argues that DNR used the attorney-client privilege and attorney work product doctrine to suppress the best evidence of DNR's efforts to recover missing records. BR 28. His argument is without merit. Records protected by the attorney-client privilege are not disclosable as a matter of law. CR 26(b)(1), RCW 5.60.060(2)(a). Disclosure of the remaining records withheld as attorney work product is determined under CR 26(b)(4). Otherwise discoverable attorney work product materials prepared in anticipation of litigation or for trial may be disclosed only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he

is unable without undue hardship to obtain the substantial equivalent of the materials by other means. CR 26(b)(4). Although Mr. West could have obtained a description of the efforts DNR made to recover the e-mails through interrogatories or depositions, he did not submit any such discovery.

Mr. West argues the trial court erred in denying disclosure based on the attorney client privilege “when there was new evidence of a regular business practice of the ports represented by Van Schoorl to evade the PRA by using the attorney-client exemption improperly.” BR 25. The “new evidence” Mr. West refers to is an inadmissible self-serving declaration Mr. West had previously submitted in an unrelated PRA lawsuit against the Port of Olympia. CP 153-55. There is no evidence to suggest Van Schoorl played any role in the assertion of the attorney-client privilege in this case.

Mr. West’s other arguments as to why the exemption does not apply, i.e., communications between DNR employees that were merely forwarded to an attorney, waiver of privilege when information shared with DNR consultants, overturning the law regarding the exemption, and bad faith exemption to the attorney client privilege, have no basis in fact or law. BR 25-32. With the exception of a single citation to inadmissible evidence, Mr. West presents seven pages of arguments with no facts to

support them. BR 25-32. The trial court correctly ruled that the records were properly withheld from Mr. West under RCW 42.56.290 after an in-camera review of the withheld records. CP 108-20.

**F. Mr. West's Assignment of Error No. 5 Does Not Warrant Appellate Review Because It Is Non-Specific, Inconsistent With RAP 10.3 for Assignments of Error and Argument, and Without Factual or Legal Support.**

Mr. West attempts to use his Assignment of Error No. 5 as a catch-all to challenge each and every finding made by the trial judge in the three orders he signed on November 6, 2009. BR 33. Mr. West's efforts fail to comply with the RAPs.

More specifically, Mr. West fails to: (1) provide a concise statement of each error made by the trial court together with the issues pertaining to the assignments of error as required by RAP 10.3(a)(4); (2) provide reasoned argument together with citations to legal authority and references to relevant portions of the record as required by RAP 10.3(a)(6); (3) make a separate assignment of error for each finding of fact<sup>10</sup> he contends was improper as required by RAP 10.3(g); (4) refer to the specific finding of fact in his assignment of error as required by RAP 10.3(g); and (5) include the findings of fact in full in the body of his

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<sup>10</sup> While Mr. West characterizes the trial court's findings as mixed findings, most are not. BR 33. For example, numbers 1-11, 13-14 of the order from the show cause hearing are findings of fact. CP 123-26.

brief or in the appendix as required by RAP 10.3(g).<sup>11</sup> *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979). BR 32-62.

Every factual statement made in a brief should be supported by reference to the record. *Estate of Lint*, 135 Wn.2d at 531-32. Mr. West characterizes his infrequent references to the record as facts or admissible evidence when they are argument, erroneous citations or inadmissible evidence. BR 33, 36. CP 58-80, 83-84, 90-94, 105-107, 151. For the reasons stated above, the Court should not consider this assignment of error. *See Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Alternatively, the Court should refuse to consider Mr. West's argument in support of Assignment of Error No. 5 because the argument is insufficient to properly decide the issues pertaining to the assigned error. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 61, 64, 837 P.2d 618 (1992). The law is well established that the passing treatment of an issue or the lack of a reasoned argument is insufficient to merit judicial consideration. *Johnson v. Mermis*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998). Mr. West should not be allowed to take this court on a flight of fantasy fueled by speculation and assumed facts either not in or contradicted by the record.

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<sup>11</sup> Mr. West states he attached these findings in the appendix to his briefing. BR 33. He did not. BR 43-62, CP 109-10, 123-26, 128-29.

Other arguments made by Mr. West under this assignment of error are the same arguments he makes under other assignments of error, have already been addressed in DNR's response, or do not warrant a response.

## VII. CONCLUSION

For the reasons cited above, Mr. West seeks relief where no relief is warranted. The record amply demonstrates DNR's efforts were more than enough to comply with the PRA. DNR took all reasonable measures to safeguard Mr. West's rights to receive responses to his requests within a reasonable amount of time and to access all records not otherwise exempt. This court should uphold the judgment of the trial court.

RESPECTFULLY SUBMITTED this 22nd day of October, 2010.

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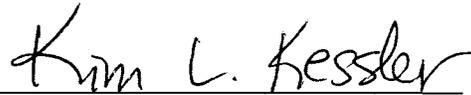
**CERTIFICATE OF SERVICE**

I certify that on the 22nd day of October, 2010, I caused a true and correct copy of the foregoing **BRIEF OF RESPONDENT** to be served upon the parties herein by U.S. Mail postage prepaid to:

Arthur West  
120 State Avenue NE #1497  
Olympia, WA 98501

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

DATED this 22nd day of October, 2010, at Olympia, Washington.



KIM L. KESSLER  
Legal Assistant

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DIVISION II  
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# APPENDIX

Chronological Summary of Arthur West's First PRA  
Request to DNR as Clarified and Amended

Date	Action	Exhibit *	No. of Pages
10/19/07	Arthur West (West) hand delivered 10/18/07 Public Records Request to Department of Natural Resources (DNR). DNR employee M. Ford acknowledges receipt of request.	A	
11/05/07	DNR sends West letter to seek clarification of request and provides some responsive records to West.	B	81
11/08/07	West e-mails DNR narrowing one portion of request and asking what items need clarification.	C	
11/21/07	DNR sends letter to West asking for further clarification. Asks West if he wants to prioritize request; provides him with status update and rough estimate of processing time.	D	
11/26/07	West e-mails DNR providing further clarification and priority of his request.	E	
11/30/07	DNR mails documents to West and informs him DNR will have large volume of documents to inspect on or about December 21, 2007.	F	3182
12/18/2007	DNR e-mails West to arrange meeting to review large volume of records on 12/21/07 or later.	G	
01/30/2008	DNR e-mails West stating Port of Olympia records are available and offers to schedule a time to inspect them.	H	
02/5/2008	West reviews records at DNR; identifies records he wants copies of; and, requests additional records.		
02/06/2008	West e-mails DNR asking: 1) when copies from 2/5/08 review will be ready; 2) when work product, expenditures and Van Schoorl records will be available for review.		
02/13/08	DNR acknowledges receipt of 02/06/08 e-mail from West, explains misunderstanding of original records request clarification, and provides a portion of records identified by West for copying.	I	78
02/20/08	DNR mails West copies of the remainder of records flagged by him.	J	69
02/29/08	DNR sends a portion of Bob Van Schoorl e-mail and expenditure statement for 2006 and 2007. DNR informs West it will continue to gather responsive e-mail and send in two weeks.	K	420
03/14/08	DNR sends West CD that includes a portion of Bob Van Schoorl e-mail. DNR informs West it will continue to identify and send additional communications to him consistent with the response schedule outlined earlier.	L	1498
03/28/08	DNR sends West CD that includes a portion of Bob Van Schoorl e-mail from 2007.	M	3050
04/04/08	DNR sends West CD that includes Bob Van Schoorl e-mail from 2007.	N	383
04/11/08	DNR sends West CD that includes Bob Van Schoorl's sent e-mail for 2007, work product and summary of Port of Olympia billings.	O	4177

**Chronological Summary of Arthur West's First PRA  
Request to DNR as Clarified and Amended**

Date	Action	Exhibit *	No. of Pages
05/22/08	DNR e-mails West relating to the recovery of the November and December 2006 Bob Van Schoorl e-mail and the status of recovery of the January through October 2006 recovery of GroupWise e-mail.		
05/30/08	DNR e-mails West advising further research shows DNR inability to restore the November and December 2006 sent e-mail and continuing research of the issue of restoring GroupWise e-mail for January through October 2006.		
08/22/08	DNR sends CD that includes 2006 Bob Van Schoorl e-mail.	P	525
09/08/08	DNR sends West last four Bob Van Schoorl e-mail from 2006 and closes out West's amended Public Records Request with summary of actions taken by DNR.	Q	4