

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 41293-4-II

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

RICHARD GERMEAU,

Appellant,

v.

MASON COUNTY, et. al.,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is Public Records Act, ch. 42.56 RCW (“PRA” or “Act”), case presenting three issues: (1) is a public records request via a letter, not the agency’s form, a valid request, (2) who has standing to enforce the PRA, and (3) does an agency violate the PRA when it does not respond to a valid public records request.

II. ASSIGNMENT OF ERROR

Assignment of Error: The trial court erred in issuing the September 9, 2010, Order Granting Defendant’s Motion for Summary Judgment and dismissing Plaintiff’s claims.

Issues Pertaining to Assignment of Error:

- No. 1 Whether a document requesting identifiable public records, but not using the words “public records request,” is a valid public records request pursuant to the PRA and requires a response in accordance with the Act.
- No. 2. Whether an individual who makes a request for public records reciting that it was on behalf of another has standing to bring a cause of action to enforce the PRA.
- No. 3 Whether an agency violates the PRA when it does not respond to a public records request.

III. STATEMENT OF THE CASE

A. Background

Appellant Richard Germeau, who made the records request at issue in this appeal, is a Deputy of the Mason County Sheriff’s Office

(hereinafter “Deputy Germeau”). CP at 29. While the request at issue speaks for itself, some background facts on the public records request at issue are necessary to understand why Deputy Germeau made the request, and why it was made in the manner it was.

On August 9, 2009, an off-duty and unarmed Mason County Sheriff’s officer, Detective Sergeant Martin Borcharding, was assaulted and severely injured at a restaurant bar by a then-unknown male assailant. CP at 37. The assailant bludgeoned Det. Sgt. Borcharding with a large rock. **Id.** Det. Sgt. Borcharding suffered massive head injuries. **Id.** He was bleeding from the ears and nose and was incoherent. **Id.** Det. Sgt. Borcharding’s girlfriend called the police to aid him. **Id.** She did not allege Det. Sgt. Borcharding threatened or hurt her. CP at 38. Det. Sgt. Borcharding was the victim of the male assailant and she was unharmed. Det. Sgt. Borcharding, bleeding profusely, was handcuffed by the Mason County Sheriff’s deputies responding to the call and was not offered medical aid. **Id.** In the days following the August 9, 2009 attack, it became clear that the Mason County Sheriff’s Office was investigating Det. Sgt. Borcharding, apparently for domestic violence. **Id.** Deputy Germeau believed that Respondents (“County”) could face significant civil liability for their treatment of Det. Sgt. Borcharding. CP at 29.

Prior to this incident, in 2006, Deputy Germeau became the guild representative for the Mason County Sheriff's Office Employees Guild ("Guild"), of which Det. Sgt. Borcharding is a member. CP at 29. The Guild's collective bargaining agreement with the County does not have a provision regarding document requests. CPat 30. To Deputy Germeau's knowledge, no Guild representative had ever asked for documents from the County formally or informally. CP at 30. Because there was no method he knew of for obtaining the records outside of the PRA (such as via a collective bargaining agreement), Deputy Germeau believed that he was required to make public records request to obtain the documents that are the subject of the request at issue here. CP at 30.

B. August 13, 2009 Request for Public Records

Because he was concerned that the County would alter or destroy records given the significant civil liability the County potentially faced, Deputy Germeau believed time was of the essence in obtaining the records related to the investigation of the incident involving Det. Sgt. Borcharding. CP at 30.

Therefore, four days after the attack, Deputy Germeau submitted a public records request dated August 13, 2009 to Chief Deputy Osterhout of the Mason County Sheriff's Office. See CP at 31, 35. Deputy Germeau believed the request was a public records request. CP at 31 ("I

strongly believed the August 13th request was a Public Record Act public records request. I made the request under the Public Records Act and fully expected Defendants to process it as one.”). Det. Sgt. Borcharding also believed that the request was for public records. CP at 38. (“I believed, and still believe, that Deputy Richard Germeau made a public records request under the Public Records Act for the records pertaining to the investigation of me.”).

Deputy Germeau requested “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35.

A few hours after submitting his public records request, Deputy Germeau was at the headquarters of the Mason County Sheriff’s Office. CP at 31. Undersheriff Barrett handed Deputy Germeau the public records request and laughed at him (Germeau) about the use in the request of the word “arterial” instead of “ulterior” (as in “ulterior” motive). **Id.** Undersheriff Barrett told Deputy Germeau that the Borcharding case was being identified as a criminal matter. **Id.** Therefore, continued Undersheriff Barrett to Deputy Germeau, “I don’t have to give you [expletive] related to a criminal investigation.” **Id.**

Deputy Germeau then tried to hand Undersheriff Barrett a copy of the public records request. CP at 32. Undersheriff Barrett put his hand up

to Deputy Germeau indicating that he did not want the request back. Id. Then Undersheriff Barrett told Deputy Germeau that Deputy Germeau could correct the error (“arterial” instead of “ulterior”) and eliminate categories of records that Undersheriff Barrett thought Deputy Germeau was not entitled to receive (records of a criminal investigation) and then resubmit it. Id. Deputy Germeau told Undersheriff Barrett that he (Deputy Germeau) would let the request stand as it was. Id. Undersheriff Barrett then took the extra copy of the request and Deputy Germeau left. Id.

Prior to the August 13, 2009 public records request, Deputy Germeau had made a few public other records requests to the County. CP at 30-31. For these pre-August 13th requests, he used the County’s public records request form. CP at 30. Those prior requests were to other County departments (other than the Sheriff’s Office) such as the Civil Service Commission and another County department regarding the purchase of a building. CP at 31-32. However, for his August 13th request to the Sheriff’s Office, he did not use the County’s records request form for two reasons. First, his August 13th request was for records relating to just one department (the Sheriff’s Office) so, to save time, he did not need to get the rest of the County involved by using a generic County-wide record request form. CP at 32. Second, he was not aware that the

Sheriff's Office had its own public records request form and did not know the procedure for filing a public records request with the Sheriff's Office. Id.¹ Therefore, he simply wrote out the request in letter format and gave it to the Sheriff's Office administration. Id.

At no time did any person at the County or Sheriff's Office ask Deputy Germeau to clarify that his request was a Public Records Act request rather than some other type of request. CP at 32. Only after being served with this Public Records Act enforcement suit did the County claim that it did not think the August 13, 2009 request for records was a public records request. Id. Similarly, only after being served with this Public Record Act suit did the County claim that the request was a "guild request" as opposed to a public records request. Id. In fact, it was only after the County had been served with this suit that Deputy Germeau heard anyone use the term "guild request." Id. Det. Sgt. Borcharding had also never hear the term "guild request" (until after this suit was served) and had no idea how to obtain records through a "guild request." CP at 38.

The County did not respond to the request. CP at 32. The County did not send a five-day acknowledgement pursuant to RCW 42.56.520.

¹ It turns out that one of the many policy manual pages deputies, including Deputy Germeau, signed for as receiving was the County's public records policy. See CP at 214, 217. However, at the time he made the request, he did not recall that the County had a policy of *requiring* the use of its form. As described below, an agency cannot require the use of a form. See infra at §A.3.

CP at 32. The County did not provide all the requested records to Deputy Germeau. CP at 33.

After being served with the suit, the County began to provide some responsive records but, it claimed, was not providing the records under the PRA. CP at 34. Deputy Germeau knows of other responsive records that have not been provided; for example, the Internal Affairs report or reports about the August 9, 2009 incident exist but have been withheld from him. Id. The County has not provided a withholding index identifying these or other withheld records. Id. In sum, the County did not respond to the request until they were sued for violating the PRA.

The County claimed in the trial court proceedings that no PRA violation existed because at the time of the August 13, 2009 request there were no responsive records. See CP at 149-150. Deputy Germeau's August 13, 2009 request sought "any notes, interoffice memo's [sic] or emails that may be related" to "any investigation involving [Det. Sgt. Borcharding]." CP at 35. Therefore, any records dated before August 13, 2009, regarding any investigation involving Det. Sgt. Borcharding were responsive to the request. Six such documents did exist.

There are at least three memoranda dated August 9, 2009 regarding an investigation involving Det. Sgt. Borcharding. See CP at 66-82. Further, at least one memorandum dated August 12, 2009, existed which is

relevant to an investigation of the incident involving Det. Sgt. Borchering. CP at 66, 84. Additionally, at least one email, dated August 12, 2009, existed that is also responsive to Deputy Germeau's request. CP at 66, 86. Finally, a memorandum created on August 12, 2009—and directly discussing recommendations of an internal affairs investigation of Det. Sgt. Borchering—existed at the time Deputy Germeau made his request. CP 66, 88-90.²

C. Procedural History

Deputy Germeau filed an Amended Complaint alleging the County violated the PRA in response to the August 13th request.³ CP at 4-11. Both parties simultaneously moved for summary judgment. CP at 12-28 (Deputy Germeau's Motion for Summary Judgment); CP 148-83 (County's Motion for Summary Judgment).

The County argued that the request was a "Guild Request" rather than a public records request, that Deputy Germeau lacked standing because the request recited that it was on behalf of the Guild, and that the

² Deputy Germeau notes that, based on representations made by the County, there is a strong likelihood that additional responsive records exist that have not been provided to him. See CP at 338 ("I know that Defendants are not releasing all the responsive records. For example, the Internal Affairs report or reports on the incident have not been released to me. I have verified with the Sheriff's Office that they exist. They have been withheld from me."). If Deputy Germeau prevails in this appeal, he asks the Court to remand the case for further proceedings to determine, *inter alia*, whether additional responsive records have been withheld.

³ The original Complaint had another PRA claim for withholding the results of a civil service exam. This claim was settled.

County did not violate the PRA because, *inter alia*, there were no responsive records in existence on the date of the request. See CP at 148-83.

On September 9, 2010, the trial court heard the parties' cross motions for summary judgment, granted the County's motion, and dismissed Deputy Germeau's case. CP at 136-37.

The trial court based its dismissal on two grounds: (1) that Deputy Germeau had not made a valid request for public records, and (2) that he lacked standing to bring an enforcement action pursuant to the PRA. RP 16-18. The primary basis for the trial court's ruling was that Deputy Germeau had not made a valid public records request. See RP 18 ("What I think this case turns on is the Wood case and the Bonamy case. This is not a clear request for a public record ...").

Having dismissed the case based on findings that Deputy Germeau failed to make a valid request for public records and lacked standing, the trial court did not rule on whether the County violated the PRA through its failure to respond to the request. RP at 18 ("I'm not finding a violation because I'm granting" the County's Motion for Summary Judgment). Though the trial court did not base its dismissal on the issue of whether the County failed to respond to the request, it nonetheless agreed with the

County that it did not violate the PRA because no responsive records existed. **Id.** (request “asks for records that don’t even exist yet”).

The trial court then commented on its ruling that Deputy Germeau lacked standing:

I want to get to the standing issue because I think the Court of Appeals should rule on it. I think this [case] is the other side of **Kleven v. City of Des Moines**, 111 Wn. App. 284, 44 P.3d 887 (2002)], and how am I going to do this? In the hopes that maybe [Deputy Germeau’s counsel] will take this up the street and see what they think, I’m going to grant the summary judgment on both standing [and the lack of a public records request], saying he doesn’t have standing because he wasn’t making it in his personal capacity, but I’ll say as a footnote that *I think that’s a weak reed for me to rely on* because if you liberally construe the act, even though he held himself out as a representative of somebody else, and even though he’s not an attorney licensed to represent somebody else, that if you give the act a very liberal construction, *he could have standing based on the zone of interest argument* that [Deputy Germeau’s counsel] mentioned, but because of my recognition of where [counsel] was going, he deferred and didn’t put it on the record, but it’s in his documents, *I think standing might be extended*, but I’m going to rule he doesn’t have standing so that if this goes up, that will be addressed by the Court of Appeals.

RP at 17-18 (emphasis added).

IV. STANDARD OF REVIEW

The standard of review for a reviewing court upon a trial court’s order for summary judgment is *de novo*. **See Parmelee v. Clarke**, 148 Wn. App. 748, 753, 201 P.3d 1022 (2008). Generally, agency decisions made under the PRA are also reviewed *de novo*. **See Bellevue John Does 1-11 v. Bellevue School District**, 164 Wn.2d 199, 208-09, 189 P.3d 139

(2008) (citation omitted); see also Lindeman v. Kelso School Dist. No. 458, 162 Wn.2d 196, 200-01, 172 P.3d 329 (2007) (citation omitted).

Issues related to statutory construction are also reviewed *de novo*.

Bellevue John Does, 164 Wn.2d at 209 (citation omitted). Therefore, whether the request for records submitted by Deputy Germeau constituted a valid public records request, whether Deputy Germeau had standing to sue to enforce the PRA, and whether the County violated the PRA are issues to be reviewed *de novo*. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005).

V. LEGAL AUTHORITY AND ARGUMENT

For reasons analyzed below, the trial court erred by ruling that the request was not a public records request because the standard for a valid request is whether it requests “identifiable public record” and the request for “any notes, interoffice memo’s [sic] or emails that may be related [.]” to “any investigation involving [Det. Sgt. Borcharding]” was a request for “identifiable public records.” The trial court also erred by ruling that Deputy Germeau, the person making the request, lacked standing because RCW 42.56.550(1) of the PRA allows “any person” denied records to file suit to obtain them and the PRA is statutorily mandated to be liberally construed in favor of disclosure. Finally, the trial court erred when it stated that the County, which did not respond to the

request or provide an explanation of the responsive documents it was withholding, did not violate the PRA.

Deputy Germeau asks this Court to find the request was a public records request, hold that he had standing, and hold that the County violated the PRA through its failure to provide responsive documents. Deputy Germeau further requests that this Court remand the case to the trial court for proceedings consistent with this Court's ruling to determine if any other requested records have been withheld, whether any of them are exempt from disclosure, and to assess attorney fees, costs, and penalties for the violations of the PRA.

A. The Request at Issue Was a Public Records Request Pursuant to the Public Records Act

1. Deputy Germeau Made a Request for "Identifiable Public Records"

A valid public records request need only ask for "identifiable public records." **Beal v. City of Seattle**, 150 Wn. App. 865, 872, 209 P.3d 872 (2009); **see also Wood v. Lowe**, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) ("**Lowe**") ("the [PRA] requires the requestor to ask for 'identifiable public records.'") (citing **Bonamy v. City of Seattle**, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), **review denied**, 137 Wn.2d 1012,

978 P.2d 1099 (1999)).⁴ The “identifiable public record” standard for a valid request comes from RCW 42.56.080, which provides: “Public records shall be available for inspection and copying, and agencies shall, upon request for *identifiable public records*, make them promptly available to any person” (Emphasis added).

Beal defined an “identifiable public record” as a record “for which the requestor has given a reasonable description enabling the government employee to locate the requested record.” **Beal**, 150 Wn. App. at 872 (footnote omitted). A request for an identifiable public record creates a legal requirement for the agency to respond within five business days. **Id.**; **see also Lowe**, 102 Wn. App. at 878.

In the present case, Deputy Germeau requested, among other things, “any notes, interoffice memo’s [sic] or emails that may be related []” to the Borcharding investigation. CP at 35. This is clearly a “reasonable description enabling the government employee to locate” the records. Notes, memos, and emails about a very specific event are certainly “identifiable public records.” Many valid public records requests are far more vague, or fail to name the record sought at all. **See, e.g., Violante v. King County Fire District No. 20**, 114 Wn. App. 565, 571 n.14, 59 P.3d 109 (2002), (holding that when an agency had a 2000-2002

⁴ There are two PRA cases with Wood as the plaintiff; therefore **Wood v. Lowe** is often referred to as “**Lowe**.” For example, the **Beal** court uses “**Lowe**.”

budget covering two years, the agency should have produced the latest budget (for 2000-2002) in response to request for the agency's "2001 budget" despite the fact that it did not have a record titled "2001 budget").

In **Beal**, the court held that an oral request for "information"—as opposed to an identifiable public record—was not a valid public records request. Instead of a request for an "identifiable public record," the request in **Beal** was for the agency to "compile the information" supporting the agency's position in a land use matter or "create a document explaining why [requestor's] suggestions were not feasible." **Id.** at 875. Further, because the agency "could have responded to [the requestors'] demand during the January 24 meeting without producing any public records" the agency "did not receive fair notice that the request was for specific documents under the PRA," and the agency was not required to respond pursuant to the requirements of the PRA. **Id.**

In contrast to the request in **Beal**, Deputy Germeau did not request mere information—he requested "any notes, interoffice memo's [sic] or emails" related to a Borcharding investigation. CP at 35. This request addresses specific types of documents that are generated during the course of an investigation and contains language typical of public records requests. The records could easily be located by County staff—as they eventually were. **See** CP at 33, ¶27; CP at 150 (County provided, but

not under the PRA, records to Deputy Germeau post-lawsuit that had been provided to Det. Sgt. Borcharding in response to a public records request made by Borcharding).⁵ Unlike the request in Beal, Deputy Germeau’s request does not ask the County to create a record or synthesize records to explain a result—it simply requests easily locatable public records. Therefore, Deputy Germeau’s request was a request for “identifiable public records.”

2. The County Received “Fair Notice” of a Request for Public Records

To be a valid PRA request, a request for identifiable public records must be made “with sufficient clarity to give the agency fair notice that it has received a request for a public record.” Lowe, 102 Wn. App. at 878; see also Beal, 150 Wn. App. at 873-74 (“Although requestors are not required to cite to the PRA itself, they must state their request with sufficient clarity to give the agency fair notice that it has received a request for a public record.”) (footnote omitted).

When records are not available through another law, an agency has no basis to presume that a request for identifiable public records is anything other than a request made pursuant to the PRA. For example, in Lowe, Division III held that a request did not give fair notice to the

⁵ There are still responsive records that are being withheld from Deputy Germeau. CP at 33.

agency that the request was a public records request because the records at issue were specifically available under a separate non-PRA statute. See Lowe, 102 Wn. App. at 880. Lowe involved a request made by a public employee for her personnel file, and involved the very unusual situation where two separate laws required disclosure of the record: (1) the PRA, and (2) RCW 49.12.250(1). See id. at 875. RCW 49.12.250(1) provides: “Each employer shall make [employee personnel] file(s) available locally within a reasonable period of time after the employee requests the file(s).” Further, RCW 49.12.250 allows an employee access to information in his or her personnel file that may be exempt from disclosure under the PRA. See Lowe, 102 Wn. App. at 880-81. Because the PRA would have actually provided the requester in Lowe with less information than would be provided pursuant to RCW 49.12.250, the agency did not have “fair notice” that the request was made pursuant to the PRA and not RCW 49.12.250. Id.

Unlike in Lowe, here there is no alternate avenue to obtain the records Deputy Germeau requested. The collective bargaining agreement does not contain a provision about the disclosure of documents. CP at 30. There is no other legal requirement or statute that would have required the County to produce the “notes, interoffice memos, or emails” regarding the Borcharding investigation—the PRA is the sole means by which Deputy

Germeau can obtain the records. Deputy Germeau knew this when he requested the records, and it is why he made a public records request to obtain the records in question. CP at 30 ¶¶9, 11.

Further, the requested records are clearly “public records.” Deputy Germeau requested “any notes, interoffice memo’s [sic] or emails that may be related []” to the Borcharding investigation. CP at 35. It cannot reasonably be disputed that notes, interoffice memos, and emails about an investigation of a police officer are “public records.” See RCW 42.56.010(2) (defining “public record”). Because notes, interoffice memos, and emails about an investigation of a police officer are so clearly “public records,” the County had fair notice that Deputy Germeau was making a request for public records. The request might not have been made in a manner that is typical of records requests but this is legally irrelevant. What is relevant is that the request clearly asked for identifiable public records and gave fair notice to the agency that Deputy Germeau was seeking public records. Therefore, the request seeking identifiable public records was a valid public records request and why the trial court erred by concluding otherwise.

3. A Valid Public Record Request Need Not Be on an Agency's Form

The County, which maintains that the request was not a public records request, argues that Deputy Germeau should have used the County's *public records request* form. CP at 155. It is unclear why a person must use a form the agency insists does not apply.

In any event, the PRA does not require a requestor to use an agency's form. The only section of the PRA discussing requests is RCW 42.56.080, which simply provides: "Public records shall be available for inspection and copying, and agencies shall, upon *request* for identifiable public records, make them promptly available to any person"

(Emphasis added.) A "request"—not a written request and certainly not a written request on an agency-approved form—is all that is required.

Similarly, the Attorney General's non-binding Model Rules on Public Records (also cited by the County) do not provide that a request must be made on an agency's form. See WAC 44-14-03006.⁶ To the contrary, the

⁶ This provision of the Model Rules was adopted by the court in Beal. See id., at 875, n.24. See also id. at 876 ("While the model rules are not binding on the [agency] we agree that they contain persuasive reasoning.") Other provisions of the Model Rules have been adopted by the Supreme Court. See O'Neill v. City of Shoreline, ___ Wn.2d ___, 240 P.3d 1149, 1156 (2010); Burt v. Dept. of Corrections, 168 Wn.2d 828, 835, n.4, 231 P.3d 191 (2010); Mechling v. City of Monroe, 152 Wn. App. 830, 849, 222 P.3d 808 (2009); Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 539, 541, 199 P.3d 393 (2009); Soter v. Cowles Pub. Co., 162 Wn.2d 716, 753-4, 174 P.3d 60 (2007). This Court has noted the non-binding nature of the Model Rules. See Building Industry Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 736,

Model Rules allow the use of oral requests. Id.⁷ See also, Beal, 150 Wn. App. at 874 (oral requests, while “problematic,” are allowed). If a request can be made orally, there can be no requirement that a requestor use a written form because an oral request—by its very nature—is not in writing. The County can point to no authority requiring a requestor to fill out an agency form in order to submit a valid request for public records.

4. A Valid Public Records Request Need Not Cite the Act or Use “Magic Words”

The County argued that Deputy Germeau’s request “did not provide ‘fair notice’ to Mason County that he was requesting records under the public records act.” CP at 154 (emphasis omitted). There is no requirement to cite the PRA or use the term “public records request.” See Lowe, 102 Wn. App. at 878 (“Mindful of the [PRA’s] broad mandate favoring disclosure, *we will not require a requester to specifically cite the act.*”) (emphasis added). Further, “There are no ‘magic words’ a records request must contain.” **PUBLIC RECORDS ACT DESKBOOK: WASHINGTON’S PUBLIC DISCLOSURE ACT AND OPEN PUBLIC MEETINGS ACT** (Wash. State Bar Assoc. 2006) (“**DESKBOOK**”) at 4-4.⁸ This is

218 P.3d 196 (2009); Koenig v. Pierce County, 151 Wn. App. 221, 233, 211 P.3d 423 (2009).

⁷“A request can also be made by e-mail, fax, or orally.” WAC 44-14-03006.

⁸ This chapter of the **DESKBOOK** was written by Greg Overstreet, counsel for Deputy Germeau. Overstreet was also the Editor-in-Chief of the **DESKBOOK**. However, the WSBA **DESKBOOK** does not contain the mere personal opinions of the authors: “This Deskbook is balanced and objective by design. Chapter authors include a Court of

because a “magic word” requirement “may raise a hypertechnical barrier behind which agencies can justify denial of otherwise legitimate requests for public records.” Lowe, 102 Wn. App. at 878. Therefore, the fact that Deputy Germeau’s request did not include the words “Public Records Act,” cite to ch. 42.56 RCW, or use the term “public records request” does not negate the fact that he made a request for identifiable public records and gave the County “fair notice” that it was a request for public records. It was, therefore, a valid public records request.

5. The County Did Not Ask for a Clarification of the Request

Pursuant to the PRA, an agency can contact the requestor to “clarify the intent of the request,” and if the requestor fails to clarify the request, the agency need not respond to it. RCW 42.56.520. The County did not avail itself of this option. Instead, Undersheriff Barrett told Deputy Germeau, “I don’t have to give you [expletive] related to a criminal investigation.” CP at 31, ¶15. Contrast this with the way the agency in Beal complied with the PRA.

In Beal, the agency specifically asked the requestor if the request was made under the PRA, stating “[i]f you are seeking records under [ch.

Appeals judge, agency attorneys, and requestor attorneys. . . . Each chapter was edited by a person from the ‘other side.’ For example, a chapter written by a requestor attorney was edited by an agency attorney. Finally, the Washington State Bar Association provided the final edits, applying their neutrality and accuracy standards.” DESKBOOK at 1-3.

RCW 42.56], please provide a specific request so that I can provide a formal response.” **Beal**, 105 Wn. App. at 870-71. The requestor responded by merely restating his request for “information.” **Id.** Thus, the agency in **Beal** tried to clarify if the request was made pursuant to the PRA; the County did not. (If the County would have asked Deputy Germeau if the request was under the PRA he would have said it was because he thought he was making a public records request. **See** CP at 31, ¶13.) Instead, the County simply ignored the request, and in doing so, violated the PRA.

6. The County’s Claim That the Internal Affairs Records Are Exempt from Disclosure Actually Supports Deputy Germeau’s Case

The County claimed that some of the records at issue, the Internal Affairs reports, are exempt from disclosure under the PRA. **See** CP at 155 at 8 (County’s Motion for Summary Judgment discussing nature of investigative records). The County cannot claim the request is not under the PRA but then allude to exemptions to the PRA as a justification to withhold the records. In its attempts to justify the withholding of records, the County would only be invoking a PRA exemption in response to something it thought was a public records request.

7. The County Received the Request

A request must be received by the agency to be a valid public records request. See Bonamy v. City of Seattle, 92 Wn. App. 403, 408, 960 P.2d 447 (1998) (“public disclosure is not necessary until and unless there has been a specific request for records”). Here, there is no question the County received the request. Deputy Germeau submitted the request to Chief Deputy Osterhout and placed a second copy of it on the desk of Chief Deputy Byrd. CP at 31. A third official of the Sheriff’s Office, Undersheriff Barrett, also had a copy of the request and even chided Deputy Germeau for using the word “arterial” instead of “ulterior.” Id. There is no question the County received the request. The County’s own evidence describes how Undersheriff Barrett reacted to the request. CP at 204-205.

Oddly, the County argued below that Deputy Germeau should have delivered the request to the County’s *public records officer*. CP at 155. Arguing that a request—that is supposedly not under the Public Records Act—must be submitted to the public records officer indicates that even the County viewed this as being a public records request.

B. Deputy Germeau, By Making the Request at Issue, Has Standing to Enforce the Public Records Act

The request at issue here begins “To: Chief Byrd ... From: Rich Germeau”, and concluded “Regards Rich Germeau”, along with Deputy

Germeau's signature. See CP at 35. Deputy Germeau's name was on the request, he submitted the request, and—after filing the lawsuit—*he* (not the Guild) began to receive records in response to his request. See CP at 33. Further, the trial court seemed troubled by its reluctant ruling that Deputy Germeau lacked standing, calling its own conclusion a “weak reed” to rely upon. RP at 17.

1. The PRA Provides that “Any Person” Denied Public Records May Bring an Action to Obtain Them

The statute authorizing the PRA enforcement action at issue provides in pertinent part: “Upon the motion of *any person* having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may” order its disclosure. RCW 42.56.550(1) (emphasis added).

Standing is afforded to “any person” who has been denied public records. That includes Deputy Germeau. He has definitely been denied public records by the County.⁹ Deputy Germeau was not a stranger to the request: he made it, signed it, and was given some records responsive to it.

⁹ The post-lawsuit production of records to Deputy Germeau is incomplete. See CP at 33. Even if the County eventually provided all the requested records, which it did not, it violated the PRA when it withheld the records before the suit. See Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-104, 117 P.3d 1117 (2005). Therefore, the County's post-lawsuit production of some records does not absolve it of liability.

The “any person” provision of RCW 42.56.550(1) is all this Court needs to find Deputy Germeau has standing to bring this case.

The PRA’s standing statute does not limit standing, as the County urges, to the entity recited as the one upon whose behalf was requesting the records because RCW 42.56.550(1) does *not* provide anything akin to: “Upon the motion of any person *upon whose behalf* a request for public records has been made” Interpreting RCW 42.56.550(1) as including an “upon whose behalf” clause would be adding requirements to the PRA’s standing statute, which is exactly what the court in **Kleven v. City of Des Moines**, 111 Wn. App. 284, 291, 44 P.3d 887 (2002) warned against.

2. PRA Standing Is Liberally Applied to Enable the Enforcement of the PRA

The **Kleven** case made it clear that artificial standing requirements will not impede the enforcement of the PRA. In **Kleven v. City of Des Moines**, 111 Wn. App. 284, 44 P.3d 887 (2002), the court ruled that a client, Kleven, had standing to sue for a public records request submitted by his attorney on the client’s behalf. In its analysis of whether Kleven had standing to sue, the court began by reiterating the central focus of the PRA:

The purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative

government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. The act is a strongly worded mandate for broad disclosure of public records. We are to construe its provisions liberally to promote complete disclosure of public records. Thus, we must view with caution any interpretation of the statute that would frustrate its purpose.

Kleven, 111 Wn. App. at 289-90 (internal quotations omitted). **See also** RCW 42.56.030 (requiring liberal construction of PRA).

The **Kleven** court went on to state:

We will not read into a statute language that is not there. Accordingly, we will not read into the act a requirement that precludes a client from obtaining public records through counsel. Likewise, we will not read into the act a requirement that counsel must identify the fact of representation or the name of the client when making a request for public records on behalf of a client.

Kleven, 111 Wn. App. at 291 (emphasis added).

Avoiding the creation of artificial standing barriers is particularly important under the PRA because individuals working with organizations often make public records request for their organizations. For example, in **Moser v. Kanekoa**, 49 Wn. App. 529, 530, 744 P.2d 364 (1987), a newspaper reporter made a public records request presumably on behalf of his employer. The reporter then sued. There was no claim that the reporter lacked standing to file the suit—he had been denied access to public records. Specifically, he was “any person having been denied an opportunity to inspect or copy a public record by an agency” as described

in RCW 42.56.550(1). See id., at 530, n.1 (quoting RCW 42.56.550(1)).

His standing was not questioned by the court.

Additionally, it is important to note that Kleven did *not* hold that a requestor who submitted and signed a request lacks standing simply because the request recites that it was made on behalf of another. There is absolutely no authority supporting the notion that an individual who signs a public records request lacks standing to bring a PRA suit. Courts “will not read into a statute language that is not there.” Kleven 111 Wn. App. at 291 (citing Hartson Partnership v. Goodwin, 99 Wn. App. 227, 236, 991 P.2d 1211 (2000)). The County urges the Court to read an “upon whose behalf” clause into RCW 42.56.550(1).

The federal Freedom of Information Act (“FOIA”) also has an “any person” standing provision. See Taylor v. Sturgell, 553 U.S. 880, 903, 128 S. Ct. 2161, 171 L.Ed.2d 155 (2008) (“FOIA does allow ‘any person’ whose request is denied to resort to federal court for review of the agency's determination.”). When the PRA and FOIA have a similar provision, the state Supreme Court has indicated that looking to interpretations of FOIA can be “particularly helpful.” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

An example of just how broad “any person” standing is under FOIA is Doherty v. U.S. Dept. of Justice, 596 F.Supp. 423 (D.C.N.Y.

1984). In that case, an undocumented alien, who was also an alleged terrorist, sought records from FBI. The court, looking to FOIA's "any person" standing statute, held that the alleged terrorist had standing to bring suit to obtain the records.

The court in Doherty addressed the question of whether someone else could file the request on the undocumented alien's behalf and then sue in the requestor's name (instead of the undocumented alien filing suit).

[T]here is absolutely no bar to a friend or a journalist filing the FOIA request on plaintiff's behalf and then filing a complaint once the request has been denied. If "any member of the public" can request information and sue to enforce the federal government's disclosure obligations, there is no reason why plaintiff cannot enjoy access to the courts in the country where he currently—albeit perhaps unlawfully—resides.

596 F.Supp at 428 (citation omitted). That is, the friend or journalist—the representative of another person—can file the request on another's behalf and then sue to enforce it. If a friend can request records from the FBI on behalf of an alleged terrorist and have standing, then one hopes Deputy Germeau can request records on behalf of the Guild and have standing to obtain records relating to the possible unlawful investigation of an injured police officer.

"Any person" standing could lead to multiple plaintiffs who have been denied records having standing, but this is not grounds to deprive

parties of standing. The U.S. Supreme Court has held that this is simply the natural result of an “any person” standing statute such as FOIA. In **Taylor**, the Court recognized that “FOIA does allow ‘any person’ whose request is denied to resort to federal court for review of the agency's determination. Thus it is theoretically possible that several persons could coordinate to mount a series of repetitive lawsuits.” **Taylor**, 553 U.S. at 903. If not even the possibility of multiple plaintiffs filing a coordinated series of repetitive lawsuits limits standing under an “any person” statute, then this possibility should not limit standing under the similar provision of the PRA. Accepting the possibility of multiple-plaintiff standing and even repetitive suits shows that when a statute provides that any person having been denied access to a public record can file suit, that any such person can file suit. It is what the Legislature provided in RCW 42.56.550(1). Deputy Germeau was, indeed, denied access to public records and therefore has standing.

3. Deputy Germeau Is the Real Party in Interest

The County also argued that Deputy Germeau is not the “real party in interest.” CP at 151-52. The real party in interest is “the person who, if successful, will be entitled to the fruits of the action.” **Northwest Independent Forest Mfrs. v. Dep’t of Labor and Industries**, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). Here, the “fruits of the action” are

access to the requested records, in addition to fees, costs and penalties for improper denial of access.

The County has provided Deputy Germeau with some of the “fruits of the action” (some of the requested records) thereby demonstrating his interest in the outcome of this action. CP at 33, ¶27. By providing records to Deputy Germeau—by giving him part of the relief he is seeking as a plaintiff—the County cannot now claim that Deputy Germeau has no interest in the outcome of this case. Again, Deputy Germeau is not a stranger picked from random with no interest in this case—he made the request, signed it, and has been receiving some of the requested records. Because the County has already been giving Deputy Germeau some of the “fruits of the action” it cannot now claim Deputy Germeau is a stranger to this case and not a real party in interest.

4. Deputy Germeau Meets the “Zone of Interest” and “Injury in Fact” Test for Standing

If RCW 42.56.550(1) did not confer standing to “any person” having been denied access to public records, then the general standing principles of “zone of interests” and “injury in fact” would apply. The trial court acknowledged Deputy Germeau “could have standing based on the zone of interest argument[.]” RP at 17. An analysis of zone of interest

and injury in fact test shows that Deputy Germeau has standing under this standard too.

The general standing requirement is that the party bringing an action “must (1) be within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise.” **Nelson v. Appleway Chevrolet, Inc.**, 160 Wn.2d 173, 186, 157 P.3d 847 (2007) (citing **Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake**, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)); **see also Branson v. Port of Seattle**, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004).

a) Deputy Germeau is Within the “Zone of Interests” Protected by the PRA

A litigant is in the “zone of interests” of the statute he or she is enforcing when “the interest sought to be protected ... is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” **To-Ro Trade Shows v. Collins**, 144 Wn.2d 403, 414, 27 P.3d 1149 (2001) (internal quotations and citations omitted).

The fundamental purpose of the PRA is to allow the public to obtain nonexempt public records. **See Livingston v. Cedeno**, 164 Wn.2d 46, 52, 186 P.3d 1055 (2008) (“The primary purpose of the Public Records Act is to provide broad access to public records to ensure

government accountability.”); **Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503**, 86 Wn. App. 688, 696, 937 P.2d 1176 (1997) (“Access [to public records] is the underlying theme of the act.”); **see also** RCW 42.56.070(1) (“Each agency ... shall make available for public inspection and copying all public records” unless exempt from disclosure).

Deputy Germeau is within the “zone of interests” of the Public Records Act because he is trying to obtain public records—the fundamental purpose of the PRA itself. There is no limit to who is within the “zone of interests” protected by the PRA because “any person” may request public records. **See** RCW 42.56.080 (“Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to *any person...*”) (emphasis added).

Furthermore, a requestor can ask for public records for any purpose. **See** RCW 42.56.080 (agency cannot require requestors to “provide information as to the purpose of the request”); **Livingston**, 164 Wn.2d at 53 (agency “must respond to all public disclosure requests without regard to the status or motivation of the requester.”)¹⁰ Therefore, *any person* making a request for *any purpose* is within the zone of interests protected by the PRA. That is, the Legislature made nonexempt

¹⁰ One exception to the “any purpose” provision is the commercial use of public records in some instances. **See** RCW 42.56.080. That is not at issue in this case.

public records available to “any person” for any purpose and granted standing to “any person” denied their right to inspect or copy them. RCW 42.56.080 & .550(1). The Legislature could not have made the zone of interests protected by the PRA any broader.

Deputy Germeau, who is attempting to determine if a fellow police officer is being unlawfully investigated, is certainly within the zone of interests of the PRA. If any person can make a public records request for any purpose, it would be inconsistent with the PRA—and logic—to assert, as the County does, that the person signing the request cannot enforce the PRA to obtain the records. Nor is there any basis in law, PRA or otherwise, that prohibits a party who made a records request reciting that it was on behalf of another from bringing an action against the agency that has failed to provide the record.

b) Deputy Germeau Suffered “Injury in Fact”

The second half of the general standing test is “injury in fact.” Nelson, 160 Wn.2d at 186. A litigant suffers “injury in fact” when he or she can show the injury will be “immediate, concrete, and specific” Leavitt v. Jefferson County, 74 Wn. App. 668, 679, 875 P.2d 681 (1994) (citation omitted); see also Kucera v. State Dept. of Transp., 140 Wn.2d 200, 213, 995 P.2d 63 (2000) (citing Leavitt). Here Deputy Germeau has been denied records to which he is entitled pursuant to the PRA. This

injury is immediate, concrete and specific. Obtaining the records would remedy the injury.

5. The Records Relate to a Matter of Serious Public Importance

Further, standing is relaxed when the matter is important to the public as a whole. “Where a controversy is of serious public importance the requirements for standing are applied more liberally.” City of Seattle v. State, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (citation omitted).

Whether a police officer is being unlawfully investigated is certainly a matter of serious public importance, reinforcing the fact that Deputy Germeau must be found to have standing the enforce PRA violations here. And, while the PRA forbids an agency from requiring requestors to “provide information as to the purpose of the request”, weighing the purpose of the request when addressing whether a plaintiff has standing to sue is not similarly barred. RCW 42.56.080

C. The County Violated the PRA by Not Responding to the Request

If Deputy Germeau made a valid public records request and has standing to bring this case, the next issue is whether the County violated the PRA. Because the trial court made no findings of fact, this Court reviews the record *de novo*. Zink v. City of Mesa, 140 Wn. App. 328,

337, 166 P.3d 738 (2007). Therefore this Court can determine whether the County violated the PRA.

1. The County Violated the PRA by Not Providing a Five-Day Response

The County did not respond to the request. CP at 32. The County did not send a five-day acknowledgement pursuant to RCW 42.56.520.

Id.

The PRA requires an agency to provide a response within five business days that (1) provides the records; (2) provides the internet address on the agency's web site where the records are located; (3) acknowledges the request and provides a reasonable estimate of time the agency will require to respond to the request; or (4) denies the request. RCW 42.56.520. An agency must strictly and actually comply with the PRA; "substantial compliance" is not enough. See Zink, 140 Wn. App. at 340. Failure to provide a valid response is a *per se* violation of the PRA. See Smith v. Okanogan County, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in [RCW 42.56.520], it violates the act[.]"). The County's failure to provide a five-day response violated the PRA.

a) The County's Claim That No Responsive Records Exist Is Incorrect

The County contends that its failure to provide records did not violate the PRA because “it is undisputed that no responsive records existed at the time of the request” CP at 156; 149-50. The trial court agreed with the County. RP 18 (request for “things that don’t even exist yet”). With all due respect to the trial court, the claim that no responsive records existed at the time of the request is incorrect. At least six responsive records are known to exist.

Deputy Germeau’s request sought “any notes, interoffice memo’s [sic] or emails that may be related” to “any investigation involving [Det. Sgt. Borcharding].” CP at 35. Therefore, any records dated before August 13, 2009, regarding any investigation involving Det. Sgt. Borcharding are unquestionably responsive to the request.

Six such records exist. See CP at 66-90. Therefore, the County is incorrect when it claims that it did not violate the PRA because it in fact violated the PRA by failing to provide responsive records that existed at the time of the request.

b) The County's Claim That It “Orally” Responded to the Request is Factually Inaccurate and Legally Insufficient

The County claimed that it orally responded to the request by telling Deputy Germeau that no responsive records exist. Specifically, the

County claimed the “fact” that there were no responsive records “was communicated verbally to Deputy Germeau by Undersheriff Barrett” and that this shows an adequate response under the PRA. CP at 156. First of all, the “fact” that there were no responsive records is simply untrue; there were at least six responsive records. CP at 66-90. A response from Undersherriff Barrett that was completely false is not a “response” as required by the PRA. Falsely claiming that no responsive records exist is not the kind of valid “response” envisioned by the PRA.

Moreover, an oral response is legally inadequate under the PRA. When the County told Deputy Germeau that no responsive records existed, this was a denial of the request. However, pursuant to RCW 42.56.520, “Denials of requests must be accompanied by a *written* statement of the specific reasons therefor.” (Emphasis added.)

Undersheriff Barrett’s oral “response” was not a valid PRA response.

Undersheriff Barrett’s “response” does not help the County for two additional reasons. First, arguing that it made a proper PRA response to a “non-PRA” request strengthens the conclusion that the request was made under the PRA. The County would not invoke a PRA defense if the request had nothing to do with the PRA. Second, Undersheriff Barrett’s oral statement shows a separate violation of the PRA. Telling a requestor in effect “nothing to see here” when, instead, there were numerous

responsive records being withheld is not what the PRA allows—it precisely what the PRA *prohibits*. RCW 42.56.070(1) (every agency “shall make available for public inspection and copying all public records” unless exempt from disclosure). **See also Rental Housing Ass'n of Puget Sound v. City of Des Moines**, 165 Wn.2d 525, 537, 199 P.3d 393 (2009) (describing how “silent withholding” of records violates the PRA). Undersherrif Barrett’s “response” was not a valid PRA response but instead proves a PRA violation for a silent withholding of responsive records.

c) The County Failed to Provide a Withholding Index

The County also failed to provide a withholding index indicating, at a minimum, the six responsive records that were being withheld. CP at 33. This failure to provide a withholding index is a second PRA violation.¹¹

In addition to the six records Deputy Germeau eventually recieved, the County is withholding other responsive records, most notably the Internal Affairs report or reports of the Borcharding investigation. CP at 33. The County has not provided a withholding index describing any documents being withheld. CP at 33.

¹¹ The first PRA violation is the County’s failure to provide a five-day response, discussed **supra**.

RCW 42.56.210(3) provides:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

See also Sanders v. State, ___ Wn.2d ___, 240 P.3d 120, 130 (September 16, 2010) (failure to provide a brief explanation describing how a claimed exemption applies to “each” record withheld constitutes a violation of the PRA because “[c]laimed exemptions cannot be vetted for validity if they are unexplained”); **Rental Housing Ass'n of Puget Sound v. City of Des Moines**, 165 Wn.2d 525, 538, 199 P.3d 393 (2009) (“[A] valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides. Indeed, RCW 42.56.210(3) requires identification of a specific exemption and an explanation of how it applies to the individual agency record.”) (Internal citation omitted). If an agency is withholding records responsive to a request, but does not account for those withheld records in its response, the agency’s failure to provide a withholding index constitutes a violation of the PRA. **Citizens For Fair Share v. State Dept. of Corrections**, 117 Wn. App. 411, 431, 72 P.3d 206 (2003).

Here, there are, and were at the time Deputy Germeau made his request, records responsive to Deputy Germeau’s request—at least six of

them. See CP at 66-90. The County did not provide a withholding index for them.¹² Because of this failure, the County violated the PRA.

Citizens for Fair Share, 117 Wn. App. at 431.

D. Fees and Costs on Appeal

If this court finds that the County violated the PRA, Deputy Germeau requests attorney's fees and costs incurred in bringing this appeal pursuant to RAP 18.1 and RCW 42.56.550(4) (mandating the award of all costs including reasonable attorney fees to a party who prevails against in agency under the PRA). Further, if this court finds for Deputy Germeau on any grounds, Deputy Germeau requests reasonable expenses incurred in bringing this appeal pursuant to RAP 14.3.

VI. CONCLUSION

Deputy Germeau made a valid public records request because he requested "identifiable public records" and his request gave the County "fair notice" that it was a request for public records. The request was not on the County's public records form but it did not need to be. The County treated the request like a public records request by alluding to PRA exemptions from disclosure, and insisting that Deputy Germeau give it to

¹² If the case is remanded, further proceedings should reveal other responsive records that have been withheld. See CP at 33 ("I know that Defendants are not releasing all the responsive records. For example, the Internal Affairs report or reports on the incident have not been released to me. I have verified with the Sheriff's Office that they exist. They have been withheld from me.") If they exist, as Deputy Germeau believes they do, they were withheld without a withholding index, which would be separate violations.

the public records officer and fill out the public records request form. The County gave some of the responsive records to Deputy Germeau (under a claim that it was not doing so under the PRA).

The standard for a valid public records request is whether it asks for “identifiable public records” and Deputy Germeau’s request for “any notes, interoffice memo’s [sic] or emails that may be related []” to “any investigation involving” Det. Sgt. Borcharding was a request for “identifiable public records.” CP at 35.

Deputy Germeau has standing to bring a PRA enforcement suit because he was denied access to public records. He signed and submitted the request. RCW 42.56.550(1) grants standing to “any person having been denied an opportunity to inspect or copy a public record by an agency.” Deputy Germeau also has general standing because he is within the “zone of interests” of the PRA because he requested public records, the very purpose of the PRA. He has suffered “injury in fact” because he has been denied access to public records.

Finally, the County violated the PRA by not providing a five-day response or a withholding index documenting responsive documents that were being withheld.

Deputy Germeau asks this Court to find that the trial court erred in granting the County’s Motion for Summary Judgment because Deputy

Germeau made a valid public records request and had standing. He asks this Court to find the County violated the PRA by not properly responding. Finally, Deputy Germeau asks this Court to remand the case to the trial court for further proceedings to determine if any additional responsive records have been withheld and, if so, if any of them are exempt from disclosure, and for an award of attorney fees, costs, and penalties pursuant to RCW 42.56.550.

Respectfully submitted this 27th day of December, 2010

By: 
Greg Overstreet, WSBA #26642
Chris Roslaniec, WSBA #40568

ALLIED
LAW GROUP

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 27, 2010, I caused the delivery by email pursuant to agreement of a copy of the foregoing Brief of Appellant to:

John E. Justice at jjjustice@lldkb.com

Dated this 27th day of December, 2010 at Seattle, Washington.



Chris Roslaniec

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