

NO. 41897-5-II

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

DERICK E. GRONQUIST,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

 A. Did the Department of Licensing appropriately redact Maureen’s Housecleaning Master Business Application when each redaction was properly made pursuant to specific statutory exemptions under the Public Records Act?2

 B. Did the trial court act within its discretion in determining that Department of Licensing’s inadvertent failure to provide Gronquist with an exemption citation did not warrant penalties under the PRA when it sent the reasons and statutory exemptions to Gronquist immediately upon learning that it had not previously done so?2

 C. Is it improper for Gronquist to raise the timeliness of the response for the first time on appeal when he did not contest the issue below, he has not raised any exception to the rule and the evidence shows that the Department did respond to the public record request in a timely manner?2

 D. Did the court clerk and trial court rule appropriately in denying Gronquist’s motion to file complete transcripts of depositions after the record had closed, Gronquist placed pertinent portions of the depositions in evidence and the court specifically found the depositions were not relevant to the final decision?2

III. COUNTERSTATEMENT OF THE CASE2

 A. Gronquist’s Public Records Request2

 B. Gronquist’s Lawsuit.....5

IV. STANDARD OF REVIEW.....7

V.	ARGUMENT	8
	A. The Department properly redacted the document according to mandatory confidentiality statutes.	9
	1. The Relevant Confidentiality Statutes and Exemptions	10
	a. Employment Security Department.....	11
	b. Department of Labor and Industries	11
	c. Department of Revenue	12
	d. The Public Records Act	14
	B. The court properly declined to assess penalties against the Department where no information was improperly withheld.....	14
	C. Gronquist may not challenge for the first time on appeal that the Department's initial response was untimely.	16
	D. The county court clerk properly did not file deposition transcripts after the record was closed; and the trial court properly denied the motion to include them in the record.	17
VI.	CONCLUSION	18

I. INTRODUCTION

The Master License Service (MLS) of the Department of Licensing (Department) is a program that provides a single place for businesses to obtain all necessary licenses. This process necessarily gathers confidential personal and financial information from new and renewing businesses. Much of the information is exempt from disclosure under the Public Records Act, Chapter 42.56 RCW (PRA or Act).

Appellant Derek E. Gronquist, pursuant to the PRA, requested a MLS record, the Master Business Application (Application) of a sole proprietorship, "Maureen's Housekeeping". The Department timely complied with the request and provided a copy of the Application with appropriate redactions of financial and personal information.

Gronquist subsequently filed a lawsuit challenging the Department's redactions and arguing that he had not received the explanations for the redactions. Discovering that it had not provided the required exemptions, the Department immediately provided the statutory exemptions to Gronquist. The trial court properly found that the Department's claims of exemption were appropriate and the lack of providing an immediate explanation did not warrant the issuance of penalties. The Department requests this Court to affirm the superior

court's order. In addition, this Court should not address new issues raised on appeal by Gronquist.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Did the Department of Licensing appropriately redact Maureen's Housecleaning Master Business Application when each redaction was properly made pursuant to specific statutory exemptions under the Public Records Act?
- B. Did the trial court act within its discretion in determining that Department of Licensing's inadvertent failure to provide Gronquist with an exemption citation did not warrant penalties under the PRA when it sent the reasons and statutory exemptions to Gronquist immediately upon learning that it had not previously done so?
- C. Is it improper for Gronquist to raise the timeliness of the response for the first time on appeal when he did not contest the issue below, he has not raised any exception to the rule and the evidence shows that the Department did respond to the public record request in a timely manner?
- D. Did the court clerk and trial court rule appropriately in denying Gronquist's motion to file complete transcripts of depositions after the record had closed, Gronquist placed pertinent portions of the depositions in evidence and the court specifically found the depositions were not relevant to the final decision?

III. COUNTERSTATEMENT OF THE CASE

A. Gronquist's Public Records Request

On July 31, 2009, the Department received a public records request dated July 20, 2009, from Gronquist. CP 186. He is an inmate at the Washington State Penitentiary in Walla Walla. CP 5. The request was for

the Master Business Application (Application) for a sole proprietorship, Maureen's Housecleaning. CP 116. The Department responded on July 31, 2009. CP 186. The letter stated: "this letter is in response to your public records request dated July 20, 2009, which was received today." CP 116, 186. The Department provided the document with some of the information redacted. CP 118-21.

The Application collects information on behalf of various state and local agencies as part of the MLS. At the time this lawsuit was filed, the Department administered the MLS.¹ *Id.* This program was created in 1977 to streamline the business license process and eliminate duplicative paperwork and payment requirements for new and renewing businesses. *Id.* The program's services are purely administrative. *Id.* The MLS does not approve specific licenses or manage the regulatory process. *Id.* MLS collects business information and payments on behalf of its partners (state agencies and local governments) and produces a document that shows all the businesses' approved license endorsements. *Id.* MLS does this on behalf of the partner agencies who maintain regulatory authority over the license endorsement. *Id.*

Thus, the MLS acts as a clearinghouse for information about the business licensing requirements for all MLS partner agencies. CP 131-32.

¹ In 2011, the MLS program moved from the Department to the Department of Revenue. RCW 19.02.030.

The Department has Memorandums of Understanding (MOUs) in place with the Employment Security Department, the Department of Labor and Industries, and the Department of Revenue to protect confidential information. *Id.*

Consistent with the MOUs and pursuant to the statutes governing the agencies on whose behalf the information is collected, the Application contains information exempt from disclosure under the PRA. For example, RCW 50.13.020 Employment Security Department (ESD) exempts "any information or records concerning an individual or employing unit obtained by the department of employment security pursuant to the administration of this title"; RCW 51.60.070(2) Department of Labor and Industries (LNI) exempts: "Information obtained from employing unit records . . . and shall not be open to public inspection"; RCW 82.32.330(c), (e) Department of Revenue (DOR) exempts: (c)"Tax information" . . . (i) a taxpayer's identity, (ii) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability deficiencies, overassessments, or tax payments, whether taken from the taxpayer's books and records or any other source, (iii) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, (e) "Taxpayer identity" means the taxpayer's

name, address, telephone number, registration number, or any combination thereof, or any other information disclosing the identity of the taxpayer.

In responding to Gronquist's PRA request, pursuant to these statutes and the PRA, the Department redacted from the Application information exempt from disclosure: home address, home phone number, marital status, business phone, income information, and banking information. CP 118-21.

The Department inadvertently failed to include the statutes authorizing redaction of the information in question in its July 31, 2009 correspondence. CP 117. The Department did not learn of the omission until after Gronquist filed his lawsuit, but immediately supplied the information in a letter dated March 1, 2010. *Id.*

B. Gronquist's Lawsuit

Gronquist filed a lawsuit in Thurston County on February 19, 2010. Gronquist alleged that he had not received an explanation for the redactions in the document he received, in violation of the Public Record Act (Act). CP 5. The Department provided the authority for the redactions as soon as it realized they had not been provided. CP 131-32.

Gronquist then engaged in discovery. Gronquist served Interrogatories and Requests for Production. These were responded to in full. CP 195-203.

Gronquist took the depositions of Maria Moore, Hannah Fultz, and Nancy Skewis, three Department employees with the MLS section.

Upon cross motions for summary judgment/show cause, Judge Paula Casey ordered an in-camera inspection of the redacted and unredacted Master License Application for Maureen's Housecleaning. In a letter ruling, the judge found for the Department:

I have reviewed in camera the unredacted copies of documents that were provided to Mr. Gronquist with redactions. I am satisfied that the redacted material is not subject to disclosure, but is protected as confidential by RCW 50.13.020, RCW 51.16.070, RCW 82.32.330, and the Public Records Act.

In this case, the Department produced materials for the requestor with redactions. At the time of production, there was no accompanying brief explanation of the reason for the redactions. No request for an explanation was made. When this lawsuit was filed identifying the requestor's issue, the Department provided an explanation for the redactions.

I am aware of the recent decision in *Sanders v. State*, ___ Wn.2d ___, 240 P.3d 120 (2010). However, because no information was wrongfully withheld in this case, I find that the initial failure of the Department to provide the explanation for the redactions was not a violation of the Public records Act giving rise to penalties. CP 160-61.

A Supplemental Order incorporating the above and granting judgment for the Department was entered May 6, 2011. CP 167-8. Gronquist's timely appeal followed. CP 162. Appellant then wished to

include the full transcripts of the depositions of Moore, Skewis and Fultz, and made a motion to settle the record. CP 120. The court denied Gronquist's motion: "the plaintiff did not make deposition transcripts part of the record, so the depositions were not considered by the court." CP 221. Gronquist's timely supplemental notice of appeal followed. CP 223.

IV. STANDARD OF REVIEW

The Public Records Act, chapter 42.56 RCW, is "a strongly worded mandate for broad disclosure of public records." *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). To affect this purpose, the Act is liberally construed in favor of disclosure and its exemptions are narrowly construed. *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 745-46, 958 P.2d 260 (1998); RCW 42.56.030. While the Act requires disclosure of public records upon request, there are specific statutory exemptions from disclosure that allow agencies to withhold records or to redact portions of them. *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 258, 884 P.2d 592 (1994) (*PAWS*); see RCW 42.56.070(1).

It is the agency's burden "to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records."

RCW 42.56.550(1). The PRA also requires an agency to cite a specific statute and provide a “brief explanation” to the requestor of the basis for the withholding. RCW 42.56.210(3).

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. . . . Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.” RCW 42.56.550(3). A summary judgment procedure may be used to resolve legal issues related to the PRA. *Guillen v. Pierce Cnty.*, 96 Wn. App. 862, 866 n.6, 982 P.2d 123 (1999), *rev'd in part*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

When a case, such as this one, is decided solely upon submission of documentary evidence and legal argument, appellate review is de novo. *Confederated Tribes*, 135 Wn.2d at 744. However, the issue of whether penalties are assessed is reviewed for abuse of discretion. *Yousoufian v. Sims*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004)

V. ARGUMENT

The Department properly redacted the Master Licensing Application for Maureen’s Housecleaning pursuant to statutes that required information to be withheld. While the Department inadvertently failed to provide the authority for exemptions until after the lawsuit was

filed, it promptly supplied the information to Gronquist. Given that no information was wrongfully withheld in this case, the superior court properly held that no penalties should be assessed.

For the first time on appeal, Gronquist complains that the Department did not respond to his public records request in a timely fashion. This court should not address this newly raised issue. Moreover, the evidence demonstrates that Gronquist's request was timely responded to on July 31, 2009.

Finally, the trial court properly denied Gronquist's request to include the full deposition transcripts. Gronquist used portions of the transcripts in his lower court argument and the full deposition transcripts were not germane in any way to the court's final order. Thus, this Court should affirm the trial court's order.

A. The Department properly redacted the document according to mandatory confidentiality statutes.

The Act exempts certain types of information from disclosure. RCW 42.56.210–480. The Act's disclosure requirements promote a policy of public access. See *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 269-71, 884 P.2d 592 (1994) hereinafter (PAWS II) (declaring "silent withholding" illegal; noting an "agency compliance with the Public Record Act is only as reliable as the weakest

link in the chain.” *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn 2d. 525, 540, 199 P.3d 393 (2009) (relying on PAWS II to conclude that failure to require an indication of whether there is a valid basis for a claimed exemption for an individual record would “defeat the very purpose of the PRA.”) In this case the Department properly withheld information pursuant to the mandatory confidentiality statutes of the various state agencies on whose behalf the information on the Application is requested.

1. The Relevant Confidentiality Statutes and Exemptions

As discussed on page 4 of this brief, the Application requests personal information from the applicant on behalf of various state and local agencies. The agencies collect the information for multiple purposes. Each of the state agencies relevant to this case has its own confidentiality statutes that prohibit disclosure of certain personal information. It was pursuant to these statutes that the Department redacted the information from Maureen’s Housecleaning’s Master Business Application. The agencies exemption statutes overlap to a certain degree. In many instances the Department withheld a given piece of information based on more than one agency’s statute.

a. Employment Security Department

The Employment Security Department has its confidentiality statute codified at RCW 50.13.020:

Any information or records concerning an individual or employing unit obtained by the department of employment security pursuant to the administration of this title or other programs for which the department has responsibility shall be private and confidential, except as otherwise provided in this chapter. This chapter does not create a rule of evidence. Information or records may be released by the department of employment security when the release is:

(1) Required by the federal government in connection with, or as a condition of funding for, a program being administered by the department; or

(2) Requested by a county clerk for the purposes of RCW 9.94A.760.

This statute requires that all information about an individual or employer remain confidential subject to certain exceptions not relevant here. This statute provided a basis upon which the Department was authorized to redact the home address and phone number, as well as the business telephone number and employee information of Maureen's Housecleaning Master Business Application.

b. Department of Labor and Industries

The Department of Labor and Industries (LNI) has its confidentiality statutes codified at RCW 51.16.070:

(1)(a) Every employer shall keep at his or her place of business a record of his or her employment from which the information needed by the department may be obtained and such record shall at all times be open to the inspection of the director, supervisor of industrial insurance, or the traveling auditors, agents, or assistants of the department, as provided in RCW 51.48.040.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for and the compensation paid to the person or entity performing the work. Failure to obtain or maintain the record is subject to RCW 39.06.010 and to a penalty under RCW 51.48.030.

(2) Information obtained from employing unit records under the provisions of this title shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties), but any interested party shall be supplied with information from such records to the extent necessary for the proper presentation of the case in question: PROVIDED, That any employing unit may authorize inspection of its records by written consent.

Consistent with the other agencies, the information collected by the LNI is strictly confidential. This statute provided a basis upon which the Department was authorized to redact the home address, home phone number and business phone number and employee information.

c. Department of Revenue

The Department of Revenue (DOR) has its confidentiality statutes codified at RCW 82.32.330:

(2) Returns and tax information are confidential and privileged, and except as authorized by this section, neither the department of revenue nor any other person may disclose any return or tax information.

Relevant definitions from RCW 82.32.330 include:

(c) "Tax information" means (i) a taxpayer's identity, (ii) the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability deficiencies, overassessments, or tax payments, whether taken from the taxpayer's books and records or any other source, (iii) whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing,

(e) "Taxpayer identity" means the taxpayer's name, address, telephone number, registration number, or any combination thereof, or any other information disclosing the identity of the taxpayer;

In addition RCW 82.32.330 states:

(3) This section does not prohibit the department of revenue from:

(k) Disclosing, in a manner that is not associated with other tax information, the taxpayer name, entity type, business address, mailing address, revenue tax registration numbers, reseller permit numbers and the expiration date and status of such permits, North American industry classification system or standard industrial classification code of a taxpayer, and the dates of opening and closing of business.

In the present case, the Department followed this statute by disclosing the taxpayers' name and business address. This information was appropriately not redacted on the document sent to Gronquist. However, as authorized by this statute, the Department redacted the home

address, the home phone number, business phone number, income information and banking information. Marital information is also considered exempt because it relates to a taxpayers identity, exemptions and/or deductions and income. RCW 82.32.330(c).

d. The Public Records Act

The PRA endorses protection of taxpayer information. RCW 42.56.230 provides in part:

The following personal information is exempt from public inspection and copying under this chapter: . . .

(3) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would: (a) Be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, 84.40.340, or any ordinance authorized under RCW 35.102.145; or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer;

This statute reinforces the privacy of taxpayer information. It reinforces the types of information found exempt under the originating revenue statute. In this case, the Department properly redacted the home address, the home phone number, marital status, business phone number, and income and banking information based on RCW 42.56.230.

B. The court properly declined to assess penalties against the Department where no information was improperly withheld.

Gronquist argues that *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), (which was decided during the pendency of the action below

on September 16, 2010), controls the outcome in this case regarding the provision of the explanatory statutes. However, *Sanders* supports affirmance of the trial court's decision.

The *Sanders* case involved a public record request made to the Attorney General's Office (AGO). The AGO did not provide certain documents and did not provide an explanation as required by RCW 42.56.210(3). The Supreme Court found that the failure to provide an explanation in and of itself was a violation of the Act. *Sanders* at 169 Wn.2d 846. However, the court concluded that this did not per se trigger monetary penalties. Instead, failure to provide an explanation was a factor to consider in deciding whether to award penalties. *Id.* at 848. The Court made the following analysis:

The trial court's conclusion reflects a fair middle ground under the PRA: the agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties, but the agency is not foreclosed from offering a satisfactory explanation. Such an interpretation serves the PRA's policy of disclosure by providing incentives for the agency to explain its claimed exemptions, while avoiding the negative consequences warned of in *PAWS II. Cf. Rental Hous. Ass'n*, 165 Wn.2d at 540, 199 P.3d 393 (requiring a detailed privilege log based on similar considerations). (Some citations omitted).

This case is distinguishable on its facts from *Sanders*. In this case the Department provided the explanation for the redaction as soon as Gronquist made it aware of the omission. In addition, because the

redactions were accurate and no information improperly withheld, the superior court properly found that no sanctions were warranted. Under the circumstances in this case, the Department acted in good faith and promptly remedied its inadvertent oversight of not providing statutory explanations when it provided the redacted document. It provided the explanations as soon as it learned of the oversight. Consequently, the trial court acted within its discretion when it determined there was not violation of the PRA giving rise to sanctions. Affirmance of the decision below would strike the “fair middle ground” sought in *Sanders*.

C. Gronquist may not challenge for the first time on appeal that the Department’s initial response was untimely.

Improperly for the first time on appeal, Gronquist argues that the Department did not respond to his public records request in a timely manner. The prohibition on raising new issues on appeal is based upon the policy that the trial court should have an opportunity to correct an error. This avoids the time and expense of an unnecessary appeal. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

There are narrow exceptions to the rule against raising new issues on review. The exceptions to the rule tend to be epic errors that make the judgment below void. RAP 2.5; 2A *Washington Practice*, Rules Practice RAP 2.5, Tegland, (7th ed. 2011) Some examples are lack of subject

matter jurisdiction or manifest constitutional error. Gronquist asserts no basis that would allow this issue to be raised for the first time on appeal.

Yet if this Court were to review the matter, the record supports the fact that the Department did respond to Gronquist's record request in a timely fashion. The PRA requires an agency to respond to a requester within five business days. RCW 42.56.520. Either the requested documents must be provided within that time period or the agency has five business days to ask for clarification or provide a reasonable estimate of when the record response may be completed. *Id.*

Gronquist's request letter was dated July 20, 2009. CP 186. The record does not contain evidence such as a postmark or log to fix the day of arrival. However, the Department's July 31, 2009 response letter states: "this letter is in response to your Public Records Request dated July 20, 2009 which was received in our offices July 31, 2009." CP 116. The uncontroverted evidence in the record is that Gronquist's letter arrived on the 31st of July, and was responded to timely on that date.

D. The county court clerk properly did not file deposition transcripts after the record was closed; and the trial court properly denied the motion to include them in the record.

During the course of the lawsuit Gronquist took the depositions of three Department employees. Gronquist alleges that the Thurston County Superior Court Clerk improperly refused to file the deposition transcripts.

This is not correct. When Gronquist selected the transcripts as part of the record, the record was closed. Judgment had already been entered. The authority Gronquist cites discussing deposition transcripts is distinguishable because the depositions were already part of the record. For example, in *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 191 (1996) the depositions at issue already had been filed with the court.

Gronquist was not deprived of use of the deposition testimony in litigating the case below or in arguing this appeal. According to his brief, he used testimony from the depositions to argue points of law and fact. Appellant's Brief at 11.

After the clerk did not file the deposition transcripts, Gronquist made a motion to settle the record, and include the transcripts. CP 120. The trial court denied the motion ruling that the full transcripts were not part of the record or considered by the court. CP 221. It was inappropriate for Gronquist to attempt to reopen a record that had closed or introduce material that was not part of the record. The trial court properly denied the motion to settle the record.

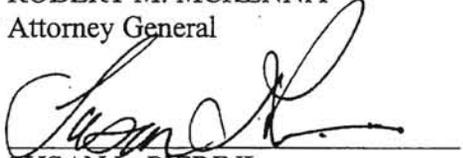
VI. CONCLUSION

The Department appropriately redacted exempt information from a Master Business Application. Although the Department inadvertently

omitted the explanatory citations, this omission does not rise to the level of warranting penalties against the Department. Additionally, Gronquist inappropriately raises the timeliness of the Department's initial response for the first time on review. Finally, his motion to settle the record was properly denied. As a result, the Department requests that the Court affirm the decision of the superior court.

RESPECTFULLY SUBMITTED this 27th day of March, 2012.

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TABLE OF AUTHORITIES

Cases

<i>Confederated Tribes v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998).....	7, 8
<i>Guillen v. Pierce Cnty.</i> , 96 Wn. App. 862, 982 P.2d 123 (1999), <i>rev'd in part</i> , 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).....	8
<i>Mithoug v. Apollo Radio of Spokane</i> , 128 Wn.2d 460, 909 P.2d 191 (1996).....	18
<i>Progressive Animal Welfare Soc'y v. Univ. of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	7, 9
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	10
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	14, 15
<i>Spokane Police Guild v. Liquor Control Bd.</i> , 112 Wn.2d 30, 769 P.2d 283 (1989).....	7
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	16
<i>Yousoufian v. Sims</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	8

Statutes

RCW 19.02.030	3
RCW 42.56	1, 7
RCW 42.56.030	7
RCW 42.56.030–520	8

RCW 42.56.070(1).....	7
RCW 42.56.210(3).....	8, 15
RCW 42.56.210–480	9
RCW 42.56.230	14
RCW 42.56.520	17
RCW 42.56.550(1).....	8
RCW 42.56.550(3).....	8
RCW 50.13.020	4, 11
RCW 51.16.070	11
RCW 51.60.070(2).....	4
RCW 82.32.330	12
RCW 82.32.330(c).....	14
RCW 82.32.330(c), (e).....	4

Other Authorities

2A <i>Washington Practice</i> , Rules Practice RAP 2.5, Tegland, (7th ed. 2011)	16
--	----

Rules

RAP 2.5.....	16
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