

No. 43787-2

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

(Thurston County Superior Court Cause No. 11-2-02266-5)

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ARTHUR WEST,

Appellant,

v.

ASSOCIATION OF WASHINGTON CITIES,

Respondent.

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APPELLANT'S OPENING BRIEF

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## I. SUMMARY OF ARGUMENT

This is a case where the Defendant and Respondent the Association of Washington Cities (“AWC”) failed to respond properly to a Public Record Act request from Plaintiff and Appellant Arthur West. The questions for this Court are simple: did the Trial Court err in concluding that AWC’s late-disclosed records were not responsive to Mr. West’s request at issue here?; and did the Trial Court err in awarding AWC its attorney fees incurred in responding to Mr. West’s motion for reconsideration?

This Court should review the late-disclosed records *de novo* and conclude that they were responsive to Mr. West’s request, should reverse the award of attorney fees, and then remand the case back to the Trial Court for further proceedings.

## II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

A. The Trial Court erred in finding that AWC’s late-disclosed records were not responsive to Mr. West’s February 9, 2011, public records request. *Shall the Public Records Act be liberally construed and its exemptions narrowly construed? Yes. As an agency subject to the Public Records Act, does the AWC owe a duty to Mr. West as a requestor, to provide him with the fullest possible assistance and the most timely possible action on requests for information? Yes. Is the purpose of the*

*Public Records Act to provide full access to nonexempt public records?*

*Yes. Did the AWC fail to properly respond to Mr. West's request? Yes.*

*B. The Trial Court erred in awarding AWC its attorney fees incurred in responding to Mr. West's motion for reconsideration. Does CR 59 provide for an award of fees to the responding party, if a motion for reconsideration is not successful? No. Does an award of fees under CR 11 require the Trial Court to specify sanctionable conduct in its order, including a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or that the paper was filed for an improper purpose? Yes. Did the Trial Court's order contain any such specifications or findings? No.*

### III. STATEMENT OF THE CASE

This case involves a public records request made to defendant and respondent Association of Washington Cities ("AWC") (erroneously named in the caption as "Washington State Association of Cities"), where the plaintiff and appellant Arthur West requested specific identifiable public records.

The Public Records Act ("PRA") request at issue here was made by Mr. West to the AWC on February 9, 2011. CP 50. Citing to RCW 42.56, Mr. West sought "1. All communications concerning SB 5025,

5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation;” “2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alternations or amendments;” and “3. All information and communications on your ‘members only’ website areas.” CP 50.

Mr. West had earlier learned that AWC was lobbying our legislature to enact certain provisions that would have the effect of weakening the PRA or limiting its application. CP 175. These provisions included SB 5025 (enacted into law by Governor Gregoire effective July 22, 2011), that made public record requests by or on behalf of an inmate ineligible for penalties under the PRA, unless the agency’s response was in bad faith; SB 5022, a bill that would clarify the statute of limitations under RCW 42.56.550,; and SB 5089, a bill that would encourage requestors and agencies to confer regarding PRA disputes, put a fifteen-day hold on a requestor’s ability to file a PRA lawsuit, and would make an award of penalties dependant on whether a conference occurred, and if not, the circumstances therefor. CP 156-72. This was the animating purpose behind Mr. West’s request, even though the PRA does not discriminate on the basis of requestors’ purposes or even require a requestor to have a purpose. *See, e.g.*, CP 175; *c.f.* RCW 42.56.080.

After receiving Mr. West's February 9 request, the AWC wrote to Mr. West on February 16, acknowledging his request and estimating dates of production and completion. CP 53. AWC's General Counsel, Ms. Sheila Gall, sent this February 16 letter to Mr. West in an email that also included links to electronic records:

that are responsive to your request of February 9, 2011, for records or correspondence related to the public records act and specific bills for the 2011 session.

CP 55-56. Several of these electronic records concerned a presentation to be made by Representative Mike Armstrong at AWC's 2010 Annual Conference. CP 56. Ms. Gall's email read:

Training:  
2010 Annual Conference  
<http://www.awcnet.org/TrainingEducation/Materials/AnnualConferenceMaterials.aspx>

Rules for playing in the open government sandbox

- \* [PowerPoint](#)
- \* [Handout 1](#)
- \* [Handout 2](#)

CP 56. The links that were active at the time that Ms. Gall sent the email to Mr. West have since been disabled. CP 442. Representative Armstrong

was one of the members of the legislature that AWC was lobbying in its efforts to support the bills that would weaken or limit the Public Records Act. CP 177.

After AWC had sent that initial email to Mr. West, a stipulated settlement and judgment was entered in a previous lawsuit between Mr. West and AWC. CP 58-61. What is important about this stipulated settlement and judgment – for the purposes of this appeal – is that AWC promised to be subject to the PRA, not only to Mr. West, but to any other requestor under the PRA. CP 59. What is also important about this stipulated settlement and judgment is that it wiped out any pending PRA requests from Mr. West to AWC, including, presumably, the February 9 request. CP 60. This stipulated settlement and judgment was entered on March 3, 2011.

Thereafter, Mr. West emailed Ms. Gall at AWC and renewed “all pending requests,” thereby re-animating his February 9, 2011 public records request. CP 63. Ms. Gall wrote again to Mr. West on March 10, 2011, acknowledging his renewal. CP 65. Though Mr. West’s “renewal” also re-animated other public records request in addition to his February 9, 2011, request, the Trial Court ruled that only Mr. West’s February 9 request is at issue in this lawsuit. RP at 15, ll. 5-13 (June 26, 2012). Mr.

West does not assign error to this ruling. Accordingly, Mr. West's argument in this appeal will be confined to this February 9 request.

On March 25, 2011, Ms. Gall again wrote to Mr. West. She enclosed copies of records that were responsive to his February 9 request: "public records correspondence and lobby related documents from June 2010 to February 10, 2010 [2011]." CP 67. Next, Mr. West and Ms. Gall had an email exchange stretching from April 21, 2011, to April 28, 2011. CP 69-70. Ms. Gall queried, "Please confirm that the public records-related legislative documents from your February 2011 request are the scope of documents you referred to in your e-mail in as 2010-11 lobbying documents." Mr. West answered, "The scope of 'lobbying' should be interpreted broadly." CP 69-70. Ms. Gall also informed Mr. West that she was sending him an "installment representing the documents related to public records legislation." CP 69.

On May 6, Ms. Gall wrote to Mr. West and sent him a disk of records "related to public records legislation, PDC lobbying reports for June 2010 to February 2011, and the members only section of the AWC website. CP 72. On June 30, Ms. Gall wrote to Mr. West, saying: "enclosed is a disk with additional records related to correspondence regarding Public Records legislation. An exemption and redaction log for

your requests will be sent to you next week. With this installment, AWC is considering your document request to be closed.” CP 76.

Mr. West waited for his exemption and redaction log. Without the exemption and redaction log, there was no disclosure of the documents for which AWC was claiming an exemption, and no disclosure of the nature or extent of any redactions. Mr. West knew – based on the statement in Ms. Gall’s letter – that there *were* records that AWC was withholding, claiming exemptions, and that there *were* records that AWC had redacted, claiming exemptions, but he had no idea how many records there were or what the exemptions were that AWC was claiming. Further, without the exemption and redaction log, Mr. West was not even able to review any claimed exemptions and make an initial assessment as to the validity of any claimed exemptions.

AWC did not send the exemption and redaction log that Ms. Gall promised. CP 176. After the passage of several weeks, Mr. West contacted Ms. Gall at the same email address that she had used to communicate with him, and he received no response. CP 176. Mr. West sent Ms. Gall a notice informing her that AWC had violated the PRA by not responding to his request. CP 176; CP 181-182. Mr. West received no response to his notice. Mr. West attempted to call Ms. Gall by telephone to enquire about the missing exemption and redaction log.

AWC staff told him she was “unavailable.” CP 176. No-one at AWC had any knowledge of any pending exemption log, or, for that matter, Mr. West’s record request. CP 176.

Mr. West then personally visited AWC and spoke with interim general counsel Mark Erickson. Mr. Erickson had no knowledge of any pending request, and stated that Ms. Gall was “on sabbatical” and could not be contacted. CP 176. Based on this breakdown in the response process, Mr. West filed the instant lawsuit. CP 176. In his complaint, he alleged: “On or about February of 2011, West submitted a request to the Association of Cities (AWC) for records concerning the AWC’s lobbying to weaken the PRA and for AWC communications with Rep. Mike Armstrong.” CP 5. Mr. West’s allegation was thus a paraphrase of his February 9 request, which had not mentioned Representative Armstrong by name (unnecessary to do so, since Representative Armstrong was one of the members of the legislature that AWC was lobbying to weaken the PRA). Mr. West attached a copy of the notice he had sent to Ms. Gall to his complaint. CP 8-9. Likewise, in the notice Mr. West had sent Ms. Gall, he paraphrased his February 9 request: “Please regard this as a notice that the AWC is in violation of the Public Records Act in regard to its statutory duty to reply to the recent request for records of AWC lobbying and AWC contacts with Mike Armstrong.” CP 9.

Mr. Erickson, AWC's interim general counsel, wrote to Mr. West after being served with the Summons and Complaint. He informed Mr. West that Mr. West's emailed notice to Ms. Gail did not clear AWC's spam filters. CP 183. He instructed Mr. West to send future correspondence to [publicrecords@awcnet.org](mailto:publicrecords@awcnet.org). CP 183. Mr. Erickson also sent Mr. West a letter on October 26 seeking clarification of Mr. West's request. Mr. West responded via email to [publicrecords@awcnet.org](mailto:publicrecords@awcnet.org):

In response to the recent letter, I am seeking the records identified in the original request that was filed, not the records as they were described in the complaint filed in the Superior Court, which generally identified the request and subject matter of the records. please review the PRA request for clarification, if any is necessary.

CP 184-185. Even though Mr. West responded via email to [publicrecords@awcnet.org](mailto:publicrecords@awcnet.org), as instructed, it appears that, again, Mr. West's email did not clear AWC's spam filters. CP 184.

On November 9, AWC filed its answer to Mr. West's complaint. In "AFFIRMATIVE DEFENSES," AWC stated and alleged, "4. Defendant has provided plaintiff access and a chance to review all unprivileged documents responsive to his request for documents dated February 9, 2011, without unjust delay." CP 15. This acknowledges "privileged documents;" if AWC gave Mr. West the chance to review all "unprivileged documents," then the corollary is that there is a set of

“privileged documents” that AWC did *not* give Mr. West the chance to review. Yet AWC had never provided the promised exemption and redaction log.

AWC’s Interim Public Records Officer, Ms. Michelle Catlin, then wrote to Mr. West on November 18, 2011, some five months after AWC informed Mr. West his request was closed: “While you did not clarify your request in response to Mark Erickson’s October 26, 2011, letter to you [apparently having failed to check AWC’s junk mail folder, where AWC would have found Mr. West’s response to Mr. Erickson], AWC conducted a search for communications with Rep. Armstrong from June 2010 to February 2011 in response to your September 12, 2011, e-mail. Enclosed is a disk with records related to that search, including ones previously provided to you this year based on a search for documents related to lobbying on public records and specific related legislation.” CP 190. Ms. Catlin’s letter also described the search terms that AWC had originally used to look for records back before AWC had closed out Mr. West’s request on June 30. CP 190. Absent from the list is Representative Armstrong’s name, even though he was one of the representatives AWC was lobbying to weaken the PRA. CP 190.

This November 18 production contained at least three discrete records responsive to Mr. West’s February 9 request that AWC had not

heretofore produced. AWC's search -- for communications with Representative Armstrong, one of the members of the legislature that AWC was lobbying to weaken the PRA -- had borne fruit. Recall that in Ms. Gall's very first production to Mr. West on February 16, she had sent him a link to Representative Armstrong's presentation materials on "Rules for playing in the open government sandbox" at AWC's 2010 conference.

CP 56. These conference materials were responsive to the first two prongs of Mr. West's February 9 request:

1. All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation.

2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alternations or amendments.

CP 50.

Now, in the November 18 production, AWC disclosed for the first time three emails between AWC staff and Representative Armstrong that concerned the conference materials and Representative Armstrong's presentation at the conference, where he would speak on the Public Records Act. CP 391-397.<sup>1</sup> In the first email, AWC's Ms. Serena Dolly wrote: "I just wanted to check about the materials you would like to

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<sup>1</sup> The AWC also disclosed two other email exchanges with Representative Armstrong that were not responsive to Mr. West's request. CP 399-407.

provide conference participants. As I recall, legislative staff was preparing summary of changes to open government laws that you wanted to include.” CP 391. The next two emails concerned logistics for Representative Armstrong’s speaking about the PRA and other open government laws at AWC’s conference. CP 394-397. These three emails, correspondence concerning the PRA and changes to the PRA, were thus responsive to those first two prongs of Mr. West’s February 9 request.

Several weeks later, on December 1, 2011, Ms. Catlin again wrote to Mr. West, and produced the exemption log that Ms. Gall had promised on June 30. “Enclosed please find a disk with documents and exemption and redaction logs as a supplement to the documents provided to you in June 2011.” CP 197. Ms. Catlin clarified that the documents themselves were responsive to a different PRA request from Mr. West, not the February 9 request that is at issue here. The exemption and redaction log, however, disclosed to Mr. West the redactions that AWC had made on the materials it previously provided to Mr. West. Three of those redacted records – monthly statements from AWC’s counsel, Foster Pepper, within the specified period, June 2010 – February 9, 2011, reflecting counsel’s advice on PRA litigation and discussions – were responsive to Mr. West’s February 9 PRA request. CP 200; *cf.* “2. All records of any lobbying or

correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alternations or amendments.” CP 50.

After AWC had made its November 18 and December 1 disclosures, AWC filed a motion for summary judgment in the lawsuit. CP 18-31. AWC entirely ignored the November 18 and December 1 disclosures in its argument, and sought an award of CR 11 sanctions against Mr. West, alleging that Mr. West had filed a lawsuit unfounded in fact and for the express purpose of harassing AWC. CP 18-31.

Mr. West responded and made a cross-motion for summary judgment, arguing that the AWC, in its June 30 letter informing Mr. West it considered his request closed, had told Mr. West it would send the exemption and redaction log “next week,” but that AWC – despite multiple attempts at contact by Mr. West – had never sent the exemption and redaction log until after Mr. West had filed the lawsuit. CP 77-95. Mr. West also argued that the disclosures on November 18 and on December 1, months after the AWC had informed Mr. West it considered his request closed, were evidence that the AWC had silently withheld responsive records, only disclosing them after Mr. West was forced to file his lawsuit. CP 77-95.

In AWC’s reply in support of its summary judgment motion, it became clear that AWC was treating Mr. West’s request narrowly. CP

362-370. AWC was only considering the February 9 request as being at issue in the lawsuit, even though when Mr. West renewed all pending requests on March 3, he re-animated the February 9 request as well as earlier requests, and both Mr. West and Ms. Gall had thereafter treated all the requests as one multi-component request. *See, e.g.*, CP 65. Indeed, Mr. West had so argued to the Trial Court. *See, e.g.*, CP 77-95. However, at the hearing on AWC's summary judgment motion and Mr. West's cross-motion for summary judgment, the Trial Court ruled that *only* the February 9 request was at issue in this lawsuit. Again, Mr. West does not assign error to this ruling.

At the summary judgment hearing, the Trial Court requested that the parties agree on, and submit to the court for review, the set of records that AWC had disclosed to Mr. West on November 18 that it had not previously disclosed. The parties did so. CP 387-408. Mr. West submitted supplemental argument. CP 373-385. AWC responded. CP 409-414. Mr. West filed a reply in support of his supplemental argument. CP 417-419. The Trial Court, the Honorable Paula Casey, issued a letter ruling where she found that none of the records disclosed by AWC on November 18 were responsive to Mr. West's February 9 request. The Trial Court granted AWC's motion for summary judgment. CP 416. In the Trial Court's Order granting AWC's motion for summary judgment, it

is clear that the Trial Court denied AWC's request for CR 11 sanctions against Mr. West. CP 465-466.

After receiving the Trial Court's letter ruling granting AWC's motion for summary judgment, Mr. West filed a motion for reconsideration. CP 426-429. AWC responded. CP 430-436. Mr. West filed a reply in support. CP 439-444. The Trial Court entered an order denying Mr. West's motion for reconsideration, where the Trial Court ordered: "Defendant shall be awarded fees incurred in responding to the Motion for Reconsideration, in amount no less than \$1000." CP 475-476. This Appeal followed.

#### IV. ARGUMENT

"Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." O'Neill v. City of Shoreline, 170 Wn.2d 138, 147 240 P.3d 1149 (2010).

The stated purpose of the Public Records Act 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. [RCW 42.56.030]. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or,

perhaps both.” Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 241, 884 P.2d 592 (1994) (“PAWS”).

Mr. West, a PRA activist, was concerned about the efforts of AWC – whom he was forced to litigate earlier to get the association to admit it was subject to the PRA – to weaken the PRA in our state. Mr. West made a public records request to the AWC for records related to its lobbying attempts to weaken the PRA. While the AWC initially appeared to respond properly to Mr. West’s request, at some point the AWC’s response broke down. On June 30, AWC told Mr. West that it considered his request closed, and that it would send him an exemption log “next week.” After promising Mr. West the exemption log, AWC failed to produce it, and then when Mr. West thrice tried to contact AWC to find out where the exemption log was, he could find no one at AWC who knew anything about his request. After Mr. West filed his lawsuit, AWC made two big disclosures of records on November 18 and December 1, also disclosing the exemption log on December 1. While many of the records in these November 18 and December 1 productions were responsive to PRA requests that the Trial Court has ruled are *not* at issue in this lawsuit (to which ruling Mr. West assigns no error), at least six of the late-

disclosed records *were* responsive to Mr. West's February 9 request. Yet the Trial Court found they were not responsive and granted AWC's motion for summary judgment. This was error.

Nor was the granting of summary judgment the only error the Trial Court made; the Trial Court awarded sanctions in the amount of not less than \$1000 worth of attorney fees for AWC's responding to Mr. West's motion for reconsideration. But the Trial Court did not specify any sanctionable conduct in its order, precluding meaningful review by this Court. This was error.

#### **A. Standard of Review**

This Court reviews questions of law *de novo*. Likewise, judicial review of all agency actions under the Public Records Act chapter is *de novo*, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review *de novo* the question of whether the late-disclosed records were responsive to Mr. West's February 9 request. While, generally, this Court reviews an award of attorney fees as a sanction for abuse of discretion (*see, e.g., Saldivar v. Momah*, 145 Wn. App. 365, 402, 186 P.3d 1117, *as amended, review denied*, 165 Wn.2d 1049, 208 P.3d 555 (2008)), here, the lack of findings precludes meaningful review of the Trial Court's award of sanctions. However,

since the Trial Court did not see or hear testimony requiring it to assess credibility or competency of witnesses, or to weigh evidence, this Court is in as good a position as the Trial Court and should review the award of sanctions *de novo*, and should reverse. PAWS, 125 Wn.2d at 252-53.

This Court should review all issues *de novo*.

**B. AWC's Late Disclosures Violated the PRA**

The public records act requires a prompt response. RCW 42.56.520 requires an agency to respond to requests under the PRA within five (5) business days. In its response, the agency may provide the records requested, direct the requestor to a link on the agency's website where the records may be viewed (under certain circumstances), 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, or deny the record request. "Denials of requests must be accompanied by a written statement of the specific reasons therefor." RCW 42.56.520. "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." RCW 42.56.210(3).

Here, it appears the ACW replied within five business days to Mr. West's February 9 request, and to his subsequent renewal of the request

(and his reanimation of his earlier request, which the Trial Court has ruled is not at issue in this lawsuit), and began making a partial response by providing some responsive records in installments. **But the ACW did not**, at any time until June 30, give Mr. West notice that it was denying any part of Mr. West's request. Instead, the ACW waited until June 30 to inform Mr. West – obliquely – that it was denying his request as to certain records, by informing him that an exemption and redaction log would be sent to him “next week.” CP 76. The “exemption and redaction log” is the “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” as provided by RCW 42.56.210(3).

June 30, therefore, is the date that ACW first informed Mr. West that it was denying part of his request. But after June 30, the ACW **did not** promptly provide Mr. West with the exemption and redaction log to which he was entitled, meaning that Mr. West's proper recourse was to this Court. “If the agency fails to provide the required written statement by the end of the second business day following denial of inspection, review of the records in question can be submitted directly to the superior court. [RCW 42.56.520] and [RCW 42.56.550(2)].” **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 139, 580 P.2d 246 (1978).

But Mr. West did not immediately rush to the courts. He gave ACW ample time to provide the exemption and redaction log. Then he emailed Ms. Gall and put her on notice that ACW was violating the public records act, and asked her if the ACW would voluntarily comply or if he would be forced to seek to compel the ACW to comply. When he received no response from Ms. Gall, Mr. West phoned the ACW and asked to speak to Ms. Gall. Staff said she was “unavailable.” Mr. West asked the staff about the exemption and redaction log and about his records request. The staff had no idea what he was talking about. So Mr. West visited the ACW and was able to speak to Mr. Erickson, who told him that Ms. Gall was “on sabbatical,” could not be contacted, and that he had no knowledge of Mr. West’s pending request.

Only then did Mr. West file this lawsuit, a lawsuit that by any measure may be viewed as “reasonably necessary.” “Whether suit is reasonably regarded as necessary must be objectively determined, from the point of view of the requesting party. We agree with the [public agency] that a history of prompt responses to previous requests may be relevant. But after four attempts to obtain the same information, the likelihood of inadvertent agency error was obviously low, the likelihood of a timely response was obviously nil, and there was nothing to indicate the [requestor’s] request would ever be honored. Viewed objectively from

the [requestor's] point of view, this lawsuit was reasonably regarded as necessary." Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, 59 P.3d 109 (2002).

Violante was partially abrogated by Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005); Spokane Research stands for the proposition that a requestor's lawsuit does not have to *cause* the release of the records in order for the requestor to be the prevailing party, instead, "prevailing" relates to the legal question of whether the records should have been disclosed on request. Spokane Research, 155 Wn.2d at 103. Here, of course, Mr. West's lawsuit actually *did* cause the release of the records, even though all he must show to prevail is whether the records should have been disclosed on request.

The three separate records responsive to the February 9 request that were listed in that exemption and redaction log that AWC first produced to Mr. West on December 1 were not disclosed on request, nor were the three responsive records that AWC produced for the first time on November 18. "A record is either 'disclosed' or 'not disclosed.' If the record's existence is revealed to the requester, it is 'disclosed' regardless of whether it is produced. Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010). An undisclosed record results in the prohibited silent

withholding discussed in PAWS, 125 Wn.2d at 270.” Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 746 n. 16, 261 P.3d 119 (2011).

The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request. The statute explicitly mandates that: 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*. (Italics ours.) [RCW 42.56.210(3).] Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed.

PAWS, 125 Wn.2d at 270-71. And that is exactly what AWC did. It silently withheld the additional responsive records to Mr. West’s February 9 request until after Mr. West was forced to file a lawsuit to get some kind of response from AWC on the exemption log it had promised to Mr. West.

Looking at the AWC’s failures to respond to Mr. West’s requests in the best light – the light most favorable to AWC – points to an utter and complete breakdown of communication at AWC. But the course of

systematic denial of Mr. West's requests (including instructing him to communicate via email addresses that don't work) make it appear that AWC's refusal to produce records and the exemption log was intentional. Any failure of ACW to comply with the public records act is a violation. "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." PAWS, 125 Wn.2d at 269.

**C. The Trial Court Erred in Finding that the Three Records Produced by AWC on November 18 Were Not Responsive to Mr. West's February 9 Request, and Erred in Finding that the Redacted Records Disclosed on the Exemption Log AWC Produced on December 1 Were Not Responsive to Mr. West's February 9 Request**

Of the five records that the parties agree were produced to Mr. West for the first time on November 18, 2011, three – the emails between AWC's Serena Dolly and Representative Armstrong, regarding Representative Armstrong's Public Records Act conference materials – were responsive to Mr. West's February 9 request. CP 391-397. Likewise, the exemption log, produced by AWC for the first time on December 1, disclosed the redactions made on three redacted responsive records: billing communications between AWC's counsel, the law firm of Foster Pepper, on PRA issues. In finding that these emails and the records

on the exemption log were not responsive to Mr. West's February 9 request, the Trial Court narrowly construed the Public Records Act and narrowly construed Mr. West's request and the records responsive thereto. But this is contrary to the Public Records Act itself:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. [The PRA] shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030. As an agency subject to the PRA, the AWC has a duty to Mr. West and other requestors: agencies "shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. The purpose of the PRA is "to provide full access to nonexempt public records." Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997). By silently withholding those emails and the exemption log, the AWC denied Mr. West full and timely access.

As to the three emails in question from the November 18 production, each of these three records is an email from Ms. Serena Dolly to Representative Mike Armstrong. Each of these three records falls within the date range June 2010 to February 9, 2011, the date range in Mr.

West's request. Each of these three records concerns Representative Armstrong's session, "Rules for Playing in the Open Government Sandbox," which he agreed to present at the AWC's 2010 Annual Conference, held June 23-25, 2010. CP 391-397. In the email dated June 2, Ms. Dolly wrote, "I just wanted to check in about the materials you would like to provide conference participants. As I recall, legislative staff was preparing a summary of changes to open government laws that you wanted to include." CP 391. These open government laws include the Public Records Act and the Open Public Meetings Act. Accordingly, all three of these records are responsive to part 2 of Mr. West's February 9 request, "All records of...correspondence concerning the Public Records Act and any proposed alterations or amendments." CP 50. Further, since Representative Armstrong, one of the primary sponsors of the legislation identified in Mr. West's request, was planning on providing conference participants with a summary of changes on open government laws that he wanted to include, the first record CP 391, is also responsive to part 1 of Mr. West's February 9 request, "All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation."

AWC itself recognized that Representative Armstrong's conference materials were responsive to Mr. West's February 9 request. Ms. Gall, AWC's general counsel, sent Mr. West links to Representative Armstrong's conference materials (links that have been since disabled) in her very first email response to Mr. West's February 9 request, back on February 16. "As discussed in the attached letter, below are links to some documents that are responsive to your request of February 9, 2011, for records or correspondence related to the public records act and specific bills for the 2011 session." CP 55-56. Representative Armstrong's conference materials were included on page two of that email, at CP 56.

It is undisputed that Representative Armstrong presented at AWC's annual conference in June 2010. His presentation concerned open government laws, including the Public Records Act, and the emails that were produced on November 18 also indicate that Representative Armstrong was planning on providing a summary of proposed changes to the Public Records Act. It is also undisputed that Representative Armstrong was one of the primary sponsors of the proposed amendments to the Public Records Act during the 2011 legislative session. The emails *about* Representative Armstrong's conference materials were therefore responsive to two parts of Mr. West's February 9 request:

1. All communications concerning SB 5025, 5022 and 5089 and their companion bills HB 1139, 1033 and 1289, to include any communications concerning drafts or proposals for of any related legislation.
2. All records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alterations or amendments.

CP 50. Representative Armstrong's conference materials were responsive to parts 1 and 2 of Mr. West's February 9 request, therefore, any correspondence about Representative Armstrong's conference materials or about Representative Armstrong's presentation at the conference are also responsive to parts 1 and 2 of the February 9 request – since both of those parts sought *correspondence* as well.

The AWC's counsel argued to the Trial Court that the conference materials did not contain references to proposed legislation; frankly, that argument is not credible, given Representative Armstrong's role as one of the primary sponsors of the proposed legislation and the timing of the annual conference, in the June preceding the 2011 legislative session. Further, even if AWC's counsel is right and the conference materials did not contain references to the proposed legislation (the links to the conference materials are now disabled), the conference materials **and the emails about them** are still responsive to part 2 of Mr. West's records request: "correspondence concerning the Public Records Act, from June

2010 [the month of the AWC conference] to present.” CP 50. Finally, the best evidence that Representative Armstrong’s conference materials contained references to proposed legislation is the fact that Ms. Gall, AWC’s general counsel, produced them to Mr. West in response to his records request!: “As discussed in the attached letter, below are links to some documents that are responsive to your request of February 9, 2011, for records or correspondence related to the public records act and specific bills for the 2011 session.” CP 55

As to AWC’s argument – made to the Trial Court -- that it had no obligation to search for public records act correspondence with Representative Armstrong, it is a disingenuous argument ignoring the fact that the records are responsive to Mr. West’s request. Mr. West requested “records of any lobbying or correspondence concerning the Public Records Act, from June of 2010 to present, and any proposed alterations or amendments.” CP 50.

The AWC had a duty to give Mr. West its fullest possible assistance and to fully disclose its nonexempt records. Since Representative Armstrong was one of the primary sponsors of the legislative amendments to the Public Records Act in 2011, the “fullest possible assistance” that the AWC had a duty to provide to Mr. West included a search for correspondence with Representative Armstrong,

since there was an excellent chance that correspondence with one of the legislation's primary sponsors would include correspondence about the Public Records Act! For the AWC to wait until Mr. West paraphrased his records request (in his notice to the AWC that they were in violation of the PRA) and mentioned Representative Armstrong by name is the equivalent of an ostrich sticking its head in the sand. And the argument that Mr. West had an obligation – in providing a reasonable description enabling the AWC to locate the requested records – to give Representative Armstrong's name to the people who had actually been corresponding with Representative Armstrong about the Public Records Act when Mr. West was looking for records about the Public Records Act is equally myopic.

And as to the redactions disclosed in the exemption log on December 1, in the AWC's reply in support of its motion for summary judgment, as well as at oral argument, the AWC represented to the Trial Court that the law firm of Foster Pepper represented AWC in the previous lawsuit between Mr. West and the AWC, which was a Public Records Act lawsuit. See, e.g., CP 365. Accordingly, three of the records whose redactions were disclosed in the privilege log produced December 1, 2011, are responsive to Mr. West's February 9 records request (in addition to being responsive to other record requests, which the Trial Court ruled are

not at issue in this lawsuit, and to which ruling Mr. West assigns no error).

These three records are the last three records on CP 385:

Monthly Statement -	6/18/2010	Redacted description related to trial strategy for
Foster Pepper		pending litigation
Monthly Statement -	7/20/2010	Redacted description related to trial strategy for
Foster Pepper		pending litigation
Monthly Statement -	8/26/2010	Redacted description related to discussions and
Foster Pepper		legal advice to client

CP 385. Since Foster Pepper was representing AWC in PRA litigation with Mr. West, these three records – which fit within the time frame of part 2 of Mr. West’s request – are responsive to part 2 of Mr. West’s request: “All records of any ... correspondence concerning the Public Records Act, from June of 2010 to present [February 9, 2011]....” CP 50.

Mr. West was on notice from the June 30 letter that there was an exemption log out there. Mr. West was also on notice from the June 30 letter that the exemption log contained records responsive to his February 9 request. Yet the AWC withheld the exemption log from Mr. West – even though Mr. West thrice contacted the AWC to ask where the exemption log was – until months after Mr. West filed this present lawsuit.

The AWC informed Mr. West in its June 30 letter that it considered its response to his record request to be closed, and it silently withheld these three email records of correspondence between Serena Dolly and Representative Armstrong that were responsive to Mr. West's February 9 request until – well after Mr. West filed his lawsuit – it produced them on November 18. Likewise, it silently withheld the nature of the redactions on those three responsive records that it only disclosed on the exemption log that it produced on December 1. This was silent withholding and a violation of the Public Records Act. This Court should conclude that these records were responsive to Mr. West's February 9 request and should reverse the Trial Court and then remand the case back to superior court for further proceeding.

**D. The Trial Court Erred in Awarding Fees to AWC**

The Trial Court erred in awarding attorney fees to AWC in denying Mr. West's Motion for Reconsideration. Unfortunately,

meaningful review of this error is impossible because the Trial Court also erred in failing to enter findings of facts and conclusions of law as to the basis for the sanctions. “But trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Further, the trial court must enter findings of fact and conclusions of law to support an attorney fee award. Mahler, 135 Wn.2d at 435, 957 P.2d 632. “[A]bsence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.” Mahler, 135 Wn.2d at 435, 957 P.2d 632.” Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn. App. 409, 415-16, 157 P.3d 431, 435 (2007).

However, in this case, the fee award was made after a motion for reconsideration of an order granting summary judgment. The Trial Court did not hear testimony or make judgments as to credibility. This Court is in as good a position as the Trial Court to determine whether sanctions are appropriate. This Court should review the award of sanctions *de novo* and should reverse the Trial Court’s award of sanctions.

First, it is not even clear whether the award of sanctions was made pursuant to CR 11, CR 59, or the inherent authority of the Trial Court. In conducting research on sanctions pursuant to the inherent authority of the

court, counsel has found that such sanctions are typically awarded for contempt. *See, e.g., State v. Hobbie*, 126 Wn.2d 283, 892 P.2d 85 (2006). There is no basis for a finding of contempt, either in the verbatim report of proceedings or in the clerk's papers.

As for CR 59, the rule pursuant to which Mr. West made his motion for reconsideration, there is no basis for an award of fees in that rule as against an unsuccessful movant. Nor does the Public Records Act provide for any kind of a fee-shifting mechanism where an unsuccessful requestor may be forced to pay fees to a prevailing agency.

And the basis for fees under CR 11 is quite clear: a signed filing must be not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. *See Just Dirt*, 138 Wn. App. at 414. "CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)." *Just Dirt*, 138 Wn. App. at 418. Even though Mr. West was unsuccessful in his motion for reconsideration, that is not a basis for fees under CR 11. And Mr. West's argument was grounded in law and fact: the late-disclosed records were responsive to his February 9 request on their face, and the Trial Court had erred in holding that they were not and in granting summary judgment. And there is no improper purpose. Had the Trial

Court granted Mr. West's motion for reconsideration, Mr. West would not have needed to file this appeal.

AWC sought an award of attorney fees against Mr. West pursuant to CR 11 before it even filed its motion for summary judgment. But Mr. West frankly and openly convinced the Trial Court that there was no basis for CR 11 sanctions and that, in fact, it was AWC's counsel who had failed to conduct an adequate inquiry into law and fact in requesting sanctions.

In response to Mr. West's motion for reconsideration, AWC again sought an award of CR 11 sanctions, arguing that Mr. West made his record requests to AWC in an attempt to achieve monetary gain, or that Mr. West had changed his argument from the time when he first responded to the summary judgment motion. Not only are both contentions false (*see, e.g.*, CP 448), but neither is a basis for CR 11 sanctions. Mr. West had argued consistently from day one that the November 18 production and the December 1 production contained responsive records to the February 9 request as well as other record requests that he had re-animated. The Trial Court ruled at the summary judgment hearing that only the February 9 request was at issue here. Accordingly, while Mr. West's arguments were and are consonant with what he had argued from day one, they are more deeper and more

textually focused in accordance with the Trial Court's ruling. This Court should reverse the award of attorney fees as a sanction.

#### E. Request for Attorney Fees

Mr. West is represented by counsel, and requests attorney fees on appeal pursuant to RAP 18.1 and RCW 42.56.550(4), and upon remand to the Trial Court.

### V. CONCLUSION

This is a case where the AWC made a good start at responding to Mr. West's record request, and then a weak link in the chain broke and AWC's response fell apart. AWC didn't produce the exemption log it had promised until after Mr. West filed his lawsuit, the filing of which also prompted the production of additional responsive records. The Trial Court erred in finding that neither the exemption log nor the additional production contained records responsive to Mr. West's February 9 request. This Court should review the records *de novo* and reverse the Trial Court, remanding the case back to the superior court for further proceedings. The Trial Court also erred in imposing sanctions where no basis exists therefor. Since the Trial Court failed to include findings of fact and conclusions of law as to the sanctions, and since the Trial Court weighed no evidence, this Court should review the imposition of sanctions *de novo* and should reverse the award of sanctions.

RESPECTFULLY submitted this 30<sup>th</sup> day of October, 2012.

CUSHMAN LAW OFFICES, P.S.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On October 30 2012, I caused a copy of the foregoing document to be electronically filed with the Court of Appeals, Division II and to be delivered electronically to the party as listed below:

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# CUSHMAN LAW OFFICES PS

October 30, 2012 - 4:49 PM

## Transmittal Letter

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- Objection to Cost Bill
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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
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### Comments:

Attached is Appellant's Opening Brief

Sender Name: Jennifer Harkins - Email: [jenniferharkins@cushmanlaw.com](mailto:jenniferharkins@cushmanlaw.com)

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