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STATE OF WASHINGTON

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No. 50124-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN GREEN,

Appellant,

v.

LEWIS COUNTY,

Respondents.

BRIEF OF APPELLANT

Joseph Thomas, #49532
Law Office of Joseph Thomas
PLLC
14625 SE 176th St., Apt. N101
Renton, Washington 98058
(206) 390-8848
joe@joethomas.org

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I. INTRODUCTION

This case presents novel issues of how the statutory penalty is applied in a Public Records Act (“PRA”) case, RCW 42.56.001, *et. seq.*

This case involves Lewis County failing to provide Mr. Green public records. Mr. Green sought these records to rebut unfair and negative media coverage during his campaign for a county-wide elected office of Sheriff. However, only after Mr. Green filed a lawsuit did Lewis County produce the responsive records. Mr. Green prevailed on the merits of all the issues in front of the court.

Mr. Green contends the trial court erred when deciding to what extent he was the prevailing party. Even though Mr. Green prevailed on all the issues in front of the court, he was only awarded 25 percent of his costs and 25 percent of his attorney’s fees.

Mr. Green also contends the trial court erred when setting the penalty. First, the superior court erred when finding using the issue of timeliness of the distribution of the records as both an aggravating and mitigating factor. *Mr. Green will argue that it violates the stated purpose of having a court weigh aggravating and mitigating factors to allow a superior court to find an issue is simultaneously both an aggravating and a mitigating factor. To remedy this situation, if a superior court judge finds an issue as an aggravating factor, then the superior court should be prohibited from also*

finding it as a mitigating factor. Second, the superior court erred when it found Lewis County responded to Mr. Green's public records request through documents directed at the court while in litigation.

II. ASSIGNMENT OF ERROR

1. The superior court erred in determining Mr. Green prevailed on only twenty-five (25) percent of the issues. CP 191 at ¶ 14-17.

2. The superior court erred in finding seemingly contradictory aggravating and mitigating factors when it found an aggravating factor of a delayed response by the agency and a mitigating factor that the agency promptly responded. CP 189 at ¶ 8(i); CP 190 at ¶ 9(ii).

3. The superior court erred in finding the timeframe for the statutory penalty, RCW 42.56.550(4), stopped running when Defendant Lewis County disclosed the wrongfully withheld record to Plaintiff Brian Green in court filings in the trial court proceeding. CP 189 at ¶¶ 5-6.

III. STATEMENT OF ISSUE

1. Did the superior court err in finding that Plaintiff Brian Green only prevailed on twenty-five (25) percent of the issues? Did the superior court err in awarding Mr. Green only twenty-five (25) percent of his costs and attorney's fees because it found Mr. Green only prevailed on prevailed on twenty-five (25) percent of the issues?

2. Did the superior court err when it seemingly found contradictory aggravating and mitigating factors? Can an issue be both an aggravating factor and a mitigating factor under a *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735 (Wash. 2010) analysis? Whether an issue can be used as a mitigating factor if it is also found to be an aggravating factor?

3. Does the timeframe for the statutory penalty of the PRA stop when wrongfully withheld records are provided as part of documents in litigation? Does an agency distinguish amongst requestors by providing wrongfully withheld records through litigation when its practice is to respond to requestors through the PRA, independently of litigation?

IV. STATEMENT OF THE CASE

A. Mr. Green's PRA Requests

This case arises out of public records requests Mr. Green made, because he believed at the time, the Office of the Lewis County Sheriff may have traded favors with a reporter at a local newspaper, which resulted in negative newspaper articles about him that hurt his campaign to become the elected Lewis County Sheriff. CP 186-87 at ¶¶ 1-3.

On November 19, 2014, Mr. Green made a public records request under the PRA to the Lewis County Sheriff's Office. CP 186 at ¶ 1. Lewis County immediately sought clarification as to the meaning of the request. CP 187 at ¶ 3. Mr. Green provided clarification that his request was broad

and he wanted the request to include “any and all” responsive documents. CP 187 at ¶ 4. Lewis County subsequently provided documents, in two installments, before closing out the request on November 26, 2014. CP 187 at ¶ 7. Neither was Mr. Green’s request reopened by Lewis County, nor did Lewis County provide any additional documents to Mr. Green before he filed his lawsuit nearly a year later, on November 17, 2015. CP 187 at ¶¶ 7-8.

B. Wrongfully Withheld Record

Mr. Green filed a lawsuit under the PRA on November 17, 2015 alleging Lewis County wrongfully withheld a record responsive to his November 19, 2014 request. CP 187 at ¶ 8. In his lawsuit, Mr. Green alleged that Lewis County wrongfully withheld a single document, a “Confidential Employment Reference Questionnaire” (“CERQ”). CP 187 at ¶ 8.

In its Answer to the Complaint, Lewis County admitted that it withheld the CERQ from Mr. Green. CP 187 at ¶ 10; CP 45 at ¶¶ 7-10.

As a part of litigation, Lewis County filed a declaration from former Lewis County Sheriff Chief Civil Deputy Stacy Brown and attached to it was the CERQ which was wrongfully withheld from Mr. Green. CP 188 at ¶ 11; CP 37-41.

Because Mr. Green alleged one record was withheld and Lewis County admitted to withholding that record, the superior court found Mr. Green the prevailing party on one-hundred (100) percent of the issues. CP 189 at ¶ 2.

C. Record Disclosed to Mr. Green

Lewis County disclosed the wrongfully withheld record to Mr. Green as a part of litigation. CP 187 at ¶¶ 9-10. Specifically, the wrongfully withheld CERQ was provided as an attachment to the Declaration filed by former Chief Civil Deputy Brown. CP 35 (stating “A copy of the Questionnaire comprises Attachment A hereto.”).

At no time in the Declaration filed by former Chief Civil Deputy Brown did she state the wrongfully withheld record, the CERQ in Attachment A, was meant for Mr. Green. CP 34-36. At no time the Declaration filed by former Chief Civil Deputy Brown did she state the wrongfully withheld record, the CERQ in Attachment A, was meant to fulfill Mr. Green’s outstanding public records request. CP 34-36.

Lewis County never re-opened Mr. Green’s public records request after it was closed on November 26, 2017. CP 187-88 at ¶¶ 7-12.

D. Litigation History

From the very beginning Lewis County admitted that it withheld the document CERQ. CP 187 at ¶¶ 9-10. Through the course of the lawsuit,

Mr. Green received the one record that should have been disclosed to him upon his November 19, 2014 request. CP 188 at ¶2 (stating “Lewis County violated the PRA by failing to provide the email and background questionnaire”). The rest of the litigation at the superior court level then became about agency culpability.

V. ARGUMENT

This appeal presents three issues: (A) whether the superior court erred in determining the extent to which Mr. Green is the prevailing party under the law; (B) whether the superior court erred in finding the issue of the timeliness of Lewis County’s response to be both an aggravating and a mitigating factor; and (C) whether the timeframe for the statutory penalty of the PRA stop when wrongfully withheld records are provided as part of documents in litigation.

This Court’s review on all three of these issues is *de novo*. RCW 42.56.550(3); *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 131 (Wash. 2011) (stating whether a party is a prevailing party is question of law); *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 746-48 (Wash. 2010); RCW 42.56.080 (stating agencies shall not distinguish amongst requestors).

A. Mr. Green is legally entitled to one-hundred percent of costs and reasonable attorney fees pursuant to RCW 42.56.550(4) because as a matter of law Mr. Green prevailed on one-hundred percent of the issues

Whether a party is prevailing is a “legal question of whether the records should have been disclosed on request.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 131 (Wash. 2011) (quoting *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005)); *Lindeman v. Kelso School District No. 458*, 172 P. 3d 329, 332 (Wash. 2007). The clear and unambiguous law of the PRA awards the prevailing party “all costs, including reasonable attorney fees.” *Sanders v. State*, 240 P. 3d 120, 139 (Wash. 2010) (quoting RCW 42.56.550(4)); *see also Lindeman*, 172 P. 3d at 332.

1. Mr. Green is the prevailing party on 100% of the issues

A finding of “a violation” of wrongful withholding of records under the PRA, directly “results in a remedy, with no discussion of what causes the final disclosure.” *Neighborhood Alliance*, 261 P. 3d at 131.

Here the superior court did find there was one allegation of a PRA violation, and the court ruled as a matter of law there was one violation of the PRA. The problem is the superior court did not stop at finding a violation, and impermissibly engaged in discussion of what caused the final

disclosure when determining to what extent Mr. Green is the prevailing party, against the *Neighborhood Alliance* standard. *Id.*

Mr. Green prevailed in the sense that he obtained a wrongfully withheld record by filing this suit. However, this point was conceded at the outset of the litigation. Mr. Green did not prevail on his claim of bad faith or his other allegations, which made up the majority of the case. Therefore, the Court holds that Mr. Green prevailed on only 25% of this matter.

CP 191 at ¶¶ 14-17. This discussion is what the *Neighborhood Alliance* court stated should not occur when determining the prevailing party status. The superior court found as a matter of fact that Mr. Green alleged one record was wrongfully withheld by Lewis County. CP 187 at ¶¶ 8-10. Then as a matter of law the superior court found Lewis County violated the PRA by wrongfully withholding that one document. CP 189 at ¶ 2.

In *Sanders* the court construes RCW 42.56.550(4), which authorizes the prevailing party of a PRA suit all costs including reasonable attorney's fees. There are only two sentences in RCW 42.56.550(4). "The first sentence entitles a prevailing party to costs and reasonable attorney fees for vindicating 'the right to inspect or copy' or 'the right to receive a response,' but the second sentence authorizes penalties only for denials of "the right to inspect or copy.'" *Sanders*, 240 P. 3d at 137. Here the court impermissibly conflates the first and second sentence of RCW 42.56.550(4) when determining the costs and fees, essentially combining prevailing party status

with the statutory penalty factors. This is wrong because the as the *Sanders* court states the first sentence of RCW 42.56.550(4) authorizes all costs including reasonable attorney's fees. Again, going back to the final trial court Findings of Fact, Conclusions of Law, and Order After PRA Hearing on March 01, 2017, the superior court stated as an issue of fact there was one issue of the right to inspect or copy. CP 187 at ¶¶ 8-10. Furthermore, the superior court ruled as a matter of law Mr. Green prevailed on that single issue. CP 189 at ¶ 2. The second sentence of RCW 42.56.550(4) authorizes the statutory penalty for a violation of the PRA, triggering a *Yousoufian* analysis. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 747-48 (Wash. 2010) (stating the fifth aggravating factor includes bad faith).

Under both the *Neighborhood Alliance* standard as a matter of law or the *Sanders* construction of RCW 42.56.550(4) Mr. Green prevailed on one-hundred percent of the issues in front of the court because on the "legal question of whether the records should have been disclosed on request" there was only one record at issue, and the superior court found a violation for a wrongful withholding of that one record. *Neighborhood Alliance*, 261 P. 3d at 131; *c.f. Sanders*, 240 P. 3d at 137 (stating the first sentence of RCW 42.56.550(4) entitles a prevailing party to all costs, including attorney's fees).

This court should overturn the superior court's ruling and rule that as a matter of law Mr. Green prevailed on one-hundred (100) percent of the issues in front of the trial court, pursuant to RCW 42.56.550(4) and the case law construing prevailing parties.

2. Mr. Green should receive 100% of his costs and attorney's fees because he prevailed on 100% of the issues

Washington courts use an abuse of discretion standard to determine how much to award costs and attorney fees. *Sanders*, 240 P. 3d at 140. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *Yousoufian*, 229 P. 3d at 743 (2010). Untenable grounds is defined as "not able to be defended." *Untenable*. Merriam-Webster Dictionary (May 17, 2017, 11:37 AM), <https://www.merriam-webster.com/dictionary/untenable>.

Here Mr. Green prevailed upon all the issues in front of the court. The court used the correct legal standard if Mr. Green had not prevailed upon all issues in front of the court -- when a party does not prevail on all issues, it is within the discretion of a superior court "to apportion an award of costs and fees so that it does not relate to any exempt documents." *Sanders*, 240 P. 3d at 140.

However, that is not the case here. According to the court there was one issue in front of the court and Mr. Green prevailed on one issue, making

him the prevailing party on all issues in front of the court. Clear and unambiguous case law states that whether a party is prevailing is a “legal question of whether the records should have been disclosed on request.” *Neighborhood Alliance*, 261 P. 3d at 131 (quoting *Spokane Research Fund*, 117 P. 3d at 1125; *Lindeman*, 172 P. 3d at 332. The superior court did not use the well-established, binding, case law that determines the standard for a prevailing party in a PRA lawsuit.

The superior court used untenable grounds to make its decision on the extent Mr. Green prevailed in the PRA lawsuit because it is not able to be defended in the face of well-established, binding Washington State Supreme Court case law stating contrarily as to how a prevailing party is to be determined.

3. This Court should award Mr. Green 100% of his costs and reasonable attorney’s fees

As Mr. Green is the prevailing party under well-established, binding, Washington State Supreme Court precedence, he is entitled to *all costs including reasonable attorney’s fees* pursuant to RCW 42.56.550(4). The superior court erred in deciding Mr. Green’s prevailing party status, when the legal grounds for its determination departed from the well-established, binding, Washington State Supreme Court precedence stating

how to determine a prevailing party status. This Court should award Mr. Green all costs and reasonable attorney's fees.

B. The superior court erred in finding the issue of timeliness in Lewis County's response to be both an aggravating and a mitigating factor

Aggravating and mitigating factors are used in a *Yousoufian* analysis in determining the statutory penalty of a PRA violation. A *Yousoufian* multifactor analysis is to ensure "predictability to parties, and a framework for meaningful appellate review." *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010). In law an aggravator works to "elevate[] the maximum" penalty. *State v. Langsteal*, 228 P. 3d 799, 802 (Wash. Ct. App. 2010) (quoting *State v. Roswell*, 196 P. 3d 705, 707 (Wash. 2008)); accord *Aggravated*, Black's Law Dictionary (8th ed. 2004) (defining aggravated as "made worse or more serious by circumstances"). On the contrary mitigating factors are meant to "merit leniency" of the penalty. *State v. McEnroe*, 333 P. 3d 402, 403 (Wash. 2014); accord *Mitigate*, Black's Law Dictionary (8th ed. 2004) (defining mitigate as "[t]o make less severe or intense").

The seminal *Yousoufian* case provides a multifactor analysis, as guidance for courts to determine the statutory penalty in a PRA case. Here the superior court used the *Yousoufian* factors when making its determination of the statutory penalty.

The superior court used the issue of a timely response to find both an aggravating and a mitigating factor. The issue of a timely response was first addressed by the superior court in aggravating factor number 1, stating in its finding of law “[t]here was a delayed response of 1 year. Time was of the essence of the request’s connection to the Sheriff’s race, which the LCSO should have realized.” CP 189 at ¶ 8(i). Next, the issue of a timely response was addressed by the superior court in mitigating factor number 2, stating in its finding of law “[t]he agency promptly responded.” CP 190 at ¶ 9(ii).

Using the same issue, arising out of the same facts, as both an aggravating and a mitigating factor violates the doctrine of strict compliance with the PRA. The public records act requires “strict compliance with public disclosure obligations.” *Gendler v Batiste*, 274 P. 3d 346, 390 (Wash. 2012); *Rental Housing Ass'n v. City of Des Moines*, 199 P. 3d 393, 398 (Wash. 2009); *Zink v. City of Mesa*, 140 Wash.App. 328, 337 (2007). Aggravating factors are found when there is not strict compliance with the PRA. Otherwise, if there is strict compliance with the PRA there would not be a violation. To find an issue that could be classified as both an aggravating factor and a mitigating factor would go against the doctrine of strict compliance because since violations of the law are aggravators, it would lessen the impact of aggravating factors.

It defies common sense for an issue to simultaneously constitute an aggravating and mitigating factor in a *Yousoufian* analysis in a PRA lawsuit. But that is how the superior court treated the issue of a timely response in this case. In terms of the PRA an aggravating factor is an issue that weighs against the agency to increase the penalty. *Cedar Grove Composting v. Marysville City*, 354 P. 3d 249, 262 (Wash. Ct. App. 2015) (stating “aggravating factors may support an increased penalty”); *Adams v. State Dept. of Corrections*, 361 P. 3d 749, 754 (Wash. Ct. App. 2015) (stating aggravating factors increase the statutory penalty and increased penalties can deter future agency misconduct). Whereas mitigating factors would do just the opposite, it would decrease the penalty and act in the agency’s favor. *McEnroe*, 333 P. 3d at 403 (Wash. 2014); *accord* Mitigate, *Black’s Law Dictionary* (8th ed. 2004) (defining mitigate as “[t]o make less severe or intense”).

It cannot be reconciled that the superior court delayed response for one year and should be penalized for it, but also through the same promptly responded. Essentially what the court did was give two separate contradictory rulings on the timeliness of the response.

When the same issue arising out of the same facts is allowed to be applied as both an aggravating factor and a mitigating factor as in this case, it works against the stated goal of the *Yousoufian* court. If an issue is

allowed to be both simultaneously an aggravating and a mitigating factor it does not serve the underlying goal of “predictability to parties, and a framework for meaningful appellate review.” *Yousoufian*, 229 P. 3d at 748. In fact, when an issue arising out of the same facts is allowed to be both an aggravating and a mitigating factor, it creates chaos for the parties, and does not allow meaningful appellate review.

Proposed solution

The *Yousoufian* court may have foresaw that “factors may overlap.” it did not give any guidance as to if a court applies contradictory factors, as in this case. *Yousoufian*, 229 P. 3d at 748.

Mr. Green proposes this Court adopt a rule that when the superior court finds an issue applies as an aggravator, that same issue cannot also be applied as a mitigator. This makes common sense.

Adopting a rule that when a superior court finds an issue applies as an aggravator, that same issue cannot also be applied as a mitigator, forwards the goal of strict compliance with the PRA. Under the theory of strict compliance, an agency must comply with all the rules of the PRA. In accord, strict compliance would not allow an issue to be both as an aggravating and mitigating factor.

C. The timeframe for the statutory penalty of the PRA does not stop when wrongfully withheld records are provided as part of documents in litigation

Disclosing records, pursuant to CR 5(b)(2)(a) as an attachment papers filed in the litigation does adhere with the statutory requirements or the spirit and intent of the PRA. “Agencies shall not distinguish among persons requesting records.” RCW 42.56.080.

Here Mr. Green was treated disparately and Lewis County distinguished him amongst requestors by responding to his public records request pursuant to CR 5(b)(2)(a), instead of having a public records officer from the Lewis County Sheriff’s Office re-open his public records request and respond to it directly.

The superior court ruled in a finding of law that Lewis County could properly respond through litigation filings when handling PRA requests only. CP 189 at ¶ 6. No case law was supplied by the superior court to justify its interpretation of the PRA. *Id.*

Washington courts have the duty when interpreting a statute “to discern and implement the legislature’s intent.” *Lowy v. PeaceHealth*, 280 P. 3d 1078, 1083 (Wash. 2012); *State v. Ervin*, 239 P. 3d 354, (Wash. 2010); *State v. Jacobs*, 154 Wash.2d 596, 600 (2005); *State v. J.P.*, 69 P.3d 318, 320 (2003). To determine the Legislature’s intent Washington courts, look to see if the “plain language of a statute is unambiguous and legislative

intent is apparent,” if it is then Washington courts “will not construe the statute otherwise.” *Lowy*, 280 P. 3d at 1083; *J.P.*, 69 P.3d at 320 (2003). “Plain meaning may be gleaned ‘from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.’” *Lowy*, 280 P. 3d at 1083 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 43 P.3d 4, 10 (Wash. 2002)).

When the legislature intended for an agency to treat a public records request from the source or subject of the information differently, it generally provided an explicit basis for the agency to do so in the statutory exemption itself. *See, e.g.*, RCW 42.56.330(6) (“Any information obtained by governmental agencies that is collected by the use of a motor carrier intelligent transportation system or any comparable information equipment attached to a truck, tractor, or trailer; however, the information may be given to other governmental agencies or the owners of the truck, tractor, or trailer from which the information is obtained.”); RCW 42.56.440(1) (“These records will be available only to the veteran, the veteran's next of kin, a deceased veteran's properly appointed personal representative or executor, a person holding that veteran's general power of attorney, or to anyone else designated in writing by that veteran to receive the records.”).

Neither is there any express provision in the PRA indicating that it is permissible for agencies to provide public records, once the request is closed, through litigation documents filed with the courts.

The plain language of RCW 42.56.080 states a requestor may not be disparately treated in either the processing of the records request or in disclosing the records to the requestor.

The third sentence of RCW 42.56.080 states that “[a]gencies shall not distinguish among persons requesting records” and requestors shall not be required to state the reason for their request, unless it might violate a statutory provision.

The operative clause is that “agencies shall not distinguish among persons requesting records.” RCW 42.56.080. That is the effect of this sentence. The use of the word and is to provide supplementary explanation in addition to the prefatory clause. *And*, Merriam-Webster Dictionary (May 17, 2017, 11:37 AM), <https://www.merriam-webster.com/dictionary/and>. The use of the word and in this sentence, is not meant to limit the scope of the operative clause. There is nothing in the plain language of the bill to suggest that. Instead, the supplementary clause is meant to give an example, and only an example, of how disparate treatment to requestors can occur.

The Legislature instructs courts to “liberally construe[]” the PRA to promote the public policy of the law and to protect public interest. RCW 42.56.030.

A liberal construction would hold that agencies shall not disparately treat requestors through any phase of the PRA, starting from the time the request is made, all the way through the disclosure of all the records is made. A narrow construction would hold that agencies can disparately treat requestors when disclosing the documents, as the superior court did in this case.

The intent of the PRA is for a response to be provided under the PRA -- it is not a response until the agency responds, otherwise violating RCW 42.56.080.

The superior court erred in finding that when Lewis County disclosed the wrongfully withheld public record to Mr. Green through litigation documents.

D. Mr. Green is entitled to an award of fees costs under the PRA and a prevailing party in this appeal

RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall

be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.”

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); see also *American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App 106, 115 (1999). The PRA does not allow for court discretion whether to award attorney fees to a prevailing party. *Progressive Animal Welfare Society v. University of Washington* (“Paws I”), 114 Wn. 2d 677, 687-88 (1990); *Amren v. City of Kalama*, 929 P.2d 389, 394 (1997). The only discretion the court has is in determining the amount of reasonable attorney’s fees. *Id.*

The Washington State Supreme Court in *Limstrom v. Ladenburg*, 136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – “[including] fees on appeal” – to the requestor. Should Mr. Green prevail on appeal on appeal in any respect, it should be awarded its fees and costs on appeal pursuant to the PRA and RAP 18.1.

VI. CONCLUSION

For the foregoing reasons, Mr. Green respectfully request that this court declare Mr. Green the prevailing party on all issues that were in front

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of the superior court; hold that under a *Yousoufian* analysis once an issue is found to be an aggravator, it cannot simultaneously be a mitigatory; and that a response to a closed PRA request cannot be given to litigation documents.

Mr. Green also requests fees and costs if he should prevail.

Respectfully submitted this 20 day of May, 2017.

By: 

Joseph Thomas, WSBA 49532
Law Office of Joseph Thomas PLLC
14625 SE. 176th St., Apt. N101
Renton, WA 98058
Attorney for Brian Green

Certificate of Service

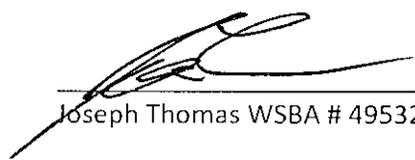
I declare under penalty of perjury under the laws of the State of Washington that on May 20, 2017, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:

Eric.Eisenberg@lewiscountywa.gov

And first class mail to:

Mr. Eric Eisenberg
Lewis County Prosecuting Attorney
351 N. North St
Chehalis. WA 98532


Joseph Thomas WSBA # 49532