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No. 50718-8-II

WASHINGTON COURT OF APPEALS
DIVISION II

WASHINGTON COALITION FOR OPEN GOVERNMENT,
a Washington nonprofit corporation,

Appellant,

v.

PIERCE COUNTY,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Washington Coalition for Open Government ("WCOG") appeals from the dismissal of its claims against Pierce County for violations of the Public Records Act, Chap. 42.56. RCW ("PRA"). WCOG's PRA request sought the County's records from another PRA case: *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). In *Nissen*, the Supreme Court unanimously rejected the argument of Pierce County and Intervenor Mark Lindquist that the PRA did not apply to any records on Prosecutor Lindquist's personal cell phone. 183 Wn.2d at 877.

Although Lindquist retained a private attorney and intervened in the *Nissen* case to assert his personal interests, Lindquist never appointed a special prosecutor to represent the County under RCW 36.27.030 despite the obvious conflict of interest created by his intervention as a private party. Unknown to the appellate courts in *Nissen*, Lindquist was personally involved in both the County's unsuccessful defense in *Nissen* and the drafting of amicus briefs filed in support of the County. Lindquist's continued representation of the County in *Nissen* despite his intervention as an adverse party was legally and ethically unprecedented.

Concerned by Lindquist's disregard for obvious conflicts of interests, WCOG requested copies of the County's litigation communications with other parties in *Nissen*, including Lindquist. In

response, the County began producing batches of heavily-redacted records, asserting that the County's communications with Lindquist and other parties were "work product" under RCW 42.56.290. The County was also as unhelpful to WCOG as possible, refusing to communicate with WCOG by email, and printing existing redacted PDF files to force WCOG to purchase useless black paper.

WCOG sued the County for (a) its invalid exemption claims, (b) its inadequate exemption logs, and (c) its failure to adopt and enforce proper rules for providing fullest assistance to requestors under RCW 42.56.100. This Court should reverse the trial court's erroneous rulings, and remand this matter to the trial court for further proceedings. This Court should also award WCOG its attorney fees under RCW 42.56.550(4).

II ASSIGNMENTS OF ERROR

Assignment of Error: The trial court erred in issuing the *Court's Letter Ruling* dated June 15, 2017 (CP 356-360) pursuant to which WCOG's case was dismissed in the *Stipulation and Order of Dismissal with Prejudice* dated July 21, 2017 (CP 354-360).

Issues Pertaining to Assignment of Error:

1. Whether the trial court erred as a matter of law in ruling, in a PRA case, that "it is the Plaintiff's burden to prove the elements necessary to recovery." CP 358.

2. Whether the trial court erred as a matter of fact ***and*** law in ruling that WCOG "failed to even identify which specific records are at issue." CP 359.

3 Whether the trial court erred as a matter of fact ***and*** law in ruling that the County had carried its burden of proof to establish that the County's records were exempt under the common interest doctrine. CP 359.

4. Whether the trial court erred in holding that the County's unexplained claims of "work product" were sufficient under RCW 42.56.210(3). CP 360.

5. Whether the trial court erred in holding that the County did not violate RCW 42.56.100 by failing to adopt and enforce rules for email and for providing electronic records to requestors. CP 3557-358.

III. STATEMENT OF THE CASE

Although WCOG does ***not*** have the burden of proof under the PRA, WCOG carefully documented the conduct of Lindquist and the County in the *Nissen case*, and proposed detailed findings of fact (which the trial court declined to adopt). CP 1575-1614. Those findings (and conclusions of law), which are attached as **Appendix A**, are fully supported by public records, whistleblower complaints, media reports, the County's discovery responses, and sworn declarations from two former

deputy prosecuting attorneys who witnessed Lindquist's misconduct first hand.[1] The County never specifically denied any of the facts alleged and documented by WCOG, and the County never produced any contrary evidence. In fact, the County persuaded the trial court to quash depositions that would have elicited the truth about Lindquist's misconduct. CP 1825-1828.[2]

A. *Nissen v. Pierce County*

On June 15, 2011, Glenda Nissen, a Pierce County deputy sheriff, filed a whistleblower complaint against Pierce County Prosecutor Mark Lindquist. Nissen alleged, *inter alia*, that Lindquist had retaliated against her for her criticism of Lindquist and her lack of support for his election campaign. Nissen also alleged, *inter alia*, that Lindquist attempted to focus the investigation of an anonymous death threat, received by deputy prosecutor Mary Robnett in 2010, on Nissen despite the lack of any evidence, and that Lindquist improperly barred Nissen from the Prosecutor's Office. CP 2126-2141; FOF 3.[3]

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[1] Each of WCOG's 137 proposed findings includes a citation to the exhibit(s) that support the finding. CP 1575-1614. The exhibits are found at CP 2122-2980.

[2] Although WCOG maintains that the trial court's order to quash the depositions was erroneous, WCOG does ***not*** appeal that ruling because the proposed deponents, Lindquist and deputy Dan Hamilton, never testified or submitted declarations in support of the County's case. *See* CP 1827.

[3] "FOF" refers to the numbered Findings of Fact proposed by WCOG. CP 1575; **Appendix A**.

On July 26, 2011, the County entered into a mediated settlement agreement with Nissen. Lindquist's senior deputy, Dan Hamilton, represented the County in the mediation. The settlement awarded $39,500 to Nissen's attorney, released all claims against Nissen, and prohibited further retaliation against Nissen. CP 2142-2143; FOF 4.

A news story about the Nissen settlement appeared in The News Tribune (TNT) on August 2, 2011. Ex. P51. Lindquist spent that day trying to manage the news story, seeking minor changes after the story was published. CP 2579-2581; FOF 5.

Unknown to anyone outside Lindquist's office (at that time) Lindquist sent a text message to at least two deputy prosecuting attorneys, Mary Robnett and Mike Sommerfeld. The text message stated "Tell allies to comment on TNT story." CP 1352-1353; CP 2580; FOF 6. Sommerfeld then posted an anonymous comment on the TNT website, calling Nissen's claims "more than frivolous," and accusing Nissen's attorney of "extorting county taxpayers." CP 2579-2580; FOF 7.

Nissen correctly suspected that Lindquist was continuing to retaliate against her. On August 3, 2011, Nissen's attorney made a PRA request for records from Mark Lindquist's cell phone on August 2, 2011. CP 2144; FOF 8.

After the County refused to produce Lindquist's text messages, Nissen brought a PRA case against the County. *Glenda Nissen v. Pierce County*, Thurston County No. 11-2-02312-2 (hereafter "*Nissen*"). Nissen's complaint alleged that her PRA request sought records from Mark Lindquist's personal cell phone, and that Nissen believed the requested records would show that "Lindquist was using his cell phone to take actions retaliating against her and other official misconduct." CP 2159; FOF 11.

Deputy prosecutors Dan Hamilton and Mike Sommerfeld appeared in the *Nissen* case on behalf of the County, and moved to strike and seal Mark Lindquist's cell phone number. These pleadings indicated that Lindquist was counsel of record for the County in the *Nissen* case. CP 2170-71, 2173-76; FOF 13.

Lindquist "kind of flipped out" after Nissen filed her PRA case. Lindquist pressured deputy prosecutor Robnett to bring a civil action against Nissen. CP 1352. Robnett never brought an action against Nissen, but she retained an attorney who made PRA requests to the Pierce County Sheriff for records relating to Nissen. CP 2177-78; FOF 14-15.[4]

[4] On or about March 12, 2012, Nissen entered into an agreement with the Pierce County Sheriff to put Nissen's emails in the custody of attorney Ramsey Ramerman, who had been appointed a special deputy prosecutor to represent the Sheriff for that purpose. CP 2221-23; FOF 21.

On November 22, 2011, Lindquist, represented by a private attorney, Stewart Estes, filed a motion to intervene in the *Nissen* case under RCW 42.56.540 "for the purposes of asserting certain individual rights and seeking to restrain and enjoin [Nissen] from receiving, and Defendant Pierce County from disclosing, certain personal records." CP 2179-89; FOF 16. On November 28, 2011, Lindquist, again represented by Estes, filed a motion for a temporary restraining order and preliminary injunction against Pierce County. CP 2190-2214; FOF 18. Lindquist's motion to intervene was granted. CP 2215-17; FOF 19. The trial court dismissed the *Nissen* case, and Nissen appealed. FOF 20.

Despite the fact that Lindquist retained a private attorney (Estes) and sought an injunction against his own agency, Lindquist never withdrew from representing the County in the *Nissen* case. Furthermore, both Lindquist and deputy Sommerfeld knew that Nissen was suing the County because Lindquist had told deputy Sommerfeld to bash Nissen on the TNT website, and he had done so. Nonetheless, the County denies that Lindquist had any conflict of interest in the *Nissen* case, either before or after he intervened. CP 1363. It is undisputed that the County and Lindquist never prepared a written waiver of conflict of interest. FOF 17.

On appeal, Lindquist, represented by Estes, filed a brief of respondent. CP 2224-25; FOF 22. The County also filed a brief, listing

Lindquist and Hamilton as counsel for the County. CP 2226-27; FOF 23. Amicus briefs supporting Lindquist and the County were filed by the Washington Association of Prosecuting Attorneys (WAPA), and the Washington State Association of Municipal Attorneys (WSAMA). CP 2228-2231.

Another amicus brief supporting Lindquist was filed on behalf of six organizations of government officials and/or employees.[5] Deputy prosecutor Jared Ausserer was identified as counsel for the Pierce County Prosecuting Attorneys Association (PCPAA) and as the author of the brief, along with four other attorneys. CP 2232-33.

On September 9, 2014, the Court of Appeals rejected Lindquist's argument that the PRA did not apply to Lindquist's cell phone. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014); FOF 26.

In October 2014, the County filed a petition for review in *Nissen*. The County's petition indicated that Lindquist was still counsel of record for the County. CP 2234-35. However, Lindquist, represented by attorney Estes, also filed a petition for review as intervenor. CP 2236-37; FOF 27.

[5] The six organizations were (i) the Washington Federation of State Employees (WFSE), (ii) the International Association of Firefighters (IAFF), (iii) the Washington Education Association (WEA), (iv) the Washington Council of Police and Sheriffs (WACOPS), (v) the Washington State Patrol Troopers Association (WSPTA), and (vi) the Pierce County Prosecuting Attorneys Association (PCPAA). CP 2232.

An amicus memorandum supporting review was filed by the six organizations (WFSE, IAFF, WEA, WACOPS, WSPTA and PCPAA). This memorandum was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney's Office. CP 2252-74; FOF 29. WSAMA also filed a memorandum in support of review. CP 2238-51; FOF 28.

The Supreme Court granted review on March 4, 2015. *Nissen v. Pierce County*, 182 Wn.2d 1008 (2015); FOF 30. The County and Intervenor Lindquist each filed supplemental briefs in *Nissen*. Again, Mark Lindquist was represented by attorney Estes, but Lindquist was also counsel of record for the County. CP 2276-92; FOF 31.

Another amicus brief supporting Lindquist and the County was filed by WFSE, IAFF, WEA, WACOPS, WSPTA and PCPAA. This brief was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney. CP 2318-19; FOF 33. Amicus briefs supporting Lindquist and the County were filed in *Nissen* by WAPA and WSAMA. CP 2293-2317; FOF 32.

On or about May 12, 2015, Deputy Prosecutor Steve Merrival filed a whistleblower complaint with the Pierce County Human Resources Department, alleging numerous instances of misconduct and retaliation by Lindquist, including misconduct relating to Nissen and violations of the

PRA. CP 2327-43; FOF 35. On May 21, 2015, another whistleblower complaint was filed by Chief Criminal Deputy Stephen Penner, also alleging numerous instances of misconduct, waste of public funds, and abuse of authority by Lindquist, including misconduct relating to Nissen's lawsuits and attempts by Lindquist to circumvent the PRA. CP 780-782; CP 2344-53; FOF 36. Penner also disclosed that the amicus briefs filed in *Nissen* on behalf of various employee groups were actually drafted by senior prosecuting attorneys, including Lindquist, Hamilton and Sommerfeld, using County time and resources. CP 781; CP 1600; CP 2350; FOF 36.

On August 27, 2015, the Supreme Court issued its opinion in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), unanimously rejecting Lindquist's argument that the PRA did not apply to records on his personal phone. FOF 38.

On or about October 22, 2015, the results of a County investigation into the Merrival and Penner whistleblower complaints were released. The report confirmed extensive misconduct by Lindquist, specifically including his practice of using his personal cell phone to thwart PRA requests. CP 2370-2435; FOF 40.

After the Supreme Court remanded the *Nissen* case to the superior court, the Pierce County Executive, Pat McCarthy, became aware that

Lindquist had a conflict of interest in the *Nissen* case. The Executive retained her own attorney, and received a 13-page legal opinion explaining that Lindquist had a conflict of interest in the *Nissen* case, and that none of the attorneys in Prosecutor's Office should represent the County in *Nissen*. CP 2356-68; FOF 39. On November 10, 2015, Executive McCarthy formally requested that Lindquist cease all action in the *Nissen* case and appoint a special prosecutor to represent the County under RCW 36.27.040. CP 2436; FOF 41.

Lindquist responded by denying that he had any conflict of interest in the *Nissen* case. CP 2450, 2459-63. Then Lindquist attempted to appoint attorney Ramerman to represent the County, despite the facts that (i) Ramerman was already involved in the *Nissen* case on behalf of the Sheriff, and (ii) was the author of the WSAMA briefs in *Nissen* that had erroneously agreed with Lindquist. CP 2440.

Executive McCarthy responded by filing a motion for the appointment of a special prosecutor chosen by McCarthy. CP 2437-63; FOF 42. Lindquist responded by appointing a law firm of his choosing, Freimund, Jackson & Tardif, PLLC, to represent the County in *Nissen*. On December 18, 2015, without deciding the issue of whether Lindquist had a conflict of interest, the superior court accepted the appointment of Freimund firm, and denied the Executive's motion. CP 2474-82; FOF 43.

On or about December 23, 2015, former deputy prosecutor Mary Robnett, who had left the Prosecuting Attorney in 2011, produced the smoking gun. Robnett disclosed in a letter to the County's attorneys that she had received a text message from Lindquist on August 2, 2011, that stated: "Tell allies to comment on TNT story." CP 1352, 2483-85; FOF 44. Robnett's disclosure of the text message enabled the TNT to determine that deputy prosecutor Sommerfeld had posted the disparaging comments about Nissen on the TNT website. CP 2579-80

The superior court in *Nissen* ruled that Lindquist's text message to Sommerfeld was a public record that should have been disclosed. CP 2584-91; FOF 46. The court awarded Nissen more than $118,000 in attorney fees and penalties. CP 2596-2600; FOF 47. By that time the County had already spent more than $325,000 on private attorneys to unsuccessfully defend Lindquist. CP 2592.

B. WCOG PRA Request

On April 1, 2015, after the Supreme Court granted review in *Nissen*, WCOG made a PRA request to the Pierce County Prosecuting Attorney. WCOG sought records of communications between the various parties in *Nissen*, the conflict of interest created by Lindquist's intervention in the *Nissen* case, and the retention of private attorneys in the *Nissen* case. WCOG did not ask the Prosecuting Attorney to produce any

party's privileged communications with its own attorneys or any "work product" relating to the *Nissen* litigation. CP 2645-47; FOF 50-51. WCOG explicitly requested that the County send all records and correspondence electronically to avoid delay. *Id.*, FOF 52. WCOG also explicitly requested that records be provided in electronic format as PDF files. *Id.*, FOF 53.

WCOG repeatedly demanded that the County respond by email and produce records electronically. CP 2646, 2650-51, 2655, 2664-65, 2668; FOF 52-53, 55-56, 58, 62, 63, 70. The County repeatedly ignored WCOG's requests and sent correspondence by mail, causing delays. CP 2649, 2654, 2656-57, 2659, 2667; FOF 54, 57, 59, 60, 64, 65, 66.

By letter dated May 11, 2015, the County stated that it was prepared to provide a "first installment" of 533 pages of redacted records, many of which were completely redacted. The County requested payment of $88.65 for WCOG to receive these records on paper by regular mail. CP 2658-59; FOF 61.

The County's letter included an exemption log that asserted that virtually all responsive records were exempt under RCW 42.56.290 (work product). CP 2660-63; FOF 61. Only eight (8) out of five hundred thirty-three (533) pages of records were unredacted. *Id.* As the County noted,

all but seventy-two pages of records were completely redacted, "leaving no text and fully blackened pages." CP 2659.

The County's first exemption log indicated that a number records redacted as County "work product" (RCW 42.56.290) had been shared with Lindquist and/or his private attorney, Estes. CP 853-856, 2660-2663. For many other redacted records the County's log provided no information, merely said "see record," and asserted that records were exempt as work product under RCW 42.56.290. *Id*.

The records produced on July 9, 2015, were first electronically redacted using Adobe Acrobat XI Pro. This electronic redaction process resulted in one or more PDF files that could have been provided to WCOG in that format as WCOG had explicitly requested. CP 2843; FOF 68, 71. **Rather than produce the existing redacted PDF files as WCOG requested, the County printed the PDF files to create paper copies that had to be mailed to WCOG at a cost of $88.65.** CP 2269-70; FOF 69, 71. Most of the 533 pages of copies were just black paper. CP 2676; FOF 71.

Additional delays were caused when the County's PRA officer retired on August 28, 2015. CP 457; FOF 72. The County made no arrangements to have the PRA officer's email account forwarded to or processed by the new PRA officer. As a result, the County did not receive

at least one email from WCOG's attorney, which was re-sent in October 2015. CP 2680-93; FOF 72-76.

On December 2, 2015, the County offered to produce the "second installment" of records either as paper copies or PDF files on a compact disc (CDR) sent by mail. After WCOG sent the County a check for $13.80, the County produced a second installment of records consisting of a single 233-page PDF file of heavily-redacted records. These records were copied onto a CDR and mailed to WCOG's attorney. CP 2700-02; FOF 78-79.

On December 14, 2015 WCOG commenced the current lawsuit. CP 1027-1037. WCOG filed an amended complaint on October 3, 2016. CP 2083-2093. WCOG alleged, *inter alia*, that the County had violated the PRA by (i) withholding non-exempt records, (ii) failing to adequately identify records and explain exemptions, and (iii) failing to provide "fullest assistance" to WCOG. CP 2090-2091.

From January 2016 to April 2016, the County produced its third, fourth and fifth installments of records, as heavily-redacted PDF files. These records were copied onto CDRs (or DVDs) and mailed to WCOG's attorney. CP 2713-60; FOF 81.

By letter dated May 13, 2016, the County stated that the Pierce County Prosecutor's Office had changed its policy on the use of internet

transfer services as a means of providing public records, and that the PRA officer was now authorized to provide responsive records through an internet transfer service called "Filelocker." CP 2765-67; FOF 82. From May 2016 through September 2016, the County produced its sixth, seventh, eighth, and ninth installments of redacted records as PDF files transmitted to over the Internet via "Filelocker." CP 2768-2831; FOF 83.

The records redacted by the County as "work product" were not only shared with Lindquist and his private attorney, but also with a large and unknown number of prosecuting attorneys through WAPA, city attorneys through WSAMA, and attorneys for various employee amicus groups that filed briefs in *Nissen*:

- Examples of records shared with WAPA are found at Record Nos. 1007-1008, 1491-1493, 2064, 1966, 1944-1946, 1910-1912, 658-690, 2132, 2311, and 2308. CP 2490-2515; FOF 86.
- Examples of records shared with WSAMA are found at Record Nos. 2174-2176, 945, 2081-2082. CP 2569-77; FOF 97.
- Examples of records shared with various organizations of government officials or employees are found at Record Nos. 1672, 1433-1434, 8093-8124, 1342-1346. CP 2917-32; FOF 104.

- Examples of records shared with Lindquist are found at Record Nos. 986, 994-996, 1665-1666, 1831-1839. CP 2933-49; FOF 112.

C. Trial Court Proceedings

Despite the facts that (i) the County had already taken more than a year to respond to WCOG's request, and (ii) the County had already produced thousands of pages of heavily redacted records, the County moved for summary judgment that WCOG's case was "premature" under *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 104 (2014). The trial court rejected the County's absurd interpretation of *Hobbs*. CP 358, 931.

WCOG submitted discovery requests to the County to clarify the scope and basis of the County's "work product" claims. In response, the County asserted (i) that the interests of the County and Intervenor Lindquist were "co-extensive," (ii) that a "common interest" existed between the County and Lindquist from the inception of the *Nissen* case, and (iii) that the "common interest" included WAPA, WSAMA, the Attorney General, and other five organizations of government officials and/or employees.[6] CP 2836-37. The County asserted that there was an

[6] The five amicus groups that supported Lindquist in the Nissen case were (i) the Washington Council of Police and Sheriffs (WACOPS), (ii) the Washington State Patrol Troopers Association (WSPTA), (iii) Pierce County Prosecuting Attorneys Organization, (iv) WSAMA, and (v) WAPA. CP 2252-74.

"agreement and understanding" between the County, Lindquist, and eight other organizations consisting of government officials, employees and/or attorneys to share information while preserving "applicable privileges." *Id*. **The County admitted that it had <u>no documentation</u> to corroborate its remarkable claim that that it had entered into a common interest agreement in *Nissen* with nine (9) other parties represented by dozens of attorneys.** *Id*.

The County's discovery response stated that only Lindquist, Hamilton, and two private attorneys (Estes and Talmadge) had personal knowledge of the alleged oral common interest agreement. CP 2836-37. Consequently, WCOG attempted to depose Lindquist and deputy Hamilton. But the County opposed such depositions, and the trial court quashed the depositions as unnecessary. RP (113/17) at 25-26; CP 1827.

The trial court held a hearing on the merits on April 21, 2017. CP 1833. Although WCOG did ***not*** have the burden of proof, WCOG submitted substantial evidence that the County's alleged oral common interest agreement was a fabrication:

- WCOG proved that when WCOG requested *Nissen* records from WAPA that agency produced its records unredacted and without any claim of a common interest agreement with the County. CP 2566; FOF 93.

- WCOG submitted an email from WAPA staff attorney Pam Loginsky dated January 17, 2014, in which Loginsky reminded WAPA member attorneys that their emails about the *Nissen* amicus brief were public records and suggested using the phone to avoid creating such public records. CP 2561; FOF 92.
- WCOG proved that, when WCOG requested records of WAPA's and WSAMA's participation in the *Nissen* case from numerous other counties and cities, those agencies produced the records without redaction and without any claim of a common interest agreement with the County. CP 1289-1292, 2516-57, 2868-98; FOF 89, 100.
- Some of the records produced by other agencies were the exact same record redacted by the County, including an email in which Lindquist asked for a draft of WAPA's amicus brief. CP 1128, 1290, 1295-97; FOF 89.

In contrast, even though the County had the burden of proof under RCW 42.56.550(1), the County submitted no declarations or other evidence to support its common interest claims. The County relied exclusively on the bare fact that the briefs filed by Lindquist and various amici curiae in the *Nissen* case agreed with the County to imply the existence of a common interest agreement. CP 1535-36. **But none of the**

four attorneys identified by the County as witnesses actually testified that any common interest agreement was ever made.

Instead, the County offered a meaningless declaration from attorney Ramerman, who wasn't even involved in the *Nissen* case when the common interest agreement was allegedly formed in November 2011. Ramerman testified, *inter alia*, that:

> In my conversations and email exchanges with Dan Hamilton in this case, I therefore believed that my clients shared a common interest with Pierce County.

CP 1830. Ramerman did ***not*** claim to have personal knowledge of the multi-party oral common interest agreement allegedly made two years earlier, and the word "agreement" never appears in his declaration. Ramerman's personal opinion that WSAMA "shared a common interest with Pierce County" in 2014 does ***not*** establish that a common interest agreement was made by other attorneys prior to Ramerman's involvement.[7]

If it were true that the County had entered into an oral common interest agreement with various parties in the *Nissen* case then the County could have and should have submitted a declaration to that effect from

[7] Attorney Ramerman was originally appointed as a special deputy prosecutor for the purpose of taking possession of Glenda Nissen's emails pending resolution of PRA requests for those records. CP 2221-22. Ramerman did not appear as counsel for WSAMA until January 2014, more than two years after the common interest agreement was allegedly made. CP 2230.

either Lindquist and/or Hamilton. But the County's common interest agreement claim was obviously false, as WCOG's investigation revealed. In the end, none of the four attorneys who allegedly had personal knowledge of the common interest agreement in *Nissen* was willing to testify under oath in support of the County's claim.

The trial court issued a letter ruling on June 15, 2017. The ruling first addressed two threshold evidentiary issues. The trial court declined to consider the WCOG's expert declarations to the extent those declarations contained opinions on conclusions of law. CP 357. The trial court also rejected the County's "unspecific" objections to WCOG's ER 904 exhibits. CP 357. The trial court then dismissed WCOG's claims.

The trial court held that the County had established a "common interest" between the County, Lindquist and various amicus groups. CP 359. This ruling was based on nothing more than the bare fact that these parties filed amicus briefs that agreed with the County. *Id*. The court ignored all the evidence that no common interest agreement was ever created. The court never found that any "agreement" was made. *Id*.

The trial court also refused to consider the legal issue of whether Lindquist's conflict of interest in the *Nissen* case—and the fact that Lindquist was both the County's attorney and an opposing party—precluded any valid common interest agreement. The trial court correctly

rejected the County's assertion that other superior courts had already decided the issue of whether Lindquist had a conflict of interest in *Nissen*. CP 359, 1363-1370; VRP (1/13/17) at 8. However, the trial court declined to rule on the issue itself, asserting that "the record is insufficiently developed." CP 359.

The trial court also held that (i) the County's exemption logs were sufficient under RCW 42.56.210(3), and (ii) the County did not violate RCW 42.56.100 by failing to adopt rules for electronic records and printing existing PDF files onto paper for no reason. CP 357-360. This appeal followed.

IV. ARGUMENT

The County has the burden to prove that its exemption claims are "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 burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request.

Neighborhood Alliance v. Spokane County, 172 Wn. App. 702, 715, 261 P.3d 119 (2011). WCOG had no burden of proof on any issue.[8]

[8] The trial court erroneously held that WCOG had the "burden to prove the elements necessary to recovery." CP 358. *Adams v. Washington State Dept. of Corrections*, 189 Wn. App. 925, 952 (2015), cited by the trial court, confirms that RCW 42.56.550(1) places the burden of proving exemptions ***on the agency***. The portion of *Adams*

Nevertheless, WCOG actually proved that the County's exemption claims were both legally and factually unsupported. In contrast, the County never submitted any admissible evidence to support its claims. *See* section IV(A)(2) (below).

The burden of proof is immaterial on the issues of whether the County's exemption logs were adequate (Section B) and whether the County violated the duty of fullest assistance in RCW 42.56.100 (Section C). The essential facts relating to those claims are undisputed, and the issues presented are questions of law.[9]

A. The County's common interest agreement claim has no basis in fact or law.

The County has redacted virtually all of its communications with other parties in the *Nissen* litigation as "work product" under RCW 42.56.290. As the trial court noted, the issue in this case is whether the County waived any work product privilege by disclosing these records to

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erroneously cited on by the trial court merely notes that RCW 42.56.550 does not address the burden of proof on other issues, such as whether an inmate-requestor has the burden to prove bad faith under RCW 42.56.565 (which is not an issue in this case). Furthermore, the trial court never explained what necessary "elements," if any, WCOG had failed to establish.

[9] *The trial court cited Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011), for the proposition that the County has the burden of proof on the duty of fullest assistance. CP 357. Although *Neighborhood Alliance* does not actually address that specific issue, WCOG agrees that statutory construction would require placing the burden of proof on the agency on every issue under the PRA. *See* RCW 42.56.030 (the PRA shall be liberally construed to promote the public policy of the PRA). It is not necessary for the Court to decide that issue in this case because the relevant facts are undisputed.

other parties.[10] CP 358. The County relies on the common interest doctrine to avoid any waiver. CP 359.

The common interest doctrine is an exception to the general rule that the voluntary disclosure of privileged attorney-client or work product communications to a third party waives the privilege. *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016), *review granted*, 187 Wn.2d 1001 (2017). The purpose of the common interest doctrine is to allow two or more parties to share confidential information in pursuit of a common legal interest. *Id*.

Abstract agreement on a legal issue is ***not*** sufficient to establish that a common interest agreement was made. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (a shared desire for the same outcome in a legal matter is not sufficient). The fact that two or more parties agree on a legal issue or file similar amicus briefs does ***not*** establish that any common interest agreement was made.

Application of the common interest doctrine requires proof that the parties actually entered into some form of ***agreement*** to share confidential

[10] The trial court erroneously stated that "it is not disputed that the work product privilege applies to these documents in a general sense." CP 359. The County has asserted that various records were work product for purposes of RCW 42.56.290, but that issue was not submitted to the trial court. WCOG's challenges the County's application of the common interest doctrine, and that argument merely assumes, *arguendo*, that RCW 42.56.290 would otherwise apply to the records. It remains to be seen whether all of the thousands of pages of records redacted by the County are actually work product.

information in pursuit of a common legal interest. "A written agreement regarding the privilege is not required, but 'the parties must invoke the privilege: they must intend and agree to undertake a joint defense effort.'" *Id*. (citing *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F.Supp.2d 1199, 1203 (W.D. Wash. 2007). In its discovery responses, the County alleged that an oral common interest agreement was formed at the outset of the *Nissen* case, when Lindquist intervened in the trial court. CP 2837. And the County has acknowledged that its common interest claim requires proof that the County entered into some sort of agreement with the other parties with whom information was shared. CP 1536.

As a threshold matter, the trial court erroneously stated that WCOG had failed to identify specific records at issue. CP 359. This ruling had no basis in fact or law. First, in response to the County argument's that WCOG had not identified "the specific disputed records at issue," WCOG explained that the requestor has no obligation under the PRA to specifically identify thousands of pages of improper redactions. CP 711. Nothing in either the PRA or the case law places that burden on the requestor. On the contrary, the County has the burden to prove that its exemptions comply with the PRA. RCW 42.56.550(1). The court's ruling erroneously shifted the burden of proof to WCOG.

Second, the trial court's statement is simply incorrect. In its hearing materials WCOG identified numerous specific examples of improperly redacted records, including:

- Twenty-six (26) pages of redacted communications with WAPA (CP 1592 [FOF 86]; CP 2490-2515);
- Six (6) pages of redacted communications with WSAMA (CP 1597 [FOF 97]; CP 2569-2577);
- Forty (40) pages of redacted communications with various amicus groups (CP 1599 [FOF 104]; CP 2917-2932); and
- Fifteen (15) pages of redacted communications with Intervenor Lindquist (CP 1601 [FOF 112]; CP 2933-2949).

These examples provided the trial court with more than enough information for the court to conclude that the County had not carried its burden of proof, and that the County's exemption claims were invalid.

1. The fact that various parties filed similar briefs in *Nissen* does *not* prove that a common interest agreement was ever made.

The County never produced any admissible evidence that a common interest agreement was ever made. Instead, the County argued that the existence of a common interest agreement could be ***implied*** from the fact that Lindquist, the County, and various amici all filed similar briefs in *Nissen*. CP 1534-1536. The trial court agreed. CP 359.

Abstract agreement on a legal issue is ***not*** sufficient to establish that a common interest agreement was made. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (a shared desire for the same outcome in a legal matter is not sufficient). The fact that the amicus briefs filed by WAPA, WSAMA and the employee amicus groups agreed with Lindquist and the County shows only that those parties had a shared desire to weaken the PRA with a legal argument that failed. As WCOG noted, both the Washington Attorney General and the League of Women Voters of Washington (LVWWA) filed amicus briefs in *Nissen* that argued that Lindquist was wrong. But that fact does ***not*** establish, or even imply, the existence of a common interest agreement between the AGO and the LVWWA. VRP (1/13/17) at 19-20. Similarly, the bare fact that certain amicus briefs agreed with Lindquist does ***not*** establish that the attorneys for all those cities, counties and employee organizations actually entered into a common interest agreement.

Significantly, the trial court did ***not*** find that any common interest ***"agreement"*** was ever made. The court merely held that there was a "common interest" between the County, Lindquist and various amici in the *Nissen* case. CP 359. Neither the County nor the trial court even attempted to explain how or when the attorneys for all of those parties, counties and cites could have formed an oral common interest agreement

in the *Nissen* case. The County claims to have entered into the common interest agreement at the outset of the *Nissen* case, but the amicus groups that were allegedly included in that agreement did not even appear in the *Nissen* case until two years later. CP 2233, 2836-37. Furthermore, when WCOG asked the County to identify all persons with knowledge of the alleged common interest agreement the County listed only Lindquist, his personal attorney, and two attorneys for the County. CP 2836-37.

As explained in the following subsection, the County's alleged common interest agreement is not merely an unsupported allegation; it is contrary to all of the evidence in the record.

2. The County's common interest agreement claim is unsupported by admissible evidence, not credible, and directly contrary to all the documentary evidence.

Although no written agreement is required, the County acknowledges that it must prove that the various parties with whom records were shared in the *Nissen* litigation at least intended and orally agreed to create a common interest agreement. CP 1536; *Kittitas County v. Allphin*, 195 Wn. App. at 368. The County admits that it has no documentation to corroborate its claim that it entered into a common interest agreement with nine other parties represented by dozens of attorneys. Therefore, the County could only carry its burden of proof under RCW 42.56.550(1) by submitting a sworn declaration from at least

one of the four attorneys who allegedly had personal knowledge of the alleged oral agreement.

But the County never produced a declaration supporting its alleged common interest agreement, and the County successfully resisted WCOG's efforts to depose the witnesses, identified by the County, who had personal knowledge of the alleged agreement. In response to the County's motion to quash the depositions of Lindquist and Hamilton, WCOG explained that the County had admitted in discovery that there was no documentary evidence whatsoever, and that the only source of admissible evidence about the alleged common interest agreement was the testimony of the County's witnesses (Lindquist and Hamilton). CP 1136. WCOG noted that the "$64,000 question" was whether WCOG would be permitted to depose the only witnesses who could carry the County's burden of proof. VRP (1/13/17) at 18, 25. The County avoided any discussion of whether it intended to submit declarations from Lindquist or Hamilton, and made a series of meritless arguments about why WCOG should not be permitted to take depositions. CP 8-23, 2546-2559. The trial court did not accept any of those arguments.

Instead, the trial court granted the County's motion to quash "without prejudice," but indicated that the court would revisit the issue if the briefing on the merits persuaded the court that additional discovery

was necessary. CP 1561, 1827. In other words, the court signaled that it might allow depositions of Lindquist or Hamilton if the County sought to introduce declarations from those witnesses on disputed issues of fact.

As it turned out, the County's hearing materials did ***not*** include a declaration from Lindquist or Hamilton. CP1526. The County apparently decided that preventing the depositions of Lindquist and Hamilton was more important than carrying the County's burden of proof under the PRA. Because the County never offered declarations, WCOG never revisited the issue of deposing Lindquist and Hamilton.[11]

The only evidence submitted by the County was a declaration from attorney Ramerman, who represented WSAMA on appeal. Ramerman asserted, based on unspecified conversations and emails with deputy Hamilton, that Ramerman "believed that [his] clients shared a common interest with Pierce County." CP 1830. But Ramerman did not have any personal knowledge of the alleged common interest agreement, and the word "agreement" never even appears in his declaration. CP 1830, 2836-37. **As a result, the County had no admissible evidence that a**

[11] WCOG maintains that the trial court's decision to quash the depositions of Lindquist and Hamilton was error. However, because those witnesses never testified and WCOG did not have the burden of proof, WCOG was not sufficiently prejudiced by the trial court's discovery ruling to appeal that ruling. WCOG maintains that it must be permitted to depose any County witness who testifies on any disputed issue of fact in this case.

common interest agreement was ever formed. CP 1593, 1597, 1600, 1602 (COFLAW 88, 99, 109, 119A).

Although the County produced no admissible evidence and WCOG did not have the burden of proof, WCOG went well beyond the duties of requestor in a PRA case by affirmatively proving that the County's alleged "common interest agreement" was a fabrication:

- WCOG proved that when WCOG requested *Nissen* records from WAPA that agency produced its unredacted records without any claim of a common interest agreement with the County. CP 2566; FOF 93.
- WCOG submitted an email from WAPA staff attorney Pam Loginsky dated January 17, 2014, in which Loginsky reminded WAPA member attorneys that their emails about the *Nissen* amicus brief were public records and suggested using the phone to avoid creating such public records. CP 2561; FOF 92.
- WCOG proved that, when WCOG requested records of WAPA's and WSAMA's participation in the *Nissen* case from numerous other counties and cities, those agencies produced the unredacted records without any claim of a "common interest agreement" with the County. CP 1289-1292, 2516-57, 2868-98; FOF 89, 100.

- Some of the records produced by other counties were the exact same records redacted by the County, including an email in which Lindquist asked for a draft of WAPA's amicus brief. CP 1128, 1290, 1295-97; FOF 89.

If the County actually had a common interest agreement with WAPA, WSAMA and their members, then the release of unredacted *Nissen* records to WCOG would have been a violation of that agreement. WAPA's staff attorney, who released the records to WCOG, was the author of WAPA's amicus brief and she would have known about the alleged common interest agreement if it really existed. CP 2228, 2566-67. Upon discovering that WAPA had released unredacted records, the County would have been expected to object to the improper release of its work product by other parties to the alleged common interest agreement, and to attempt to claw back such records. But when the County learned that WAPA had produced unredacted records, the County merely acknowledged that fact and offered no explanation for why WAPA had released the same records unredacted. CP 1594, 2488.

Two weeks later, after WCOG submitted some of the WAPA emails in response to the County's renewed motion to quash depositions, CP 1127-29, the County falsely asserted that WAPA and its members had "waived" the alleged common interest agreement. CP 373-74. The

County repeated its "waiver" argument in its hearing brief. But the County never produced any evidence that the other parties had "waived" any common interest agreement with the County. CP 1537. On the contrary, the evidence clearly shows that there was no common interest agreement and no expectation of confidentiality in the County's communications with WAPA (or any other party). CP 2561, 2566. The County's waiver theory was pure fabrication, and the trial court did ***not*** accept it. *See* CP 356-360.

Finally, the County's unsupported claim of an oral common interest agreement is not credible. WAPA and WSAMA are merely organizations of public attorneys who represent only their own agencies. WCOG explained that it would have been impractical, if not impossible, for the County to form an oral common interest agreement with a dozen attorneys representing seven amicus parties, prosecutors from thirty-eight different counties, and a very large but unknown number of municipal attorneys. CP 1593, 1597, 1600. The insurmountable difficulty of creating even a written common interest agreement with thirty-nine (39) member prosecutors, much less an ***oral*** agreement, is undoubtedly why WAPA's staff attorney advised WAPA members to use the phone to avoid creating public records. CP 2561; FOF 92. It also explains why both

WAPA and WSAMA released unredacted records of their discussion of amicus briefs in other cases as well. CP 1594, 1598, 2558-60, 2899-2916.

The County's alleged common interest agreement included at least two parties that did ***not*** agree with the County's legal theories in *Nissen*. The County claimed to have a common interest agreement with the Attorney General's Office (AGO) despite the fact that the AGO filed an amicus brief that ***disagreed*** with the County's interpretation of the PRA. CP 2321-2326, 2836-37. The County also claimed to have a common interest agreement with WAPA despite the fact that some prosecuting attorneys never agreed with the County's legal theories and voted against supporting the County in *Nissen*. CP 2523, 2540.

In sum, the County's common interest agreement claim is not supported by any admissible evidence, not credible, and directly contrary to all the documentary evidence in the record. The trial court's decision was erroneous and must be reversed.

3. There is no legal precedent for an attorney to form a common interest agreement with himself as an adverse party.

Not only is there no admissible evidence to support the County's alleged common interest agreement, there is also no legal basis for such an agreement. The County argued that prosecutors "routinely represent both the government employer and individually sued government employees in

lawsuits," and that the interests of Lindquist and the County were "completely aligned" for purposes of the common interest doctrine. CP 1539. This argument ignored the obvious facts that (i) Lindquist was pursuing his own interests in concealing his own text messages, not the privacy interests of other county employees, and (ii) Lindquist had intervened as an adverse party in *Nissen* without appointing a special prosecutor to represent the County. The County produced no authority to suggest that an attorney who is a party to a lawsuit is ever permitted to represent another party in the same case. Consequently, the County never produced any legal authority that would allow a common interest agreement to be created where an attorney for one party is also an adverse party in the same case. CP 1606-1608.

WCOG explained that Lindquist had a clear conflict of interest in the *Nissen* case under RPC 1.7(a), and that a special prosecutor should have been appointed to represent the County. CP 1607, 2016-2017. WCOG noted that there was no legal authority to allow a prosecutor who has intervened in a case to remain as counsel for the agency or for such an attorney to form a common interest agreement with himself. WCOG argued that the trial court should rule, as a matter of first impression, that an attorney cannot form a valid common interest agreement with himself as an adverse party. CP 1608, 2018.

The County responded with two meritless arguments. First, the County argued that WCOG had confused the issue of Lindquist's conflict of interest with whether there was an attorney-client relationship between Lindquist and the County. CP 1538. Like the County's prior arguments, this argument misleadingly avoided mentioning the fact that Lindquist intervened in *Nissen* as a party. CP 772. The trial court ignored the County's obfuscation.

Second, the County argued that the allegation that Lindquist had a conflict of interest in *Nissen* had already been rejected by two other courts (in *Nissen* and in a 2015 recall action against Lindquist), and that these alleged rulings were binding on WCOG by collateral estoppel. CP 1369-1370; 1540-1541. The trial court correctly rejected that argument as well. CP 359; VRP (1/13/17) at 8.[12]

But the trial court refused to rule on the key legal issues raised by WCOG, asserting that the record was somehow "insufficiently developed"

[12] The county's collateral estoppel argument was meritless. First, the trial courts in *Nissen* and *Recall of Lindquist* did not actually decide the issue of whether Lindquist had a conflict of interest. CP 771, 1142-1144. Second, WCOG noted that neither court was aware at the time of its ruling that Lindquist had wrongfully withheld the text message at issue in *Nissen* and thereby caused the County to become liable for violating the PRA. CP 1143-1144. Third, the County had no authority to support its argument that WCOG's submission of an amicus brief in *Nissen* created privity for purposes of collateral estoppel. CP 771; 1607-1608.

to decide the issues.[13] CP 359. This trial court error, which is immaterial in light of this Court's *de novo* review, appears to have been based on the trial court's erroneous assertion that WCOG had the "burden to prove the elements necessary to recovery." CP 358.

WCOG's argument was supported by a declaration from an ethics expert, Art Lachman. CP 2067-2082. Lachman reached the same conclusion as the attorney hired by Executive McCarthy in the *Nissen* case: that Lindquist had a conflict of interest and should not have represented the County in *Nissen*. CP 2070. Lachman also noted that RPC 1.7(b)(3) flatly prohibits a representation that involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation, and that this prohibition should apply equally to Lindquist's representation of the County in a case to which he was a party.

[13] The trial court never explained why the record was "insufficiently developed" with respect to the conflict issues. CP 359. In light of (i) how carefully and completely WCOG had documented Lindquist's misconduct in the *Nissen* case, and (ii) the fact that the trial court prevented WCOG from deposing Lindquist (CP 1825-1828), the trial court's assertion was baseless. The relevant facts are undisputed, and Lindquist's obvious conflict of interest in *Nissen* is established by Lindquist's own pleadings. CP 2179-89. Furthermore, an agency has the burden of proof under RCW 42.56.550(1) to show that its exemptions are "in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." Therefore, a reviewing court cannot dismiss a PRA exemption claim based on a determination that there are unanswered questions of fact or law. Either the agency must answer such questions to the satisfaction of the court, or the court must rule that the agency has not carried its burden of proof under RCW 42.56.550(1). In this case the trial court simply failed to perform the judicial review required by the PRA.

CP 2071. Finally, Lachman noted that Lindquist's unethical representation of the County was unprecedented:

> In my years advising lawyers on ethics and conflict of interest issues, I have never seen a lawyer even attempt to represent a party in the same judicial proceeding in which that lawyer was participating personally as a litigant adverse to the party he or she was representing. I am unaware of any authority anywhere supporting the proposition that a prosecuting attorney (or any lawyer for that matter) is permitted to represent a party when that lawyer is an adverse party in his or her individual capacity in the same litigation matter. Nor have I been able to locate any such authority in rendering my opinions in this matter.

CP 2071. Not surprisingly, the County was not able to find an expert willing to defend either Lindquist's conduct or the County's legal theories.

Instead, the County argued that the opinions of both Lachman and Smith were inadmissible legal conclusions. CP 1527. The trial court agreed, holding that the court "will not consider such expert opinions contained within the declarations." CP 357. But that ruling did not help the County carry its burden of proof under RCW 42.56.550(1). The questions of whether Lindquist could continue to represent the County and/or enter into a valid common interest agreement with himself are either pure questions of law or the proper subject of expert testimony. **The County loses either way, because the County has *neither* supporting legal authority *nor* supporting expert testimony.**

Unless the Court determines that there is no factual basis for the County's exemption claims (see section A(2)), the Court must decide whether the County's alleged common interest agreement is legally permissible. The purpose of a common interest agreement is to allow two or more parties to share confidential information in pursuit of a common interest. But where one party is also the attorney for another party, all confidential information held or obtained by one party is disclosed to the other party automatically, including all information relating to any issues on which the parties' interests conflict. In that situation, a common interest agreement does not enable separate parties to share confidential information. Such an agreement merely enables the attorney to conceal his unethical conduct behind a claim of "work product." This Court should rule, as a matter of law, that an attorney cannot form a common interest agreement with himself as an adverse party. CP 1608, 2018.

In the alternative, the Court should rule that the PRA exemption in RCW 42.56.290 does not apply where one party is also the attorney for an adverse party in the same case. PRA exemptions must be narrowly construed to promote the PRA's policy of transparency in government. *Progressive Animal Welfare Soc'y v. University of Washington (PAWS II)*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994). Narrowly interpreted, RCW 42.56.290 does not allow a prosecuting attorney who had a conflict of

interest and should have appointed a special prosecutor to create a common interest agreement with himself. To hold otherwise would reward Lindquist and the County for their failure to appoint a special prosecutor. CP 1609.[14]

In sum, there is no factual or legal basis for the County's alleged common interest agreement. The County has waived any work product protection for any records shared with Lindquist or any other party in *Nissen*, including amici. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by redacting such records.

B. The County's exemption logs, which merely asserted that redacted records were "work product" under RCW 42.56.290, failed to provide the brief explanation required by RCW 42.56.210(3).

RCW 42.56.210(3) requires agencies to provide a brief explanation of how an exemption applies to withheld or redacted records:

> (3) 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). Under *Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014), an exemption log must provide "sufficient explanatory information for requestors to determine whether the exemptions were

[14] WCOG's proposed conclusion of law 148 contains a typo, omitting the word "not" from the second sentence. CP 1609.

properly invoked." Merely asserting that records are exempt as privileged or work product is ***not*** a sufficient explanation of an exemption. *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010).

The County's exemption logs, which repeat without explanation that virtually every record is exempt as work product under RCW 42.56.290, were not sufficient under *Sanders* and *Lakewood*. WCOG argues that an exemption claim of work product for records shared with other parties requires a brief explanation as to why such records remain exempt notwithstanding such disclosure. In order for WCOG to determine whether the exemption for work product in RCW 42.56.290 had been "properly invoked," *Lakewood*, 182 Wn.2d at 97, the County needed to explain in writing (i) that a common interest agreement was made, (ii) the nature of the common interest and the scope of the agreement, and (iii) the identity of other parties to the agreement.

The trial court rejected WCOG's argument, erroneously citing *Sanders* for the proposition that the County was only required to cite the exemption for work product (RCW 42.56.290) and was not required to explain how the common interest doctrine applied to avoid waiver of any work product exemption. The trial court stated:

> The common interest doctrine is part of the attorney-client privilege and the work product privilege. It is merely an exception to the typical rule that those privileges are

> waived when confidential communications are shared with parties outside of the attorney-client relationship. *Sanders v. State*, 169 Wn.2d 827, 853-54 (2010). The common interest doctrine is not an independent basis to withhold or redact PRA documents. The "exemption relied on" to withhold documents in this case was the work product privilege. That was adequately cited and explained in the redaction logs. Pierce County did not violate its duty.

CP 360.

The trial court's ruling is directly contrary to *Sanders*. In that case, former Justice Sanders sued the Attorney General's Office (AGO) for failing to defend him in proceedings against Sanders before the Commission on Judicial Conduct (CJC). In support of his action, Justice Sanders made a PRA request to the AGO for all records relating to the CJC action. In response, the AGO produced an entire document index (EDI) for 334 responsive documents. The EDI provided information about each document, such as author, recipient and date. 169 Wn.2d at 836-37. The EDI also asserted that various documents were exempt as either privileged (RCW 5.60.060(2)(a) or work product under RCW 42.56.290. 169 Wn.2d at 840. But the EDI "did not contain any facts or explanation of how its claimed exemptions applied to each document withheld." 169 Wn.2d at 837.

Sanders sued the AGO for failing to provide the brief explanation required by RCW 42.56.210(3). *Id*. Sanders noted a CR 30(b)(6)

deposition for an expert from the AGO to explain the exemption claims, but the State's expert could do no more than read from the EDI. 169 Wn.2d at 838. Sanders finally got an explanation of how the AGO's privilege and work product exemptions applied when the State moved for summary judgment. *Id*.

The Supreme Court upheld the trial court's determination that the AGO had failed to provide the brief explanation required by RCW 42.56.210(3). The Court rejected the AGO's argument that the EDI was sufficient because it described each document and specified an exemption:

> The State's argument that the EDI "explains" the application of each claimed exemption is untenable, which may explain why the State has not renewed it on appeal. The identifying information about a given document does not explain, for example, why it is work product under the PRA's "controversy" exemption. See CP at 187-224 (claiming the controversy exemption for numerous records without specifying details such as the controversy to which each record is relevant). Allowing the mere identification of a document and the claimed exemption to count as a "brief explanation" would render the brief-explanation clause superfluous.

169 Wn.2d at 846.

After holding that the AGO had violated RCW 42.56.210(3) by failing to explain its exemptions the Court went on to ***uphold*** most of the AGO's exemption claims, including several documents that the AGO claimed were exempt under the common interest doctrine. 169 Wn.2d at

853-854. In other words, *Sanders* upheld the AGO's common interest claims, but also held that the exemption log in which those common interest claims were asserted was a violation of RCW 42.56.210(3).[15]

The County's exemption logs were inadequate under *Sanders*. The County identified records in a log and asserted that these records were exempt as work product. But the County did not provide a sufficient brief explanation of how that exemption applied under the common interest doctrine. Like Justice Sanders, WCOG did not receive an actual explanation of the County's common interest claims until after the lawsuit was filed. That was a violation of RCW 42.56.210(3). The trial court's ruling was erroneous and must be reversed.[16]

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[15] In the trial court the County argued that its exemption logs are similar to the logs upheld in the unpublished portion of *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016), *review granted*, 187 Wn.2d 1001 (2017). In *Kittitas County* the Court of Appeals held that the exemption logs were adequate where (i) there were only two parties to the alleged common interest agreement (Kittitas County and Dept. of Ecology), (ii) those agencies were statutorily required to collaborate in the regulation of hazardous waste, and (iii) the nature of the common interest was readily apparent. *See Kittitas County*, 195 Wn. App. at 369, ¶55. In contrast, the County's logs in this case do not indicate whether a common interest agreement was made, what the scope of the agreement might be, or who the parties to the alleged agreement might be. And unlike in *Kittitas County*, the County's records were shared with an adverse party in the litigation, Intervenor Lindquist and with dozens of agencies all over the state.

[16] The County made two additional arguments that the trial court did not accept. First, the County argued that a claim for inadequate exemption logs "does not give rise to a freestanding PRA claim." CP 1023. WCOG explained that the County's argument was dead wrong under *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014). CP 807. Second, the County argued that WCOG's claims were "premature" under *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 104 (2014). CP 1542. The trial court rejected the County's absurd interpretation of *Hobbs*. CP 358, 931.

C. The County violated RCW 42.56.100 by failing to adopt and enforce rules for the production of electronic records.

RCW 42.56.100 requires the County to adopt and enforce reasonable rules and regulations to provide full access to public records and to protect public records from damage or disorganization. "Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. Failure to adopt and enforce rules is a PRA violation. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002); *ACLU v. Blaine School Dist.*, 88 Wn. App. 688, 695, 937 P.2d 1176 (1997).[17]

The undisputed facts show that the County violated RCW 42.56.100 in the manner in which it responded to WCOG's PRA request:

- The County had current office technologies, including email, PDF, Acrobat redaction software, and internet file transfer, and it knew how to use these technologies.

[17] The County ignored these applicable, published cases in favor of an unpublished opinion that states—in dicta and without any authority or analysis—that there is "no separate cause of action for an agency's failure to provide fullest assistance to a requester." CP 153, 255-260. To the extent the unpublished opinion in *Chen v. City of Medina*, 179 Wn. App. 1026 (2014) suggests RCW 42.56.100 is unenforceable that opinion is contrary to *ACLU* and *Kleven*, and is simply wrong. Interpreting RCW 42.56.100 to be unenforceable or meaningless is contrary to RCW 42.56.030 which requires liberal construction of the PRA

- The County had no rules addressing (i) whether the County would respond to PRA requestors by email or (ii) whether or how the County would provide electronic documents to requestors.[18]
- The absence of rules required by RCW 42.56.100 enabled the Prosecuting Attorney to be intentionally unhelpful in response to WCOG's PRA request, by refusing to respond by email and by printing existing redacted PDF files to create useless black paper.

The County violated RCW 42.56.100 and it is liable for WCOG's attorney fees. The question of how the County will be brought into compliance with the PRA must be addressed on remand.

The trial court noted that the facts are "essentially uncontested," but the trial court got the facts wrong in two important respects. This Court's *de novo* review must be based on a correct assessment of the facts.

First, the trial court erroneously asserted that the County started using the technologies at issue during this lawsuit. CP 358. In fact, the

[18] The County admitted in response to discovery that it had no policies regarding whether the County would communicate with requestors by email, and no policies about how electronic records would be provided to requestors. CP 2838. Nonetheless, the County's hearing brief erroneously argued that it had adopted the rules required by RCW 42.56.100, and that WCOG had failed to challenge any specific rules. CP 1532. The County's PRA rules, which were last updated in 2007, indicate that a PRA request can be made by delivery, mail or fax, but inconsistently purport to require a PRA requester to provide their email address. CP 263-264. Those rules do not address whether the County will actually respond to a requestor by email. *Id*. The County's rules also address the cost of copying electronic records, but those rules do not address whether or how the County will produce electronic records. CP 266.

County had already used email extensively in the *Nissen* litigation, and the County had used PDF files and internet file transfer in June 2015, before the County produced the first installment. CP 2950-2956. The County simply refused to use these technologies to respond to WCOG's PRA request. Furthermore, the County admits that the first installment of records was electronically redacted using Adobe Acrobat XI Pro, CP 2843, and there is nothing in the record to suggest that this was the first time that this software had been used. If there were any exculpatory reasons for the County's decision to print existing redacted PDF files onto paper the County failed to put such reasons into the record.

Second, the trial court erroneously asserted that the County's conduct in this case somehow demonstrated that email is not a reliable method of communication. CP 358. Nothing in the record indicates that there were any technical impediments to the use of email to respond to a PRA request. The County's 2007 rules required requestors to provide an email address, and the County had actual knowledge that its PRA officer (Ms. Glass) was communicating with both requestors and other county employees by email. CP 2689. WCOG's August 31, 2015 email failed to reach the County's PRA officer because the County made the irresponsible decision to simply deactivate Ms. Glass' email account rather than have her emails forwarded to the new PRA officer. *Id*.

The trial court did not accept the County's legal arguments, which would have rendered RCW 42.56.100 meaningless and unenforceable.[19] But the trial court erroneously held that the PRA did not require rules for the electronic transmittal of documents:

> This Court does not find any authority holding that the PRA is violated based on failure to adopt rules allowing electronic transmittal of responsive documents.

CP 358. The trial court's focus on the "electronic transmittal" of records misstates the issue, and minimizes the County's violations of RCW 42.56.100. The County also had no rules for email or the ***production*** of electronic records, and the County initially refused to provide existing electronic records in electronic format, insisting on printing PDF files that had already been electronically redacted.

At the end of its ruling the trial court opined that "the very facts of this case demonstrate why electronic submission of documents under the

[19] The County made various arguments that were not accepted by the trial court. The County argued that RCW 42.56.100 could only be enforced by seeking an injunction, and that WCOG had failed to brief the requirements for an injunction. CP 1531-1532. WCOG explained that this argument directly contradicted the County's prior argument (on summary judgment) that WCOG could not seek an injunction under *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 446-47, 327 P.3d 600 (2013), unless and until the trial court found that the County had violated the PRA. CP 776, 2116. WCOG reserved its injunction claim to avoid an unnecessary argument with the County about whether the injunction claim is premature. CP 776. The County also argued that PRA case law allowed the County to refuse to produce existing electronic records that had already been redacted. CP 1529-30. WCOG explained that none of the cases cited by the County permitted an agency to refuse to produce existing electronic records, and that *Mechling v. Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009), held that the agency was required to produce emails in electronic format "if it is reasonable and feasible for the City to do so." CP 778.

PRA can be problematic." This comment is neither evidence nor legal authority. The trial court's function in this case was to determine whether the County had violated RCW 42.56.100 by failing to adopt and enforce rules. The trial court's decision on that issue was erroneous.

Agencies are required to adopt rules for electronic public records. In 2005, the Legislature amended RCW 42.56.580 to require the Attorney General to adopt model rules for the PRA, specifically including "providing fullest assistance to requestors" and "[f]ulfilling requests for electronic records." Laws of 2005, ch. 483, §4. The AGO promulgated such rules in Chap. 44-14 WAC, effective July 16, 2007. WSR 07-13-058. Those model rules note that the PRA does not distinguish between paper and electronic records, that the PRA explicitly includes electronic records, that providing electronic records is cheaper and easier, and that former RCW 43.105.250 (Laws of 1996, c 171, §1) indicated that the Legislature intended to encourage agencies to make "public records widely available to the public." WAC 44-14-05001. For at least eight (8) years following the promulgation of the AGO model rules Pierce County failed to comply with RCW 42.56.100 by adopting its own rules for electronic public records. That failure to adopt and enforce rules was a violation of the PRA for which the County is liable.

The trial court's ruling was erroneous and must be reversed. The remaining issues relating to the County's compliance with this statute should be addressed on remand.

D. WCOG is entitled to attorney fees on appeal.

If this Court rules in WCOG's favor on any PRA issue then WCOG is the prevailing party on such issues, and entitled to an additional award of attorney fees on appeal under RCW 42.56.550(4). *Sanders v. State*, 169 Wn.2d 827, 869-870, 240 P.3d 120 (2010). Pursuant to RAP 18.1, WCOG requests an award of its reasonable attorney fees.

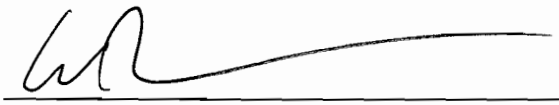
V. CONCLUSION

For all these reasons the Court should reverse the trial court and hold that (i) the County's exemption claims are invalid, (ii) the County's exemption logs were insufficient under RCW 42.56.210(3), and (iii) the County violated RCW 42.56.100 by failing to adopt and enforce rules for communications with requestors and the production of electronic records. The Court should award WCOG its attorney fees and remand this case to the trial court for further proceedings.

VI. APPENDIX

Appendix WCOG's Revised Proposed Findings and Conclusions

RESPECTFULLY SUBMITTED this 12th day of February, 2018.

By: 

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Certificate of Service

I, the undersigned, certify that on the 12th day of February, 2018, 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) and First Class Mail to:

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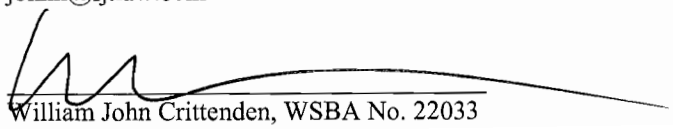

William John Crittenden, WSBA No. 22033

☐ EXPEDITE
☐ No hearing set
■ Hearing is set
Date: Friday, April 21, 2017
Time: 3:00 pm
Judge: Carol Murphy

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

WASHINGTON COALITION FOR OPEN GOVERNMENT, a Washington nonprofit corporation, Plaintiff, vs. PIERCE COUNTY, Defendant.	No. 16-2-01006-34 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** ***(Revised Proposed)***

Plaintiff Washington Coalition for Open Government ("WCOG") brought this action against defendant Pierce County for violations of the Public Records Act, Chap. 42.56 RCW ("PRA"). This matter came before the Court for a hearing on the merits on April 21, 2017.

Pursuant to RCW 42.56.550(3) the Court did not hear any live witnesses, but considered the following declarations and exhibits thereto:

1. *Declaration of William John Crittenden in Support of Motion for Partial Summary Judgment on Standing* (May 20, 2016);

2. *Declaration of John R. Nicholson* (May 20, 2016);

3. *Declaration of Theresa Brown* (May 20, 2016);

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4. *Supplemental Declaration of William John Crittenden in Support of Motion for Partial Summary Judgment on Standing* (June 6, 2016);

5. *Declaration of John R. Nicholson in Support of Defendant's Motion for Protective Order* (October 28, 2016);

6. *Declaration of William John Crittenden in Support of Response to Motion for Protective Order* (November 2, 2016);

7. *Supplemental Declaration of John R. Nicholson in Support of Defendant's Motion for Protective Order* (November 3, 2016);

8. *Declaration of John R. Nicholson in Support of Defendant's Renewed Motion for Protective Order* (January 4, 2017);

9. *Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 4, 2017);

10. *Declaration of Arthur J. Lachman* (January 4, 2017);

11. *Supplemental Declaration of John R. Nicholson re: Discovery Motions* (January 9, 2017);

12. *Second Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 9, 2017);

13. *Second Supplemental Declaration of John R. Nicholson re: Discovery Motions* (January 12, 2017);

14. *Third Supplemental Decl. of William John Crittenden in Supp. Discovery Motions* (January 12, 2017);

15 *Declaration of Ramsey Ramerman* (January 12, 2017);

16 *Supplemental Decl. of William John Crittenden re: Additional Exhibits*;

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17. *Supplemental Declaration of Theresa Brown*;

18. *Declaration of John R. Nicholson in Support of Defendant Pierce County's Responding Brief for [PRA] Hearing*;

19. *Declaration of Stephen Penner*; and

20 *Declaration of Mary Robnett*.

The Court also considered (i) *Plaintiff's Corrected Hearing Brief*, (ii) *Defendant Pierce County's Responding Brief for [PRA] Hearing*; and (iii) *Plaintiff's Hearing Reply Brief*.

Having considered all the evidence presented and having heard the arguments of the parties' counsel, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. History of *Nissen* Litigation

1. On June 3, 2011, an attorney representing Glenda Nissen, a Pierce County deputy sheriff, submitted a request for public records to the Pierce County Prosecuting Attorney for records from the cell phone used by Pierce County Prosecutor Mark Lindquist. **Ex. P1**

2. On June 8, 2011, the Public Records Officer for the Pierce County Prosecuting Attorney responded to the Nissen's PRA request by asserting, *inter alia*, that the cell phone at issue was Mark Lindquist's personal cell phone. **Ex. P2**.

3. On June 15, 2011, Glenda Nissen, a Pierce County deputy sheriff, filed a whistleblower complaint against Pierce County Prosecutor Mark Lindquist. Nissen alleged, *inter alia*, that Lindquist had retaliated against Nissen for her criticism of Lindquist and her lack of support for his election campaign. Nissen also alleged that Lindquist attempted to focus the investigation of an anonymous death threat, received by deputy prosecutor Mary Robnett in

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2010, on Nissen despite the lack of any evidence, and that Lindquist also improperly barred Nissen from the Prosecutor's Office. **Ex. P3**. The fact that Nissen made these allegations is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.

4. On July 26, 2011, the County entered into a settlement agreement with Nissen. Lindquist's senior deputy, Dan Hamilton, represented the County in the mediation leading to the settlement. The settlement required a payment of $39,500 to Nissen's attorney, released all claims against Nissen, and prohibited further retaliation against Nissen. **Ex. P4**. The fact that the County entered into the settlement agreement with Nissen is admissible and relevant to the County's exemption claims.

5. A news story about the Nissen settlement appeared in the Tacoma News Tribune (TNT) on August 2, 2011. **Ex. P51**. Lindquist spent that day trying to manage the news story, seeking minor changes after the story was published. *Id*. The allegations in the TNT are relevant to whether Lindquist had a conflict of interest, which is an issue on which the County has the burden of proof. But the County has offered no evidence to contradict the allegations.

6. Unknown to anyone outside Lindquist's office (at that time) Lindquist sent a text message to at least two deputy prosecuting attorneys, Mary Robnett and Mike Sommerfeld. The text message stated "Tell allies to comment on TNT story." *Declaration of Mary Robnett ("Robnett Dec."),* ¶ 5; *see* **Exs. P50, P51**.

6A. The allegation that Lindquist sent the August 2, 2011 text message to DPA Sommerfeld is relevant to whether Lindquist had a conflict of interest, which is an issue on

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which the County has the burden of proof. But the County has offered no evidence to contradict the allegation.

7. DPA Sommerfeld then posted an anonymous comment on the TNT website, calling Nissen's lawsuit "more than frivolous," and accusing Nissen's attorney of "extorting county taxpayers." **Ex. P51**. The allegation that Sommerfeld posted an anonymous comment critical of Nissen and her attorney on the TNT website is relevant to whether Lindquist had a conflict of interest, which is an issue on which the County has the burden of proof. But the County has offered no evidence to contradict the allegation.

8. Nissen correctly suspected that Lindquist was continuing to retaliate against her. On August 3, 2011, Nissen's attorney made a PRA request for records from Mark Lindquist's cell phone on August 2, 2011. **Ex. P5**.

9. On or about August 29, 2011, Nissen filed another whistleblower complaint against Lindquist. Nissen alleged, *inter alia*, that Lindquist was continuing to retaliate against her. **Exs. P6, P7**. The fact that Nissen made these allegations and filed the second whistleblower complaint is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.

10. On September 28, 2011, the County responded to Nissen's second PRA request. **Ex. P8**.

11. After the County refused to produce Lindquist's text messages Nissen brought a PRA case against the County. *Glenda Nissen v. Pierce County*, Thurston County No. 11-2-02312-2 (hereafter "*Nissen* case"). Nissen's complaint specifically alleged that her PRA request sought records from Mark Lindquist's own cell phone, and that Nissen believed the

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requested records would show that "Lindquist was using his cell phone to take actions retaliating against her and other official misconduct." **Ex. P9**.

12. By email dated November 2, 2011, deputy prosecutor Hamilton asserted that Nissen's complaint was frivolous, and "interposed for improper purposes as part of [Nissen's] ongoing attempt to harass Prosecutor Lindquist…" **Ex. P10**. The fact that the Lindquist's deputies attacked Nissen and asserted that her claim was frivolous when in fact it had merit is not hearsay, even if the substance of Hamilton's remarks are hearsay. This fact is relevant to whether Lindquist and his deputies had a conflict of interest, which is an issue on which the County has the burden of proof.

13. On or about November 3, 2011, deputy prosecutors Dan Hamilton and Mike Sommerfeld appeared in the *Nissen* case on behalf of the County. **Ex. P11**. The following day these deputy prosecutors filed a motion to strike and seal Mark Lindquist's cell phone number. **Ex. P12**. These pleadings indicated that Lindquist was counsel of record for the County in the *Nissen* case. *Id*.

14. ~~According to the October 22, 2015 report by attorney Mark R. Busto,~~ Lindquist "kind of flipped out" after Nissen filed the PRA case, and Lindquist pressured deputy prosecutor Robnett to bring a civil action against Nissen. *Robnett Dec.*, ¶ 4 ~~*see* **Ex. P42**~~.

15. Robnett never brought an action against Nissen. However, Robnett retained an attorney who made extensive PRA requests to the Pierce County Sheriff for records relating to Nissen. *Robnett Dec.*, ¶ 4; **Ex. P13**.

16. On or about November 22, 2011, Prosecutor Lindquist, represented by a private attorney, Stewart Estes, filed a motion to intervene in the *Nissen* case under RCW 42.56.540 "for the purposes of asserting certain individual rights and seeking to restrain and enjoin

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[Nissen] from receiving, and Defendant Pierce County from disclosing, certain personal records." **Exs. P14, P15**.

17. The County denies that Lindquist had a conflict of interest in the *Nissen* case, either before or after he intervened. *See Defendant's Response in Opposition to Plaintiff's Motion to Compel* (January 9, 2017) at 4. It is undisputed that the County and Lindquist never prepared a written waiver of any conflict of interest.

18. On or about November 28, 2011, Lindquist, represented by Estes, filed a motion for a temporary restraining order and preliminary injunction against Pierce County. **Ex. P16**.

19. Lindquist's motion to intervene was granted on November 30, 2011. **Ex. P17**.

20. The superior court dismissed the *Nissen* case on or about December 23, 2011, and Nissen appealed. **Ex. P58**.

21. On or about March 12, 2011, Nissen entered into an agreement with the Pierce County Sheriff to put Nissen's emails in the custody of attorney Ramsey Ramerman, who had been appointed a special deputy prosecutor to represent the Sheriff for that purpose. **Exs. P19, P20**.

22. On or about March 4, 2013, Intervenor Mark Lindquist, represented by attorney Stewart Estes, filed his brief of respondent. **Ex. P21**.

23. On or about March 7, 2013, the County filed his its brief of respondent, listing Lindquist and deputy prosecutor Hamilton as counsel for the County. **Ex. P22**.

24. On or about January 24, 2014, amicus briefs supporting the County and Lindquist were filed in *Nissen* on behalf of the Washington Association of Prosecuting Attorneys (WAPA), and the Washington State Association of Municipal Attorneys (WSAMA). **Exs. P23, P24**.

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25. Also on or about January 24, 2014, an amicus brief supporting Lindquist was filed in *Nissen* on behalf of six organizations: (i) the Washington Federation of State Employees (WFSE), (ii) the International Association of Firefighters (IAF), (iii) the Washington Education Association (WEA), (iv) the Washington Council of Police and Sheriffs (WACOPS), (v) the Washington State Patrol Troopers Association (WSPTA), and (vi) the Pierce County Prosecuting Attorney' Association (PCPAA). Deputy prosecutor Jared Ausserer was identified as counsel for the PCPAA and as the author of the brief, along with four other attorneys. **Ex. P25**.

26. On September 9, 2014, the Court of Appeals reversed, rejecting the argument of Lindquist and the County that the PRA did not apply to Lindquist's cell phone. *Nissen v. Pierce County*, 183 Wn. App. 581, 333 P.3d 577 (2014).

27. On or about October 6, 2014, the County filed a petition for review in *Nissen*. The County's petition indicated that Lindquist was still counsel of record for the County. **Ex. P26**. On or about October 9, 2014, Mark Lindquist, represented by attorney Estes, also filed a petition for review as intervenor. **Ex. P27**.

28. On or about December 5, 2014, WSAMA filed a memorandum in support of review in *Nissen*. **Ex. P28**.

29. On or about December 5, 2014, an amicus brief supporting review was filed by WFSE, IAF, WEA, WACOPS,WSPTA and PCPAA. This brief was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney. **Exs. P29, P30**.

30. The Supreme Court granted review on March 4, 2015. *Nissen v. Pierce County*, 182 Wn.2d 1008 (2015).

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31. On or about April 20, 2015, the County and Intervenor Lindquist each filed supplemental briefs in *Nissen*. **Exs. P31**. Again, Mark Lindquist was represented by attorney Estes, but Lindquist was also counsel of record for the County. *Id*.

32. On or about April 27, 2015, amicus briefs supporting Lindquist and the County were filed in *Nissen* by WAPA and WSAMA. **Exs. P32, P34**.

33. On or about May 4, 2015, an amicus brief supporting Lindquist and the County was filed in *Nissen* by WFSE, IAF, WEA, WACOPS,WSPTA and PCPAA. This brief was authored by deputy prosecutor Scott Peters, and was filed by a legal assistant in the Pierce County Prosecuting Attorney. **Ex. P36**.

34. On or about May 4, 2015, the Washington Attorney General filed an amicus brief in Nissen that disagreed with the argument of Lindquist and the County that the PRA did not apply to records on Lindquist's personal phone. **Ex. P37**.

35. On or about May 12, 2015, a Pierce County Deputy Prosecutor, Steve Merrival, filed a whistleblower complaint with the Pierce County Human Resources Department, alleging numerous instances of misconduct and retaliation by Prosecutor Lindquist, including misconduct relating to Glenda Nissen and violations of the PRA. **Ex. P38**. <u>The fact that DPA Merrival made these allegations is admissible and relevant to the County's exemption claims even if the allegations are themselves hearsay. Furthermore, the County has the burden of proof but it has offered no evidence to contradict the allegations.</u>

36. On May 21, 2015, another whistleblower complaint was filed by Chief Criminal Deputy Stephen Penner, also alleging numerous instances of misconduct, waste of public funds, and abuse of authority by Prosecutor Lindquist, including misconduct relating to Glenda

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Nissen's lawsuit(s) and attempts by Lindquist to circumvent the PRA. **Ex. P39**; *Declaration of Stephen Penner ("Penner Dec."),* ¶ 3.

37. By letter dated June 22, 2015, Chief Criminal Deputy Stephen Penner informed the director of Pierce County Human Resources that he waived any confidentiality with respect to his whistleblower complaint. Penner further complained that Chief Civil Deputy Doug Vanscoy had falsely informed the Tacoma News Tribune (TNT) that Penner's complaint was "anonymous." **Ex. P40**; *Penner Dec.*, ¶ 3.

38. On August 27, 2015, the Supreme Court issued its opinion in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), unanimously rejecting Lindquist's argument that the PRA did not apply to records on his personal phone.

39. After the Supreme Court remanded the *Nissen* case to the superior court, the Pierce County Executive, Pat McCarthy, became aware that Lindquist had a conflict of interest in the *Nissen* case. The Executive retained her own attorney, and received a 13-page legal opinion explaining that Lindquist had a conflict of interest in the *Nissen* case and that no attorneys in Prosecutor's Office should represent the County in *Nissen*. **Ex. P41**.

40. On or about October 22, 2015, the results of a County investigation into the two whistleblower complaints by deputy prosecuting attorneys against Lindquist were released. **Ex. P42**.

41. By letter dated November 10, 2015, Executive McCarthy told Lindquist that he had a conflict of interest in the Nissen case, and asked him to appoint a special prosecutor chosen by McCarthy. **Ex. P43**.

42. On November 24, 2015, attorneys hired by Executive McCarthy filed a motion in *Nissen* for the appointment of a special prosecutor chosen by McCarthy. **Exs. P44, P45**.

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43. Lindquist responded by appointing a law firm of his choosing, Freimund, Jackson & Tardif, PLLC, to represent the County in Nissen. On December 18, 2015, without deciding the issue of whether Lindquist had a conflict of interest, the superior court accepted the appointment of Freimund, Jackson & Tardif, PLLC, and denied the Executive's motion. **Exs. P48, P49**.

44. On or about December 23, 2015, former deputy prosecutor Mary Robnett, who had left the Prosecuting Attorney in 2011, disclosed in a letter to the County that she had received a text message from Lindquist on August 2, 2011. The text message stated "Tell allies to comment on TNT story." Robnett enclosed a copy of the text message. Robnett denied being involved in any political activity for Lindquist, and she opined that the text message was public record. *Robnett Dec.*, ¶¶ 5-8; **Ex. P50**.

45. After Robnett disclosed the existence of the August 2, 2011 text message, the TNT determined that deputy prosecutor Sommerfeld had posted the disparaging comments about Nissen on the TNT website. That fact was reported in the TNT on January 19, 2016. The revelation of Sommerfeld's improper involvement in the *Nissen* case caused the Pierce County Sheriff to dismiss Sommerfeld as his legal advisor. **Exs. P50, P51**. The allegation that Sommerfeld posted disparaging comments on the TNT website is relevant to the conflict of interest. That allegation has not been denied by the County despite having the burden of proof.

46. On February 9, 2016, the superior court issued a ruling, after *in camera* review, that Lindquist's text message to Robnett on August 2, 2011, was a public record that should have been disclosed. **Exs. P52, P53, P54**.

47. On or about March 18, 2016, the superior court awarded Nissen more than $118,000 in attorney fees and penalties against the County. **Ex. P56**.

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48. By that time the County had already spent more than $325,000 on private attorneys to defend Lindquist. **Ex. P55**.

49. No party appealed from the superior court's order in *Nissen*. Both Nissen and the County filed motions to recall the Supreme Court's mandate, which were denied on June 1, 2016.

B. WCOG PRA Request

50. After the Supreme Court granted review in *Nissen*, on or about April 1, 2015, plaintiff Washington Coalition for Open Government ("WCOG") made a PRA request to Pierce County for records relating to the *Nissen* case. **Ex. P61**.

51. WCOG requested the following records:

> (a) All correspondence, including email, between the County and Mr. Lindquist, other agencies, other public officials, and/or amicus organizations relating to the Glenda Nissen v. Pierce County litigation;
>
> (b) All records discussing the conflict of interest between the County and Mr. Lindquist in the Glenda Nissen v. Pierce County litigation, including any waiver or other resolution of such conflict;
>
> (c) All records, including correspondence, agreements and invoices, relating to the retention of any private attorneys to represent Pierce County in the Glenda Nissen v. Pierce County litigation; and
>
> (d) All records of litigation decisions being made for Pierce County as the defendant in the Glenda Nissen v. Pierce County litigation, specifically including but not limited to, records indicating which person(s) are making litigation decisions for the County in the Glenda Nissen v. Pierce County litigation in light of Mr. Lindquist's status as a separate party to that litigation.

52. WCOG's PRA request explicitly stated that "Time is of the essence in this request" and demanded that the County "send all records and correspondence to [WCOG] by email or internet transfer service (such has drop box)." *Id*. WCOG's

53. WCOG's PRA request explicitly requested that the County provide existing electronic records (such as email, Word or PDF files), and that the County provide paper

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records by scanning the to PDF files. "PDF" stands for Portable Document Format, which is an open standard commonly used to share electronic documents. *Id*.

54. The County responded to the PRA request by letter dated April 8, 2015. The County failed to send the letter to WCOG's attorney by email as requested. Instead, the County sent the letter by regular mail, and WCOG's attorney did not receive that letter until approximately April 17, 2015. **Exs. P62, P63**.

55. On April 17, 2015 WCOG's attorney sent the County a letter (by email), objecting to the County's failure to respond by email, and warning the County that it was violating the PRA. **Ex. P63**.

56. On April 19, 2015 WCOG's attorney sent the County a letter (by email) expanding the existing PRA request to include additional records. WCOG's attorney advised the County to see the prior letters regarding the County's obligation to respond by email and to produce electronic records. **Ex. P64**.

57. The County responded to the letter dated April 19, 2015, by letter dated April 24, 2015. The County failed to send the letter to WCOG's attorney by email as requested. Instead, the County sent the letter by regular mail, and WCOG's attorney did not receive that letter until approximately April 27, 2015. **Ex. P65**.

58. By email dated April 27, 2015, WCOG's attorney objected to the County's ongoing refusal to communicate by email, and warned both PRA officer Joyce Glass and deputy prosecutor Dan Hamilton that the County was violating the PRA. **Ex. P66**.

59. On May 5, 2015, the County responded with another letter sent by regular mail but not by email. As a result WCOG's attorney did not receive the letter until approximately May 12, 2015. The County's letter asserted, *inter alia*, that the County's refusal to correspond

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by email did not violate the PRA or *ACLU v. Blaine School Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999). **Ex. P67**.

60. On May 11, 2015, the County responded with another letter sent by regular mail but not by email. As a result, WCOG's attorney did not receive the letter until approximately May 14, 2015. **Ex. P68**.

61. The May 11, 2015 letter stated that the County was prepared to provide a "first installment" of 533 paper pages of redacted records, many of which were "fully redacted leaving no text and fully blackened pages." The letter requested payment of $88.65 in order to receive these records by regular mail. The letter included an exemption log that asserted that various records were exempt under RCW 42.56.290 (work product). **Ex. P68**.

62. By email dated May 14, 2015, WCOG's attorney notified the County that, *inter alia*, (i) the County was still refusing to correspond by email, and (ii) the County had ignored WCOG's request that responsive records be scanned to PDF files. **Ex. P69**.

63. By email dated July 1, 2015, WCOG's attorney objected to the County's failure to respond to the objections in the earlier email on May 14, 2015. Also on July 1, 2015, WCOG's attorney sent the County the requested check for $88.65 and notified the County by email that WCOG was making that payment under protest as WCOG had specifically asked the County to scan paper records to PDF. **Ex. P70**.

64. The County received WCOG's check for $88.65 on July 6, 2016. However, the County decided to return the check and only send WCOG the seventy-two (72) pages of the first installment that " that were not fully redacted. *Declaration of Theresa Brown* (May 20, 2016), ¶ 13.

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65. By letter dated July 9, 2015, the County informed WCOG's attorney that the County had decided to send only those seventy-two (72) pages of the "first installment" that were not fully redacted, and that the check for $88.65 was being returned. **Ex. P71**.

66. The County again responded by regular mail but not by email. As a result, WCOG's attorney did not receive the letter until July 13, 2015.

67. The County's letter dated July 9, 2015, included seventy-two (72) pages of paper copies of extensively redacted records, all of which were allegedly exempt under RCW 42.56.290 (work product). *Id.*

68. The records produced on July 9, 2015, were first electronically redacted using Adobe Acrobat XI Pro. **Ex. P98**. This electronic redaction process resulted in one or more PDF files that could have been provided to WCOG in that format as WCOG had explicitly requested.

69. Rather than produce PDF files—as WCOG requested and which already existed as a result of the County's electronic redaction—the records produced by the County on July 9, 2015, were printed the PDF files to create paper copies that had to be mailed to WCOG. **Ex. P74**.

70. By email dated July 15, 2015, WCOG's attorney objected to the County's ongoing refusal to communicate by email. WCOG's attorney stated that WCOG still wanted the other 461 pages of records and that a replacement check would be sent. **Ex. P72**.

71. On or about August 10, 2015, the County produced 533 pages of redacted paper records. Those records were also electronically redacted and then printed onto paper. **Exs. P73, P74**.

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72. On or about August 28, 2015, Theresa Brown replaced Joyce Glass as the Public Records Officer for the Prosecuting Attorney. *Declaration of Theresa Brown* (May 20, 2016), ¶ 2.

73. By email dated August 31, 2015, WCOG's attorney reviewed the status of the pending PRA request and the County's response, and objected to the County's violations of the PRA. **Ex. P79**. The County never responded to the email dated August 31, 2015.

74. The County did not receive the email from WCOG's attorney dated August 31, 2015 because the County simply deactivated Ms. Glass' email account after she left the Prosecuting Attorney on August 28, 2015. *Declaration of Theresa Brown* (May 20, 2016), ¶¶ 19-20. The County did not make arrangements for Ms. Glass' email to be forwarded to or processed by the new PRA officer (Ms. Brown). **Ex. P78**.

75. By letter dated October 19, 2015, WCOG's attorney (i) informed the County that it had not responded to the email dated August 31, 2015, (ii) summarized the status of the PRA request and the County's response, and (iii) explained the County's violations of the PRA. **Ex. P77**.

76. On October 19, 2015, the County informed WCOG's attorney that the PRA officer for the Prosecuting Attorney had retired and provided an email address for the new PRA officer. WCOG's attorney re-sent the email dated August 13, 2015, email dated August 31, 2015, and letter dated October 19, 2015, to the new PRA officer. **Ex. P77, P79**.

77. By letter dated October 23, 2015, the County repeated its assertions that there was no conflict of interest between the County and Mr. Lindquist, that most of the requested records were exempt as "work product," that the County had no obligation to communicate by

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email or produce electronic records, and that the County's exemption logs were adequate. **Ex. P80**.

78. By letter dated December 2, 2015, the County stated that the cost of paper copies of the "second installment" of 233 pages of records is $38.60, and that if the requester would rather receive the documents on CD then "the cost to scan and copy these pages plus the cost of materials and postage is $13.80." WCOG's attorney sent the County a check for $13.80. **Exs. P82, P83**.

79. On or about December 14, 2015, the County produced a second installment of records consisting of a single 233-page PDF file of heavily redacted records. These records were copied onto a CDR and mailed to WCOG's attorney. **Ex. P83**.

80. On December 14, 2015, WCOG served its Complaint in this action on the Pierce County Auditor. **Ex. P84**.

81. The County produced its third, fourth and fifth installments of records, as heavily-redacted PDF files, on or about January 5, 2016, February 17, 2016, and April 1, 2016. These records were copied onto CDRs (or DVDs) and mailed to WCOG's attorney. **Exs. P85, P86, P87, P88, P89, P90, P91, P92**.

82. By letter dated May 13, 2016, the County stated that the Pierce County Prosecutor's Office had changed its policy on the use of internet transfer services as a means of providing public records, and that the PRA officer was now authorized to provide responsive records through an internet transfer service, "Filelocker." **Ex. P95**.

83. The County produced its sixth, seventh, eighth, and ninth installments of heavily-redacted records, as PDF files transmitted to over the Internet via "Filelocker," on or about May 13, 2016, July 6, 2016, August 16, 2016, and September 15, 2016. **Ex. P96, P97**.

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84. In its *Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment on Standing* (June 5, 2016) at 5, the County asserted that "the County is not close to finishing its response to Plaintiff s PRA request." By this time the County had been working on WCOG's PRA request for more than a year.

85. WCOG filed an *Amended Complaint* on October 3, 2016, which expanded the Complaint to address the County's third through ninth installments of records.

C. Claim of "Common Interest" With WAPA

86. The County has redacted a large number of records of communications between the County and the Washington Association of Prosecuting Attorneys relating to the *Nissen* litigation. The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P96**. Examples of such records are found at Record Nos. 1007-1008, 1491-1493, 2064, 1966, 1944-1946, 1910-1912, 658-690, 2132, 2311, and 2308. **Ex. P102**. The Court has not determined the exact number of records of communications with WAPA that the County has withheld as that number is not relevant at this time.

87. Although these records were shared with an outside party (WAPA) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**. The County's answers to WCOG's interrogatories state, in relevant part:

> a. The County and Mr. Lindquist's interests in the *Nissen v. Pierce County* public records litigation were co-extensive with one another. Each had the interest of producing any records responsive to the request in the underlying case that were properly classified as "public records," but also preventing the requestor from invading the right of privacy held by governmental employees and officials in their private records.
>
> b. The common interest between Pierce County and Pierce County Prosecuting Attorney Mark Lindquist existed from the outset of the *Nissen* public records litigation. When Prosecuting Attorney Lindquist retained private

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> counsel to intervene in the case, the agreement and understanding between the County and Mr. Lindquist was that they and their attorneys would share information regarding case strategy and briefing, and that any applicable privileges would be preserved. No written agreement was executed. …
>
> d. The following amicus groups and their attorneys in the *Nissen* public records litigation also shared in the common interest identified above: Washington Council of Police and Sheriffs; Washington State Patrol Troopers Association; Pierce County Prosecuting Attorneys Association; Washington State Association of Municipal Attorneys; Washington State Attorney General's office; Washington Association of Prosecuting Attorneys.

88. The records redacted by the County were not merely shared with WAPA and its in-house attorneys (McBride and Loginsky) but were shared with every one of the other thirty-eight prosecuting attorneys in the state. Although each of those prosecutors, and many of their deputies are members of WAPA, each member of WAPA is the attorney for their own County. It would be impractical if not impossible for the County to have entered into a common interest agreement with thirty-eight other Counties. Furthermore, the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** The County has presented no admissible evidence of a common interest agreement between the County and WAPA. The fact that WAPA's amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

88A. The letter from WCOG's counsel to the legislature dated December 14, 2016 (**Ex. P120**) was filed by the County in the *2d. Supp. Nicholson Dec.*, Ex. 32. Nothing in that letter supports the County's assertion that WCOG's counsel believed there was a common interest agreement between the County and other parties in the *Nissen* case.

89. The County's unsupported claim of a common interest agreement with WAPA directly conflicts with the conduct of other counties that were allegedly a party to that agreement. When WCOG requested that other counties produce their records of WAPA's

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participation in the *Nissen* case those counties produced their records without any redactions or claims of exemption. Some of the records produced by other counties are the exact same emails that the County has redacted as work product. If the County had actually entered into a common interest agreement with WAPA and the other counties the release of such records would have violated the agreement. **Ex. P103**. The fact that these agencies produced their *Nissen* records without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

89A. There is no evidence to support the County's assertion that WAPA and/or its member counties decided to "waive" any common interest agreement in producing *Nissen* records. The County's unsupported claim of unilateral waiver contradicts the County's assertion that those agencies had agreed to maintain confidentiality.

90. WAPA has also released unredacted records of WAPA members discussing possible WAPA amicus participation in two other recent cases. **Ex. P104** . The fact that these agencies produced their correspondence relating to other amicus matters without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

91. On or before December 22, 2016, the County discovered that WCOG had obtained unredacted emails from WAPA that the County had previously withheld as work product. If the County had actually entered into a common interest agreement with WAPA and the other counties then the County would have been expected to object to the improper release of records and attempted to claw the records back. But the County merely acknowledged that WAPA had released the records and offered no explanation of why WAPA had released the records, which is inconsistent with the County's claims. **Ex. P101**.

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92. By email dated January 17, 2014, WAPA staff attorney Pam Loginsky sent an email to several dozen WAPA member prosecutors from various counties requesting feedback on a draft amicus brief. Nine minutes later Ms. Loginsky sent a second email that stated "Caution-- a reminder that your responses are public records. Typos, etc., can be sent by e-mail. Concerns about the arguments, themselves, are best shared by phone." **Ex. P105**. Ms. Loginsky's statements directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. The fact that Whitman County released this email to WCOG also contradicts the County's claim. The fact that Ms. Loginsky instructed WAPA members to use the phone to avoid creating public records is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

93. When WAPA director Tom McBride responded to WAPA's PRA request by email dated January 25, 2016, he explicitly stated that "Neither Pam Loginsky or I are asserting any exemptions." **Ex. P107**. Mr. McBride's statement directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. The fact that WAPA did not claim any exemptions with respect to its *Nissen* records is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

94. By email dated December 15, 2016, Benton County Prosecuting Attorney Andy Miller stated that he had never changed his position against filing an amicus brief in support of Lindquist, and that while Miller was on the WAPA board (through December 2014) WAPA did not agree to submit an amicus brief. **Ex. P109**. Prosecutor Miller's statement directly contradict the County's claim that WAPA had entered into a common interest agreement with the County. Given that Prosecutor Miller did not agree with or support Lindquist's arguments

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he could not and did not enter into a common interest agreement with the County. Prosecutor Miller's unsworn letter is hearsay. But the allegation that Miller never agreed with Lindquist is relevant to whether the County actually formed the alleged common interest agreement, which is an issue on which the County has the burden of proof but has offered no evidence.

95. The County's assertion that the alleged common interest agreement included the Washington Attorney General (AGO) is directly contrary to the documentary evidence, and further undermines the County's claims. The County produced **unredacted** an email discussion of the *Nissen* case between Lindquist and AG Bob Ferguson (Record No. 2052-2053). **Ex. P117**. The County's exemption log for this record erroneously indicates that this record was exempt as work product under RCW 42.56.290. **Ex. P96**. The County admits that it has not redacted its correspondence with the AGO despite having claimed a common interest agreement with the AGO. The County's assertion that the Attorney General had a common interest with the County is directly rebutted by the fact that the Attorney General filed an amicus brief in the *Nissen* case that disagreed with Lindquist's argument that the PRA did not apply to his cell phone. **Ex. P37**.

96. The County's assertion that it had an oral common interest agreement with WAPA is not credible. The Court finds that the County never entered into a common interest agreement with WAPA. Any work product protection for records shared with WAPA or any other county has been waived.

D. Claim of "Common Interest" With WSAMA

97. As with the redacted communications with WAPA, the County has redacted a large number of records of communications between the County and the Washington State Association of Municipal Attorneys relating to the *Nissen* litigation. The County asserts that

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these records are exempt as work product under RCW 42.56.290. **Ex. P96**. Examples of such records are found at Record Nos. 2174-2176, 945, 2081-2082. **Ex. P110**. The Court has not determined the exact number of records of communications with WSAMA that the County has withheld as that number is not relevant at this time.

98. Although these records were shared with an outside party (WSAMA) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

99. The records redacted by the County were not merely shared with WSAMA's amicus attorneys but were shared with a very large but unknown number of municipal attorneys around the state. Although each of those attorneys are members of WSAMA, each member of WSAMA is the attorney for their own city. It would be impractical if not impossible for the County to have entered into a common interest agreement with every other member of WSAMA. Furthermore, the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. The County has presented no admissible evidence of a common interest agreement between the County and WSAMA. The fact that WSAMA's amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

99A. The *Declaration of Ramsey Ramerman* does ***not*** establish that any common interest agreement was made. Mr. Ramerman does not claim to have personal knowledge of any common interest agreement, and the word "agreement" never appears in his declaration. Mr. Ramerman merely states that, based on unspecified conversations and emails with deputy Dan Hamilton, he "believed that [his] clients shared a common interest with Pierce County." Mr. Ramerman's unsupported beliefs are not evidence.

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100. The County's unsupported claim of a common interest agreement with WSAMA directly conflicts with the conduct of other cities that were allegedly a party to that agreement. When WCOG requested that other cities produce their records of WSAMA's participation in the *Nissen* case those cities produced their records without any redactions or claims of exemption. If the County had actually entered into a common interest agreement with WAPA and the other counties the release of such records would have violated the agreement. **Ex. P111**. The fact that these agencies produced their *Nissen* records without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

100A There is no evidence to support the County's assertion that WSAMA and/or its member cities decided to "waive" any common interest agreement in producing *Nissen* records. The County's unsupported claim of unilateral waiver contradicts the County's assertion that those agencies had agreed to maintain confidentiality.

101. WSAMA has also released unredacted records of WSAMA members discussing possible WAPA amicus participation in two other recent cases. **Ex. P112**. The fact that these agencies produced their correspondence relating to other amicus matters without any redactions or claims of exemption is admissible and relevant to the County's exemption claims, which is an issue on which the County has the burden of proof.

102. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA and the Washington Attorney General further undermines the County's claim of a common interest agreement with WSAMA.

103. The County's assertion that it had an oral common interest agreement with WSAMA is not credible. The Court finds that the County never entered into a common interest

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agreement with WSAMA. Any work product protection for records shared with WSAMA or any other city has been waived.

E. Claim of "Common Interest" With Employee Amicus Groups

104. As with the redacted communications with WAPA and WSMA, the County has redacted a large number of records of communications between the County and five other amicus groups who filed amicus briefs in the *Nissen* litigation, including the Pierce County Prosecuting Attorneys Association (PCPAA). The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P98**. Examples of such records are found at Record Nos. 1672, 1433-1434, 8093-8124, 1342-1346. **Ex. P113**. The Court has not determined the exact number of records of communications with WSAMA that the County has withheld as that number is not relevant at this time.

105. The redacted records are not limited to communications between the five amicus groups and the deputy prosecutors who represented the PCPAA. Such communications were also shared with Lindquist himself, Phil Talmadge, and deputies Hamilton and Farina. **Ex. P113**.

106. Although these records were shared with several outside parties the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

107. The amicus briefs filed by the employee groups were authored by deputy prosecutors working on County time and using County resources. *Penner Dec.*, ¶ 6. The briefs were filed by legal assistants employed by the County. **Exs. P25, P29, P30, P36, P42**. According to the Busto whistleblower investigation report (at page 52) multiple prosecuting attorneys spent "extensive" County time on these amicus briefs. *Id*.

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108. ~~According to the Busto whistleblower investigation report t~~The employee amicus briefs in the *Nissen* case were drafted by senior leadings in the Prosecuting Attorney, including but not limited to, Lindquist and deputies Hamilton and Sommerfeld. *Penner Dec.*, ¶ 6; *see* **Ex. P42**. On January 3, 2014, deputy Hamilton emailed a 30-page draft pleading, presumably the draft amicus brief, to deputy Ausserer. **Ex. P113**.

109. The County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** At least a dozen attorneys (Lindquist, Talmadge, Hamilton, Sommerfeld, Farina, Hunter, Ausserer, Nobile, Woodley, Peters, Iverson, Garfinkel, Julius), not including any WAPA or WSAMA attorneys, would have been parties to the alleged oral common interest agreement. It would be impractical if not impossible for a dozen attorneys (some out-of-state) representing at least seven different parties to have entered into such an oral common interest agreement. It is extremely unlikely that such an agreement could have been made without some sort of documentation being created. Yet the County admits that it has no documentation to corroborate its claim that a common interest agreement was made. **Ex. P98.** The County has presented no admissible evidence of a common interest agreement between the County and the employee amicus groups. The fact that the employee amicus briefs in *Nissen* agreed with the County does not establish that any common interest agreement was made.

110. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA, WSAMA and the Attorney General further undermines the County's claim of a common interest agreement with the employee amicus groups.

111. The County's assertion that it had an oral common interest agreement with the employee amicus groups is not credible. The Court finds that the County never entered into a

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common interest agreement with those amicus groups. Any work product protection for records shared with those amicus groups has been waived.

F. Claim of "Common Interest" With Intervenor Lindquist

112. The County has redacted a large number of records of communications between the County and Intervenor Lindquist relating to the *Nissen* litigation. The County asserts that these records are exempt as work product under RCW 42.56.290. **Ex. P98**. Examples of such records are found at Record Nos. 986, 994-996, 1665-1666, 1831-1839. **Ex. P114**. The Court has not determined the exact number of records of communications with Lindquist that the County has withheld as that number is not relevant at this time.

113. Although these records were shared with an outside party (Intervenor Lindquist) the County asserts that the protection for work product has not been waived because of the common interest doctrine. **Ex. P98**.

114. Because Lindquist did not withdraw from representing the County in the *Nissen* case, even after he intervened in that litigation as a separate party, Lindquist was wearing two hats: (1) Lindquist was the County's attorney, and (2) Lindquist was an adverse party. Consequently, any record shared with Lindquist in his capacity as the County's attorney was also shared with Lindquist in his capacity as Intervenor.

115. The interests of the County and Intervenor Lindquist were not "co-extensive" as the County asserts. **Ex. P98**. Before the *Nissen* case was filed the County had paid $39,500 to settle claims of retaliation by Lindquist himself. **Ex. P4**. Nissen's new PRA complaint was explicitly based on allegations that Lindquist had continued to retaliate against Nissen and that the requested records would show that. **Ex. P9**. Lindquist had significant employment and

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reputational interests in preventing the disclosure of the text message. The County's conflicting interest was to comply with the PRA and not incur liability for violating the PRA.

116. In light of Lindquist's prior conflicts with Nissen, the prior settlement, and the fact that Nissen's PRA complaint was explicitly directed at Lindquist himself, Lindquist had conflict of interest at the outset of the *Nissen* litigation because there was a significant risk that Lindquist's representation of the County would be materially limited by Lindquist's own personal interests.

117. The facts that Lindquist intervened in the *Nissen* litigation and sought a temporary restraining order against his own agency establish that the interests of the County and Lindquist were directly adverse.

118. It was never in the County's interest to erroneously argue that the PRA was unconstitutional or that the text message wrongfully withheld by the County was not a public record. The County took those positions because Lindquist failed to recognize that he had conflict of interest and should not have represented the County. Lindquist personally caused the County to violate the PRA and incur hundreds of thousands of dollars in PRA liability and litigation costs.

119. The fact that the briefs filed in *Nissen* by Lindquist and the County agreed with each other does not establish any common interest between Lindquist and the County. The County's briefs agreed with Lindquist's legal position because Lindquist failed to appoint an independent special prosecutor to represent the County.

119A The County has presented no admissible evidence of a common interest agreement between the County and Intervenor Lindquist.

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120. The County's unsupported and erroneous assertion that it formed a common interest agreement with WAPA, WSAMA, the Attorney General, and five other amicus groups further undermines the County's claim of a common interest agreement with Intervenor Lindquist.

121. The County's assertion that it had an oral common interest agreement with Intervenor Lindquist is not credible. The Court finds that the County never entered into a common interest agreement with Intervenor Lindquist. Any work product protection for records shared with Lindquist has been waived.

122. The County's exemption log (**Ex. P96**) indicates that the County also asserts that record Nos. 1831-1839 are protected by the attorney-client privilege. These records are redacted emails between Lindquist and the County's appellate attorney, Phil Talmadge. **Ex. P114**. Any attorney-client privilege for these records has been waived because any record shared with Lindquist in his capacity as Prosecuting Attorney was also shared with Lindquist in his capacity as an adverse party, and there is no attorney-client relationship between the County and Intervenor Lindquist.

G. Email Communications and Electronic Records

123. From the outset in April 2015, the County refused to correspond with WCOG's attorney by email despite repeated demands from WCOG. This practice continued until at least May 2016. Even the letter dated May 13, 2016, which announced the County's willingness to make records available on its Filelocker website, was sent by regular mail. **Ex. P95**.

124. During the same time period Lindquist and the County made extensive use of email in the *Nissen* litigation, and there was no actual impediment to using email to correspond with WCOG about the PRA request. The County simply refused to do so.

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125. In contrast to the unhelpful conduct of the Prosecuting Attorney, the Pierce County Human Resources Department was willing and able to respond to PRA requests by email. **Ex. P115, P116**.

126. In light of the County's widespread use of email for legal communications the County's stated reasons for not communicating with WCOG by email are pretextual and not credible.

127. When the Prosecuting Attorney's PRA officer, Joyce Glass, retired in August 2015, the Prosecuting Attorney failed to forward her email or transfer responsibility for her email account to the new PRA officer. **Ex. P78**. This prevented the County from receiving an email from WCOG's attorney, and that this caused additional delays.

128. The County admitted in response to discovery from WCOG that the County had no policy regarding whether the County would respond to PRA requests by email. **Ex. P98**. PCC 2.04.030(D)(1) indicates that a PRA request can be made by delivery, mail or fax, but inconsistently purports to require a PRA requester to provide their email address. Otherwise the provisions of PCC 2.04.030(D)(1) do not address whether the County would respond to PRA requests by email.

129. The County's refusal to correspond by email caused confusion, additional costs, and unnecessary delay in responding to WCOG's PRA request.

130. The first installment of records produced by the County on July 9, 2015, were first electronically redacted using Adobe Acrobat XI Pro. **Ex. P98**. This electronic redaction process resulted in one or more PDF files that could have been provided to WCOG in that format as WCOG had explicitly requested. **Ex. P61**.

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131. The County could have provided the PDF file(s) to WCOG by email, by copying the files onto a CDR (or DVD), or by uploading them to the County's Filelocker website. **Ex. P82, P115, P116**. Instead, the County printed the first installment onto paper and mailed the resulting pile of mostly black paper to WCOG, charging WCOG $88.65. **Exs. P70, P73, P74**.

132. The County admitted in response to discovery from WCOG that the County had no policy regarding how electronic records would be provided to requesters. **Ex. P98**. PCC 2.04.070(C) addresses the cost of copying electronic records but does not address whether or how the County will produce electronic records.

133. The County's refusal to provide the first installment of records in PDF format imposed unnecessary costs and delays on WCOG, and produced records that were less useful than the PDF files would have been.

134. For the second, third, fourth, fifth installments of records the County scanned these records to create redacted PDF files and then provided those files to WCOG on CDRs sent by mail. Exs. **P85, P86, P87, P88, P89, P90, P91, P92**.

135. At that time the County was capable of communicating with requesters by email and of transmitting large electronic documents electronically. In response to a PRA request to the Pierce County Human Resources Department on or about June 3, 2015, the PRA officer for that County department communicated with WCOG's attorney by email and transmitted requested records electronically using the "filelocker" utility on the County's website. **Exs. P115, P116**.

136. The County admitted in response to discovery from WCOG that the County had no policy regarding whether the County would make records available to requesters on its filelocker website. **Ex. P98**. Chapter 2.04 PCC (2007) does not address whether or when the

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County would make records available on the filelocker website. The statement in the County's letter dated May 13, 2016, that the Prosecuting Attorney had "changed" its policy on the use of internet transfer services is false because the County had no policy. **Ex. P95**.

137. The County's refusal to provide the second, third, fourth, fifth installments of records using the County's filelocker website imposed unnecessary costs and delays on WCOG.

II. CONCLUSIONS OF LAW

138. Any finding of fact incorrectly designated a conclusion of law shall be treated as a finding of fact, and vice versa.

138A. The Court rejects the County's interpretation of *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 104 (2014). The actual holdings of *Hobbs* are narrow: (i) no claim for withholding records may be brought where an agency has not actually denied access to the records but rather simply has not yet completed its response, and (ii) no PRA claim based on the manner in which an agency responds to a PRA request may be brought where the agency is still attempting to respond in the manner or format requested. *WCOG's Motion* (5/20/16) at 14; *WCOG's Response* (6/6/16) at 9. These holdings have no application to this case. WCOG's PRA claims are not premature and will not be dismissed.

138B. The County has the 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 County has not presented any legal authority or expert testimony to support its argument that Lindquist did not have a conflict of interest in *Nissen*. Nor has the County cited any authority for the proposition that a

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common interest agreement can be created where an attorney for one party is also an adverse party in the same case.

138C. The Court has discretion to consider the expert opinions of Arthur Lachman and James Smith, and to give those opinions such weight as the Court thinks proper. The Court notes that it has considered these opinions. However, even if the Court ruled that these opinions were inadmissible and gave them no weight, the Court would reach the same result because the County has submitted no legal authority or expert opinion to suggest that the alleged common interest agreement would be lawful or effective.

139. Mark Lindquist had a concurrent, non-waivable conflict of interest in the *Nissen* case for purposes of RPC 1.7(a).

140. Mark Lindquist's conflict of interest was a disability for purposes of RCW 36.27.030, and a special prosecutor should have been appointed in the *Nissen* case.

141. Collateral estoppel applies where (i) an identical issue was decided in a prior adjudication, (ii) there was a final judgment on the merits, (iii) the party against whom estoppel is asserted was a party or in privity with a party to the prior litigation, and (iv) application of the doctrine would not work an injustice. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Collateral estoppel is not applicable to either (i) the decision of the Pierce County Superior Court in *Recall of Mark Lindquist*, No. 15-2-10116-7, dated August 11, 2015 or (ii) the *Order on Motion to Appoint Special Prosecutor* dated December 18, 2015 in the *Nissen* case, because WCOG was not a party (or in privity with a party) to those cases, and because application of the doctrine would be an injustice to WCOG because it has not had an opportunity to litigate the issue of whether Lindquist had a conflict of interest.

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142. Those superior court decisions have no precedential value. Furthermore, neither court actually decided the question of whether Lindquist had a conflict of interest or disability under RCW 36.27.030. Nor was either court aware at the time their decisions were made that Lindquist had sent the August 2, 2011 text message that the County wrongfully withheld from *Nissen*.

143. However, collateral estoppel precludes any argument by the County that the August 2, 2011 text message was not a public record or that Lindquist did not cause the County to violate the PRA in *Nissen*.

144. Lindquist's decision to intervene in the *Nissen* case without appointing a special prosecutor for the County was legally unprecedented. The County has not cited any legal authority for the proposition that it is ever be permissible for a prosecuting attorney, or any other lawyer, to represent an adverse party in a lawsuit to which the prosecutor is also an adverse party. The Court assumes that there is no such legal authority.

145. It follows that there is no legal authority for the proposition that a common interest agreement can be created where an attorney for one party is also an adverse party in the same case. As a matter of first impression the Court concludes that no valid common interest agreement can be created under such unethical circumstances.

146. The purpose of a common interest agreement is to allow two or more parties to share confidential information in pursuit of a common interest. *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 381 P.3d 1202 (2016). There was no need for a common interest agreement between Lindquist and the County because Lindquist was both the County's attorney and the Intervenor in *Nissen*, and therefore all of the County's records in *Nissen* were shared with the Intervenor anyway.

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147. Nor is there any evidence that Lindquist and the County entered into a common interest agreement to share confidential work product. The assertion that Mark Lindquist entered into an oral common interest agreement with himself is not credible.

148. Even if it were possible to form a common interest agreement where an attorney for one party is also an adverse party in the same case the PRA does not allow such an untenable, conflicted relationship to create an exemption for work product under RCW 42.56.290. Narrowly interpreted, RCW 42.56.290 does allow a prosecuting attorney who had a conflict of interest and should have appointed a special prosecutor to create a common interest agreement with himself. To hold otherwise would reward Lindquist and the County for their failure to appoint a special prosecutor.

149. The County has waived any work product protection for any records shared with Mark Lindquist. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

150. Even if Lindquist did not have a conflict of interest in the *Nissen* case the County's claim of a common interest agreement fails because no common interest agreement was ever made.

151. There is no legal or factual basis for the County's assertion that it formed a common interest agreement with the Attorney General, who filed an amicus brief in *Nissen* that disagreed with Lindquist. The fact that the County made this false assertion further impeaches the County's claim with respect to the other amicus groups.

152. The County has waived any work product protection for any records shared with WAPA and/or any of its member prosecutors. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

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153. The County has waived any work product protection for any records shared with WSAMA and/or any of its member attorneys. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

154. The County has waived any work product protection for any records shared with the employee amicus groups and/or their attorneys. Such records are not exempt under RCW 42.56.290. The County has violated the PRA by wrongfully redacting nonexempt records.

154A. The Court disagrees with the County's argument that the PRA provides only two causes of action, for wrongfully withholding records and for a reasonable estimate of time. The County has interpreted the PRA narrowly, in violation of RCW 42.56.030. The case law the case law recognizes that the PRA gives courts broad authority to remedy all sorts of violations of the PRA. *See Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 724-25, 261 P.3d 119 (2011) (failure to conduct reasonable search); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 99, 343 P.3d 335 (2014) (failure to properly explain exemptions); *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 446-47, 327 P.3d 600 (2013) (agency may be ordered to adopt rules).

155. The County's exemption logs do not comply with RCW 42.56.210(3), which requires a brief explanation of how an exemption applies to the record withheld. For example, a number of entries in the County's exemption log indicate that records authored by Stewart Estes (Lindquist's personal attorney) are work product but do not explain why. Under *Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014), an exemption log must provide "sufficient explanatory information for requestors to determine whether the exemptions were properly invoked." An exemption claim based on RCW 42.56.290 and the common interest doctrine required the County to explain (i) that a common interest agreement was made, (ii) the

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nature of the common interest and the scope of the agreement, and (iii) the identity of other parties to the agreement. The County failed to provide this information.

156. RCW 42.56.100 requires the County to adopt reasonable rules and regulations to provide full access to public records and to protect public records from damage or disorganization. "Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.56.100. Failure to adopt and enforce such rules is a violation of the PRA. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002); *ACLU v. Blaine School Dist.*, 88 Wn. App. 688, 695, 937 P.2d 1176 (1997). Interpreting RCW 42.56.100 to be unenforceable (or meaningless) would be inconsistent with the requirement in RCW 42.56.030 to interpret the PRA liberally to promote and protect the public interest. The Court rejects the unpublished opinion in *Chen v. City of Medina*, 179 Wn. App. 1026 (2014) as unpersuasive because the *Chen* opinion provides no authority or analysis for its statement that there is no separate cause of action for an agency's failure to provide fullest assistance.

156A. It is not necessary for the Court to determine which party has the burden of proof on the issue of whether the County violated RCW 42.56.100. The basic facts are not disputed, and to the extent WCOG had the burden to establish a violation of RCW 42.56.100 it has done so.

157. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding communication with PRA requesters by email.

158. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding scanning paper records or providing existing electronic records to requesters.

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159. Because the County redacted the records electronically and already had the resulting PDF files, the County could have and should have provided those PDF files to WCOG. *Fisher Broadcasting v. Seattle*, 180 Wn.2d 515, 524, 326 P.2d 688 (2014). The County's decision to print the first installment onto paper rather than provide the PDF files as WCOG requested was a violation of the PRA. *Mechling v. Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009), *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 260 P.3d 249 (2011), and *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015), do ***not*** allow an agency to refuse to produce electronic records that already exist in redacted electronic format.

160. Because the County had the ability to make electronic records available over the Internet (via the County's filelocker website) the County could have and should have used that method to transmit records to WCOG. The County violated RCW 42.56.100 by failing to adopt or enforce reasonable rules regarding the use of its filelocker website.

161. WCOG's claim for an injunction to require the County to adopt rules under RCW 42.56.100 is not before the Court at this time. The County previously argued that WCOG could not pursue its injunction claim unless and until this Court determined that the County had violated the PRA. This order only addresses whether the County's lack of rules is a violation of the PRA. The issue of whether the County should be ordered to adopt new rules will be addressed in subsequent proceedings.

III ORDER

1. Within ninety (90) days of this Order the County shall provide plaintiff WCOG with new copies of all responsive records, including all responsive records not yet produced, at no cost to WCOG. The County shall produce all records that do not require redaction in native electronic form. Email records, including all attachments, shall be produced in a PST (personal

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storage table) file. Paper records shall be scanned 300 DPI black/white PDF files. Paper records shall not be scanned in color except for records that contains color images (other than logos). Records that require redaction shall be redacted using Adobe Acrobat redaction software. Electronic records that require redaction shall first be converted to PDF directly (not printed and scanned) and then redacted using Adobe Acrobat redaction software. All records shall be made available to WCOG by uploading the records to the County's Filelocker web site.

2. As set forth above, the County has waived any claims of work product (or attorney-client privilege with respect to any *Nissen* litigation records shared with Mark Lindquist or any other outside party, and shall not assert such exemptions. Any other exemptions shall be explained as required by RCW 42.56.210(3) in new exemption logs provided within ninety (90) days of this Order.

3. The County shall send all necessary communications to WCOG by email whether or not the County chooses to also send a paper copy by mail.

4. Within ninety (90) days of this Order the County shall file a statement of the actions it has taken to comply with this Order. Within thirty (30) days after receiving the County's statement plaintiff WCOG will file a statement regarding whether the County has complied with this Order.

5. After the Statements are filed the parties shall cooperate to set a date for another scheduling conference before this Court.

6. All remaining compliance issues and all issues of attorney fees and penalties under RCW 42.56.550 are reserved for future determination.

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DATED this _____ day of _____, 2017.

_____
Judge Carol Murphy

Presented by:

s/ William J. Crittenden
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